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## Default Rules in Inheritance Law: A Problem in Search of Its Context

Adam J. Hirsch

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## Default Rules in Inheritance Law: A Problem in Search of Its Context

### Cover Page Footnote

David M. Hoffman Professor of Law, Florida State University. M.A., 1979, J.D., 1982, Ph.D., 1987, Yale University. My thanks to Regis Campfield, Gregory Crespi, Frances Foster, Susan Gary, Gregory Mitchell, Eric Rakowski, Jeffrey Schoenblum, Mark Seidenfeld, Robert Sitkoff, Gary Spitko, and to auditors at faculty colloquia at the University of San Diego School of Law, Southern Methodist University Dedman School of Law, and Washington University School of Law for helpful comments.

## ARTICLES

### DEFAULT RULES IN INHERITANCE LAW: A PROBLEM IN SEARCH OF ITS CONTEXT

*Adam J. Hirsch\**

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## INTRODUCTION

Rules are rules—but some rules are made to be broken.

Modern jurisprudence distinguishes *mandatory* rules from *default* rules.<sup>1</sup> We style as mandatory those rules that legal actors are obliged to obey, irrespective of their wishes upon the matter. These comprise rules in the lay understanding of the word. Default rules, on the other hand, are freely breakable, applying only to a legal actor who forbears to take whatever steps the law requires to override them. These rules operate in the breach, announcing themselves when legal actors are silent, and filling in the lacunae in their arrangements with others.

This categorical dichotomy (if a trifle oversimplified)<sup>2</sup> is well known within contract law, where parties to a commercial transaction or business agreement can draft around any default rule contrary to their liking. The same dichotomy reappears within the inheritance field. Of course, several of the most prominent inheritance doctrines are mandatory ones: The statute of wills and the rule against perpetuities, for instance, establish guidelines that benefactors cannot choose to abrogate at their pleasure. At the same time, other inheritance doctrines—the bulk of them, in fact—comprise default rules.<sup>3</sup> The most fundamental of these is the intestacy statute, setting out rules for the division of decedents' estates that take effect in the absence of, and yield to, an executed writing. The intestacy scheme represents

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1. Although the distinction has roots within the work of earlier theorists, its nomenclature and currency (primarily within the literature of law and economics) dates to the past twenty years or so. See Ian Ayres, *Valuing Modern Contract Scholarship*, 112 Yale L.J. 881, 885-86 (2003). Some variation in nomenclature lingers: Scholars use the term "immutable" rules on occasion as a synonym for mandatory rules. E.g., Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227, 1269 (2003).

2. One could further distinguish intentional from accidental default rules, the latter comprising rules that lawmakers *intend* to make mandatory but which nonetheless prove to be default rules because imperfections of design have left them with a "loophole." What is more, a borderland exists between mandatory and default rules: for the obstacles in the path of a party who wishes to override a default rule may be considerable, hence difficult and/or expensive to clear. See, e.g., Fla. Stat. ch. 737.402(4)(a) (2003) (requiring a party who wishes to override the rule at issue to "refer specifically to this subsection and provide expressly to the contrary"); *In re Estate of Robbins*, 756 A.2d 602, 604 (N.H. 2000) (ruling that language apparently intended to override a default rule was insufficiently precise to do so). Professor Ayres dubs default rules within this borderland "strong defaults." Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 123 (1989).

3. This fact reflects the great scope of freedom of testation under American law. For a recognition of the structural dominance of default rules within the realm of trust law, see John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1105 (2004). Default rules are also quite venerable and even numbered among the inheritance doctrines laid down in the earliest known *lex scripta*. See The Hammurabi Code § 171a, at 61 (Chilperic Edwards ed., 3d ed. 1921) (c. 2084-2081 B.C.) (legal code of Babylonia) ("And if the father in his lifetime has not said . . .").

“the will which the law makes,”<sup>4</sup> if and only if the decedent fails to make her own.<sup>5</sup>

However predominant, the default rules of inheritance law have received less scholarly attention than have their mandatory counterparts. Without exception, extant discussions of inheritance defaults have confined themselves to particular doctrines; thus far, no one has assayed the problem as a conceptual whole. Possibly as a consequence, scholarship on inheritance law has largely neglected to explore, or even to notice, the potential relevance of general default rule theory, even while that theory has flourished within the province of contract law.<sup>6</sup>

My agenda in this Article is twofold: namely, to make a contribution both to the theoretical content *and context* of inheritance defaults. My overall conclusion is that contractual default rule theory provides a model that is readily adaptable to inheritance defaults and points the way to their ideal composition.

Laying down a policy foundation for inheritance defaults comprises the main task, which we undertake in Part I. Then, in Part II, we commence to build upon that foundation by addressing how lawmakers might apply a theory of inheritance defaults to rework a number of prevalent rules, with particular attention to their formulation under the influential Uniform Probate Code (“the Code”)—for it is one thing to instill a theory, and another to install it on the ground. Finally, in the Conclusion, we step back and reflect upon the larger implications of the analysis.

## I. INHERITANCE DEFAULTS IN THEORY

### A. *Prior Examinations*

The first thing to do is briefly to rehearse what others have conjectured about the subject. Although scholars heretofore have

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4. Peter Lovell, *The Will Which Makes the Law* (London, W. Strahan & M. Woodfall 1785) (retitled *The Law's Disposal of a Person's Estate Who Dies Without Will or Testament* in subsequent editions).

5. Additional default rules fill gaps or clarify ambiguities within wills while yielding to the act of more detailed testation. The doctrines of lapse and ademption, for instance, fall into this category.

6. Several scholars have made reference to general default rule theory in connection with a few discrete inheritance problems. See Joel C. Dobris, *The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?*, 28 Real Prop. Prob. & Tr. J. 393, 397-409 (1993); Paula A. Monopoli, “Deadbeat Dads”: Should Support and Inheritance Be Linked?, 49 U. Miami L. Rev. 257, 276-79 (1994). In the context of trust law, see Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 Fla. St. U. L. Rev. 109, 148-49 (2001); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 660-64 (1995); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 644-46 (2004).

developed no general theories of inheritance defaults, individual default rules have of course come under scrutiny. Examination of those discussions, most prolific in connection with intestacy law, reveals the absence of any clear, developed framework of analysis. In setting guidelines for state legislators drafting rules for distribution of estates in the absence of a will, commentators have typically cited to multiple criteria. Writing early in the twentieth century, Thomas Atkinson identified "two primary considerations" for determining rules of intestate succession: provision for dependents of the decedent and provision for those whom "an average property owner would be most apt to favor."<sup>7</sup> Professor Atkinson defended these dual concerns succinctly: "The humane basis of the former is evident, while if the latter ideal is accomplished the number of cases in which a will is thought desirable will be reduced."<sup>8</sup>

More recent analyses of intestacy law have been similarly terse, and similarly eclectic. Mary Lou Fellows and collaborators place alongside the "dispositive wishes" of decedents the "alternative defensible rationale" of serving society's interests, identified as protection of dependents, avoidance of complications of title, promotion of the nuclear family, and encouragement of industry.<sup>9</sup> With regard to the decedent's wishes, Professor Fellows opines that "[t]estamentary freedom should include the right not to have to execute a will in order to . . . pass [wealth] to natural objects of the decedent's bounty," whereas denial of that right would "create[] a trap for the ignorant or misinformed."<sup>10</sup> To the extent that society's well-being conflicts with the wishes of intestate decedents, it should take precedence only where the social interest at stake is of "overriding" importance.<sup>11</sup>

In subsequent work, Fellows and other scholars have diminished their emphasis on the intent of the decedent, rarely heralding its primacy among the litany of goals of intestacy law.<sup>12</sup> At the same

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7. Thomas E. Atkinson, *Succession Among Collaterals*, 20 Iowa L. Rev. 185, 187 (1935).

8. *Id.* at 187-88.

9. Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 321, 323-24.

10. *Id.*

11. *Id.* at 324.

12. See, e.g., Lawrence W. Waggoner et al., *Family Property Law* 37-38 (3d ed. 2002) (laying out a string of considerations without further comment); Lawrence H. Averill, Jr., & Hon. Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. Ark. Little Rock L. Rev. 631, 639-40 & n.35 (1995) (same); Mary L. Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 Law & Ineq. 1, 8-9, 12-13 (1998) (same); Mary L. Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 Vand. L. Rev. 671, 674 n.8 (1984) (suggesting that "to the extent . . . societal interests [in intestate succession] conflict with the preferences

time, they have added to that litany. Inheritance scholars now posit that intestacy law can take on an “expressive” function. Applying ideas first developed in the abstract by Cass Sunstein and others,<sup>13</sup> these scholars suggest framing the default regime of intestacy law with an eye toward the inculcation of social norms that lawmakers deem desirable—both generally within the community-at-large, and specifically among benefactors who *do* execute wills:

The law has great potential to teach and reinforce the values that ground it or appear to ground it. Those who experience the law operating upon them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages.

In this way, intestacy law not only reflects society’s familial norms but also helps to shape and maintain them.<sup>14</sup>

Finally, inheritance scholars now assert that, along with all of this, lawmakers formulating intestacy laws should also take into account the pattern of distribution that *survivors* would consider fair. Doing so will promote family harmony and respect for the legal system while

of individual citizens, the societal interests should prevail”); Julian R. Kossov, *The New York Law of Intestate Succession Compared with the Uniform Probate Code: Where There’s No Will There’s a Way*, 4 Fordham Urb. L.J. 233, 238-39 (1976) (urging lawmakers to focus on “society’s interest”); Eugene F. Scoles, *Probate Reform, in Death, Taxes and Family Property* 136, 149-51 (Edward C. Halbach, Jr. ed., 1977) (suggesting that “justice and fairness for the successors” along with “due consideration” of intent inspire intestacy law); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 Or. L. Rev. 255, 289 (2002) (suggesting that various goals of intestacy law ought to be “balance[d]”); see also *id.* at 269-89. But cf. Ralph C. Brashier, *Inheritance Law and the Evolving Family* 4, 7 (2004) (“the first goal” of intestacy law is to effectuate the typical decedent’s intent, but “[l]ike all laws, probate laws ultimately should promote and protect the state”); Lewis M. Simes & Paul E. Basye, *Problems in Probate Law, Including a Model Probate Code* § 22 cmt. (1946) (“[I]ntestate succession . . . should *in the main* express what the typical intestate would have wished.” (emphasis added)) [hereinafter *Model Probate Code*]; William Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. Rev. 1037, 1047 (1966) (endorsing only the goal of intent effectuation). For additional surveys of the prevailing eclecticism of intestacy theory, see Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. 1, 7-13 (2000) [hereinafter *Gary, Adapting Intestacy*]; Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. Mem. L. Rev. 643, 651-53 (2002) [hereinafter *Gary, Parent-Child*].

13. See *infra* Part I.C.2.d.

14. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 Ariz. L. Rev. 1063, 1100 (1999); see also *id.* at 1099-1102. Likewise, Professor Fellows and collaborators observed:

At the same time that intestacy statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships. . . .

By including a surviving committed partner as an heir, the intestacy scheme would . . . establish a social norm that a partner *should* have a share in a decedent’s estate.

Fellows et al., *supra* note 12, at 8, 22; see also *id.* at 8-10, 90-91.

serving to protect survivors' reliance and reciprocity interests in decedents' estates.<sup>15</sup>

The Commissioners who drafted the Uniform Probate Code have been tight-lipped about their perspective on intestacy policy. Whereas a general comment accompanying the original version of the Code stated that its intestacy provisions "attempt[] to reflect the normal desire of the owner . . . as to [the] disposition of his property at death,"<sup>16</sup> the revised version (significantly?) omits this passage, adverting more obliquely to "bringing [intestacy law] into line with developing public policy,"<sup>17</sup> without elaborating what that might be. In independent work, however, the Reporter for the revised Code endorses an eclectic approach to fashioning intestacy law.<sup>18</sup> Likewise, when called upon to interpret existing intestacy statutes in light of their purposes, at least some courts have assumed those purposes to include the accomplishment of "[s]tate interests" along with the observance of donative intent.<sup>19</sup>

It would seem, then, that intestacy law—the quintessential default rule in the inheritance field—has become a theoretical grab-bag. Scholars and lawmakers are now prepared to acknowledge the relevance of virtually every conceivable preference—that of the decedent, that of survivors, that of society—all mixed together in no particular order and following no unified formula. Commentary associated with other inheritance defaults is similar in character.<sup>20</sup>

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15. Waggoner et al., *supra* note 12, at 38; Fellows et al., *supra* note 12, at 12; Gary, *Adapting Intestacy*, *supra* note 12, at 10-11; Gary, *Parent-Child*, *supra* note 12, at 652-53; Spitko, *supra* note 12, at 269-83.

16. Unif. Probate Code art. II, pt. 1, cmt. (amended 2003), 8 U.L.A. 271 (1998) (pre-1990 version of article II).

17. *Id.* art. II, pt. 1, general cmt. (amended 2003).

18. The Reporter in question is Professor Lawrence Waggoner. See Waggoner et al., *supra* note 12, at 37-38.

19. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 264-65 (Mass. 2002); see also Nunnally v. Trust Co. Bank, 261 S.E.2d 621, 623-24 (Ga. 1979); Estate of Hicks, 675 N.E.2d 89, 93-94 (Ill. 1996); cf. Estate of Cleveland, 22 Cal. Rptr. 2d 590, 594, 599 (Ct. App. 1993) (referring to effectuation of intent as the "principal purpose" of intestacy law); King v. Commonwealth, 269 S.E.2d 793, 795 (Va. 1980) (same); King v. Riffie, 309 S.E.2d 85, 87-88 (W. Va. 1983) (referring only to the goal of effectuating probable intent, without indicating whether that goal is exclusive); *In re Estate of Fosler*, 13 P.3d 686, 689 (Wyo. 2000) (same). See also Trimble v. Gordon, 430 U.S. 762, 775 n.16 (1977) ("doubt[ing]" the constitutionality of an intestacy statute that implements a discriminatory probable intent "[a]t least when the disadvantaged group has been a frequent target of discrimination"); MacCallum v. Seymour, 686 A.2d 935, 938-41 (Vt. 1996) (holding unconstitutional as a violation of equal protection an intestacy statute purporting to follow presumed discriminatory intent toward adopted children).

20. The doctrine of lapse (and antilapse), for example, applying a default rule to redirect bequests made to beneficiaries who cannot inherit because they predecease the benefactor, came to be considered an intent-effectuating doctrine only in the nineteenth century. See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 Ohio St. L.J. 1057, 1128-29 (1996). Yet, the Commissioners also speak of the doctrine as "remedial in nature, tending to preserve equality of treatment among different lines



This won't do—or, at least, it fails meaningfully to clarify how lawmakers ought to go about setting the rules of intestacy or other inheritance defaults. Any theory so chock-full of ideas is, in practical consequence, evacuated of content. Like those sprawling, five-part balancing tests that often ornament constitutional law, the theory has grown so luxuriant that it now serves to justify nothing—or anything at all.

### B. *Parallel Examinations*

There matters stand, none too happily, in the inheritance realm. In the contractual realm, on the other hand, default rule theory has matured, *pari passu*, into a sharper tool of policy analysis.

Contractual theorists posit that the sole purpose of default rules is to promote efficiency by minimizing transaction costs. Hence, default rules are necessary only because transaction costs exist. If Adam and Eve had bargained in a Coasian Eden where transacting was costless, they would have provided *ex ante* in their contracts for every eventuality. Default rules would have served no purpose in their perfect world.<sup>21</sup> In our own imperfect world, however, bargaining parties have to bear transaction costs that inevitably give rise to incomplete agreements.<sup>22</sup> Contractual theorists contend that when parties fail to spell out provisions in a contract or other instrument of agreement, the law should supply the missing terms by reference to the hypothetical bargain that parties most likely would have arrived at themselves had they addressed the issue. This approach is efficient in that it spares those pairs of parties who are pleased with the default rules the expense of drafting the missing terms—including provisions for the myriad of imaginable contingencies that might never come to pass. Of course, parties who disfavor the rules will still have to incur costs to opt out of the default regime, but so long as each default rule

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of succession." Unif. Probate Code § 2-603 cmt. (amended 2003). The default rule of ademption, reformulating bequests of property that no longer exists at the benefactor's death, has rarely been framed in intent-effectuating terms at all. Hirsch, *supra*, at 1128-35; see also Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 Minn. L. Rev. 639, 640-41 (1993) (downplaying the importance of intent effectuation in comparison to "simplicity and certainty").

21. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L.J. 729, 737-42 (1992) (addressing the implications of the Coase Theorem for default rules); Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 Ohio St. L.J. 339, 366-67 (1998) (same); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L.J. 389, 397-99 (1993) (same).

22. See generally Sharon Gifford, *Limited Attention and the Optimal Incompleteness of Contracts*, 15 J.L. Econ. & Org. 468 (1999).

selected by lawmakers constitutes a majoritarian default, transaction costs are reduced in the aggregate.<sup>23</sup>

This classical, economic approach to default rules has never quite attained the status of dogma; other theorists have weighed in with criticisms. One difficulty identified in the modern literature is how to go about determining in a realistic way what parties to a contract would have agreed to, given surplus value and a mutual desire to maximize profit. Because "any number of distributions of rights and responsibilities . . . would be jointly profit maximizing," determining the parties' hypothetical bargain "is no trivial undertaking."<sup>24</sup>

Ian Ayres offers a more fundamental criticism. In a much-cited brace of articles,<sup>25</sup> he and a collaborator argue that lawmakers sometimes achieve greater efficiency by setting default rules designed to *contradict* the parties' preferences. Seemingly perverse, a so-called "penalty" default can operate benignly, either to create incentives for better informed parties to reveal information to the less well informed, or to create incentives to reveal information to "third parties (especially the courts)," thereby avoiding ex post litigation which is state-subsidized and hence an inefficient means of eliciting information.<sup>26</sup>

### C. Cross-Examination

Gratuitous transfers and commercial transactions have developed into separate bodies of law, surrounded by separate nebulae of theory—including, as we have just seen, separate spheres of default rule theory. Nevertheless, both involve voluntary arrangements operating to shift resources between individuals. The foundational claim of this Article is that contract scholars have something to teach inheritance scholars (and perhaps vice versa?) about the problem of default rules.

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23. E.g., Robert Cooter & Thomas Ulen, *Law and Economics* 200-04 (3d ed. 2000); Richard A. Posner, *Economic Analysis of Law* § 4.1, at 96-97, § 14.3, at 413 (6th ed. 2003). This approach constitutes "[t]he received wisdom of a vast law-and-economics literature." Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. Cal. Interdisc. L.J. 1, 5 (1993). For a case putting this theory into practice, see *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588, 596 (7th Cir. 1991) (Posner, J.).

24. Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 Harv. J.L. & Pub. Pol'y 639, 707-09 *passim* (1989); see also Ayres & Gertner, *supra* note 21, at 765-66 *passim* (demonstrating that "[w]hen the parties' knowledge is not symmetric, . . . choosing the efficient [default] rule can entail an extraordinarily complex analysis").

25. Ayres & Gertner, *supra* note 2; Ayres & Gertner, *supra* note 21.

26. Ayres & Gertner, *supra* note 2, at 91. Hence, the term "information forcing" default is sometimes used in place of the older sobriquet "penalty" default. For a related criticism by Ayres of the theory of majoritarian defaults, see *infra* text accompanying note 148.

### 1. Majoritarian Defaults

For contractual theorists, default rules serve to minimize the expense of bargaining. Gratuitous transfers do not ordinarily involve bargaining, to be exact, but they do entail drafting and formalization, in the form of a will. By analogy to the two-party “hypothetical bargain” approach to default rules on the contracts side, we can posit a one-party “probable intent” approach to default rules on the inheritance side.<sup>27</sup>

Begin with the limiting case. If a default rule of intestacy correctly anticipates a benefactor’s distributive preferences, both initially and as her circumstances change, lawmakers save her the expense of executing a will altogether. The scale of the saving is bound to fall short of its equivalent on the contracts side—since business negotiations typically cost more than estate planning—but nevertheless comprises an efficiency.<sup>28</sup> In this respect, the contractual model fits gratuitous transfers snugly.

When we turn to the problem of default rules applicable to filling gaps within an executed will, however, the issue becomes more nuanced. Although a theorist might conjecture that default rules can function to reduce the marginal cost of preparing a will by removing the need to spell out contingencies, a competent practitioner in the field would scoff at that idea. It is a credo of estate planning that a well-drafted will should anticipate contingencies and *never* rely on default rules.<sup>29</sup> There are several explanations for this drafting policy,

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27. “A will is a unilateral instrument, and the court is concerned only with the intention of the testator as expressed in the document.” *Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971).

28. For an observation of the potential efficiency of intestacy law in rendering will execution unnecessary, thereby avoiding “time and expense,” see *Estate of Cleveland*, 22 Cal. Rptr. 2d 590, 599 (Ct. App. 1993). Cf. William M. McGovern, Jr. & Sheldon F. Kurtz, *Wills, Trusts, and Estates* § 2.3, at 61-62 (3d ed. 2004) (suggesting that wills are potentially more efficient than intestacy in that they allow benefactors to name executors and to modify their powers—although these too are subjects of default rules in intestacy). For modern trends in estate planning costs, see David J. McCabe & Dilip B. Patel, *Is Estate Planning Expensive?*, Tr. & Est., June 2004, at 60. For empirical evidence that some benefactors forebear to execute wills because they are satisfied with the distributive outcome under intestacy law, see Marvin B. Sussman et al., *The Family and Inheritance* 72, 202 (1970); and Contemporary Studies Project, *A Comparison of Iowans’ Dispositive Preferences with Selective Provisions of the Iowa and Uniform Probate Codes*, 63 Iowa L. Rev. 1041, 1076-78 (1978). But cf. Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 Or. L. Rev. 769, 842 (1993); Fellows et al., *supra* note 9, at 339; see also *infra* note 131. Conversely, for empirical evidence that some benefactors execute wills because they are dissatisfied with the outcome under intestacy law, see *infra* note 48.

29. John R. Price, *Price on Contemporary Estate Planning* §§ 4.15.1-2 (2d ed. 2000); David M. Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. Rev. 339, 406 (1999); Nancy G. Henderson, *Drafting Dispositive Provisions in Wills* (pt. 1),

which highlight differences between the gratuitous and contractual spheres. First, once a benefactor engages an attorney to draft a will, that attorney must go to the trouble of establishing intent in any event; thereafter, the difference in cost between resolving contingencies explicitly or implicitly is insignificant. Again, no costly negotiations are involved. And second, the potentially long latency period before a will matures, coupled with the possibility that the benefactor will migrate to a different jurisdiction in the interim, raises the prospect that the original default rule upon which a drafter relied may not in due course govern the testamentary instrument.<sup>30</sup> No equivalent danger menaces parties in the contractual realm.

Nevertheless, the contractual model remains germane in connection with poorly drafted wills. If, because of imperfect drafting, a will neglects to anticipate a significant contingency which then occurs, a default rule reflecting the benefactor's intent as modified by unfolding events spares her the expense of executing a codicil. That again represents a cost efficiency.

To be sure, heterogeneous preferences may dilute the potential gains in efficiency available in the inheritance realm. Donative intent varies widely: *No will has a brother*, is another of the estate planner's abiding maxims. It follows that the wider the variety of alternative preferences that a default rule must anticipate, the fewer the number of parties who can take advantage of it to save transaction costs. "Plurality defaults" afford less savings than "majoritarian defaults," and many inheritance defaults will fall into the first category, not the second.<sup>31</sup> Yet the same may be true of contractual defaults, and, however varied preferences become, the potential for efficiency never vanishes completely.

Simultaneously, contractual default rule theory affirmatively gains credibility in at least one respect when introduced into the inheritance realm. One of the modern criticisms of contractual theory, we have

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43 Prac. Law. 33, 39, 47-48 (1997); Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 Mich. L. Rev. 2309, 2310-12 (1996).

30. Price, *supra* note 29, § 4.15.1. Well-drafted wills can minimize this hazard by including governing-law clauses, although their effectiveness under state law would remain uncertain. See 1 Jeffrey A. Schoenblum, *Multistate and Multinational Estate Planning* § 14.08.D (2d ed. 1999); Henderson, *supra* note 29, at 34-35.

31. The possibility of a plurality default has also been hypothesized within contractual theory, although its efficiency implications have gone unexplored therein. See Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan. L. Rev. 1591, 1612 (1999) ("[B]ecause of heterogeneity, a majoritarian default may not even exist—there may only be a plurality default."). One inheritance scholar understood the problem intuitively: "When neither spouse nor issue survives, there appears to be too little regularity in the patterns of testamentary succession to justify their use as a frame of reference for intestate succession." Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 Mich. L. Rev. 1303, 1312 (1969).

observed, is the difficulty of anticipating the terms that competing bargainers would likely agree on if unimpeded by transaction costs, for there exist any number of mutually beneficial equilibria.<sup>32</sup> This problem disappears when we re-direct the theory to a one-party model.<sup>33</sup> In this context, the preferences that default rules are supposed to parrot are less "hypothetical" (although the means of going about discovering them still require analysis).<sup>34</sup>

Yet, in one other respect, contractual theory may not travel quite so well. In order to exploit default rules to save transaction costs, parties need first to glean what the default rules are. As always, this knowledge costs something to obtain. By hypothesis, if the information cost ever exceeds the transaction cost, then default rule theory breaks down.<sup>35</sup> From the perspective of professional merchants and corporate entities, who are ordinarily repeat players, the benefits of streamlining the contractual process again and again should outweigh any initial investment in the knowledge of default rules necessary to facilitate such streamlining.<sup>36</sup> On the other hand, benefactors—mortals who, as such, can only die once—may see the matter differently. For a one-time gratuitous transfer, the burdens of deciphering legal texts that comprise an essential precursor to capitalizing on default rules loom larger, since the information cost is more difficult to amortize. The fog of law thus hangs heavier over this segment of the legal landscape.<sup>37</sup>

Does this mean that relatively few benefactors could make efficient use of majoritarian defaults? On reflection, we may conclude that the

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32. See *supra* note 24 and accompanying text.

33. But cf. Gregory S. Kavka, *Is Individual Choice Less Problematic than Collective Choice?*, 7 *Econ. & Phil.* 143 (1991).

34. See *infra* Part I.D.2.

35. For a related condition under which default rule theory breaks down, see *infra* note 51 and accompanying text. In connection with the instant scenario, if it is less costly to formalize one's preference than to learn what the default rule is, then everyone who values the preference more than the transaction cost will bear the cost to formalize the preference. The rest are not relying on a default rule they do not know (since the information cost is even higher), so setting a majoritarian default saves no transaction costs. Under these conditions, lawmakers may as well set default rules to accomplish social purposes.

36. Perhaps because of this implicit fact, inquiries into the information cost problem have been few. See Ayres, *supra* note 23, at 10-11 ("Complex default rules might induce more complete contracting because it is comparatively less costly to write comprehensive provisions than it is to become informed of the complex rule."); Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 *Va. L. Rev.* 821, 886-87 (1992) ("With small one-shot transactions it may be irrational for either party to pay a lawyer to provide information concerning the default rules."); Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 *S. Cal. Interdisc. L.J.* 115, 136 (1993) ("Especially if they are to find it easy to contract out, parties should be able to know the applicable default rule with ease.").

37. To adapt a famous metaphor for the informational opaqueness of the battlefield. See Carl Von Clausewitz, *On War* 101 (Michael Howard & Peter Paret eds., 1984) (1832).

theory remains viable. It bears noting initially that although benefactors only die once, they may nevertheless contemplate their estate plans more than once. Personal circumstances often evolve, and an estate plan remains ambulatory, subject to revision at will. In this sense, benefactors *can* be repeat players, and a calculating one might deem an initial investment in legal information to pay dividends over time.

If, however, most benefactors judge the acquisition of legal information as cost inefficient, that fact would support an indictment not of the state of our theory, *but of the state of our law*. Presented with the indictment, lawmakers ought to respond by simplifying inheritance defaults—and to go on doing so until they reach a point where a majority could, after all, make sense of them without first having to incur exorbitant expense.<sup>38</sup> Viewed structurally, reliance is just as feasible in the world of gratuity as in the busier world of commerce, although the facilitation of reliance requires sensitivity to the different characteristics of those two worlds.

Indeed, the core insight of contractual theory is not alien to the thinking of inheritance scholars. It may even have found its earliest expression there. Professor Atkinson anticipated the idea seventy years ago (less the decorations of modern jargon) when he observed that by patterning the default rules of intestacy after the “average” decedent’s intent “the number of cases in which a will is thought desirable will be reduced.”<sup>39</sup> Still, this notion is just one element in the farrago of ideas that has poured forth from inheritance scholars over the years. What of the rest of it?

## 2. Social Defaults

### a. *Inheritance Theory*

Considered as a matter of inheritance theory, the introduction of an eclectic mix of considerations into intestacy law or other inheritance defaults appears anomalous on its face. When it comes to the interpretation of testamentary texts, the principle that applies is clear, unchallenged, and perdurable: In the language of judicial metaphor, the intent of the testator is “the pole-star by which the courts must steer.”<sup>40</sup> Yet, with regard to the interpretation of silence, to be filled by the pronouncements of lawmakers, inheritance scholars would

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38. For a more detailed discussion of the optimal complexity of inheritance defaults, see *infra* Part I.D.1.b.

39. Atkinson, *supra* note 7, at 187-88; see also Browder, *supra* note 31, at 1313.

40. 4 James Kent, *Commentaries on American Law* 537 (photo. reprint 1971) (1826-1830). Chancellor Kent coined the phrase, although the idea it embodies dates to medieval times, if not earlier. For further references, including citations to modern caselaw, see Hirsch, *supra* note 20, at 1114-15 nn.170-72.

have us navigate by a larger constellation of stars. What justifies distinguishing the two situations?

Inheritance scholars have not faced up to this question. Susan Gary observes that social considerations usually “parallel” probable intent, thereby avoiding a conflict,<sup>41</sup> but to that extent social considerations merely become superfluous. The problem remains: What about those situations where the two fail to correspond?

One conceivable response is that the public policy of intent-oriented construction—as a concomitant of freedom of testation in general—reaches no farther than the creation of an *opportunity* to express donative wishes. Once a benefactor has forsaken that opportunity, the state ought to impose whatever disposition it deems expedient.<sup>42</sup> Is such a proposition defensible within inheritance theory? The matter requires us to go back a step and review the policies testamentary freedom is supposed to subserve.

One traditional justification for freedom of testation is that it encourages benefactors to produce and save more wealth. If an individual knows that the power of disposition at death (the *jus dividendi*) is included among the incidents of ownership, then the value of property to its owner increases—hence strengthening her incentive to produce it. A second longstanding rationale for freedom of testation is that it facilitates a gray economy in the provision of social services within a family, where formal exchange would be hampered by cultural taboos. Those taboos do not, however, foreclose exercises in reciprocal altruism; parents can obtain benefits during life in return for gifts at death. Finally, freedom of testation exploits benefactors’ detailed knowledge of their families to make sensible provisions for them and hence to enhance their welfare. Courts could set about this task themselves but only at much greater information and administrative cost.<sup>43</sup>

None of these conventional rationales justifies intent-effectuation in connection with default rules. All pertain exclusively to active estate planning. Thus, the added incentive to productivity flows from the opportunity to execute a will, as does the market in social services.

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41. Gary, *Adapting Intestacy*, *supra* note 12, at 10.

42. See Ascher, *supra* note 20, at 641 (“I am less interested in a system that seeks to carry out a decedent’s intent (particularly where the decedent has never bothered to express that intent) . . .”). *But cf. supra* note 10 and accompanying text. Compare the early jurisprudential assertion that intent effectuation for intestate decedents should accompany freedom of testation because they form dual aspects of the natural right of ownership. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* bk. II, ch. 7, pt. iii (Francis W. Kelsey et al. eds., Clarendon Press 1925) (1646); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* 625 (C. H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688); Adam Smith, *Lectures on Jurisprudence* 38, 44 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1762-1763).

43. For an elaboration of the rationales adumbrated in this paragraph, together with scholarly references, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 Ind. L.J. 1, 6-14 (1992).

And in order for lawmakers to exploit benefactors' detailed knowledge, they must proceed affirmatively to record their estate plans; when they fail to do so, an effort to restore the lost benefit would defeat the purpose of avoiding information and administrative costs.

b. *Default Rule Theory*

Nevertheless, if we reflect anew upon the issue in light of contractual default rule theory, this analysis appears problematic. Apart from effectuation of probable intent, all of the public policy objectives of intestacy law identified by inheritance scholars involve potential benefits to society in respect of fairness or tangible social welfare. The ideal response under these conditions, well known in economics, is a Pigouvian tax (or subsidy) operating either to charge benefactors for negative externalities or to reward them for positive externalities produced by alternative distributive choices.<sup>44</sup> Once preferences adjust in reaction to the tax, we again maximize total wealth by minimizing transaction costs—that is, by applying a majoritarian default.

Yet, even assuming (as we shall do for the balance of the discussion) that lawmakers are politically constrained from a tax-related response to externalities, default rules set by reference to societal interests—which we shall dub social defaults<sup>45</sup>—cannot operate as an alternative means of social regulation. Social defaults that conflict with intent simply force parties<sup>46</sup> to bear the cost of contracting around the less preferred rule, a dead-weight loss that reduces efficiency.<sup>47</sup> Indeed, by placing more than a minimum number of parties in this predicament, and hence contributing to the needless waste of resources, social defaults are open to criticism on moral grounds: “[E]nacted to bring about fair or just states,” these rules are “actually . . . unfair” for rules that “[i]ncreas[e] costs without increasing gains [are] unfair to the burdened parties.”<sup>48</sup> This analysis readily crosses over from contracts to gratuitous transfers. A social

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44. A.C. Pigou, *The Economics of Welfare* 192-94 (photo reprint, 4th ed. 1952) (1932); see, e.g., Nicolas Wallart, *The Political Economy of Environmental Taxes* 25-56 (1999). To a limited extent, such taxes and subsidies exist under current law: In some jurisdictions, state inheritance taxes increase with the distance of the relationship between benefactor and beneficiary, thereby encouraging bequests to close relatives. At the same time, federal law grants an exemption from federal estate taxes for charitable bequests, thereby encouraging bequests that qualify. Regis W. Campfield et al., *Taxation of Estates, Gifts and Trusts* 11-12, 561-62 (1999).

45. Cf. Schwartz, *supra* note 21, at 391 (suggesting different terminology).

46. By which (strictly speaking) we refer hereinafter to pairs of parties in a contractual model and to individual parties making a transfer at death in a gratuitous transfers model.

47. Schwartz, *supra* note 21, at 402.

48. *Id.*



default contrary to benefactors' probable intent puts them to the unnecessary expense of overriding the default by executing a will.<sup>49</sup>

Still, this simple and straightforward conclusion becomes more complicated when we delve a little deeper into the assumptions that underlie it. The proposition that social defaults are futile and wasteful takes for granted that (virtually) all parties have a sufficient stake in the rules to contract around them. In that case, a social default simply results in the fulfillment of the parties' preferences at greater cost than if the preferred rule were the default rule. The only sensible alternative to the preferred default rule in that event is a mandatory rule fulfilling social interests, which would be efficient if the mandatory rule is more valuable to society in the aggregate than the preferred rule is to affected parties in the aggregate.<sup>50</sup>

On the other hand, if (virtually) all parties find their stake in the rule to be so small that the transaction cost of opting out exceeds the benefit of doing so, then lawmakers could impose a social default, increasing public welfare without wasting any resources. Hence, one scholar argues that the hypothetical bargain model breaks down in this context.<sup>51</sup> To make the point otherwise: If no one (by hypothesis) has a sufficient incentive to opt out of a default rule, then it becomes the functional equivalent of a mandatory rule *and should be analyzed as one*. Once again, mandatory (and functionally mandatory) rules can efficiently impose social preferences over the preferences of contracting parties when the benefit to society of doing so exceeds the cost to the parties.

Most interesting of all is the "intermediate" case—possibly a common one—where a significant fraction of the parties would have a sufficient interest to opt out of a social default, and a significant fraction would not.<sup>52</sup> This problem has not, as of yet, been modeled in

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49. See Sussman et al., *supra* note 28, at 205 (finding in one empirical study that a significant fraction of testators "said they made or would make wills because they preferred not to have their property distributed in strict accordance with the testa[cy] statutes"); Mary L. Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. Ill. L. F. 717, 723 (reporting a similar finding); 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, 489-90 (1998) (same).

50. We are simplifying by assuming that the parties' preferred rule generates *no* value to society, and vice versa. Otherwise, what we refer to as values would instead have to be marginal values. See also the related discussion in Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 Colum. L. Rev. 1395, 1405-06 (1989); and Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 Colum. L. Rev. 1549, 1555-56 (1989).

51. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich. L. Rev. 1815, 1879 (1991).

52. The tendency of parties to accede to default rules in order to avoid the cost of contracting around them renders them "sticky," in Professor Ayres's terminology. Ayres & Gertner, *supra* note 31, at 1598. Because transaction costs never reach absolute zero, every default rule should be at least a trifle sticky—a principle Ayres

the default rule literature. We present such a model below in Appendix I.

If some parties would bear transaction costs to avoid a default rule and others would not, lawmakers have three choices: they can adopt a mandatory rule imposing the state's preference, a social default rule, or a default rule consistent with the parties' preferences. Depending on the values that parties derive from their preference relative to the value the state assigns to its preference, circumstances will plainly exist where either a mandatory rule or a preferred default rule achieves efficiency. But will lawmakers ever maximize total wealth by adopting a social default?

The answer is yes: It may be intuitively obvious (and can be demonstrated mathematically) that, very roughly speaking, where the values different parties derive from their preference vary around a midpoint that comprises the value the state assigns to its preference, the opportunity to sort the parties into strong-preferrers (willing to pay dearly to escape a social default) and weak-preferrers (who would not lift a finger to do so) maximizes value, even though some transaction costs are borne in the process.<sup>53</sup> Hence, when (and only when) the necessary conditions are satisfied, social defaults prove efficient.

### c. Moral Theory

Nevertheless, even assuming—and it is a generous assumption—that lawmakers could ascertain all of these values in the absence of actual market signals with any meaningful degree of rigor,<sup>54</sup> a moral

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calls "the iron law of default inertia." *Id.* For a psychological explanation for the stickiness of default rules, albeit one that could not apply to inheritance defaults, see Korobkin, *supra* note 1, at 1269-74.

53. See *infra* app. I.

54. Professor Eric Kades has, in effect, inferred that intestacy law provides an opportunity for the sort of value screening just described: Persons "[who] are working hard to provide someone with an inheritance . . . know that they need only write a will" to avoid the rules of intestacy, whereas when one does die intestate "there are fairly strong grounds to presume a certain indifference on the part of the deceased." Eric Kades, *Windfalls*, 108 Yale L.J. 1489, 1553-54 (1999). On this basis, Professor Kades concludes that an "expansion of escheat"—the rule whereby the state confiscates an intestate's estate in lieu of close surviving relatives—"seems efficient." *Id.* at 1554. Such an expansion would "create[] little, if any, disincentive for the living" to produce wealth, because the rule would only apply to intestates, whose wealth is "basically abandoned at death." *Id.* at 1553; see also Beyer, *supra* note 28, at 842 (reporting empirical evidence that indifference is a factor in, but not a major cause of, intestacy); Contemporary Studies Project, *supra* note 28, at 1076-78 (reporting empirical evidence of the causes of intestacy; indifference not mentioned as significant); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 263 (1963) (surmising that persons without close relatives who fail to execute a will "simply do not care what happens to their property"). The doctrine of escheat that Kades endorses is, indeed, a social default, in that it provides wealth to society. See *infra* notes 220-24 and accompanying

case can still be made for eschewing social defaults, at least in the province of gratuitous transfers.<sup>55</sup> The case rests on the stratifying effect of social defaults: Social defaults discriminate against poorer benefactors. That the effect exists is easy enough to demonstrate. Why it exists, and why we can anticipate it to persist, requires a brief digression.

Economic theory predicts that richer and poorer benefactors should have differential propensities to testation. Affluent benefactors are better able to bear the transaction cost connected with will-drafting than those who are straitened.<sup>56</sup> Likewise, affluent benefactors are better able to bear the higher fees demanded by an experienced drafter, who is less apt to leave accidental gaps in a will. This much is obvious. But another less-exploited, although quite significant, theory reinforces the point. For propensities to testation do not depend merely on cold assessments of costs and benefits: Psychological factors are also implicated.

Executing a will can yield obvious psychic benefits: "For the vast majority of estate planning clients, the main reason for having a will . . . is the peace of mind that comes from knowing that their assets will be distributed the way they want them to be distributed."<sup>57</sup> Yet, attorneys practicing in the field have long wrung their hands over many clients' mulish resistance to estate planning.<sup>58</sup> Attorneys who have met this resistance explain it in a variety of ways, and the cost of their services ranks low on their list.<sup>59</sup> Clients often harbor what one observer calls "the illusion of continued life. The minds of many simply do not avert to the possibility of untimely death and there exists the belief that there is no pressing need to attend to the

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text. Nevertheless, without far more evidence, we cannot safely assume that intestates are blasé about the distribution of their estates, and that the expansion of escheat would not actuate them in large numbers needlessly to bear the costs of testation.

55. Cf. *supra* text accompanying note 48. Of course, the moral and economic perspectives on public policy are not mutually exclusive. See generally Daniel M. Hausman & Michael S. McPherson, *Economic Analysis and Moral Philosophy* (1996).

56. The cost increases with the size of the estate but not proportionately with it, because estate planners typically charge on an hourly basis for the work they perform. See Mercer D. Tate, *Strategies for Establishing a Fair Rate of Compensation for Planning a Client's Estate*, 13 Est. Plan. 194, 195 (1986).

57. Henderson, *supra* note 29, at 33; see also Thomas L. Shaffer, *Some Thoughts on the Psychology of Estate Planning*, 113 Tr. & Est. 568, 569 (1974).

58. E.g., Jerome A. Manning et al., *Manning on Estate Planning* § 1.2, at 1-4 (6th ed. 2004) ("In some instances, the adviser will have achieved progress when the client makes the appointment at which the interview will occur. There are many, many people who are reluctant to make that appointment."); L. Paul Hood, Jr., *From the School of Hard Knocks: Thoughts on the Initial Estate Planning Interview*, 27 Am. C. Tr. & Est. Couns. J. 297, 299 (2002) ("Two of the most common complaints . . . made by estate planners about clients are procrastination and inaction.").

59. See generally Gerry W. Beyer, *Teaching Materials on Estate Planning* 5-7 (2d ed. 2000); 1 William H. Page, *Page on the Law of Wills* § 1.6, at 31-33 (rev. ed. 2003).

matter . . . ."<sup>60</sup> Along with procrastination often comes superstition: For centuries now, would-be testators have harbored the fear that if they executed their wills, the documents would become relevant in short order.<sup>61</sup> (Yet, at the opposite extreme, one can also identify a lunatic fringe of benefactors who compulsively revise their wills, succumbing to a sort of testamentary logorrhea.)<sup>62</sup>

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60. 1 Page, *supra* note 59, § 1.6, at 31; *see also, e.g.*, Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 71 (6th ed. 2000); Manning, *supra* note 58, § 1.2, at 1-4; David K. Johns, *Will Execution Ceremonies: Securing a Client's Last Wishes*, 23 Colo. Law. 47, 47 (1994); G. Warren Whitaker, *Classic Issues in Family Succession Planning*, Prob. & Prop., Mar.-April, 2003, at 32, 36; William D. Zabel, *About Men; Last Will and Testament*, N.Y. Times, May 20, 1984, § 6 (Magazine), at 82 (observations of an experienced estate planner). For empirical evidence that procrastination is a major factor deterring testation, see Beyer, *supra* note 28, at 842; Contemporary Studies Project, *supra* note 28, at 1076-78; and Fellows et al., *supra* note 9, at 339. A rude shock—a death in the family, or a brush with death—is sometimes the trigger that overcomes this mind-set. *See* Sussman et al., *supra* note 28, at 204.

61. *See, e.g., In re Estate of Gutierrez*, 11 Cal. Rptr. 51, 54 (Ct. App. 1961). For observations by estate planners, *see for example* Thomas E. Atkinson, *Handbook of the Law of Wills* § 38, at 159-60 (2d ed. 1953); James Comyn & Robert Johnson, *Wills and Intestacies* 4 (1970) (British observation); Manning, *supra* note 58, § 1.2, at 1-4; Johns, *supra* note 60, at 47; and Zabel, *supra* note 60, at 82 (quoting Pablo Picasso's attorney, who ascribed the artist's persistent refusal to execute a will to his superstitiousness). This superstition has existed since at least the sixteenth century. For an early English reference to this belief "amongst the ruder and more ignorant people," *see* Henry Swinburne, *A Brief Treatise of Testaments and Last Wills* pt. 1, § 12, at 24 (photo. reprint 1978) (London, John Windet 1590). For an early American reference, *see Thomas' Administrator v. Lewis*, 15 S.E. 389, 390 (Va. 1892). Yet, oddly enough, in the farther reaches of the past a contrary attitude prevailed. In early medieval England, people had a horror of intestacy, for to die without a will was to die unconfessed. Hence, intestacy was rare at that time. 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 322, 356-61 (2d ed. reissued 1968).

62. "The deceased was very much in the habit of making wills. Several of his old wills and fragments of old wills are produced." *Boylan v. Meeker*, 15 N.J. Eq. 310, 357 (1854). For two more cases of testamentary obsession in the same century, afflicting none other than the Lord Chancellor of England and a self-absorbed Italian countess, *see Sugden v. Lord St. Leonards*, 1 P.D. 154, 173 (C.A. 1876) ("It is evident, from the number of testamentary papers, that the mind of the deceased was constantly fluctuating as to the disposition of his property . . ."); Roger L. Williams, *Gaslight and Shadow: The World of Napoleon III, 1851-1870*, at 159-60 (1957) ("[I]n later years . . . her chief occupation was a continual reworking of her Last Will and Testament."). For a modern example, *see* Jeff Lee, *Court Upholds Philanthropist's Will Changes*, Vancouver Sun, Aug. 11, 2000, at B1 (discussing the estate of a wealthy testator who "had a penchant for changing his will virtually at the drop of a hat"). One estate planner identifies a related type, apparently obsessed with control—"clients who . . . spend[] enormous time and energy to create intricate and detailed estate plans . . . designed to rigidly control the management and distribution of their assets for all eternity." Whitaker, *supra* note 60, at 36. Perhaps due to its rarity, testamentary obsession (in its various forms) has yet to be investigated by the psychologists, although some assert that *any* desire to make a will can indicate depressive or suicidal tendencies. Thomas L. Shaffer, *Death, Property, and Lawyers* 117 (1970); *see also* Nathan Roth, *The Psychiatry of Writing a Will* 51 (1989) (speculating about the related "compulsive need of some persons to write a new will

These reports out of the client conference room coincide with observations inside the laboratory. Cognitive psychologists in recent years have developed and tested what they call “terror management theory” to explain aspects of human behavior.<sup>63</sup> Because human beings uniquely possess the capacity to appreciate the inevitability of their deaths and yet, like all organisms, are genetically adapted for self-preservation, the thought of death inspires terror.<sup>64</sup> Studies demonstrate that humans alleviate this terror in a variety of ways, such as by overestimating their longevity, underestimating their vulnerability to life-threatening illness, and by maneuvering to avoid situations that would bring thoughts about mortality consciously to mind.<sup>65</sup> Estate planners’ anecdotal observations about self-deceptive foot-dragging and their uphill struggle to get clients actually to present themselves in a law office—where, of course, they would directly confront their mortality—fits neatly with the psychologists’ findings in other settings.<sup>66</sup> Meanwhile, the prevalence of socially-transmitted

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before making any . . . journey, even though they make no noteworthy additions to pre-existent wills”).

63. For prior applications of terror management theory to the problem of inheritance taxation, see Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. Rev. 567, 584-85 (2003); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. Rev. 825, 863 (2001); Joel Slemrod, *Thanatology and Economics: The Behavioral Economics of Death*, Am. Econ. Rev. (Papers & Proc.), May 2003, at 371, 373-74; see also Donald P. Judges, *Scared to Death: Capital Punishment As Authoritarian Terror Management*, 33 U.C. Davis L. Rev. 155 (1999) (applying terror management theory to the death penalty); Wojciech Kopczuk & Joel Slemrod, *Denial of Death and Economic Behavior* (Jan. 16, 2004) (unpublished manuscript, on file with author) (applying terror management theory to saving/consumption behavior).

64. For a survey of terror management theory, see Eric Strachan et al., *Coping with the Inevitability of Death: Terror Management and Mismanagement*, in *Coping with Stress* 114 (C.R. Snyder ed., 2001). See also Robert Kastenbaum & Ruth Aisenberg, *The Psychology of Death* 137-40 (3d ed. 2000) (suggesting speculative extensions of the theory). With his usual wit, the filmmaker (and famous neurotic) Woody Allen expressed his own terror of death: “It’s not that I’m afraid to die, I just don’t want to be there when it happens.” *Love and Death* (MGM/UA Studios 1975).

65. See Jeff Greenberg et al., *Terror Management Theory of Self-Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, 29 *Advances in Exper. Soc. Psychol.* 61, 90-91, 105-14 (1997) (summarizing prior studies) [hereinafter Greenberg et al., *Terror Management*]; Shannon K. McCoy et al., *Transcending the Self: A Terror Management Perspective on Successful Aging*, in *Death Attitudes and the Older Adult* 37, 39-42 (Adrian Tomer ed., 2000) (same); Tom Pyszczynski et al., *A Dual-Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory*, 106 *Psychol. Rev.* 835, 838-39 (1999) (same); Strachan et al., *supra* note 64, at 123-25 (same). For the most recent studies of defense mechanisms, see Jamie Arndt et al., *Terror Management and Self-Awareness: Evidence that Mortality Salience Provokes Avoidance of the Self-Focused State*, 24 *Personality & Soc. Psychol. Bull.* 1216 (1998); and Jeff Greenberg et al., *Proximal and Distal Defenses in Response to Reminders of One’s Mortality: Evidence of a Temporal Sequence*, 26 *Personality & Soc. Psychol. Bull.* 91 (2000).

66. Estate planners have observed directly the anxieties caused by the estate planning process that psychologists would have predicted. See Shaffer, *supra* note 62, at 109-26; Hood, *supra* note 58, at 300-01. For an identification of additional

superstitious beliefs and their psychological roots in a desire to control life's uncertainties—such as the time of one's death—has also drawn scholarly attention.<sup>67</sup>

In short, psychological barriers accompany transaction costs, conspiring to impede the testamentary process.<sup>68</sup> What is more, theory predicts that those psychological barriers should not be evenly distributed across society. Wealthier benefactors should, on average, remain more open to the process of testation, just as they are better able to bear its costs. Of course, well-heeled persons ordinarily receive more astute counsel and face more concerted efforts to get past their denial of death or whatever other anxieties or phobias about estate planning they may harbor.<sup>69</sup> On top of that, studies suggest that more successful persons are less susceptible to these psychological forces and hence should be less prone to resist testation in the first place. It comes as no surprise that richer, better educated persons prove less superstitious, in general, than poorer, unschooled persons; learning and credulity are inversely correlated.<sup>70</sup> Intriguingly, an assortment of studies likewise finds richer, better educated persons to suffer less dread of death. These persons actually appear to have less terror to manage.<sup>71</sup> Accordingly, the social distribution of

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psychological conditions that, if manifest, could deter will-making, see John M. Astrachan, *Why People Don't Make Wills*, Tr. & Est., Apr. 1979, at 45, 46-50 (observations by a psychiatrist); and Fred O. Henker, *Psychological Aspects of Writing a Will*, 19 Med. Aspects Hum. Sexuality 17, 17-20 (1985) (same).

67. See Gustav Jahoda, *The Psychology of Superstition* 17-32, 127-37 (1969); Stuart A. Vyse, *Believing in Magic: The Psychology of Superstition* 196-203 (1997).

68. Whether the same is ever true of the contracting process, operating to impede bargaining in some settings, likewise merits investigation.

69. Sophisticated estate planners understand that they must deal sensitively with "emotional roadblocks that can actually halt the financial planning process." Carol Larco-Murzyn & Vanessa Bohrer, *Think Like a Shrink*, Tr. & Est., May 2002, at 43, 43; see also Roth, *supra* note 62, at 51-52; Shaffer, *supra* note 62, at 109-26; Hood, *supra* note 58, at 298-301.

70. Jahoda, *supra* note 67, at 140 (remarking an inverse correlation between superstitiousness and income); Vyse, *supra* note 67, at 37-41 (remarking an inverse correlation between superstitiousness and education); Laura P. Otis & James E. Alcock, *Factors Affecting Extraordinary Belief*, 118 J. Soc. Psychol. 77, 83-84 (1982) (same); P.V. Ramamurti & D. Jamuna, *Superstitious Beliefs Across the Age Span 20-70*, 31 J. Psychol. Res. 156, 157 (1987) (same); see also Vyse, *supra* note 67, at 46-47 (remarking an inverse correlation between superstitiousness and scores on intelligence tests); Pat Killen et al., *Superstitiousness and Intelligence*, 34 Psychol. Rep. 1158, 1158 (1974) (same); Michael A. Thalbourne & Oriana Nofi, *Belief in the Paranormal, Superstitiousness and Intellectual Ability*, 61 J. Soc'y for Psychical Res. 365, 369-70 (1997) (same).

71. "As ironic as it may be, those who ostensibly have more to live for have less fear of death." Richard Lonetto & Donald I. Templer, *Death Anxiety* 13 (1986) (citing to studies); see also Victor G. Cicirelli, *Fear of Death in Older Adults: Predictions from Terror Management Theory*, 57B J. Gerontology: Psychol. Sci. P358, P362 (2002) (finding a weak but significant negative correlation between death anxiety and socioeconomic status). These findings support the predictions of terror management theory, which posits that self-esteem functions as a buffer on anxiety. See Greenberg et al., *Terror Management*, *supra* note 65, at 72-78, 93-94 (citing to

psychological inhibitions acts to steepen the incline of the playing field, amplifying the stratifying effect that transaction costs already produce.

Empirical evidence corroborates these theoretical predictions. Assorted studies have all found a pronounced correlation between wealth and testation—the more prosperous one's circumstances, the likelier one is to execute a will.<sup>72</sup> And these effects are not felt merely at the margin: Whereas rates of testation overall appear to have risen over time, intestacy remains a common phenomenon today, covering something around (or just under) one-half of the American population.<sup>73</sup>

Accordingly, if lawmakers adjust default rules to fulfill social concerns when in conflict with probable intent, wealthier benefactors are likelier than poorer ones to have their distributive wishes respected. Of course, an economist might respond that this residue of social stratification is a normal concomitant of wealth maximization in a capitalist economy. Yet, as Judge Richard Posner reminds us, "there is more to justice than economics."<sup>74</sup> The notion of individual equality before the law, irrespective of one's means, has been a tenet of Western political theory stretching back to Pericles, if not to the

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studies); Eddie Harmon-Jones et al., *Terror Management Theory and Self-Esteem: Evidence That Increased Self-Esteem Reduces Mortality Salience Effects*, 72 J. Personality & Soc. Psych. 24 (1997). Higher self-esteem tends to flow from socioeconomic status and thus ostensibly functions to mitigate fear of death. Jean M. Twenge & W. Keith Campbell, *Self-Esteem and Socioeconomic Status: A Meta-Analytic Review*, 6 Personality & Soc. Psych. Rev. 59 (2002); Cicirelli, *supra*, at P358-60.

72. For a recent empirical study, see Marsha A. Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills*, 22 J. Fam. & Econ. Issues 243, 250-58 (2001). See also Carole Shamma et al., *Inheritance in America from Colonial Times to the Present* 17-18 (1987); Sussman et al., *supra* note 28, at 202-04; Contemporary Studies Project, *supra* note 28, at 1071-73; Dunham, *supra* note 54, at 263-64; Fellows et al., *supra* note 9, at 336-39; Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 Wis. L. Rev. 393, 412. But cf. Janet Finch et al., *Wills, Inheritance, and Families* 55-57 (1996) (reporting results of a British study). Of course, one can identify exceptions, such as the immensely wealthy Howard Hughes, who died intestate in 1976. For a discussion of the Hughes estate, see Roger W. Andersen & Ira Mark Bloom, *Fundamentals of Trusts and Estates* 40 (2d ed. 2002). For a recent instance of a \$19 million intestate estate, see *In re Estate of Fosler*, 13 P.3d 686 (Wyo. 2000).

73. Fellows et al., *supra* note 9, at 337 (reporting results of a study finding a rate of testation over 45% and also citing to earlier studies); Goetting & Martin, *supra* note 72, at 253 (reporting results of a study finding a rate of testation of 66% and also citing to a 1995 study finding a rate of testation of 69%); see also 1 Page, *supra* note 59, at 28-31 (citing to American studies); Shamma et al., *supra* note 72, at 16-19, 219-20 (performing a historical study); M.C. Mirow, *Last Wills and Testaments in England 1500-1800*, 60 *Recueils de la Société Jean Bodin Pour L'Histoire Comparative Des Institutions* 47, 49 n.10 (1993) (citing to British historical studies).

74. Posner, *supra* note 23, § 2.3, at 28.

pre-Socratics,<sup>75</sup> manifested nowadays in such tangible sequelae as public defenders, legal aid, and so on. In the same vein, Professor Fellows has posited the objective of "equal planning under the law"<sup>76</sup> as a guiding principle of lawmaking in the inheritance realm—a natural extension of equality before the law, in that it affords benefactors the advantages that legal representation would otherwise provide.

Social defaults violate the principle of equal planning under law. Whenever adopted, they discriminate against poorer benefactors, who are more likely to accede to them even though they contradict their preferences, whereas better heeled benefactors can more easily afford to override them and implement their preferences.<sup>77</sup> By comparison, a majoritarian default would tend to level the playing field, allowing the poor to accomplish their preferred estate plan at lower cost. What is more, lawmakers gain an additional benefit when they achieve equality in this way, because the alternative of offering state-subsidized estate planning services would procure the same result at far greater cost. Equal planning under law thus achieves, so to say, *moral* efficiency: Aidful laws are invariably more efficient than aidful lawyering.<sup>78</sup>

None of this is to suggest that social concerns have no place within inheritance law. If lawmakers deem a distributive policy sufficiently important as to merit widespread observation, however, they ought to enforce it in an egalitarian manner. The solution is simple: Lawmakers can impose a mandatory rule of inheritance and thereby implement the policy impartially.<sup>79</sup>

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75. For discussions, see J.M. Kelly, *A Short History of Western Legal Theory* 29-30, 236, 291 (1992); Posner, *supra* note 23, § 8.7, at 267; Lloyd L. Weinreb, *Natural Law and Justice* 166-67 (1987); James Konow, *Which Is the Fairest One of All? A Positive Analysis of Justice Theories*, 41 J. Econ. Lit. 1188, 1194-95 (2003); and Geoffrey Marshall, *Notes on the Rule of Equal Law*, in 9 *Nomos: Equality* 261, 261-64 (J. Roland Pennock & John W. Chapman eds., 1967).

76. Mary Louise Fellows, *In Search of Donative Intent*, 73 Iowa L. Rev. 611, 613 (1988).

77. Professor Fellows had hinted at this point in her early work emphasizing intent effectuation as the primary goal of intestacy law. Her concern that intestacy law not "create[] a trap for the ignorant or misinformed," holds manifestly greater relevance with respect to poorer benefactors. *See supra* note 10.

78. This analysis has no clear parallel in the contractual realm, where issues of inequality are ordinarily raised with regard to the relationship between contracting parties, as opposed to pairs of parties *inter se*.

79. *See generally* Lewis M. Simes, *Public Policy and the Dead Hand* (1955) (addressing the utility of mandatory limits on testamentary freedom). A court once mused about making *all* the default rules of intestacy mandatory: "In the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all is often gravely questioned." *In re Walker's Estate*, 42 P. 815, 818 (Cal. 1895), *modified on reh'g* 42 P. 1082 (Cal. 1896) (per curiam).



*d. Expressive and Transformative Defaults*

The analysis presented up to now relies upon the implicit assumption (usual to economists) that preferences are static and exogenous. If we assume instead (as the psychologists do) that preferences are mutable and endogenous, then additional arguments for the formulation of default rules can present themselves.<sup>80</sup>

The latter assumption underlies the thesis offered by a number of inheritance scholars, quoted earlier,<sup>81</sup> that intestacy law can fulfill an “expressive function,” exemplifying what the state considers an appropriate devolution of wealth. To the extent the message is directed toward the community at large, a rule of intestacy ostensibly serves to promote moral acceptance of relationships not otherwise culturally countenanced. To the extent the message is also directed to benefactors themselves, the rule ostensibly serves to encourage the development of donative preferences that the state deems socially desirable.

A copious general literature on the expressive function of law already exists, and the theory has now coalesced around a core of ideas.<sup>82</sup> Put simply, the theorists posit that because norms of behavior are malleable, even “fragile,”<sup>83</sup> they will naturally form and reform in response to incessant private interactions, which can also trigger a cascade effect ending in the proliferation of a uniform norm throughout society. Government can inject itself into this ferment and endeavor to participate in “norm management,”<sup>84</sup> for example, by launching a rhetorical campaign—or simply by passing a law. Law affects the actions of citizens through coercion, of course, but it can also do so—sometimes more effectively—by “making statements”<sup>85</sup> that imbue those actions with new social meanings and alter the

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80. For a recent discussion of the chasm separating economists from psychologists with respect to this, and other, behavioral axioms, see Daniel Kahneman, *A Psychological Perspective on Economics*, Am. Econ. Rev. (Papers & Proc.), May 2003, at 162, 163-65. See also Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. Econ. Lit. 75 (1998).

81. See *supra* note 14 and accompanying text.

82. See generally Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996) [hereinafter Sunstein, *Expressive Function*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996) [hereinafter Sunstein, *Social Norms*]. An antecedent to expressive theory was the theory of civic republicanism. See Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. Pa. L. Rev. 801, 811-14, 822-33 (1993). For a still earlier antecedent, see Aristotle, *The Nicomachean Ethics* 352-58 (J.E.C. Welldon trans., 1987) (c. 334-323 B.C.).

83. Sunstein, *Social Norms*, *supra* note 82, at 909.

84. *Id.* at 907.

85. Sunstein, *Expressive Function*, *supra* note 82, at 2024.

private judgments citizens face within their communities. Through the experience of shame or esteem, citizens may even come to internalize the ballyhooed norm.

It is this theory that several inheritance scholars have taken up and run with, but here they have carried it beyond its credible range. On analysis, the expressive ramifications of intestacy law appear alternately negligible and irrelevant, and the conclusion follows that they should not influence the formulation of rules of intestacy or other inheritance defaults in (virtually)<sup>86</sup> any respect.

Consider first the expressivists' claim that intestacy law offers a "powerful symbol"<sup>87</sup> about which relationships the community ought to respect. Thus conceived, intestacy law again comprises a social default, albeit of a special sort—one that benefits society not because of the wealth transfers that result from it, but because of their symbolic impact on third parties.

We have earlier questioned the usefulness and propriety of social defaults in general,<sup>88</sup> but here a more fundamental criticism looms: Are the benefits even tangible? Not all laws can reasonably be anticipated to have attitudinal consequences. As Cass Sunstein cautions, "for purposes of law, any support for 'statements' should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about its effect on social norms."<sup>89</sup> Indeed, when laws predicated on expressivism are not only futile as an instrument of norm management but also economically injurious, they "verge on fanaticism."<sup>90</sup>

The notion that lawmaking can ever have a significant impact on public attitudes toward the morality of relationships ("familial norms")<sup>91</sup> appears doubtful; citizens do not look to lawmakers as authorities when they make this sort of judgment.<sup>92</sup> Additionally,

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86. For one possible and limited exception, see *infra* notes 186-88 and accompanying text.

87. Spitko, *supra* note 14, at 1100.

88. See *supra* Part I.C.2.b-c.

89. Sunstein, *Expressive Function*, *supra* note 82, at 2045.

90. *Id.* at 2047.

91. Spitko, *supra* note 14, at 1100.

92. See Sunstein, *Expressive Function*, *supra* note 82, at 2026 (observing, by analogy, that legalization of prostitution would probably have a negligible impact on social norms). Although psychological evidence suggests that persons are subject to persuasion by authority figures, which lawmakers are, those figures must still be accounted authorities on the matter at hand, which lawmakers are not. We might expect ministers, for example, to be more persuasive managers of familial norms. See Robert B. Cialdini, *Influence: Science and Practice* 8-10, 179-88, 196-97 (4th ed. 2001). What is more, persuasion will not occur in the absence of trust, *id.* at 197-99, possibly a significant impediment to the influence of lawmakers. Professor Sunstein recognizes that efforts by government to manage some norms "may fail for lack of trust." Sunstein, *Social Norms*, *supra* note 82, at 952; see also Adler, *supra* note 82, at 1467; Sunstein, *Expressive Function*, *supra* note 82, at 2049. Nevertheless, the proposition that a law can influence social norms is necessarily "grounded on the view

rules of inheritance are at best tangentially related to the social acceptance of family relationships, having no bearing whatsoever on everyday life; by comparison, rules against discrimination have more widespread repercussions and would be far likelier to engender attitudinal changes, if any rules can.

Intestacy law is also relatively obscure. Only those persons directly affected by it have an incentive to acquaint themselves with it. Nor does the community truly witness intestacy law in action; people may see property inherited, of course, but without having any way of knowing whether the transfer occurred under a rule of law, or under an estate plan.<sup>93</sup>

Finally, and more generally, there is the fact that rules of intestacy are nothing other than default rules. As such, they do not represent strong statements about anything.<sup>94</sup> On the contrary, considered from a structural perspective, default rules signal legal *deference* to private values.

Yet, expressive inheritance defaults can simultaneously implicate costs. Whenever they contradict the preferences of most benefactors, they wastefully contribute to transaction costs. Such rules will meet Professor Sunstein's definition of fanatical ones.<sup>95</sup> On the other hand, whenever they conform with the preferences of most benefactors, expressive inheritance defaults are majoritarian in nature and hence have no independent theoretical significance; their expressive radiations are incidental and irrelevant to lawmakers' formulation of the rule at issue.<sup>96</sup>

But that brings us to the expressivists' second assertion—to wit, that intestacy laws can serve to change not only how “others view” familial relationships, but also how the parties to those relationships “view themselves. . . . shap[ing] . . . [their] relations . . . to each other.”<sup>97</sup> By influencing benefactors to internalize familial norms, expressive laws

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that law will have moral weight and thus convince people that existing norms are bad and deserve to be replaced by new ones.” Sunstein, *Expressive Function*, *supra* note 82, at 2031; *see also* Iris Bohnet & Robert D. Cooter, *Expressive Law: Framing or Equilibrium Selection* (2003) (U.C. Berkeley School of Law, Public Law Research Paper No. 138) (finding, in an experimental study, that expressive sanctions had no effect on preferences but could affect behavior in situations where coordination provided a Pareto-superior equilibrium) *available at* <http://ssrn.com/abstract=452420>.

93. Theorists have recognized that the obscurity of a rule dampens its expressive effect. *See* McAdams, *supra* note 82, at 362, 389 n.127; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 404 n.217 (1997); Sunstein, *Expressive Function*, *supra* note 82, at 2050-51.

94. *See* Schwartz, *supra* note 21, at 414 (“[P]ersons are unlikely to abandon considered views merely because the state enacts a nonbinding rule that these persons think is objectionable.”).

95. *See supra* note 89 and accompanying text.

96. *See supra* note 41 and accompanying text.

97. Fellows et al., *supra* note 12, at 91; *see also* Spitko, *supra* note 14, at 1101.

could have the effect of reconfiguring donative preferences.<sup>98</sup> To the extent the effect is merely to reinforce a preexisting majority preference, the expressive ramifications of a rule are once again irrelevant to its composition. But to the extent a rule encourages parties to form a *new* majority preference, it becomes intent-effectuating as a sort of self-fulfilling prophecy, thereby dynamically reconciling social concerns with efficiency.

The possibility of adopting default rules in order to change parties' preferences had in fact been aired within the contracts literature before inheritance scholars joined the discussion. Alan Schwartz called such rules "transformative defaults."<sup>99</sup> He counseled against them, however, on the ground that their powers of persuasion were speculative at best and hence, like social defaults, would magnify transaction costs.<sup>100</sup>

For reasons already discussed, Professor Schwartz is right to question the potential of default rules to affect parties' preferences. In the context of intestacy, although benefactors (unlike other members of a community) do have an incentive to become informed about the rules that apply to them, they have no reason to accord them moral weight.<sup>101</sup> Indeed, even more than other sorts of transfers and transactions, estate planning is a process well-insulated from any sort of external moral influence,<sup>102</sup> a proposition that finds support in at least one empirical investigation.<sup>103</sup>

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98. The expressivists are vague, and perhaps a trifle uncertain, about what aspects of parties' relations they would intend intestacy law to change. See Fellows et al., *supra* note 12, at 22, 91 & n.350; Spitko, *supra* note 14, at 1101 & n.197. Plainly, the prospect of altering donative preferences is not central to their vision. To the extent that their concern is to affect how parties behave otherwise toward each other within a relationship, the foregoing analysis remains pertinent.

99. Schwartz, *supra* note 21, at 391; see also Charny, *supra* note 51, at 1836-37.

100. Schwartz, *supra* note 21, at 396, 413-15; cf. Charny, *supra* note 51, at 1867-68 (asserting that when default rules do change preferences, intent effectuation becomes circular, leaving lawmakers no choice but to look to other social values); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106, 109-12, 124-34 (2002) (same).

101. See *supra* notes 90-92 and accompanying text. For the suggestion that default rules can influence norms when citizens believe that government possesses better information than they do about which choice is superior, see Korobkin, *supra* note 1, at 1247, 1271; and Sunstein, *supra* note 100, at 114-16. Of course, as concerns donative choices, benefactors are—and know that they are—better informed about how best to allocate their wealth than are lawmakers. Norms of conduct may also be internalized over time simply by virtue of repeated conformity but, as Professor Schwartz points out, that should not occur in connection with a disapproved default rule, which parties will reject from the outset. Schwartz, *supra* note 21, at 414. At any rate, estate planning is not a repetitive, habitual activity. Finally, the suggestion that the endowment effect can cause persons to prefer any given default rule, see Korobkin, *supra* note 1, at 1269-74 (citing to earlier discussions), is irrelevant to inheritance defaults, which create for the benefactor no initial rights or interests.

102. Wills remain private documents until death, at which point benefactors need no longer fear the social consequences of their decisions (apart from their effects on their reputations *post mortem*). Hence, will-making comprises "an exercise of power

In sum, scholars who would import expressive legal theory into the realm of inheritance defaults are barking up the wrong doctrinal tree. But even if this dog will hunt, one could object more fundamentally to the whole enterprise. The notion that the state can legitimately undertake to manipulate moral attitudes and even preferences concerning matters so personal as familial relations is, to say the least, politically disquieting.<sup>104</sup> Secondly, such a theoretical vision also leads legal policy in the direction of functional indeterminacy.<sup>105</sup> In this regard, one might add, inheritance scholars who have found expressive theory so alluring betray a distinctly academic blend of arrogance and naiveté. Assume for a moment the scholars gained acceptance of their view. Whose morality and preferences, then, should inheritance law express? Why, *theirs* of course! The scholars, in fact, have taken their stance precisely with an eye to promoting an agenda, namely the legal and social recognition of nontraditional families.<sup>106</sup> Yet, once lawmakers accept the invitation to manage citizens' morals and preferences, who is to say which ones elected

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without responsibility[,] [f]ree of the constraint of what the neighbours would think." M. Meston, *The Power of the Will*, 1982 Jurid. Rev. 172, 173; see also Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 Wash. & Lee L. Rev. 33, 53-55 (1999); Hirsch & Wang, *supra* note 43, at 13. For an example of external influence upon inter vivos gift-giving behavior, by comparison, see Peter H. Reingen, *Test of a List Procedure for Inducing Compliance with a Request to Donate Money*, 67 J. Applied Psychol. 110 (1982).

103. A study endeavoring to assess the strength of outside influences upon testators concluded:

[Evidence of] the social influences of family, friends, attorneys, governments . . . was much less direct and less obvious than is implied by writers from the family-community position and the legalist position. No instances were found in which a testator said or implied that he or she was unduly influenced or pressured by any of these entities into making various choices or statements within the will. . . . If, however, we are willing to assume that the less obvious influences of family, friends and community are manifested by "standard" wills, . . . then almost one-half (48 percent) of the testators were at least indirectly influenced by these social entities. . . . On the other hand, about 42 percent of the testators manifested enough individuality that there their wills were considered to be more personalized than they were socially influenced.

T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences*, 34 Soc. Q. 337, 349-50 (1993); cf. *infra* note 176.

104. For a general (and withering) criticism of norm management by the state, see Gey, *supra* note 82, at 822-33, 894-98. Compare Professor Sunstein, who defends norm management by the state as legitimate within the same bounds as "any other kind of governmental action," hence so long as it does not "invade rights, whatever our understanding of rights may be." Sunstein, *Expressive Function*, *supra* note 82, at 2048-49; see also *id.* at 2029-33. On this theory, however, government efforts to instill familial norms would be vulnerable to challenge as an invasion of citizens' privacy rights. For additional pertinent discussions, see the sources cited *infra* note 184.

105. The same could be said of any default rule theory that pays regard to amorphous "state interests." See *supra* text accompanying note 20. Here the difficulty is compounded by the moral relativism of familial norms.

106. See Fellows et al., *supra* note 12; Spitko, *supra* note 14.

officials—themselves influenced by the persuasive expressions of interest groups<sup>107</sup>—will see fit to propagate? In due time, scholars might rue the day when they gave their imprimatur to the politicization of inheritance law.<sup>108</sup>

### 3. Penalty Defaults

We have one final aspect of default rule theory to look at in the inheritance field—possibly with reflections back into its field of origin. That is Professor Ayres's argument, summarized earlier,<sup>109</sup> that contractual defaults can, in some circumstances, enhance efficiency by contradicting preferences. When "purposefully set at what the parties would not want,"<sup>110</sup> a default rule creates incentives for parties to contract around them. That action is costly, to be sure, but it may entail as a by-product the disclosure of valuable information. If the value of the information gained exceeds the transaction cost, a penalty default is efficient.

Ayres identifies three potential recipients of the information elicited by a penalty default: (1) less informed bargainers under conditions where asymmetric information generates inefficiencies; (2) interested third parties, such as creditors (under those same conditions); and (3) courts.<sup>111</sup> In the context of inheritance, only the benefactor has a say in the transfer, and a will induced by a penalty default would reveal no useful information to interested parties, for it remains a private document until death and creates mere expectancies.<sup>112</sup>

Ayres's analysis of courts' interest in the disclosure of information, on the other hand, could have a bearing on inheritance defaults. His point is this: When parties leave a gap in a contract, they implicitly delegate to the legal system the task of filling that gap. Accordingly,

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107. See generally Daniel A. Farber & Philip P. Frickey, *Law and Public Choice* 12-37 (1991).

108. One scholar considers the door to expressive lawmaking already wide open: The potential of succession law to affect [sic] change in cultural norms is at the heart of the debate over same-sex equality and succession law reform. . . . If exclusionists and inclusionists agree on nothing else, they share a similar view of the expressive function of same-sex equality under the law.

Spitko, *supra* note 14, at 1099-1100. Well, "exclusionists" and "inclusionists" may share this view, but default rule theorists do not share it, and only a handful of political theorists share it. Ironically, by repudiating the use of law to change social values and insisting that lawmakers focus exclusively on probable intent, scholars could still make a case—and far more persuasively—for intestacy reform with respect to nontraditional families. See *infra* notes 270-72 and accompanying text.

109. See *supra* notes 25-26 and accompanying text.

110. Ayres & Gertner, *supra* note 2, at 91.

111. *Id.* at 97 & n.48.

112. Competent testators remain free to amend or revoke their wills *at will*, hence a will cannot be relied on.

[i]f it is costly for the courts to determine what the parties would have wanted, it may be efficient to choose a default rule that induces the parties to contract explicitly. In other words, penalty defaults are appropriate when it is cheaper for the parties to negotiate a term *ex ante* than for the courts to estimate *ex post* what the parties would have wanted. Courts, which are publicly subsidized, should give parties incentives to negotiate *ex ante* by penalizing them for inefficient gaps.<sup>113</sup>

By analogy, a default rule purposefully contrary to the wishes of most benefactors would encourage them to reveal their preferences, lest the default rule go into operation—thereby sparing courts from the task of filling gaps in their estate plans.

In fact, long before Professor Ayres worked out this thesis, several inheritance scholars had entertained the idea of using intestacy law to such an end. Allison Dunham stole a march on default rule theory nearly half a century ago, by suggesting the possibility of drafting “intestate succession law . . . with the purpose of ‘inducing’ wills.”<sup>114</sup> Professor Dunham continued:

Society might decide that distribution by private volition is such a major value that it should do everything within its power to induce people to make a will. From such a point of view, society might well conclude that the intestate succession law should deviate from common understanding and expectation in order to induce people to do what society has assumed to be desirable.<sup>115</sup>

As early as 1935, Professor Atkinson had apprehended the germ of this idea. He advocated the expansion of escheat—whereby the state confiscates the estates of intestate decedents who lack close relatives—to increase public revenue, adding that “if people indulged in will-making” to preserve their wealth, “this very process of testamentary execution would result in a great social gain. Because testators would consider the deserts and the needs of the beneficiaries, their wills would undoubtedly provide better plans of distribution than present intestate laws do with respect to remote collaterals.”<sup>116</sup> Escheat, then, could function as a penalty default, forcing benefactors

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113. Ayres & Gertner, *supra* note 2, at 93; *see also* Ayres & Gertner, *supra* note 31, at 1596-98.

114. Letter from Allison Dunham, Prof. of Law, Univ. of Chicago (Apr. 24, 1968), *quoted in* Sussman et al., *supra* note 28, at 84 n.6.

115. *Id.*

116. Atkinson, *supra* note 7, at 197. To the same effect a generation later, *see* Browder, *supra* note 31, at 1312 (“A decedent who was unhappy with [an escheat] would presumably be induced to make a judgment by will which would probably be more thoughtful and sensible than a mechanical pursuit of his remote kindred.”).

to choose between disclosing their preferences or accepting a draconian estate plan that no one, save Justice Holmes,<sup>117</sup> would want.

Yet, the logic of all this remains problematic. One may observe, first of all, that penalty defaults bear a curious, mirror-image resemblance to social defaults: Whereas social defaults exploit apathy in order to reach a socially desirable end, penalty defaults spur activity in order to achieve the same end. Hence, whereas action to override a social default offsets its social utility, *inaction* frustrates a penalty default. The "stickier" a penalty default,<sup>118</sup> the more ineffectual it is. And because *every* default rule will prove at least somewhat sticky,<sup>119</sup> penalty defaults can never operate perfectly—an observation applicable to both contractual and inheritance defaults.

In the inheritance arena, penalty defaults are vulnerable to a second criticism. Just as social defaults discriminate against poorer benefactors due to disparate tendencies to (in)action,<sup>120</sup> so penalty defaults will do likewise. In similar ways, both infringe the principle of equal planning under law.<sup>121</sup>

More fundamentally, however, a penalty default that coerces parties to disclose preferences *ex ante* generates no judicial economy if the parties would otherwise want the gap to be filled with a rigid default rule. Such a rule is no more costly to carry into execution *ex post* than the explicit testamentary (or contractual) language that a penalty default would induce. Either way, the court will be called upon to enforce (and construe) inflexible provisions set out either in a statute, or in an instrument.<sup>122</sup> Where that is our choice, the default rule more closely consonant with probable intent provides greater efficiency, because it also lessens transaction costs.

The only sort of preferred default lawmakers could reasonably deny parties on grounds of judicial economy is a *discretionary* default, whereby the court estimates preferences on a case-by-case basis. But even that sort of default would remain efficient if lawmakers imposed the full cost of the resulting judicial proceeding on the parties, and a majority still favored that route. At any rate, discretionary inheritance defaults are unlikely to be popular, for reasons discussed later in this Article.<sup>123</sup>

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117. For Justice Holmes's famous estate plan (executed when he was a childless widower), see G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 472-73 (1993).

118. To recall Ayres's terminology. See *supra* note 52.

119. This is Ayres's "iron law of default inertia." See *supra* note 52.

120. See *supra* Part I.C.2.c.

121. See *supra* note 76 and accompanying text.

122. If anything, a mechanical statute is likely to cost less to implement than an instrument, on average, because instruments vary in the quality of their drafting and hence tend to breed construction litigation.

123. See *infra* Part I.D.1.c. In connection with escheat, see *infra* notes 228-30 and accompanying text.



Now, on closer inspection, it would appear that Professors Dunham and Atkinson put the case for penalty defaults on a slightly different, but related, basis. Their argument seems to have been that by inducing wills society could benefit not by forcing out information that a court needs to simplify adjudication, but by forcing out information that a court needs to divide an estate sensibly. If, by hypothesis, an individualized approach to estate planning *yields greater welfare* than a mechanical one, then we derive greater efficiency by pressing the benefactor to engage in that enterprise.

However inventive, this argument ultimately does not hold water. Although theorists have justified freedom of testation, *inter alia*, on the ground that it facilitates thoughtful estate planning,<sup>124</sup> this advantage follows from benefactors' own eagerness to behave thoughtfully. If some benefactors prove unresponsive to this opportunity, and would just as soon die intestate, then a penalty default might induce will-making, but it cannot induce benefactors to plan judiciously. Instead, they can execute simple wills that suffice to avoid the penalty but prove no more edifying than the uninformed estate plan lawmakers implement with greater efficiency by adopting a simple, majoritarian default.

At the end of the day, penalty defaults have no place in our inheritance law. Neither do social defaults, nor expressive defaults, as we have already concluded. That leaves majoritarian defaults as the exclusive means of achieving public policy within the arena of gratuitous transfers. As contractual default rule theory has helped us to clarify, more eclectic approaches to intestacy rules, and to inheritance defaults in general, whether grounded in fairness or public policy or didactics, all prove a *trompe l'oeil*, superficially pleasing to the eye and to the emotions, perhaps, but ultimately both costly and discriminatory. Thin on analysis to begin with, those approaches merit re-examination by scholars and rejection by lawmakers.

#### D. *The Problems of Evidence*

We are not quite done with our theory, however: As usual, our answer to the question of how to set inheritance defaults gives birth to other questions. Next comes the matter of determining how to structure default rules premised on probable intent so as best to achieve that goal; and also the matter of their derivation—that is, determining how to infer the donative preferences that will serve as templates for our default rules.

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124. See *supra* note 43 and accompanying text.

## 1. Structuring Majoritarian Defaults

In assessing how to fashion majoritarian inheritance defaults, several related issues require our attention: the sorts of contingencies that should form the building blocks of our default rules, the level of complexity of those contingencies, and the extent to which courts should retain elbow room to reach outcomes at their discretion.

### a. *Contingencies*

By tradition, default rules in inheritance law have hinged on relational contingencies—who is married to whom, who is kindred to whom, who is or is not alive when the transfer occurs. Considered in the abstract, however, any factual contingencies could compose the raw material for a majoritarian default so long as they further the objective of intent effectuation. Do any theoretical limits cabin in this principle?

One thing we can say is that unless a factual contingency is defined precisely and objectively, costly litigation could be required to resolve its meaning (just as when a testator introduces ambiguities into a will). That defeats the purpose of default rule efficiency. But this observation speaks more to the matter of lawmakers' professional competence in drafting default rules than to the sorts of factual inquiries they ought to warrant.

What if the factual inquiry is *expensive* to undertake? One argument that the Commissioners have made in favor of restricting the range of intestate beneficiaries to near relatives is that doing so "simplifies proof of heirship."<sup>125</sup> On its face, this again seems a relevant efficiency concern, but on further analysis it proves to be specious. If a majority of benefactors would want to authorize the expense—say, a search for distant relatives—then the exclusion of preferred beneficiaries as heirs simply increases transaction costs. No negative externality is implicated here, because the cost of any factual inquiries is borne by the probate estate itself, as an administrative expense.<sup>126</sup>

### b. *Complexity*

It would seem, then, that any sort of pertinent contingency can underlie a majoritarian default. But this leads into another difficulty with the very concept of majoritarian defaults: For the range of contingencies that lawmakers can allow for, statistically

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125. Unif. Probate Code art. II, pt. 1, cmt. (amended 2003), 8 U.L.A. 271 (1998) (pre-1990 version of article II).

126. C. Tim Rodenbush, *Missing Heirs: Put Yourself in Their Shoes*, Tr. & Est., Dec. 1991, at 53, 53.

approximating intent more or less precisely, is boundless. Hence, merely to espouse the aim of effectuating probable intent is to leave open an alarming multitude of options. Where, in their prognostic zeal, should lawmakers draw the line?

This ultimately becomes a key question. Unfortunately, the answer to it is easier to set out in theory than to locate in practice. The number of contingencies lawmakers add to a rule—and hence the overall complexity of that rule—simultaneously yields benefits and entails costs. As lawmakers add to the complexity of a rule, the marginal benefit of complexification must eventually decline, while the marginal cost grows. A rule becomes optimally complex when the net benefit reaches its maximum value—that is, where the marginal benefit equals the marginal cost.<sup>127</sup>

In connection with default rules, the benefit of a more complex rule is that, properly crafted, it improves the rule's "fit" to the facts and hence raises the probability of effectuating intent in any given case—which in turn enhances parties' opportunities to economize by relying on the rule. The cost of complexity is the greater sums parties must expend to learn and apply the rule—thereby reducing the cost efficiency of reliance.<sup>128</sup> If the information cost ever grew to the point that it exceeded the transaction cost, the default rule would become self-defeating, for then parties would find it cheaper to opt out than to learn the rule as a prelude to relying on it, *vel non*.<sup>129</sup> But even before a default rule collapses under its own weight, there comes a point at which lawmakers should leave well alone. We model the problem below in Appendix II.

The problem of legal complication is further complicated by another phenomenon: Different benefactors (and commercial actors) can rely on a default rule at different levels of specificity.<sup>130</sup> Whereas some benefactors might see fit to familiarize themselves with the fine details of (let us say) intestacy law, other more insouciant ones would be satisfied to know that if they spare the expense of executing a will

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127. See generally Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. Econ. & Org. 150 (1995) (addressing the problem from the perspective of mandatory rules).

128. Complexity also increases the cost of crafting a rule, although that is a one-time cost and hence should be relatively insignificant, given the number of parties who can benefit over a space of time before the rule requires (again costly) updating. But cf. Ayres, *supra* note 23, at 10-14 (emphasizing "promulgation costs"); Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. Cal. Interdisc. L.J. 167, 183-84 (1993) (suggesting that complexity increases error costs, i.e., the risk that a default rule will be misapplied).

129. See *supra* note 35 and accompanying text. Repeat players can amortize information costs over the series of their transactions, a consideration not strictly relevant to transfers at death, which only occur once. See *supra* note 36 and accompanying text.

130. For a theoretical recognition, see Ayres, *supra* note 23, at 8.

their immediate family will benefit.<sup>131</sup> They can thereby penetrate a complex default rule to an adequate depth, from their perspective, at relatively little cost. By hypothesis, these parties should be indifferent to the degree of complexity of a default rule that they can digest cheaply in any event, because it is either simple *or simplifiable*.<sup>132</sup> By the same token, they should be content to join a coalition of parties who insist on complete information before they will rely on a default rule. Hence, it is the costs and benefits of those parties who would inquire into a default rule in detail that bear on an analysis of optimal complexity, so long as they add up to more than a nominal number.<sup>133</sup>

Theoretical models to one side, lawmakers must exercise their (hopefully conscious) judgment about whether additional layers of complexity are worth the costs. Perhaps a sensible rule of thumb to adopt is that an inheritance default—or any component thereof<sup>134</sup>—should never become so complex that it appears to require specific consultation with an attorney to fathom. Once the client has borne the expense of a conference to establish the relevant data, the further expense of drafting (versus abstaining from drafting) becomes marginal, hence robbing the default rule of its potential for transaction-cost efficiency.<sup>135</sup>

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131. See Joel R. Glucksman, Note, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?*, 12 Colum. J.L. & Soc. Probs. 253, 261-66 (1976) (reporting results of an empirical study finding that 76% of randomly chosen state residents “knew enough about the state of intestacy law to realize that intestate property goes to the family” yet “showed little knowledge of the intestate succession law’s precise terms”); see also Contemporary Studies Project, *supra* note 28, at 1077-78; Fellows et al., *supra* note 49, at 722-23; Johnson & Robbennolt, *supra* note 49, at 489; cf. Fellows et al., *supra* note 9, at 340 & n.73 (reporting results of an empirical study finding that over 70% of intestates “indicated they knew who would inherit their estates if they died without wills,” although also finding widespread confusion about the distributive “subtleties” of local intestacy law). For references to British studies, see Finch et al., *supra* note 72, at 44. Here, we might say, the default rule at issue breaks down into different components: one relatively more consequential and more readily accessible (*who* benefits); the other relatively less consequential and more obscure (how those benefits are *divided*).

132. In the context of intestacy, for example, benefactors who care mainly about (1) who the heirs are, rather than (2) the division among them, should be indifferent when presented with a choice between, on the one hand, a complex default rule under which they can cheaply make the first determination and only expensively the second; and, on the other hand, a simple default rule under which they can make both determinations cheaply. See also *infra* notes 145-46 and accompanying text.

133. Once we reach a level of complexity that will affect testamentary behavior in only a small number of cases, the cost of lawmaking does become significant to the law’s efficiency. See *supra* note 128.

134. See *supra* note 131 and accompanying text.

135. See Finch et al., *supra* note 72, at 44. Finch notes:

[T]he amount of time required to clarify these issues with a client is only slightly greater if a will is drafted, yet it may be easier to make a more economic charge than where only advice is provided. Drafting a will is more likely to lead to profitable business in winding up the estate than if the [attorney] had merely provided advice, for whose source relatives would have no tangible evidence.

*c. Discretion*

Rather than tinker with the intricacy of inheritance defaults, lawmakers could proceed in a different direction: They could grant courts discretion to establish probable intent on a case-by-case basis. In other words, instead of endeavoring to anticipate the manifold contingencies that might affect intent and factoring them into a complex, mechanical default rule, lawmakers could mandate intent effectuation as a default *standard* and delegate to courts the task of reconstructing intent in a postmortem hearing.

Discretionary inheritance defaults have some historical precedent in American law,<sup>136</sup> and pockets of discretion can be found in a handful of state probate codes today.<sup>137</sup> Overall, however, default standards are few and far between in the inheritance realm; default rules dominate this segment of the legal landscape.

That lawmakers should have favored rules over standards when setting inheritance defaults appears appropriate as a theoretical proposition.<sup>138</sup> The eternal tension between the *certainty* of rules,

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*Id.*; see also Gary, *Parent-Child*, *supra* note 12, at 653.

136. For elements of discretion in the intestacy law of colonial Massachusetts, see George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 Yale L.J. 1280, 1282-85 (1942). For discretion under medieval English intestacy law, see *Intestacy in Legal History*, Law Times, Mar. 20, 1926, at 241.

137. *E.g.*, R.I. Gen. Laws § 33-1-6 (1995) (allowing courts discretion to grant a surviving spouse up to \$75,000 worth of real property from an intestate estate, if no issue survived the decedent); Vt. Stat. Ann. tit. 14, § 401 (2002) (allowing courts discretion to determine the intestate share of a surviving spouse, above a minimum of one-third of the estate); see also *infra* notes 204-10 and accompanying text. Family maintenance legislation in Great Britain and other Commonwealth states provide courts somewhat broader discretion to deviate from the mechanical rules of intestacy. See S.M. Cretney, *Reform of Intestacy: The Best We Can Do?*, 111 Law Q. Rev. 77, 83-86 (1995); Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 Harv. L. Rev. 277, 283-87 (1955); see also Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. Davis L. Rev. 77 (1998).

138. Prior commentators have divided on the issue. Compare Contemporary Studies Project, *supra* note 28, at 1120-23 (favoring judicial discretion within intestacy law), and Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. Rev. 199, 263-68 (2001) (same), and Gary, *Adapting Intestacy*, *supra* note 12, at 67-73 (same), and John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. Miami L. Rev. 497, 559-60, 562-63 (1977) (same), and Laufer, *supra* note 137, at 283, 312-14 (same), and Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 Wash. U. Global Stud. L. Rev. 447 *passim* (2003) (same; comparative study), with Atkinson, *supra* note 61, § 5, at 38 (opposing discretion), and Brashier, *supra* note 12, at 6-7, 208-09 (same), and Ascher, *supra* note 20, at 640-41, 658 (same), and Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. Pa. L. Rev. 1033, 1050 (1994) (same), and M.C. Meston, *Succession—Rights or Discretion?*, 1987 Jurid. Rev. 1, 6, 9-11 (same), and Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. Ky. L. Rev. 409, 426-27 (1987) (same). For an early discussion, see Jeremy Bentham, *Principles of the Civil Code*, in 1 The Works of Jeremy Bentham 297, 334 (John Bowring ed., 1962) (c. 1775-

contemplated *ex ante*, and the *justice* of standards, applied *ex post*, resolves itself relatively easily in this context.<sup>139</sup> On the one hand, benefactors presented with a default standard of intent effectuation could take solace in knowing that a wide range of evidence—wider than any rule could accommodate<sup>140</sup>—can go into the process of reconstructing probable intent, albeit at the cost of litigation between potential beneficiaries that the state only partially subsidizes (and need not subsidize at all). On the other hand, benefactors presented with a rigid default rule could anticipate the consequences of the rule precisely and appreciate further that the rule will be applied routinely and efficiently.

Within the commercial realm, parties have always rated legal certainty a valuable, if not an essential, underpinning for business planning. Because they are risk averse, commercial actors prefer to know, so far as possible, the consequences of their transactions.<sup>141</sup> The same principle should extend to gratuitous transfers: Risk averse benefactors will likewise want to know with assurance the distributive consequences of their munificence.<sup>142</sup>

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1802) [hereinafter Works] (preferring “general presumptions” of intent to its reconstruction case-by-case because the latter exercise would occasion “infinite disputes”). See generally Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165 (1986).

139. For a classic discussion of the rule/standard dichotomy, see Roscoe Pound, *An Introduction to the Philosophy of Law* 59-71 (rev. ed. 1954) (1922). For modern discussions, see, for example, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); and Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988).

140. That body of evidence cannot, however, include unformalized expressions of the party's particular intent without abolishing, in effect, the formality requirements for wills. See *Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971) (“The intention of the testator must be found . . . in the words of the will, and for that reason his other declarations of intention . . . are generally not admissible.”). Even if a majority of parties would prefer that courts give effect to statements of intent informally expressed, the formality requirements have at least traditionally comprised a *mandatory* rule. For a discussion of the justifications for mandatory will formalities, see Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 5-13 (1941).

141. “[The] security of transactions . . . call[s] for [a] rule or conception authoritatively prescribed in advance and mechanically applied. . . . [C]ommercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question.” Roscoe Pound, *The Theory of Judicial Decision* (pt. 3), 36 Harv. L. Rev. 940, 957 (1923); see also *id.* at 951; Pound, *supra* note 139, at 69. For a modern discussion, see Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 601-05 (2003). See also Kaplow, *supra* note 139, at 605 (recognizing the relevance of risk aversion to the preference for rules). But see Ayres, *supra* note 23, at 6 (“[T]he hypothetical contract approach does not exclude standards as optimal law. It might be that the majority of contracting parties would prefer to be governed by a ‘reasonableness’ standard rather than any . . . rule.”). We shall consider Ayres’s analysis of the potential efficiency of default standards forthwith. See *infra* notes 145-51 and accompanying text.

142. Dean Pound himself amalgamated inheritances with commercial transactions in this respect—in both instances, “general security is the controlling element.”

Indeed, this logic applies a fortiori in the venue of gratuity: Here, the tension between certainty and individualized appraisal of intent is less vexing, because the need for individualization is less acute. In the context of a transaction, parties must make an initial, unalterable choice between the certainty of a rule and the discriminate accuracy of a standard. If they give priority to certainty, either by an explicit contractual term or by implicit adoption of a default rule, they must live with the consequences when contingencies unanticipated under the term or rule arise. By contrast, wills are ambulatory. Benefactors can give priority to certainty *without* endangering discriminate accuracy, because they can override an explicit testamentary provision or implicit adoption of a default rule, should unanticipated contingencies ever materialize. If, for example, a certain but indiscriminate rule of intestacy were to prove insufficiently responsive to a benefactor's evolving circumstances, she could always execute a will to escape the rule's dictates. A discretionary standard serves little purpose under these conditions, because the benefactor can exercise her *own* discretion. An uncertain but flexible standard of intestacy should appeal only to those parties who are hypersensitive to transaction costs yet simultaneously numb to beneficiaries' litigation costs.

When the law at issue is a default law, it should bow to the parties' structural preferences, just as it should defer to their substantive preferences.<sup>143</sup> As with distributive intent, if most parties desire certainty—an assumption susceptible to empirical study<sup>144</sup>—then its denial will only spur them to opt out in greater numbers, at higher cost. Any larger concern for the justice of a discretionary standard is irrelevant in this context.

Contrary to all of this, Professor Ayres posits two arguments for the proposition that a default standard could, in theory, prove more efficient than a default rule. First, he asserts, a majority of parties might prefer a standard to a rule if it featured lower information costs at less punctilious levels of inquiry:

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Pound, *supra* note 139, at 69; *see also* Pound, *supra* note 141, at 956-57. A recent court similarly emphasizes the "useful certainty in the law" of inheritance, absent which "one could anticipate frequent litigation in which parties dispute the intimacies of family life. Not only would such litigation often be destructive of familial relationships, it could significantly disrupt property transactions and estate planning." *Otero v. City of Albuquerque*, 965 P.2d 354, 360 (N.M. Ct. App. 1998). For a historical observation, see J.H. Baker, *An Introduction to English Legal History* 303-04 (3d ed. 1990).

143. Lawmakers could legitimately ignore the parties' structural preferences to the extent that those preferences produce negative externalities—such as a preference for a discretionary hearing that the state will subsidize. On the other hand, as between an inflexible default rule and a flexible default standard whose higher court costs the parties are obliged entirely to bear, lawmakers should remain indifferent.

144. The general prevalence of economic risk aversion is already well documented. *See, e.g.,* Hirsch & Wang, *supra* note 43, at 31 n.117.

[W]hile . . . rules are probably cheaper to interpret if one is striving for a precise knowledge of legal contours, it may be that standards give individuals a less expensive way of gaining a rough idea of the law's content. Thus, although the reasonable price default . . . may be more expensive to interpret *precisely* than a more explicit *ex ante* rule, it might give market participants a rough approximation of damages fairly cheaply. Anyone who has tried to work through the social security disability grids will understand that *ex ante* precision may increase the costs of making rough estimates.<sup>145</sup>

This hypothesis does not hold up under analysis: Lawmakers can always add an explanatory preamble to a complex rule, describing the public policy that underlies it. Such a preamble appended to a rule provides at least as much information for purposes of rough approximation as a standard does.<sup>146</sup> But even assuming that Ayres's argument is correct for the sake of discussion, if most parties would be satisfied by a default standard which they can determine at low cost to produce a result falling somewhere within a range around their exact preference, then logic suggests that they would be even more satisfied by a *simple* default rule, featuring similarly low information costs, yielding (by virtue of its simplicity) a result less likely to fit preferences exactly, but one that falls within the same range. By comparison to a default standard, a simple default rule entails less risk and hence will appeal to parties who are risk averse—as parties tend typically to be.<sup>147</sup>

Ayres's second argument follows from his insight that a *non-majoritarian* default might nevertheless prove optimal by virtue of disparate transaction costs: If the costs of writing into a contract a minority's preferred term exceeds the costs of writing in the majority's preferred term, then it might prove more costly in the aggregate for the minority to opt out of a majoritarian default than vice versa. Under these conditions, adopting the "minoritarian" default yields cost efficiency.<sup>148</sup>

Although only a minority might prefer that a standard should govern parties' rights under a contract, Ayres asserts, in the context of corporate law defaults, a standard can be replicated there only at great expense: Whereas a standard operating in default of contractual provision can be imposed within acceptable bounds of predictability once courts have elaborated it with precedents, a *contractual* standard of the same (inexpensive) brevity is unacceptably uncertain because

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145. Ayres, *supra* note 23, at 8 (footnotes omitted); cf. Kaplow, *supra* note 139, at 596-99.

146. See, e.g., Unif. Probate Code, art. II, pt. 1, general cmt. (amended 2003).

147. For a further discussion of the problem of precision of preferences, see *supra* notes 130-33 and accompanying text.

148. Ayres & Gernter, *supra* note 2, at 93.



linguistic variations will splinter the precedents.<sup>149</sup> For those (fewer) parties who prefer the standard, the cost of folding the precedents into the contract—or, by extension, the testamentary instrument—would prove prohibitive.

Once again, this imaginative argument does not withstand analysis. In the inheritance context, even benefactors who prefer a default standard may be satisfied with a default rule that matches their current substantive intent and hence holds out the prospect of avoiding transaction costs entirely. As a consequence, the relevant minority may be a small minority indeed. At any rate, even benefactors who do choose to delegate discretion (typically to a fiduciary—but usually for the purpose of building postmortem flexibility into the estate plan, only after they have lost the opportunity to exercise discretion themselves) have long acted to diminish uncertainty by recourse to terminological conventions that preserve and exploit bodies of precedent, transforming (mere) words into terms of art.<sup>150</sup> The phenomenon of path dependence thus operates to forestall the sort of doctrinal splintering that Ayres conjectures. Why the same forces should not channel language in other doctrinal arenas, including commercial and corporate law, is not readily apparent.<sup>151</sup>

## 2. The P's and Q's of Empiricism

Having said this much, we still face the problem of how to go about determining benefactors' "probable" intent, as a prelude to formulating inheritance defaults. Although spared having to reconstruct hypothetical bargains, scholars who would inquire into unilateral donative preferences still have their work cut out. The mind of a decedent is the ultimate *sanctum sanctorum*. It refuses to yield itself to view. That being so, scholars must make do with less authoritative forms of evidence, be they decedents' relics or some sort of survey conducted before the fact.

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149. Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. Chi. L. Rev. 1391, 1403-06 (1992) (book review).

150. "The forms used herein have been taken from cases, or have been based upon well-established legal principles. The cases cited, in many instances, give an authoritative exposition of the terminology used. . . . [B]y the use of approved terminology lawyers can reduce the possibility of litigation to a minimum." William D. Rollison, *Clauses in Wills and Forms of Wills*: Annotated vi (1946); see also David M. Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 Iowa L. Rev. 751, 802, 814 n.102, 816-17 (1978) (observing the utility of linguistic standardization); John Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 494 (1975) (same).

151. See Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L.Q. 347, 348, 350-51 (1996).

a. *The Perils of Expertism*

Existing studies have taken a variety of forms, all of which betray weaknesses of one kind or another.<sup>152</sup> Perhaps the most audacious solution is the one offered by the Commissioners, who are content to poll the Joint Editorial Board in charge of their model law, the Uniform Probate Code. This distinguished body "counts among its members not only leading scholars in the field but also nationally known estate planners of considerable insight and experience," the Reporter observes, and "[t]heir cumulative experience suggests that they have a pretty good idea of what most clients want."<sup>153</sup>

Would that we could discover decedents' intent with such ease! Alas, this ointment, advertised as a soothing remedy for the Commissioners' dearth of funding for genuine empirical research,<sup>154</sup> contains a host of flies. One obvious difficulty is our want of assurance that the interactions reported by a group of estate planners will have involved a random sample of benefactors.<sup>155</sup> This difficulty is, if anything, compounded by the collective prominence of the instant group, for the more elite the practitioners, the greater the danger that they have lost touch with the planning patterns of lower- and middle-income benefactors who make up the bulk of the population.<sup>156</sup>

This difficulty to one side, any analysis based upon recollections and impressions in lieu of statistics is prone to an assortment of cognitive errors<sup>157</sup> Of course, the recollections of concern to us here are those of estate planning *experts*—yet psychological studies of expertise in general confirm that it lends little or no refuge against organic imperfections of memory and statistical judgment.<sup>158</sup> In this respect,

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152. For prior assessments, see Fellows et al., *supra* note 9, at 324-26; Johnson & Robbennolt, *supra* note 49, at 483-85, 490-98.

153. Waggoner, *supra* note 29, at 2337-38. Professor Waggoner had taken a more agnostic view of this approach before he himself joined the Uniform Probate Code revision project. See Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U. L. Rev. 626, 627 (1971) ("While this may or may not be an authoritative way of measuring average client intent . . ."). Compare also Professor Waggoner's complaint that local *deviations* from the Code are "[a]ll too often . . . the result of less well informed persons acting on scant investigation." John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Code*, 55 Alb. L. Rev. 871, 878-79 (1992).

154. Waggoner, *supra* note 29, at 2337.

155. Nor can we readily compensate for that lack of randomness, as we might in connection with an actual data set. See *infra* note 173 and accompanying text.

156. See *infra* note 171 and accompanying text.

157. In the related context of expert medical testimony, Professor Sunstein likewise argues that expert witnesses will be prone to excessive-optimism bias and hence are less reliable than statistical evidence. William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 Duke L.J. 629 *passim* (2001).

158. Scott Plous, *The Psychology of Judgment and Decision Making* 72-73, 258 (1993); Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 782-83 &

expert and lay persons alike are essentially, inescapably, and everlastingly human.

One mnemonic frailty documented in the psychological literature is the tendency of persons to recall a vivid experience more readily than the mundane. As a consequence, they tend systematically to overestimate the frequency of unusual events because those events leap more easily to mind.<sup>159</sup> This tropism might lead estate planners, by analogy, to overestimate the proportion of clients with *atypical* preferences. Persons are also prone to extrapolate on the basis of limited experience. An estate planner who has encountered only a few clients who needed to deal with an unusual issue will often assume that the clients' resolution or intent with respect to it is representative of clients generally, whereas a statistician would attach less confidence to data based on such a small sample.<sup>160</sup> Finally, persons have a demonstrated inclination to ascribe their own attitudes to others and hence are apt to regard "their own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, and inappropriate."<sup>161</sup> This cognitive bias could compromise any assessments of a typical client's preferences offered up by estate planners, irrespective of their experience.

Suffice it to say, then, that the memories—or confabulations—of estate planners represent a poor substitute for hard data. And we can even bolster this surmise with a bit of hard data. In a study performed

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nn.26-27 (2001); Meadow & Sunstein, *supra* note 157, at 630 & n.5; Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, in *Judgment Under Uncertainty: Heuristics and Biases* 23, 26-28 (Daniel Kahneman et al. eds., 1982) [hereinafter *Judgment Under Uncertainty*]. This might not be true of experts whose expertise *depends on*, and hence by virtue of selection reflects, their memory skills or statistical abilities. Presumably, estate planning experts require neither. See Plous, *supra*, at 219-20 (reporting the findings of studies that professional oddsmakers and other experts in statistically-sensitive areas are less subject to common statistical fallacies); Elena L. Grigorenko, *Expertise and Mental Disabilities: Bridging the Unbridgeable?*, in *The Psychology of Abilities, Competencies, and Expertise* 156, 158-59 (Robert J. Sternberg & Elena L. Grigorenko eds., 2003) (reporting the findings of studies that generalized memory skills *per se* are not associated with expert performance in various domains).

159. This phenomenon is known within cognitive psychology as the availability heuristic. Plous, *supra* note 158, at 121-30; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in *Judgment Under Uncertainty*, *supra* note 158, at 163.

160. This phenomenon, playfully dubbed the law of small numbers, derives from the representativeness heuristic. Plous, *supra* note 158, at 112-13; Tversky & Kahneman, *supra* note 158, at 23.

161. Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *Judgment Under Uncertainty*, *supra* note 158, at 129, 140. Cognitive psychologists have termed this phenomenon false consensus bias or egocentric attribution bias. *Id.* at 129, 140; Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 *Psychol. Bull.* 737 (1999).

in 1987, all members of a national organization of inheritance lawyers received a questionnaire concerning donative preferences which they were requested to present to their clients. Some did so, generating one data set, but others simply reported "what they said their clients wished, . . . based upon discussions with clients and experience over many years."<sup>162</sup> When the researchers compared this second (accidental) data set with the first one, they discovered "a striking difference between what lawyers believe their clients want . . . and what the clients themselves want."<sup>163</sup> *Quod erat demonstrandum.*

Yet, developing a sound methodology to replace the Commissioners' armchair empiricism is no simple matter. Studies based on surveys of living persons provide no assurance of accuracy; the preferences expressed therein by subjects may well be off-the-cuff—or even disingenuous.<sup>164</sup> And the extant studies of this sort have sacrificed additional credibility by asking subjects to react hypothetically to various scenarios of family circumstance posed by the investigator.<sup>165</sup> It goes without saying that a subject's donative intent in the abstract and in the concrete might differ markedly.

Performative intent is only assured if we confine our study to executed wills, either of the living or of the dead. Helpfully, the dead cannot balk at participating in such a study; probate records are public documents and have provided the raw data for a number of empirical investigations.<sup>166</sup> Yet, obstacles remain. Some matters resist inquiry by reference to wills, either because wills too seldom address them,<sup>167</sup> or because in structural terms the act of formulating a will itself modifies intent. Consider in this second regard the problem of gratuitous transfers to distant relatives. Although examinations of wills would lead us to conclude that few benefactors intend to make such transfers,<sup>168</sup> there is a ready explanation for their rarity: They are crowded out by bequests to close relatives or, in want of these, by unpredictable bequests to non-relatives that an inflexible scheme of intestacy cannot reproduce. Whether a benefactor without close

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162. Raymond H. Young, *Meaning of "Issue" and "Descendants,"* 13 Am. C. Prob. Couns. Prob. Notes 225, 225-26 (1988).

163. *Id.* at 226.

164. Either testate or intestate subjects might falsify their preferences if those preferences contradict a prevailing social norm, a fact which subjects might wish to conceal from the researcher. See generally Timur Kuran, *Private Truths, Public Lies* (1995).

165. See Fellows et al., *supra* note 49, at 722; Fellows et al., *supra* note 9, at 327-30; Glucksman, *supra* note 131, at 267, 294. One pair of researchers limited its data set to "responses of those persons who could easily relate to the scenario." Johnson & Robbennolt, *supra* note 49, at 495; cf. *id.* at 496.

166. Most of the existing studies are of this type. E.g., Schneider, *supra* note 138, at 411-13.

167. Remote contingencies (such as the possibility of divorce) hardly ever appear in wills, either because of transaction costs, overoptimism bias, or social taboos.

168. See *infra* note 225.

relatives would wish to provide for distant relatives under a scheme of intestacy is therefore a question that researchers can only resolve by conducting a survey of intestates, however reliable that evidence may be.<sup>169</sup>

Even concerning issues susceptible to a study of wills, a random sample of probate records may fail to reflect a cross-section of benefactors, at least for the purpose of propounding default rules of intestacy. Testate persons prove more affluent, on average, than their intestate counterparts<sup>170</sup>—and the rich are different from you and me.<sup>171</sup> Statisticians can, however, compensate for the lack of representativeness of a sample by weighting it to reflect relevant criteria (economic and otherwise)<sup>172</sup> proportionately to their numbers—a process known as stratified or quota sampling.<sup>173</sup> For a

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169. For another instance in which evidence drawn from wills should prove inconclusive, albeit for a different reason, see *supra* text accompanying notes 149-50.

170. See *supra* note 72.

171. See F. Scott Fitzgerald, *The Rich Boy*, in *All the Sad Young Men* 1, 1 (1926). But compare Hemingway's retort: "Yes, they have more money." Ernest Hemingway, *The Snows of Kilimanjaro*, in *The Snows of Kilimanjaro and Other Stories* 3, 23 (1927). For another literary assertion of the cultural identity of the rich and poor, see George Orwell, *Down and Out in Paris and London* 119-20 (Harcourt Brace Jovanovich 1961) (1933). Although the extent to which donative preferences of the rich and poor tend to differ has not been studied systematically, the disparate incentive for tax planning, if nothing else, has a preference-stratifying effect. See Shammass et al., *supra* note 72, at 180-91. More generally, wealth affords benefactors greater leeway to indulge in what an economist might dub discretionary bequests, a benevolent analogue to the consumption of luxury goods. Hence, there is some evidence that affluent benefactors are more inclined to bequeath to persons beyond the immediate family, and to charity. See Charles T. Clotfelter, *Federal Tax Policy and Charitable Giving* 237, 244 (1985); Sussman et al., *supra* note 28, at 90, 111-18; Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. Soc. Psychol. 347, 351-53 (1937) (presenting evidence from an early empirical study).

172. Possibly including ethnicity, among others. See Remi P. Clignet, *Ethnicity and Inheritance*, in *Inheritance and Wealth in America* 119, 125-32 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998); Fellows et al., *supra* note 49, at 734-36; cf. Britt, *supra* note 171, at 352 *passim* (finding no evidence in an early empirical study that testamentary patterns differ markedly on the basis of various testator characteristics). Presumably, there is not something unique about testators *per se* that distinguishes them systematically from intestates, although a statistically significant number of benefactors may sort themselves into intestates or testators on the basis of their satisfaction or dissatisfaction with existing intestacy law. See *supra* notes 28, 48. Hence, a sample of wills may be skewed disproportionately in the direction of contrariety. A researcher could only control for this effect by developing additional polling data and factoring into the data set a proportional number of intentional intestates who have not executed wills in order to carry out the scheme of distribution that intestacy law currently provided. For a study mixing evidence from probate records with survey evidence, see Contemporary Studies Project, *supra* note 28, at 1045.

173. Richard C. Sprinthal, *Basic Statistical Analysis* 117-18 (3d ed. 1990). Given that wealthy persons are likely to execute wills irrespective of the utility of an intestacy statute, we may reasonably skew our statistical sample of wills to reflect not a cross-section of society *per se*, but rather a cross-section of *potential intestates*—which means we must shift the sample further toward the poor end of the socioeconomic spectrum.

sample of executed wills, the requisite information should be sufficiently accessible; data on the size of decedents' estates, for example, can be gleaned from executors' inventory and accounting records, which accompany wills in the probate archives.<sup>174</sup>

b. *The Meaning of Intent*

Yet, the prospect of this methodology also brings to light a more substantial theoretical question. Preferences are endogenous.<sup>175</sup> A subject may begin the estate planning process with one set of preferences and upon deliberation with, and technical guidance from, an attorney scrivener, end with another.<sup>176</sup> Professionally drafted wills reflect benefactors' informed intent. Is that the intent inheritance defaults should strive to mimic?

This issue has surfaced only once in the inheritance literature.<sup>177</sup> Professor Fellows argued that, to the extent they premise the rules of intestacy upon probable intent, lawmakers should look to informed intent. Doing so advances the fairness objective of "[e]qual planning under the law," by "extending . . . the benefits of competent estate planning" to intestate benefactors.<sup>178</sup> Hence, the statutory scheme of intestacy might provide for the creation of trusts, rather than outright bequests, to minor children, for example.<sup>179</sup>

Once again, default rule theory offers a useful perspective on this problem.<sup>180</sup> If lawmakers align the rules of intestacy with informed intent, and if we stipulate that informed intent differs from

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174. Shammass et al., *supra* note 72, at 17-18. Whether a random sample of probate records will suffice for exploring the default rules applicable to testamentary instruments, as opposed to the rules of intestacy, again depends on the distribution of testators who *do* expressly anticipate contingencies that default rules otherwise resolve within simpler wills. Once more, we cannot overlook the possibility that wills failing explicitly to resolve contingencies will trace on average to a poorer set of testators whose testamentary intent could differ systematically from wealthier testators who execute more comprehensive wills. Hence, stratified sampling remains important in this context.

175. *See supra* note 80.

176. For an advocacy of the exercise of attorney influence, see John R. Price, Price on Contemporary Estate Planning §§ 1.9, 1.31 (1st ed. 1992) (in the 1st ed. only). For brief discussions and survey evidence of attorney influence, see Jeffrey P. Rosenfeld, *The Legacy of Aging: Inheritance and Disinheritance in Social Perspective* 18-20 (1979); Sussman et al., *supra* note 28, at 217-18; and Fellows et al., *supra* note 49, at 721-22. Obviously, attorney scriveners have a greater opportunity to exercise influence over benefactors than do lawmakers, since these attorneys participate directly in the estate planning process. *Cf. supra* notes 101-03 and accompanying text.

177. *See* Fellows, *supra* note 76, at 613, 656-57; *see also* McGovern & Kurtz, *supra* note 28, § 2.3, at 60-61 (raising, but not resolving, the issue).

178. Fellows, *supra* note 76, at 657; *see also supra* text accompanying note 76.

179. Fellows, *supra* note 76, at 656-57. Likewise, incompetent heirs. *See* Sussman et al., *supra* note 28, at 189-90 (offering evidence from wills).

180. For the one extant discussion, see Charny, *supra* note 51, at 1820-23, 1844-47.

uninformed intent, then the consequence will be either to encourage the creation of homemade wills to avoid intestacy (at a modest transaction cost) or to encourage consultation with estate planners (at a more substantial transaction cost). Even if estate planners then proceed to impress benefactors with the virtues of intestacy law, and of the needlessness of a will, they will not have gained this wisdom free of charge; indeed, the cost will more or less have equaled that of executing a will.<sup>181</sup> Hence, informed-intent defaults do tend to produce inefficiency. By contrast, an intestacy law mirroring uninformed intent minimizes transaction costs.

Contemplating the issue from the contracts side, the late Professor David Charny observed that defaults reflecting informed intent might serve paternalistic ends: Contracting parties who neglect to override the default can be expected to become thankful in due course.<sup>182</sup> This argument fails to bridge the categorical divide. Benefactors who defer to a sophisticated intestacy scheme of which they (naïvely) disapprove, or which they do not understand, never live to appreciate its superiority.<sup>183</sup> Others who instead respond by executing homemade wills that reflect their uninformed preferences also derive nothing from the exercise.<sup>184</sup> Only those who happen to respond by consulting an estate planner may come to approve a sophisticated intestacy law, and then only after remitting the requisite fees for their enlightenment. A priori, uninformed benefactors know they can pay the price of becoming informed. They choose whether or not to do so on the basis of how much they value the learning experience, irrespective of the background state of intestacy law. Schemes of intestacy thus should have little impact on the market for estate planning, even assuming we found sufficient cause for paternalistic intervention into that market.<sup>185</sup>

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181. See *supra* note 135 and accompanying text.

182. Charny, *supra* note 51, at 1845-47.

183. For this reason, paternalistic intervention ordinarily has no place within inheritance policy. See Hirsch & Wang, *supra* note 43, at 24-27.

184. This, indeed, is the rub: As a general proposition, because it wants coercion, a paternalistic *default* is a doubtful means of ever enhancing the utility of an unwilling subject. For further discussions, see Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. Pa. L. Rev. 1211, 1211-26, 1250-54 (2003); Charny, *supra* note 51, at 1847 & n.114; Korobkin, *supra* note 1, at 1273-74; Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 Nw. U. L. Rev. (forthcoming 2005); and Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159, 1159-67 *passim* (2003).

185. Our earlier analysis of penalty defaults pertains here. See *supra* text accompanying note 124. For a discussion of the problem of paternalistic interference with markets, see John Kleinig, *Paternalism* 176-99 (1983). There may exist an element of irrationality in the market for estate planning stemming from the psychological aversion to testation, see *supra* Part I.C.2.c, but it is hardly clear that encouraging participation in that market would serve strictly paternalistic ends. Persons dragged kicking and screaming to an estate planner may or may not be

Still, Fellows's position may be analytically defensible otherwise. Just possibly in this one situation, an informed-intent default could have benign didactic consequences for the uninformed.<sup>186</sup> Some experimental evidence suggests that when subjects believe a default to be premised on better information than theirs, signaling its superiority, they tend to switch over to it as a preference.<sup>187</sup> Whereas benefactors have no cause to believe that anyone has better information than they about how best to distribute their wealth, they might be prepared to concede lawmakers' greater sophistication when it comes to *packaging* bequests. Thus, a default rule creating trusts for beneficiaries who untutored benefactors would have wanted to provide for outright might well gain their acquiescence. Benefactors might accept on faith an embellished version of an estate plan in substantive accord with their wishes—as perhaps many do already when an attorney endeavors to explain it to them. In such cases, the default rule would serve to alter intent not for the expressivists' imperious end of “norm management,”<sup>188</sup> but for the less intrusive purpose of efficiently disseminating estate planning proficiency. If it operates in this way, an informed-intent default will not occasion costly opt-out activity.

Even if an informed-intent default does not operate to transform intent, the question remains how many uninformed benefactors will pay coin of the realm to avoid a default that defies their wishes only in respect of its instrument of transfer, not its substance. Those (few?) who do will produce inefficiency. Those (many?) who do not will leave behind happier beneficiaries, profiting from a more sophisticated estate plan. The problem then becomes one of weighing the costs and benefits, similar to the balance we earlier considered theoretically in connection with social defaults.<sup>189</sup> There, however, egalitarian concerns contraindicated a social default, which discriminates against poorer benefactors.<sup>190</sup> Here, the opposite is true, because an informed-intent default promotes equality of estate planning.

If we conclude, as we reasonably may, that the default rules of intestacy should reflect informed probable intent, then a stratified sample of professionally drafted wills provides the best route to its

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thankful after the fact for having been forced to reflect at length upon their inevitable demise.

186. Cf. *supra* Part I.C.2.d.

187. Korobkin, *supra* note 1, at 1247, 1271; Sunstein, *supra* note 100, at 114-16.

188. Sunstein, *Social Norms*, *supra* note 82, at 907.

189. See Charny, *supra* note 51, at 1847; *supra* Part I.C.2.b. Were the advantages of the trust device to beneficiaries sufficiently great and uniform, the possibility of a *mandatory* rule would also have to be contemplated here: In Great Britain, for example, all future interests must be clothed in trust. See Hirsch & Wang, *supra* note 43, at 32-33.

190. See *supra* Part I.C.2.c.



discovery.<sup>191</sup> If, on the other hand, we choose to focus on uninformed intent, yet we remain skeptical of survey evidence, then investigators should include in the stratified sample only wills that were not professionally drafted.<sup>192</sup> These comprise the best available indicators of the performative intent of typical, untutored intestates.

## II. INHERITANCE DEFAULTS IN PRACTICE

So much for our theory. We are safe in saying that it has never been put into anything remotely approaching rigorous practice. To the extent that existing inheritance defaults aim at effectuating probable intent, lawmakers have derived those probabilities almost entirely from inference, if not arbitrary guesswork.<sup>193</sup> Even the default rules established in the Uniform Probate Code—for better or worse, a cynosure for local drafters<sup>194</sup>—lack a reliable foundation in empirical evidence.<sup>195</sup> Reconsideration of the compendium of existing inheritance defaults from a majoritarian perspective thus becomes a tall order, which we cannot expect lawmakers anywhere to undertake anytime soon—even if we may hold out hope that they will eventually get around to it somewhere, sometime. Be that as it may, the analysis presented up to now can still have immediate, practical significance for our law. So long as we do not allow the best to be the enemy of the good, we need not dismiss the last many pages as so much *recherché* idealizing.

The key is to lay out some priorities. We can identify a number of inheritance defaults that appear likely candidates for revision under a

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191. In advocating informed intent as the appropriate standard for intestacy defaults, Professor Fellows distinguishes between common testamentary provisions resulting from attorneys' "helpful" estate planning influence and other common provisions that "are based more on custom within the legal profession than on good legal reasons." Fellows et al., *supra* note 9, at 325. Whereas lawmakers should incorporate the first sort into intestacy law, they should screen out the second sort "[t]o the extent that such provisions can be detected . . ." *Id.* Fellows failed to explain how lawmakers should go about distinguishing the two sorts of attorney-inspired provisions.

192. For a British study of the frequency of homemade wills (which unsurprisingly are more common among poorer benefactors), see Finch et al., *supra* note 72, at 45-46.

193. See Model Probate Code, *supra* note 12, § 22 cmt. ("[A]ny scheme of intestate succession is, to some extent, arbitrary. It should in the main express what the typical intestate would have wished. . . . This is a highly speculative matter . . ."). Professor Lawrence Friedman maintains that in practice rules of intestacy are "imposed for social rather than individualistic reasons." Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 Wis. L. Rev. 340, 355; see also *In re Estate of Fosler*, 13 P.3d 686, 689 (Wyo. 2000) ("Among the fifty states, the [intestacy] statutes are widely disparate, and many of the provisions were drafted over one hundred years ago." (citation omitted)).

194. See generally Roger W. Anderson, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. Puget Sound L. Rev. 599 (1985).

195. Only a few of the Code's defaults are premised on empirical evidence. See *infra* note 213; see also *supra* note 153 and accompanying text.

majoritarian-default model. And we can identify a few defaults that almost certainly contravene that model. Even if, then, lawmakers put off the thorough review of inheritance defaults that the field requires, they can begin to take on bits and pieces of that task where it is most apt to bear fruit. Accordingly, our final project shall be to assist lawmakers in setting a research agenda for inheritance defaults.

#### A. Structural Attributes

To the extent that the model of inheritance defaults developed in this Article speaks to the matter of their structural form, we can offer immediate criticisms and recommendations that require little or no confirmation in empirical research.

Some inheritance defaults have always been complicated.<sup>196</sup> Perversely, the Code has operated in quite a few instances to enhance their complexity,<sup>197</sup> and the drafters of the Code even plead guilty (without remorse) to the charge. Their commentary merits examination, for it throws a flood of light on one influential approach to crafting inheritance defaults.

Addressing the Code's provisions on antilapse,<sup>198</sup> a default rule of construction applicable to wills, the drafters avowed that "we do not deny the intricacy of the statutory scheme."<sup>199</sup> They continued:

The terms of the statutes are elaborate and intricate, however, because they have to deal with a variety of potentially complicated factual situations. . . . [T]he test of a statute is not whether it is understandable upon a single reading of its text. The test is whether the statute produces a clear and appropriate result when applied to actual cases. . . . If, by working with the statutory language and the official comments for a few hours, a lawyer (or probate judge) can resolve the case, the public is much better served . . . than it would be by a simpler statute that leaves . . . issues unresolved and [perhaps] requires . . . lengthy litigation . . . in order to resolve the case.<sup>200</sup>

Of course, the drafters are correct to conclude that a comprehensive default rule, filling gaps in an instrument, is superior to a rule that itself contains gaps. But that represents a false dichotomy. The real issue is whether a complex and comprehensive default outperforms a simple and comprehensive default. Here, we need to recall that the

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196. Intestate division among collateral kindred provides one obvious example. See A.W.B. Simpson, *An Introduction to the History of the Land Law* 59-63 (2d ed. 1986). On lawmakers' tropism for legal complexity in general, see Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. Cal. L. Rev. 1331, 1349 & n.79 (2003).

197. See Ascher, *supra* note 20, at 639-43 *passim*.

198. Unif. Probate Code §§ 2-603, 2-706 (amended 2003). On the problem of lapse and antilapse, see *supra* note 20.

199. Edward C. Halbach, Jr., & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 Alb. L. Rev. 1091, 1148 (1992).

200. *Id.*; see also *id.* at 1124.

cost efficiency of an inheritance default stems not from the opportunity to produce wills more economically; no experienced estate planner drafts in reliance on inheritance defaults.<sup>201</sup> Rather, the benefit flows from avoiding the very need for professional assistance—either at all (i.e., intestacy) or after events (such as an unanticipated lapse) render an existing will obsolescent. Assuming that a more complicated inheritance default negates the need for such assistance more often, it is superior—but not if the benefactor must employ counsel simply to comprehend what the default rule is; then the opportunity to save disappears. The drafters of the Code ought to have asked themselves whether a lay person, not an attorney or a judge, “working . . . for a few hours,” could master their inheritance defaults.<sup>202</sup> Quite possibly, the answer is *no*. State legislators, contemplating their existing inheritance defaults, ought to ask themselves the same question.

On the matter of discretion within the regime of inheritance defaults, the Commissioners again leave themselves open to criticism. Few states, apart from those that have adopted the Code, currently provide any default standards, and extrinsic evidence pertaining to intent is consistently inadmissible; inheritance defaults operate mechanically and hence with predictability. For reasons already discussed, this approach appears sound.<sup>203</sup> The Commissioners, however, have broken with this tradition, sprinkling elements of discretion into their inheritance defaults, and rather haphazardly at that.

As regards the default rules of intestacy, the Code’s rules continue to operate mechanically.<sup>204</sup> Yet, as regards the principal default rules applicable to wills—antilapse, ademption, and related doctrines—the Code admits extrinsic evidence to override its default rules.<sup>205</sup> Another trio of default rules pertains to the implied effect of marriage, childbirth, and divorce on an antecedent estate plan. With respect to marriage, the Code’s default rule bows to certain types of

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201. See *supra* note 29 and accompanying text.

202. See *supra* text accompanying note 200. This concern also bears on several of the criticisms of existing inheritance defaults presented *infra* Part II.B. To the extent we can identify *refinements* of an inheritance default that would better serve to effectuate probable intent, we must still weigh their virtues against the damage they do to the law’s accessibility to lay persons. The game is not necessarily worth the candle.

203. See *supra* Part I.D.1.c.

204. The Commissioners had considered but rejected the possibility of injecting discretion into the scheme of intestacy. Richard V. Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 U. Ark. Little Rock L. J. 1, 3 (1979).

205. Unif. Probate Code §§ 2-601, 2-701 (amended 2003); *cf. id.* §§ 3-902(b), 3-9A-103(a), 3-9A-104 (setting out default rules applicable to wills for which no extrinsic evidence is admissible).

extrinsic evidence;<sup>206</sup> with respect to childbirth, a more limited range of extrinsic evidence is admissible;<sup>207</sup> and with respect to divorce, no extrinsic evidence is admissible.<sup>208</sup> The degree of explicitness and level of proof necessary to override a default rule also vary under the Code.<sup>209</sup>

In only one instance do the Commissioners offer any sort of justification for these seemingly arbitrary structural choices. As concerns the decision to admit extrinsic evidence in connection with antilapse and ademption,<sup>210</sup> the Commissioners defend their rule with the (utterly preposterous) claim that it “align[s] the statutory rules of construction . . . with those established at common law.”<sup>211</sup> Like prior statutory law, the common law established no such precedent,<sup>212</sup> and default rule theory suggests that we ought not set one now. State legislators already operating under the Code should consider expunging all of its discretionary intrusions into their default regimes.

### B. Substantive Attributes

When we proceed to inspect the substance of inheritance defaults, we find that the Commissioners, along with other lawmakers, have displayed at least a velleity toward intent effectuation. Preexisting empirical studies figured in the design of a few of the Code’s default rules, and others are premised on unsubstantiated inferences (however accurate) about probable intent.<sup>213</sup> Nevertheless, neither

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206. *Id.* § 2-301(a)(1), (a)(3).

207. *Id.* § 2-302(b)(2).

208. *Id.* § 2-804(b).

209. Compare *id.* § 3-902(b) (granting the court discretion to deviate from a default rule apportioning estate *debts* among beneficiaries to carry out the testator’s “express or implied purpose,” given the “testamentary plan”), with *id.* § 3-9A-103(a) (giving effect only to a testamentary provision that “expressly and unambiguously directs” deviation from a default rule apportioning estate *taxes* among beneficiaries). Although the preponderance of the evidence standard ordinarily applies, in a few instances the Code requires clear and convincing evidence to override a default rule. *Id.* §§ 2-507(c)-(d) (requiring clear and convincing evidence to deviate from the default rules determining how subsequent testamentary instruments should be read *in pari materia* with prior instruments); see also Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 Conn. L. Rev. 453 (2002) (criticizing the requirement of clear and convincing evidence anywhere within inheritance law).

210. See *supra* note 205.

211. Unif. Probate Code § 2-601 cmt. (amended 2003). The Commissioners cite no cases to substantiate this ahistorical pronouncement. That an error of this magnitude could find its way into the Code’s official commentary is surprising and even a bit troubling. Cf. Hirsch, *supra* note 6, at 185-86.

212. For common law doctrine, see 6 Page, *supra* note 59, §§ 50.1-2, 50.14-20, 52.16, 54.1, 54.3-54.5, 54.14-15; Hirsch, *supra* note 20, at 1128-30.

213. See Unif. Probate Code §§ 2-102 cmt., 2-106 cmt., 2-302 cmt. (amended 2003) (citing to empirical studies); *id.* §§ 2-109 cmt., 2-301 cmt., 2-705 cmt., 2-804 cmt., 3-902 cmt. (inferring intent); cf. *id.* § 2-507 cmt. (defending a default rule as “workable” and based on “common-sense”); *id.* § 2-509 cmt. (defending a default rule premised on

the Commissioners nor any state legislature has mandated an informed scheme of default rules of the sort that Professor Fellows advocates;<sup>214</sup> thus, intestacy law nowhere provides by implication for the creation of trusts.<sup>215</sup> In this respect, American law contrasts with longstanding British law, whose rules of intestacy do clothe certain distributions in “statutory trust.”<sup>216</sup> What is more, several significant rules of intestacy are manifestly out of step with a majoritarian approach to inheritance defaults of either the informed *or* uninformed variety.<sup>217</sup>

Consider the treatment of intestate succession in the absence of close relatives. Following a longstanding principle, if no heirs claim an intestate estate, then *propter defectum sanguinis* it escheats to the state.<sup>218</sup> State statutes traditionally allowed distant relatives to take as heirs, so long as they could be found (or presented themselves). The Code, however, confines heirship to the second collateral line, thereby

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legalities that “the testator understood or should have understood”); *id.* § 2-607 cmt. (offering no rationale for a default rule that “abolished” the preceding common law rule); *id.* § 2-608 cmt. (defending a default rule because it “seems better”); *id.* § 3-9A-104 cmt. (defending a default rule because the alternative would be “harsh”); *see also supra* note 20.

214. *See supra* notes 177-79 and accompanying text.

215. *See* Unif. Probate Code art. II, pt. 1 (amended 2003). One of the Codes’s default rules applicable to wills was inspired by the aim of extending to the testator the benefits of expert estate planning, although whether the Commissioners’ rule serves to achieve that end remains a matter of controversy. *Id.* § 2-707 & cmt., (construing remainder interests to be contingent on surviving to the time when they become possessory); Waggoner, *supra* note 29, at 2310 *passim*; *cf.* Becker, *supra* note 29, at 369-70 *passim*; Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 163-65 *passim* (1995).

216. Clive V. Margrave-Jones, Mellows: The Law of Succession §§ 12.11, 12.23-25 (5th ed. 1993). These rules parallel “what most intestates would have done if a well-drawn will had been prepared for them.” Joseph Warren, *The Law of Property Act, 1922*, 21 Mich. L. Rev. 245, 265 (1923).

217. Another issue peculiarly apposite to the setting of default rules within Uniform Acts is their generalizability. To the extent that comparative analysis of local empirical data demonstrates sharply divergent patterns of donative intent, nonharmonious rules will be superior to uniform rules. The Commissioners should steer clear of default rules covering any such matter. *See* Hirsch, *supra* note 6, at 157. For a related discussion, see Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. Ill. L. Rev. 1033, 1051-56.

218. For historical background, see 1 William Blackstone, *Commentaries on the Laws of England* \*302 (1765-1769); 2 *id.* \*72-73, \*244-57, \*494-95. There is some evidence that escheat was once considered abusive; at least it was sufficiently unpopular that the early settlers of Massachusetts Bay took the opportunity of colonization to abolish escheat altogether. The Massachusetts Body of Liberties § 10 (1641), *reprinted in* Puritan Political Ideas, 1558-1794, at 177, 181 (Edmund S. Morgan ed., 1965). It is unclear what the settlers contemplated would happen to property for whom no heir could be found; at any rate, within seven years the doctrine of escheat reappeared in colonial Massachusetts. The Laws and Liberties of Massachusetts 21 (photo. reprint, Max Farrand ed., 1929) (1648).

broadening somewhat the range of estates that lie vulnerable to escheat. This approach has proven influential among the states.<sup>219</sup>

The default rule of escheat is not premised on intent effectuation. Escheat began as one of the feudal incidents, and lawmakers continue to conceptualize it as a revenue measure.<sup>220</sup> The Reporter for the original Code endorsed this policy<sup>221</sup> and defended the extension of the parameters of escheat on another ground: Inheritance by remote relatives “aligns with no expectation” on their part.<sup>222</sup> As an earlier scholar cited by the Reporter had elaborated more graphically, distant relatives comprise “laughing heirs,” persons “who suffer no sense of bereavement” at the decedent’s loss and for whom the inheritance constitutes an “undeserved windfall.”<sup>223</sup> Thus rationalized, escheat comprises a social default.<sup>224</sup>

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219. This rule appeared in the original Code of 1969 and was carried forward into the revised Code of 1990. Unif. Probate Code §§ 2-103(4), 2-105 (amended 2003); *id.* §§ 2-103(4), 2-105, 8 U.L.A. 276, 282 (1998) (pre-1990 version of article II). Although the Commissioners did not spearhead the limitation of heirship in the United States, many states have since adopted similar legislation. Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 Alb. L. Rev. 927, 934 n.36 (1992); see Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.4 statutory notes 4-6 (1999) [hereinafter Restatement]. Great Britain has had such legislation in place since 1925. Margrave-Jones, *supra* note 216, §§ 12.38, 12.41.

220. “The purpose of all escheat laws is not only to enrich the state but to put in active use funds that are unclaimed and lying dormant.” *New Jersey v. Elsinore Shore Assocs.*, 592 A.2d 604, 606 (N.J. Super. Ct. App. Div. 1991); see also, e.g., Browder, *supra* note 31, at 1312. For an early theoretical discussion, see Jeremy Bentham, *Supply Without Burden; or Escheat Vice Taxation*, in 2 Works, *supra* note 138, at 585 (1795). See also Bentham, *Principles of the Civil Code*, in 1 Works, *supra* note 138, at 336. Some lawmakers and commentators have justified this rule as compensating for the state support that intestates lacking close relatives often received during life. See 38 U.S.C.A. § 8520(a) (2002) (providing that the personal property of veterans and their families who die in a veterans facility that would escheat under state law goes instead to a federal trust fund supporting veterans facilities); Md. Code Ann., Est. & Trusts § 3-105(a)(2)(i)-(ii) (2001) (providing that escheated estates go to the state Medical Assistance Program if the decedent was a recipient of long-term care under the program, and otherwise to education); *Estate of Jurek*, 428 N.W.2d 774, 777 (Mich. Ct. App. 1988); Rosenfeld, *supra* note 176, at 14-15; Averill & Brantley, *supra* note 12, at 647. On the other hand, this policy is vulnerable to criticism as a form of regressive taxation.

221. In the context of intestates without close relatives, the Reporter for the original Code approved “the policy of directing undevised assets to public needs.” Richard V. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. Ill. L. F. 536, 537.

222. *Id.*

223. *Id.*; see also David F. Cavers, *Change in the American Family and the “Laughing Heir,”* 20 Iowa L. Rev. 203, 208-09 (1935) (also decrying inheritance by distant relatives as a “social injustice”).

224. See *supra* Part I.C.2; see also *supra* notes 54, 114-17, 125-26 and accompanying text. In addition, Commissioners have argued that restricting the range of intestate beneficiaries “eliminates will contests” they would otherwise have standing to bring. Unif. Probate Code art. II, pt. 1, cmt. (amended 2003), 8 U.L.A. 271 (1998) (pre-1990 version of article II); Richard V. Wellman, Response of the Joint Editorial Board for the Uniform Probate Code to the State Bar of California’s “The Uniform Probate Code: Analysis and Critique” 5-6 (1974); see also Cavers, *supra* note 223, at 209-10.

Could the default rule of escheat simultaneously be justified in majoritarian terms? Possibly so, at least as regards the scope of the doctrine. How far out along the branches of a family tree the majority of benefactors would wish to clamber in search of blood relatives is difficult to predict. The range of persons' family ties—the ken of their kin—varies a great deal, but it is entirely possible that empirical evidence would confirm the typical benefactor's preference to exclude second cousins.<sup>225</sup> On the other hand, substituting *the state* for heirs of the blood surely carries out the wishes of virtually no benefactors.<sup>226</sup> This much we can deduce from an abundance of empirical evidence.<sup>227</sup>

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Even considered on its own terms, the ostensible aim of avoiding will contests appears a dubious one: Surely, *someone* ought to have standing and incentive to monitor and challenge the validity of a doubtful will.

225. See generally David M. Schneider, *American Kinship: A Cultural Account* (2nd ed. 1980). For a sociobiological perspective on inheritance by distant relatives, suggesting that blood is not invariably thicker than water even from the perspective of the selfish gene, see John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 Nw. U. L. Rev. 216, 255-58 (1981). The extant studies suggest that, in the absence of a nuclear family, testators may provide for the first collateral line (siblings, nephews and nieces, etc.) under their wills, but rarely for the second collateral line (first cousins, etc.)—thus implying that the scope of heirship under the Code may *still* be too broad under a majoritarian approach to inheritance defaults. For the most recent empirical study, citing in turn to earlier ones, see Schneider, *supra* note 138, at 432-37. More investigation is necessary, however, to determine what preferences concerning the scope of heirship obtain when, because she is intestate, the benefactor cannot select an alternative beneficiary herself but instead can only substitute for blood relatives either (1) a consortium of charities, or (2) a discretionary distribution made by the probate court intended to reconstruct her probable intent, as discussed hereinafter. Here, evidence drawn from wills fails us, so we must instead have recourse to survey evidence. See *supra* notes 168-69 and accompanying text.

226. For implicit recognitions of this fact by lawmakers, see Ga. Code Ann. § 53-2-8 (1997) (avoiding distributions from an intestate to a surviving spouse who also dies intestate within the next six months, if the property would then escheat); Tex. Prob. Code Ann. § 47(a) (Vernon 2003) (requiring heirs to survive the intestate by 120 hours *unless* this condition would cause the intestate's property to escheat); *Jackson v. Schultz*, 151 A.2d 284, 285-86 (Del. Ch. 1959) (construing a will to avoid escheat). *But cf.* Model Probate Code, *supra* note 12, § 22 cmt. ("Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives."); Atkinson, *supra* note 7, at 196.

227. Empirical studies of the elasticity of giving indicate that the propensity to donate or bequeath to charity responds strongly to tax deductibility. Clotfelter, *supra* note 171, at 222-52 *passim*; Shammass et al., *supra* note 72, at 180-84; Gerald E. Auten et al., *Charitable Giving, Income, and Taxes: An Analysis of Panel Data*, 92 Am. Econ. Rev. 371 (2002); Michael J. Boskin, *Estate Taxation and Charitable Bequests*, 5 J. Pub. Econ. 27 (1976); David Joulfaian, *Charitable Bequests and Estate Taxes*, 44 Nat'l Tax J. 169 (1991). Hence, we can infer that persons prefer to donate to charity than "donate" to government. For attitudinal data demonstrating widespread distrust of government as a substitute provider of support for charitable causes, see Francie Ostrower, *Why the Wealthy Give* 114-16 (1995). Statistical data from tax returns shows that something less than 12.6% of all charitable gifts and bequests went to governmental entities in 2002. AAFRC Trust for Philanthropy, *Giving USA 2003: The Annual Report on Philanthropy for the Year 2002*, at 7, 10 (2003). Of course, history affords some celebrated counterexamples. See William J. Rhees, *James Smithson and His Bequest* (1880); *supra* note 117.

In the absence of close relatives, most testators bequeath their estates either to friends or charities or a combination of the two.<sup>228</sup> Friends cannot be brought within the rubric of a default rule without creating the sort of discretionary regime that we earlier predicted most benefactors would reject due to its uncertainty.<sup>229</sup> A default rule under which escheated property goes to a defined consortium of charities would probably appeal to a larger number of benefactors, a narrow point that we could again test empirically.<sup>230</sup> Even if the doctrine of escheat only applies to a handful of decedents, with a handful of money,<sup>231</sup> it is a rule that demands majoritarian reform.

The "laughing heir" comprises just one subset of a larger stigmatized category, the "unworthy heir,"<sup>232</sup> which in additional ways has left a social imprint on the Code and many state statutes. Consider the Code's widely-adopted default rule governing inheritance by a decedent's parent. A parent can inherit by intestacy from a child only if the parent has "openly treated the child as his [or hers], and has not refused to support the child."<sup>233</sup> Although the

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228. See Sussman et al., *supra* note 28, at 111-20; Browder, *supra* note 31, at 1312-15; Schneider, *supra* note 138, at 435; see also Contemporary Studies Project, *supra* note 28, at 1119 (survey evidence); Jeffrey P. Rosenfeld, *Bequests from Resident to Resident: Inheritance in a Retirement Community*, 19 *The Gerontologist* 594 (1979); Jeffrey P. Rosenfeld, *Old Age, New Beneficiaries: Kinship, Friendship, and (Dis)inheritance*, 64 *Sociology & Soc. Res.* 86 (1979). That benefactors often substitute kith for absent kin corresponds with the sociological theory of the "open" or "wider" family, whereby persons ostensibly "create their own relatives as needed," who thereby "fill in for missing . . . kin." Barbara H. Settles, *A Perspective on Tomorrow's Families*, in *Handbook of Marriage and the Family* 157, 160 (Marvin B. Sussman & Suzanne K. Steinmentz eds., 1st ed. 1987) (in the 1st ed. only); see generally Teresa D. Marciano, *Families Wider than Kin or Marriage*, 1 *Fam. Sci. Rev.* 115 (1988); Teresa Marciano & Marvin B. Sussman, *Wider Families: An Overview*, in Teresa D. Marciano & Marvin B. Sussman, *Wider Families: New Traditional Family Forms* 1 (1991).

229. See *supra* Part I.D.1.c.

230. Here we must again rely on survey evidence. See *supra* notes 167-69 and accompanying text. Neither type of escheat statute is unprecedented. Under the law of some states, escheated estates go to the county board of education. Ga. Code Ann. § 53-2-51(c) (Supp. 2004); Md. Code Ann., Est. & Trusts § 3-105(2)(ii) (2001); see also *supra* note 220. In North Carolina, escheated estates go to provide loans for students at the state universities. N.C. Gen. Stat. §§ 116B-5, 116B-7 (Supp. 2002). Under the law of Great Britain, the Crown may at its discretion distribute an escheated estate to dependents or friends of the decedent. Margrave-Jones, *supra* note 216, § 12.41. For earlier American proposals along one or the other of these lines, see Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth* 423 (1914); Atkinson, *supra* note 7, at 196; Cavers, *supra* note 223, at 210-11; Fratcher, *supra* note 12, at 1050.

231. For a discussion of the social setting of escheat, see Rosenfeld, *supra* note 176, at 99-108.

232. Atkinson, *supra* note 61, § 37, at 147. The best-known unworthy heir is the slayer of the beneficiary, but there the applicable public policy against inheritance is so strong as to have inspired a mandatory (rather than a default) rule. See McGovern & Kurtz, *supra* note 28, § 2.7, at 75-77 & n.21.

233. Unif. Probate Code § 2-114(c) (amended 2003); see also Restatement, *supra*



Commissioners neglected to articulate their rationale(s) for this provision,<sup>234</sup> courts and commentators have explained equivalent state statutes as serving to prevent injustice,<sup>235</sup> and/or to encourage parental responsibility,<sup>236</sup> and/or to effectuate the probable intent of the decedent child.<sup>237</sup>

Only the last of these justifications fits into a majoritarian-default model.<sup>238</sup> Does the Code's provision reflect *exclusive* fidelity to probable intent? On the one hand, the Commissioners might infer that most children, once competent to execute a will, would prefer not to provide for a parent who had abandoned them<sup>239</sup>—an inference which nonetheless needs empirical verification, lest the intuitions of unabandoned Commissioners fail to coincide with the psychology of those who have actually suffered the experience.<sup>240</sup>

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note 219, § 2.5(5) & cmt. m, statutory notes 2, 14, reporter's note 9 (1999); Unif. Probate Code. § 2-109 (amended 2003), 8 U.L.A. 284 (1998) (pre-1990 version of article II) (similar provision restricted to fathers). For additional statutory references, see *Rainey v. Chever*, 527 U.S. 1044, 1048 (1999) (Thomas, J., dissenting) (petition for certiorari). This rule applies to inheritance both from a minor child (for whom it is a mandatory rule, since minor children cannot execute wills) and from an adult child (for whom it is a default rule). See *In re Estate of Lunsford*, 547 S.E.2d 483, 486-87, 488-89 (N.C. Ct. App. 2001), *vacated by* 556 S.E.2d 292 (N.C. 2001); Unif. Probate Code §§ 1-201(5), (29), 2-114(c) cmt., 2-501 (amended 2003). One glitch in the Code's provision is that it applies only to an abandoning "natural" parent, hence not to an abandoning adoptive parent, a pointless and presumably accidental limitation. Unif. Probate Code § 2-114(c) (amended 2003). Although this drafting error was identified a decade ago, the Commissioners have never corrected it. Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 Ind. L. Rev. 517, 536-37 (1994).

234. The accompanying comment and the Commissioners' scholarly commentary are silent on the matter. See Unif. Probate Code § 2-114 cmt. (amended 2003); *id.* § 2-109 cmt., 8 U.L.A. 284-85 (1998) (pre-1990 version of article II).

235. *In re Estate of Patterson*, 798 So. 2d 347, 351 (Miss. 2001); McKinney v. Richtielli, 586 S.E.2d 258, 263 (N.C. 2003); *King v. Commonwealth*, 269 S.E.2d 793, 795-96 (Va. 1980); Atkinson, *supra* note 61, § 37, at 148; Monopoli, *supra* note 6, at 264, 267; Rhodes, *supra* note 233, at 537.

236. *Rainey v. Chever*, 510 S.E.2d 823, 824 (Ga. 1999), *cert. denied*, 527 U.S. 1044 (1999); McKinney, 586 S.E.2d at 263.

237. *Estate of Griswold*, 24 P.3d 1191, 1195-96, 1204 (Cal. 2001); *Estate of Hicks*, 675 N.E.2d 89, 93-95 (Ill. 1996); *King*, 269 S.E.2d at 795; Rhodes, *supra* note 233, at 520.

238. Along with substantive intent effectuation, the problem of definitional objectivity arises here. Unless abandonment is sharply defined, a default rule contingent upon the concept will occasion costly litigation that most benefactors (by hypothesis) would prefer to avoid. See *supra* Part I.D.1.c. The Code's language, permitting a parent to inherit so long as he or she "has openly treated the child as his [or hers], and has not refused to support the child," does not quite qualify as a sharp definition. Unif. Probate Code § 2-114(c) & cmt. (amended 2003).

239. See *King*, 269 S.E.2d at 795 ("It is reasonable to assume . . ."); see also *supra* note 237.

240. See Monopoli, *supra* note 6, at 277 (questioning the inference in connection with minor children). As a general proposition, emotional bonds tend to be mutual. For a recent review of the social psychology of attachment, see Mario Mikulincer et al., *Attachment Theory and Affect Regulation: The Dynamics, Development, and*

On the other hand, notice that this rule operates in a unilateral, not a reciprocal, manner. When an abandoning parent is the first to die, his or her abandoned child *can* inherit as an intestate heir under the Code.<sup>241</sup> Yet, even more directly, Commissioners could infer from the parent's lifetime decision a preference not to provide for the child at death either.<sup>242</sup> Manifestly, if implicitly, this second side of the existing rule follows from the social equity of the child's position, here contradicting and superseding, instead of reinforcing, presumptive intent.<sup>243</sup> To be sure, abandoned children arouse our sympathy, and lawmakers could consider creating a *mandatory* rule of filial inheritance.<sup>244</sup> Framed as a social default, however, and viewed dispassionately, the rule appears ineffectual and even inequitable: It forces a majority of affected benefactors to expend resources unnecessarily in order to opt out of the default; and it discriminates against poorer benefactors who can ill afford to do so. Conversely, those with the means to be mean will promptly disinherit unloved heirs.<sup>245</sup>

In a word, default rule theory demands that we jettison the very concept of the unworthy heir and replace it with the *unintended heir*.

A number of the central provisions of modern intestacy law also invite empirical scrutiny. Every current state probate code, including the Uniform Probate Code, divides estates co-equally among children of the benefactor.<sup>246</sup> We have no reason to question this general framework: A raft of studies all indicate that, by a wide margin, most benefactors approve, irrespective of their children's relative needs or means (or gender).<sup>247</sup> Yet, it bears investigating whether discrete

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*Cognitive Consequences of Attachment-Related Strategies*, 27 *Motivation & Emotion* 77 (2003).

241. Unif. Probate Code §§ 2-114(c), 2-705 cmt (amended 2003).

242. For an anecdotal illustration, see *Goff v. Goff*, 179 S.W.2d 707, 709 (Mo. 1944).

243. See McGovern & Kurtz, *supra* note 28, § 2.9, at 97 ("[P]arents who challenge a statute which bars them from inheriting have a less appealing case than a child who seeks to inherit from a parent.").

244. Such a rule exists in many countries and has been proposed on occasion in the United States. For a recent discussion, see Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 Utah L. Rev. 1; see also *supra* note 232.

245. This same analysis (preferably after empirical verification) could also be applied to support a reciprocal default rule of disinheritance when a child "abandons" a parent: from the perspective of intent effectuation, it seems unlikely to matter who abandons whom. For a judicial recognition of this issue, see *In re Estate of Patterson*, 798 So. 2d 347, 352 (Miss. 2001). For an anecdotal illustration of disinheritance under these conditions, see Sussman et al., *supra* note 28, at 98. What abandonment (or, more aptly, estrangement) entails in this regard would again require objective definition to forestall litigation. The Code makes no provision for this contingency, however. Cf. *infra* note 274 (pointing out analogous spousal abandonment statutes).

246. Unif. Probate Code §§ 2-103(1), 2-106(b) (amended 2003). The Code "always provides equal shares to those equally related." *Id.* § 2-106 cmt.

247. For empirical studies, see Sussman et al., *supra* note 28, at 96-102; Britt, *supra*

exceptions to this pattern occur systematically. Do insolvent children (or other heirs, for that matter) typically receive the same shares as others? Lest they bequeath, in effect, to creditors, benefactors have an incentive in such instances either to divert the inheritance to a close relative of the insolvent or (in a well-planned estate) to shield the inheritance in a spendthrift trust.<sup>248</sup> Similarly, are institutionalized or disabled children ordinarily treated no differently from others? Those eligible to receive state support could lose it as a result of the inheritance; benefactors may prefer either to divert such an inheritance or to place it in a special-needs trust.<sup>249</sup> (On the other hand, query whether disabled children *ineligible* to receive state support tend systematically to receive larger inheritances, to take into account the costs of their institutional care.)<sup>250</sup>

And consider the treatment of adopted children: For purposes of intestate succession, the Code provides that adopted children become members of the adoptive family (including the extended family), but

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note 171, at 351; Contemporary Studies Project, *supra* note 28, at 1102; Fellows et al., *supra* note 49, at 736-37; Fellows et al., *supra* note 9, at 368-70; Debra S. Judge & Sarah Blaffer Hrdy, *Allocation of Accumulated Resources Among Close Kin: Inheritance in Sacramento, California, 1890-1984*, 13 *Ethology & Sociobiology* 495, 510-16, 518 (1992); Paul L. Menchik, *Primogeniture, Equal Sharing, and the U.S. Distribution of Wealth*, 94 *Q.J. Econ.* 299, 310, 314-15 (1980); Paul L. Menchik, *Unequal Estate Division: Is it Altruism, Reverse Bequest, or Simple Noise?*, in *Modelling the Accumulation and Distribution of Wealth* 105, 111-12 (Denis Kessler & André Masson eds., 1988) [hereinafter Menchik, *Unequal*]; Schneider, *supra* note 138, at 425; and Mark O. Wilhelm, *Bequest Behavior and the Effect of Heirs' Earnings: Testing the Altruistic Model of Bequests*, 86 *Am. Econ. Rev.* 874, 880 (1996). Cf. Dunham, *supra* note 54, at 253-54 (finding, in an older study, a smaller tendency toward equality with no clear pattern of variation); Nigel Tomes, *The Family, Inheritance, and the Intergenerational Transmission of Inequality*, 89 *J. Pol. Econ.* 928 (1981) (finding a smaller tendency toward equality than other recent studies, using data disputed in Menchik, *Unequal*, *supra*, at 109-10). For a historical study, see Shammas et al., *supra* note 72, at 42-47, 108-12, 202-04. For a theoretical analysis and explanation of the tendency toward equalization, see B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 *J. Pol. Econ.* 733, 735 (2003). For practical discussions, see L.F. Gianelli, *Treating Children Equally: Estate Planning for the Family Business or Farm*, *Prob. & Prop.*, Jan.-Feb. 1988, at 12, 12-13; and Schneider, *supra* note 138, at 427.

248. For a discussion in a related context, see Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 *Hastings L.J.* 175, 235-39 (1994). For an anecdotal example, see Hirsch, *supra* note 6, at 157 n.224. For empirical evidence on the frequency with which spendthrift trusts appear in wills (but without exploring the circumstances), see Browder, *supra* note 31, at 1331-32.

249. For a recent discussion, see Kristen Lewis Denzinger, *Special Needs Trusts*, *Prob. & Prop.*, May-June 2003, at 11.

250. For some preliminary findings on this question, see Sussman et al., *supra* note 28, at 101; and Contemporary Studies Project, *supra* note 28, at 1125-26. Query also whether adult children who live with (or close to) a benefactor parent in old age are favored systematically, in return for the care they can thereby provide the parent, over adult children who live at a distance from the parent. For preliminary findings, see Sussman et al., *supra* note 28, at 98-100, 118-20; Contemporary Studies Project, *supra* note 28, at 1126-29. See also Finch et al., *supra* note 72, at 114-17 (reporting findings of a British study).

are simultaneously detached from the natural family.<sup>251</sup> Although the official commentary accompanying the Code offers no justification for this as-of-now ubiquitous rule, the Reporter for the original Code asserts that it stemmed from a social concern: Whereas one critic had argued that “innocent” adoptees should continue to inherit from the natural family, “[t]he committees shaping the Uniform Probate Code preferred the argument that adopted children should be fully transplanted into adopting families so that they may be raised in the belief that they belong there.”<sup>252</sup>

Even if the Commissioners’ decision to frame this default rule according to social policy is objectionable per se,<sup>253</sup> the rule may qualify as a majoritarian default. Yet, the issue cries out for empirical investigation, for in the years since the Code appeared the practices of adoption have undergone profound change in the United States.<sup>254</sup> The system of confidentiality that predominated through the 1970s, denying natural parents and adopted children any right to information concerning the other, and thereby walling them off sociologically, now coexists with regimes of so-called “open” adoption under which parties share information, either directly or through the adoption agency as intermediary. Following an open adoption, natural parents and adopted children retain threads of knowledge and even have the opportunity to build relationships; accordingly, the possibility that a majority of natural parents participating in an open adoption would prefer to bequeath to adopted children—and vice versa?—cannot be dismissed.<sup>255</sup>

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251. Unif. Probate Code § 2-114(b) & cmt. (amended 2003); *see also* Restatement, *supra* note 219, § 2.5(2)(A), cmt. e, statutory notes 2, 7-8, reporter’s note 4 (1999).

252. Wellman, *supra* note 221, at 538; *see also In re Estate of Fleming*, 21 P.3d 281, 285-86 (Wash. 2001) (articulating this social concern as the “legislative objective” underlying the state’s analogous intestacy statute); Unif. Adoption Act § 14 cmt. (amended 1971), 9 U.L.A. 199 (1999) (1969 Revised Act) (justifying termination of rights of intestate inheritance from the natural parents on the additional social ground that doing so “preserves the secrecy of adoption proceedings . . . by reducing the selfish reasons an individual might have to discover his antecedents.”); William L. Eagleton, *Introduction to the Intestacy Act and the Dower Rights Acts*, 20 Iowa L. Rev. 241, 257-58 (1935) (defending a precursor to the Code’s provision in similar terms).

253. Even considered on its own terms, this social policy—reflecting conventional wisdom once upon a time—is controversial today. *See* Harold D. Grotevant & Ruth G. McRoy, *Openness in Adoption* 52-63, 83-105 (1998); Judith S. Modell, *A Sealed and Secret Kinship* 33-40, 62-66 (2002); Katarina Wegar, *Adoption, Identity, and Kinship* 25-35 (1997).

254. The Code (including this rule) made its debut in 1969. Unif. Probate Code § 2-109(1) (amended 2003), 8 U.L.A. 284 (1998) (pre-1990 version of article II). Nor is this the first moment in American history when adoption practices have gone through transition, raising questions about the obsolescence of intestacy law. For an earlier assertion that intestacy statutes had failed to keep up with evolving social practices of adoption, *see* Fred L. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 Wash. U. L.Q. 221, 244-49 (1943).

255. By 1993, the vast majority of adoption agencies offered some form or forms of open adoption as an option. *See* Grotevant & McRoy, *supra* note 253, at 32. On the

Be this as it may, the Code's rule is in at least one respect<sup>256</sup>

transition in adoption practices, see *id.* at 11, 25-34. For a discussion of the legal history of adoption in the United States, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 Duke L.J. 1077 (2003). For sociological discussions, see Judith S. Modell, *Kinship With Strangers* 144, 163-68 (1994); and Modell, *supra* note 253, at 49-54, 56-62, 65-66. Although empirical evidence demonstrates the propensity of adoptive parents to bequeath to adopted children, no statistics on the frequency with which kindred of the adoptive parents or members the natural family wish to benefit adopted children, and vice versa, are extant. See Contemporary Studies Project, *supra* note 28, at 1104-05, 1141; Judge & Hrdy, *supra* note 247, at 516-17, 519. Judges from different eras have drawn different conclusions. Compare *Keegan v. Geraghty*, 101 Ill. 26, 35 (1881) (inferring without evidence that kindred of adoptive parents would not wish to bequeath to an adopted child), with *MacCallum v. Seymour*, 686 A.2d 935, 940 (Vt. 1996) (doubting that presumption). For a hypothesis explaining intent to provide for adopted children grounded in behavioral biology, see Beckstrom, *supra* note 225, at 260-65. But cf. Anne Case et al., *Household Resource Allocation in Stepfamilies: Darwin Reflects on the Plight of Cinderella*, Am. Econ. Rev. (Papers & Proc.), May 1999, at 234, 237-38 (reporting evidence of disproportionate food expenditure on biological versus adopted children). In five jurisdictions today, an adopted child can inherit by intestacy from both the natural and adoptive family, irrespective of whether the adoption was of the confidential variety. Kan. Stat. Ann. § 59-2118 (1994); Okla. Stat. Ann. tit. 10, § 7505-6.5 (West 1998 & Supp. 2004) (construed in *Stark v. Watson*, 359 P.2d 191, 194 (Okla. 1961)); R.I. Gen. Laws §§ 15-7-16, -17 (2003); Tex. Prob. Code Ann. § 40 (Vernon 2003); Wyo. Stat. Ann. § 2-4-107 (Michie 2003); see also Colo. Rev. Stat. §§ 15-11-103(6), 15-11-114 (2002) (allowing an adopted child to inherit by intestacy from a natural parent only if the natural parent has no other heirs). In two other states, an adopted child can inherit by intestacy from the natural family as well as the adoptive family if the decree of adoption so provides, a rule that can take account of the type of adoption at issue. Alaska Stat. § 25.23.130(a)(1) (Michie 2002); Me. Rev. Stat. Ann. tit. 18-A, § 2-109(1) (West 1998). In Pennsylvania, the statute specifies that an adopted child can inherit by intestacy from kindred of the natural parents (although not the natural parents themselves) "who ha[ve] maintained a family relationship with the adopted person," thereby taking account of extrinsic evidence—a rule that could reasonably be extended to the natural parents as well. 20 Pa. Cons. Stat. Ann. § 2108 (West 1975 & Supp. 2003). The drawback of this rule is that the contingency of maintaining a "family relationship" is too subjective to forestall litigation.

256. In addition, the Code carves out an exception from the general rule of intestacy rights upon adoption that may at once be overbroad and underinclusive: If a child is adopted by a spouse of a natural parent, the child is the heir of the adoptive parent and can also continue to inherit by intestacy from or through *either* natural parent. Unif. Probate Code § 2-114(b) (amended 2003); see also Restatement, *supra* note 219, § 2.5(2)(C), cmt. h, statutory note 11, reporter's note 6. The rationale for this exception is left unstated. See Unif. Probate Code § 2-114 cmt. (amended 2003); *id.* § 2-109 cmt., 8 U.L.A. 284-85 (1998) (pre-1990 version of article II). It presumably rests on the assumption that in cases of stepparent adoption the child (obviously) will still have a relationship with the custodial natural parent and is also likely to maintain a relationship with the family of the noncustodial natural parent. Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Code's Intestacy and Class Gift Provisions*, 32 Real Prop. Prob. & Tr. J. 539, 543 (1998). This assumption is likely to be sound in connection with a stepparent adoption following the death of a natural parent, but possibly not in connection with a stepparent adoption following divorce of the natural parents, both of whom must then consent to the adoption. If the noncustodial parent grants consent, that action could indicate a break with the child. See, e.g., *Estate of Dye v. Battles*, 112 Cal. Rptr. 2d 362, 367-68, 370 (Ct. App. 2001) (where such a break had occurred). Some state statutes distinguish between these two scenarios, although the distinction still needs to be corroborated by empirical

manifestly flawed: It applies irrespective of whether the child was adopted as a minor, or as an adult.<sup>257</sup> Adult adoption is today widely permissible and generally requires no consent or even notification of the natural family. The only social connection implied by the act involves the adoptor and adoptee. Other members of the "adoptive" family are as unlikely to develop bonds of affection with the adult adoptee as members of the natural family are to sever theirs. Empirical evidence will surely confirm that a separate rule of intestacy covering adult adoption would better serve to effectuate probable intent. Indeed, in this context, even the Commissioners' social-policy rationale for the existing rule fails to apply.<sup>258</sup> As of now, however, only two jurisdictions distinguish minor from adult adoption under their intestacy laws.<sup>259</sup>

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evidence. Roberts, *supra*, at 543 n.11. The Code also neglects to extend its exception to adoption following the deaths of both natural parents, which under most circumstances seems unlikely to sever ties between the adopted child and the families of either natural parent (although again this inference requires empirical confirmation). For statutory references and discussion, see Tenn. Code Ann. § 36-1-121(e) (2001); Restatement, *supra* note 219, § 2.5(2)(B) & cmts. f-g, statutory notes 9-10, reporter's note 5; Roberts, *supra*, at 553-55. Finally, under the Code the exception does not operate reciprocally: Only the adoptive parent and the natural parent who is married to the adoptive parent, and their kindred, not the other natural parent and his/her kindred, can ever inherit by intestacy from the adopted child. Unif. Probate Code § 2-114(b) (amended 2003). Because bonds of affection tend naturally to be mutual, this element of the exception appears dubious as an intent-effectuating measure. See Mikulincer et al., *supra* note 240. By comparison, some state statutes featuring similar exceptions do create reciprocal rights of intestate succession. E.g., Fla. Stat. ch. 732.108(1)(b)-(c) (2003).

257. See *supra* note 251; see also *Tinney v. Tinney*, 799 A.2d 235, 236-38 (R.I. 2002).

258. See *supra* note 252. Empirical study of the phenomenon of adult adoption should further distinguish adult adoption of stepchildren from others. On the problem of unadopted stepchildren, see *infra* notes 260-63. For a discussion of adult adoption and its treatment under intestacy statutes, see Jan E. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 Vand. L. Rev. 711, 749-57 (1984). Professor Rein identified the inadequacy of the Code in this regard, *id.* at 755 n.182, but once again the Commissioners turned a blind eye to the criticism. See also Brashier, *supra* note 12, at 160-63; Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 Utah L. Rev. 93, 162-72, 176-77.

259. Colo. Rev. Stat. §§ 14-1-101(2), 15-11-114(2) (2002) (providing that minor adoptees become heirs of the adoptive parents and their kindred, and vice versa, but not heirs of the natural parents and their kindred, and vice versa; whereas, adult adoptees remain heirs of the natural parents and their kindred, and vice versa, and also become heirs of the adoptive parents but not their kindred); N.J. Stat. Ann. §§ 2A:22-3, 3B:5-9, 9:3-50 (West 2002) (providing that minor adoptees become heirs of the adoptive parents and their kindred, and vice versa, but not heirs of the natural parents and their kindred, and vice versa; whereas, adult adoptees remain heirs of the natural parents and their kindred, and that adult adoptees also become heirs of the adoptive parents but not their kindred, and that adoptive parents and their kindred become the heirs of the adult adoptee); see *Ehrenclou v. MacDonald*, 12 Cal. Rptr. 3d 411, 417-19 (Ct. App. 2004) (dicta, construing Colorado law); see also *MacCallum*, 686 A.2d at 941 (observing that intestate succession by an adult and minor adoptee raise distinct issues of public policy); cf. Ohio Rev. Code Ann. § 107.15(A)(3) (Anderson

If the rules of intestacy applicable to an adopted person warrant review, so do those applying to *unadopted* family members—that is, the benefactor's stepchildren. These currently enjoy no right of intestate succession under the Code, as under the vast majority of state statutes.<sup>260</sup> If, however, stepchildren joined the benefactor's household and were raised by the benefactor, the possibility remains that he or she would perceive them as indistinguishable from a natural (or adopted) child.<sup>261</sup> Once again, an empirical study could isolate more precisely the social circumstances under which intent to benefit a stepchild at death is not merely possible but probable.<sup>262</sup> Still and all, unless those variables are defined objectively within an intestacy statute, applying them could embroil heirs in costly litigation.<sup>263</sup>

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2003) (excluding adult adoptees from bequests by virtue of lapse, as well as from class gifts, but not explicitly covering adult adoptees' intestacy rights); Unif. Probate Code § 2-705(c) & cmt. (amended 2003) (construing class gifts to exclude adult adoptees when the grantor is someone other than the adoptive parent, on the basis of inferred intent).

260. Restatement, *supra* note 219, § 2.5(3) & cmt. f; Unif. Probate Code §§ 1-201(5), (9), (33), 2-103(1) (amended 2003); *cf. infra* note 262 (remarking exceptional state statutes).

261. *See, e.g.,* Jackson v. Stevenson, 14 Cal. Rptr. 2d 250, 255 (Ct. App. 1992) (involving children who *believed* their stepmother was their natural mother). For sociological discussions, see for example, Lawrence H. Ganong & Marilyn Coleman, Remarried Family Relationships 69-86 (1994) (surveying studies of variables that affect the quality of a stepparent/stepchild relationship); Susan J. Gamache, *Confronting Nuclear Family Bias in Stepfamily Research*, in *Stepfamilies: History, Research and Policy* 41, 51-56 (Irene Levin & Marvin B. Sussman eds., 1997) [hereinafter *Stepfamilies*] (same).

262. Existing empirical evidence supports the proposition that some fraction less than a majority of stepparents consider their stepchildren as equivalent to their natural children for purposes of inheritance. Sussman et al., *supra* note 28, at 108-13; Kim Porter, *The Will of the Wealthy*, Tr. & Est., Aug. 1999, at 56, 56. Accordingly, a default rule of intestate succession for stepchildren would require refinement. *See* Estate of Cleveland v. Thomas, 22 Cal. Rptr. 2d 590, 599 (Ct. App. 1993) (drawing the inference that "intestates . . . are unlikely to have wished to provide equally for their natural and adopted children on the one hand and their voluntarily unadopted stepchildren . . . on the other"); Finch et al., *supra* note 72, at 101-03 (reporting results of a British study); Case et al., *supra* note 255, at 237-38 (reporting evidence of disproportionately small food expenditure on stepchildren versus biological or adopted children); Marilyn Coleman & Lawrence H. Ganong, *Attitudes Toward Inheritance Following Divorce and Remarriage*, 19 J. Fam. & Econ. Issues 289, 308-09, 310-13 (1998) (reporting survey evidence); *cf.* Cal. Prob. Code § 6454 (Deering Supp. 2004) (allowing a stepchild to inherit as an heir if (1) the relationship of stepparent and stepchild began when the child was a minor, (2) continued throughout their joint lives, and (3) the stepparent would have adopted the child but for a legal barrier). For criticisms of this statute, suggesting it is too restrictive, see Gary, *Parent-Child*, *supra* note 12, at 671-74; Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. Davis L. Rev. 917, 929-31 (1989). Intestacy statutes in a few other jurisdictions allow stepchildren, and sometimes other affines, to take as heirs in the absence of a surviving spouse and any heirs of the blood. Restatement, *supra* note 219, § 2.4 statutory notes 4a-b, 5b, 6.

263. *See supra* Part I.D.1.a. For two thoughtful proposals to create intestacy rights in stepchildren, premised on whether the court finds a parent-child relationship to have existed between the decedent and a stepchild, see Gary, *Adapting Intestacy*,

A similar concern for social facts might improve the default rules of inheritance among siblings. As presently configured, the Code and most state statutes treat whole- and half-blooded siblings alike for purposes of intestate succession.<sup>264</sup> On the other hand, stepsiblings never comprise heirs unless they become related by adoption.<sup>265</sup> Neither the Commissioners' official nor unofficial commentary contains a word about these rules, so their rationale remains a mystery.<sup>266</sup> Contemplated from the perspective of probable intent, we can hypothesize that the typical benefactor would not distinguish whole-blooded siblings from either half-blooded or stepsiblings, so long as they grew up together within the same household. If, however, either half-blooded or stepsiblings were brought up in separate households, then we would expect the typical benefactor to form closer bonds with whole-blooded siblings.<sup>267</sup> Lawmakers could

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*supra* note 12, at 71-82; and Mahoney, *supra* note 262, at 928-40. Professor Gary's proposal is marginally more concrete than Professor Mahoney's, in that it specifies an array of factors (structurally reminiscent of the badges of fraud) as "indications" of that relationship, but without making any one or more of them determinative. See Gary, *Adapting Intestacy*, *supra* note 12, at 81. Hence, under both proposals, courts would exercise discretion, a prospect that we earlier questioned theoretically. See *supra* Part I.D.1.c. One court has even warned that such an approach could have deleterious social consequences. See *Otero v. City of Albuquerque*, 965 P.2d 354, 362 (N.M. Ct. App. 1998) ("[I]t is in the public interest for stepparents to be generous and loving with their stepchildren. Such conduct could be discouraged if a consequence of such kindness toward a stepchild would be the imposition on the stepparent of the legal incidents of parenthood . . ."). The alternative approach is to create a fixed default rule of stepchild inheritance if objective factors are present, where empirical evidence demonstrates those factors to be associated in a majority of cases with the presence of donative intent.

264. Unif. Probate Code § 2-107 (amended 2003) (no comment accompanies this provision); see also Restatement, *supra* note 219, § 2.4 cmt. f, statutory note 7 (remarking some statutory variation among the states).

265. Unif. Probate Code §§ 1-201(33), 2-103(3) (amended 2003).

266. See *supra* note 264. One commentator has defended the Code's rule on the social basis that "[e]limination of distinctions between half blood and whole blood relatives has a beneficial effect in that it may reduce tensions within the family." Kossow, *supra* note 12, at 248. Even assuming for the sake of argument that such a policy should supersede intent, it takes no account of the problem of stepsiblings.

267. Sociological evidence supports this donative hypothesis:

Half-siblings who live together all or most of the time generally think of each other simply as siblings. The "half" is a meaningless abstraction. . . . When children have little contact, however, distinctions between half-siblings and full siblings are more common; in these situations the "sibling" part of the label "half-sibling" is the meaningless abstraction.

Ganong & Coleman, *supra* note 261, at 104 (citations omitted); see also Lawrence H. Ganong & Marilyn Coleman, *Do Mutual Children Cement Bonds in Stepfamilies?*, 50 J. Marriage & Fam. 687 (1988); cf. Lynn K. White & Agnes Riedmann, *When the Brady Bunch Grows Up: Step/Half- and Fullsibling Relationships in Adulthood*, 54 J. Marriage & Fam. 197 (1992) (finding that half- and stepsibling relationships tend to continue into adulthood, but that whole-blooded sibling relationships tend to be closer). See generally Anne C. Bernstein, *Stepfamilies from Siblings' Perspective*, in *Stepfamilies*, *supra* note 261, at 153. That the degree of positive feelings between persons is a function of the frequency of their interaction is an old and fundamental



formulate a default rule premised on this contingency, although it would again call for objective definition.<sup>268</sup> Once more, the matter warrants empirical investigation.<sup>269</sup>

A final social fact disregarded by the Code, along with most state statutes, is committed sexual partnership outside of marriage. A number of proposals have been made in recent years, both within and without the National Conference of Commissioners, to recognize these partnerships, involving either opposite-sex or same-sex couples, for purposes of intestate succession.<sup>270</sup> Two studies already provide empirical ammunition for such a rule within a probable-intent model,<sup>271</sup> and one of those has even begun to explore statistically the indicia of commitment likely to trigger donative intent.<sup>272</sup>

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proposition of sociology. See, e.g., George C. Homans, *The Human Group* 110-17 (1950); Robert H. Frank, *Cooperation Through Emotional Commitment, in Evolution and the Capacity for Commitment* 57, 67-69 (Randolph M. Nesse ed., 2001). Within popular culture, the theorem finds expression in a maxim: "to know me is to love me." But for a contrary hypothesis that benefactors will typically prefer whole-blooded siblings to others, see Atkinson, *supra* note 7, at 197-202; Beckstrom, *supra* note 225, at 258-60; and for an early discussion, see Bentham, *supra* note 138, at 335-36.

268. See *supra* Part I.D.1.a. The Code already incorporates such a contingency in its provision construing class gifts, albeit one that may lack optimal clarity. See Unif. Probate Code § 2-705(b) (amended 2003) (construing class gifts to children of a third party to include only those children who "lived while a minor as a regular member of the household" of the third party or a close relative).

269. Query also whether the typical decedent would prefer a *twin* sibling over other siblings. Sets of twins often form a unique emotional bond, and sometime even develop a private language (called an *idioglossia*) during childhood. See Ricardo C. Ainslie, *The Psychology of Twinship* 138-47 (1997); Barbara Schave & Janet Ciriello, *Identity and Intimacy in Twins* 105-11 (1983); A.O. Scott, *The Secret Languages of Childhood*, N.Y. Times, May 4, 2003, at 15. A sociobiologist might predict that identical twins, as genetic alter egos, would wish to bequeath twice as much to each other as to other siblings, with whom they share half as much genetic information. See Beckstrom, *supra* note 225, at 258-60 (discussing the problem of half-blooded versus whole-blooded siblings). This matter also ought to be studied empirically.

270. Fellows et al., *supra* note 12, at 24-31, 63-65, 92-95; Spitko, *supra* note 12, at 264-68, 289-349; Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21, 78-87 (1994). Thus far, four jurisdictions have enacted statutes on point. Cal. Fam. Code § 297 (Deering Supp. 2004); Cal. Prob. Code §§ 37, 6401 (Deering Supp. 2004); Haw. Rev. Stat. Ann. §§ 560:2-102, 572C-4, 572C-5 (Michie 1999); 2004 Me. Legis. Serv. 672 (West); Vt. Stat. Ann. tit. 15, § 1204(b) (2002) (by implication). But cf. 2003 N.J. Sess. Law Serv. 246 (West) (creating a domestic partner law that fails to include rights to intestate inheritance).

271. Fellows et al., *supra* note 12, at 35-52, 89; Johnson & Robbennolt, *supra* note 49, at 490-96. For an anecdotal illustration, see for example *Holtz v. Deisz*, 68 P.3d 828, 829-30, 834 (Mont. 2003) (construing a holographic will that bequeathed "the bulk of [testator's] estate" to his nonmarital companion).

272. Fellows et al., *supra* note 12, at 52-65. Once again, those indicia require objective definition to avoid breeding costly litigation. See Brashier, *supra* note 12, at 52-54; Fellows et al., *supra* note 12, at 26. Requiring committed partners to register for the status is one possible solution to the objectivity problem. For a discussion, see T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 Ohio St. L.J. 1513, 1525-28 (1999). All of the existing state statutes take this approach. See *supra* note 270.

Having zeroed in on the problem of commitment beyond marriage, scholars have overlooked a less fashionable but nonetheless significant set of issues concerning the edges of marriage. For purposes of intestate succession, the legal dividing line between bachelorhood and marriage, and between marriage and divorce, are the formal proceedings themselves.<sup>273</sup> Universally taken for granted, these traditional boundaries of affinity may have an implicit social-policy foundation in the context of inheritance defaults. Whether they correspond with probable intent remains a question that no one has thought to raise, let alone investigate. Do couples that have announced their engagement to be married typically wish to bequeath to one another? Do spouses who have permanently separated or filed for divorce typically wish to do so?<sup>274</sup> Effectuation of probable intent might well require lawmakers to acknowledge that subjective affinity, pertinent to the formulation of default rules, begins—and ends—in anticipation of its mandatory legal ramifications.

### CONCLUSION

This Article has sought to rescue the problem of inheritance defaults from splendid isolation. Although not without distinctive features, the problem remains closely akin to that of contractual defaults; many of the axioms worked out within the contracts field easily cross the category barrier, enabling us to administer a dose of analytical rigor to defaulttheorizing within the inheritance field. Just as majoritarian defaults display the virtues of efficiency on the

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273. See *Estate of Carlisle v. Hundoble*, 653 N.W.2d 368, 369-70 (Iowa 2002) (holding that a decree of separate maintenance does not operate to terminate marital inheritance rights); Unif. Probate Code § 2-802 & cmt. (amended 2003).

274. For one probate judge's plea for a provision denying intestacy rights to spouses who have lived apart for "somewhere in the range of three to five years" in order to carry out their respective "presumed intent," see *Estate of Carmona*, N.Y. L.J., May 12, 2000, at 30. In some instances, separation agreements that precede divorce explicitly provide for the loss of inheritance rights, by intestacy or otherwise. See, e.g., *Gustason v. Dean*, 250 P.2d 837, 838-39 (Kan. 1952) (giving effect to such a settlement agreement to override the intestacy statute); see also *Estate of Lahey v. Bianchi*, 91 Cal. Rptr. 2d 30, 32-34 (Ct. App. 1999) (applying a statute denying intestacy rights to a surviving spouse following a court order terminating all marital property rights). In a few states, a spouse who abandons the other spouse forfeits the right to inherit as an heir, but these statutes once again comprise social defaults premised on wrongdoing and hence do not operate reciprocally: The abandoned spouse remains the heir of the abandoning spouse unless the abandoned spouse as well commits "misconduct." *In re Archer's Estate*, 70 A.2d 857, 860 (Pa. 1950); see Ind. Code Ann. § 29-1-2-14 (Michie 2000); N.Y. Est. Powers & Trusts Law § 5-1.2(5) (McKinney 1999); N.C. Gen. Stat. § 31A-1 (2003); 20 Pa. Cons. Stat. Ann. § 2106 (West 1975 & Supp. 2003); Va. Code Ann. § 64.1-16.3 (Michie 2002); *Estate of Fulton*, 619 A.2d 280, 285 (Pa. Super. Ct. 1993); *Estate of Carmona*, N.Y. L.J., May 12, 2000, at 30. Where intent to disinherit a spouse is probable, lawmakers might nevertheless mandate a minimum "forced share" in intestacy, equivalent to the forced share a surviving spouse disinherited under a will can claim (and invariably smaller than a full intestate share). Cf. Browder, *supra* note 31, at 1313.

contractual side, so do they share the same virtues on the donative side. Meanwhile, we have endeavored to see clearly—and through—some of the inheritance scholars' more misty notions, including expressivism. One can only hope this "ism" becomes a "wasm" in short order.<sup>275</sup>

Why have inheritance scholars been more open to social considerations than contract scholars in their respective approaches to the formulation of default rules? More generally, why have the contract scholars' trove of insights concerning this generic problem received so little comparative attention?

Part of the answer may have to do with the relatively greater poignancy of social considerations on the inheritance side, magnifying their capacity to cloud analytical judgment. Implicating as they do family relations and situations that we can all imagine, if not relate to, inheritance policies carry an emotional resonance that more abstract questions about contractual fairness lack. It requires a somewhat austere turn of mind to recognize that the injection of social considerations—the injustice of abandonment for example—into inheritance defaults will produce inefficiency and discriminate between differently-situated benefactors.

But there is more going on here than just that. At the outset of this Article, we speculated that scholars' failure to conceptualize the array of inheritance defaults as a singular issue had obscured the potential relevance of default rule theory, which sprang from such an analytical consolidation in the field of contracts. In a sense, though, this explanation begs the question: Why had inheritance theorists not watched this consolidation occur and pondered it by analogy? In part, their very segregation within a distinct legal category has operated to restrict inheritance scholars' peripheral vision. Although useful in some respects, legal categorization has a perverse and pervasive tendency to confine theory. The ensuing "cross-sterilization of disciplines," as Felix Frankfurter put it, affects all corners of the legal landscape, and the inheritance field, with its barriers and hedges, is no exception.<sup>276</sup>

Yet, theoretical confinement is only the half of it. Because they are contingent, legal categories may also be roped off arbitrarily, for reasons that often have (as Justice Holmes would say) more to do with history than with logic.<sup>277</sup> Inheritance law has long been viewed as adjacent to, or even as a sub-category of, property law. To offer just one example, the American Law Institute chose to address the doctrines of inheritance within its *Restatement of Property*—thereby

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275. To borrow a historian's *bon mot*. John Lukacs, *The Stirrings of History*, Harper's Mag., Aug. 1990, at 41 (ascribing the phrase to an unidentified "English wit").

276. Quoted in David Spiegel, *Peer Review*, The Sci., Sept.-Oct. 1987, at 16, 19.

277. See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

locating them intellectually within that category.<sup>278</sup> In the process, the conceptual space between inheritance law and contract law has expanded, rendering it a less obvious—and hence a neglected—repository of ideas for inheritance scholars.

Considered logically, however, both domains involve transfers of assets between parties, albeit transfers distinguished by that elusive but oh-so-important abstraction, the presence (or absence) of consideration. From the perspective of public policy, these fields are in fact nearly connected.<sup>279</sup> The ready adaptability of contractual default rule theory to inheritance defaults both reflects and illustrates the nearness of that connection. And it is a connection whose utility we have not begun to exhaust.<sup>280</sup>

Thus, the epilogue of our story provides a prologue for others: In all its aspects, inheritance law will benefit from reexamination through the lens of contractarianism.

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278. 1 Page, *supra* note 59, § 1.1, at 1 (“The law of wills . . . is clearly a part of the law of property.”). The Restators were not, however, entirely oblivious to the subject’s contractual nexus. See Restatement (Second) of Prop.: Donative Transfers, at Introduction (1983) (“This part of the Restatement . . . excludes . . . commercial transactions in property, even though some of the property problems dealt with herein may arise in a commercial context as well as in a donative one.”).

279. But for a recent discussion defending the conceptual and policy distinction between the two spheres, see Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 Cal. L. Rev. 821, 840-52 (1997). Cf. Avner Offer, *Between the Gift and the Market: The Economy of Regard*, 50 Econ. Hist. Rev. 450 (1997).

280. Professor John Langbein has already urged that trust law be conceptualized as a branch of contract law (i.e., a third-party beneficiary contract). Langbein, *supra* note 6. Cf. Melanie B. Leslie, *Morals or Markets? Monitoring Trustee Misbehavior* (2004) (unpublished manuscript, on file with author); Henry Hansmann & Ugo Mattei, *The Function of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 469-72 (1998); Sitkoff, *supra* note 6, at 627-34.

## APPENDIX I

In order to model the possible utility of a social default, assume that there are two alternative rules,  $R_p$  being the rule all parties prefer, and  $R_s$  being the socially beneficial rule. These rules can take the form either of a mandatory rule (MRs) or a default rule (DRs or DRp). Now let  $n$  = the number of parties (being individual benefactors or pairs of contracting parties in hypothetical agreement), let  $c$  = the transaction cost of overriding a default rule, let  $V_s$  = the value to society of  $R_s$  per party who conforms to it (assumed to be constant, irrespective of which parties decide to conform), and let  $V_n$  = the value to a given party of implementing the preferred rule (said value varying from party to party, but assuming further that the value of  $R_s$  is zero to all parties). The set of every  $V_n$  will now break down into two subsets,  $V_\alpha$  and  $V_\beta$ , where  $V_\alpha$  = the (varying) value to a given party of implementing  $R_p$  and for whom  $V_\alpha - c > 0$ , hence who would incur a transaction cost to override a DRs, and where  $V_\beta$  = the (varying) value to a given party of implementing  $R_p$  and for whom  $V_\beta - c < 0$ , hence who would *not* incur a transaction cost to override a DRs.

The total value of implementing MRs =  $n(V_s)$ .

The total value of implementing DRp =  $\sum V_\alpha + \sum V_\beta$

The total value of implementing DRs =  $\sum V_\alpha - \alpha(c) + \beta(V_s)$

MRs is optimal if it produces more total value than either DRp or DRs. This is true where  $n(V_s) > \sum V_\alpha + \sum V_\beta$  which simplifies to:

$$V_s > \overline{V_n}$$

and where  $n(V_s) > \sum V_\alpha - \alpha(c) + \beta(V_s)$  which simplifies to:

$$V_s > \overline{V_\alpha} - c$$

DRp is optimal if it produces more total value than either MRs or DRs. This is true where  $\sum V_\alpha + \sum V_\beta > n(V_s)$  which simplifies to:

$$V_s < \overline{V_n}$$

and where  $\sum V_\alpha + \sum V_\beta > \sum V_\alpha - \alpha(c) + \beta(V_s)$  which simplifies to:

$$V_s < \overline{V_\beta} + \frac{\alpha(c)}{\beta}$$

DRs is optimal if it produces more total value than either MRs or DRp. This is true where  $\sum V\alpha - \alpha(c) + \beta(Vs) > n(Vs)$  which simplifies to:

$$Vs < \overline{V\alpha} - c$$

and where  $\sum V\alpha - \alpha(c) + \beta(Vs) > \sum V\alpha + \sum V\beta$  which simplifies to:

$$Vs > \overline{V\beta} + \frac{\alpha(c)}{\beta}$$

or, in combination, where

$$\overline{V\beta} + \frac{\alpha(c)}{\beta} < Vs < \overline{V\alpha} - c$$

Professor Ayres and a collaborator make a related point that implicitly assumes the potential efficiency of social defaults. Intriguing, they argue that lawmakers can potentially increase efficiency by artificially *raising* transaction costs, in order to create the conditions under which sorting will occur.<sup>281</sup> Such manipulation would be relatively easy to achieve in the inheritance realm, for example, by abolishing low-cost holographic wills in jurisdictions that currently permit them.

Professor Ayres's insight can be proven mathematically. Return to our model, and assume initially that  $Vn - c > 0$  for all parties, so that all have a sufficient incentive to opt out of a social default. Then,

The total value of implementing MRs =  $n(Vs)$

The total value of implementing DRp =  $\sum Vn$

The total value of implementing DRs =  $\sum Vn - n(c)$

Under these conditions, MRs is optimal where  $n(Vs) > \sum Vn$ , and DRp is optimal where  $\sum Vn > n(Vs)$ . DRs is never optimal.

Now assume that  $n(Vs) > \sum Vn$ , so that MRs is optimal. If  $c$  becomes a variable, we can contrive to increase  $c$  to a level where some parties ( $\alpha$ ) will continue to have a sufficient incentive to opt out of a social default, but others ( $n - \alpha$ ) no longer will.

For what values of  $c$  is  $n(Vs) < \sum V\alpha - \alpha(c) + (n - \alpha)V_s$ ?

Where:  $c < \overline{V\alpha} - Vs$ . So long as we do not increase  $c$  above this amount, and then switch from MRs to DRs, we increase total wealth.

Now assume instead initially that  $\sum Vn > n(Vs)$  so that DRp is optimal. Once again, if we increase  $c$  and thus trigger sorting, for what value of  $c$  is  $\sum Vn < \sum V\alpha - \alpha(c) + (n - \alpha)V_s$ ?

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281. Ayres & Gertner, *supra* note 2, at 123-25.

$$\text{Where: } c < \overline{V\alpha} + \frac{(n-\alpha)V_s}{\alpha} - \sum \frac{V_n}{\alpha}$$

So long as we do not increase  $c$  above this amount, and then switch from DRp to DRs, we increase total wealth.

Notice finally that  $\alpha$  (and hence  $\overline{V\alpha}$ ) is itself a function of  $c$ . Consequently, as  $c$  increases  $\overline{V\alpha}$  may also increase! We thus observe that there exist, so to say, different sorts of sorts. But the ideal value of  $c$ , yielding the ideal sort, will depend on the varying distributions of  $V\alpha$ 's and hence cannot be assayed under this model.

## APPENDIX II

In order to model the optimal complexity of an inheritance default, assume that the rule concerns an issue that different parties value at a varying level ( $V$ ), that overriding the rule will entail a one-time transaction cost ( $c$ ), and that the information cost of learning the rule ( $i$ ) produces a probability ( $p$ ), expressed as a fraction between 0 and 1, that the default rule corresponds with different parties' preferences. If we can assume that legal complexity enhances  $p$  as it raises  $i$ —in other words, that lawmakers are sound craftsmen—then  $p$  is a function of  $i$  and approaches 1 as  $i$  increases.

If for all parties  $i < c < V$ , and if all parties are perfectly risk averse, then all parties will pay the information cost necessary to learn the rule. All parties will then proceed either to rely on the default rule (if it fits their preference) or to opt out (if it doesn't). The average value of the rule thus equals:

$$p(\bar{V} - i) + (1 - p)(\bar{V} - i - c)$$

which reduces to:

$$\bar{V} - i - c + p(c)$$

$\bar{V}$  (in any one scenario) and  $c$  are fixed. Accordingly, we maximize the average value of the rule at the point where we maximize  $p(c) - i$ .

The level of complexity at which  $p(c) - i$  reaches its maximum obviously varies, depending upon the function of  $p$  and  $i$ . We can, however, determine that the rule becomes optimally complex at some level *below* the point at which  $i$  grows so large that  $i = c$ , because at that point  $p(c) - i \leq 0$ .

Notice finally that our universe of parties could include those who devalue the issue resolved by the default rule to the extent that for them  $V < c$ . These parties will *never* opt out of the rule and accordingly have no incentive to spend  $i$  to learn the rule. So far as they are concerned, the more complex—and hence accurate—the rule, the better off they are, so long as  $V > 0$ . The more numerous they are, the more total value (albeit the sum of small values) they will derive from an extremely complex rule. These are parties whose characteristics are such that, for them, default rule theory has broken down. From their perspective, the default rule is functionally equivalent to a mandatory rule. If these parties predominated, and if a social default would yield greater value per party than their preferred default, then lawmakers would enhance total wealth by imposing the social default. If, however, we assume that effectuating these parties' preference would produce greater value than a social default, then we maximize total wealth by establishing a more



complex rule than otherwise, depending on how many such parties exist relative to the number of parties for whom  $V > c$ .

Assume  $V\alpha > c$  for parties  $\alpha$  whereas  $V\beta < c$  for parties  $\beta$ . The total value derived from the default rule is now

$$\alpha[p(\overline{V\alpha - i}) + (1 - p)(\overline{V\alpha - i - c})] + \beta(p\overline{V\beta})$$

which reduces to

$$\alpha[\overline{V\alpha} + p(c) - i - c] + \beta(p\overline{V\beta})$$

A default rule is optimally complex where  $p$  and  $i$  are such that the value of this equation reaches its maximum.

Specifically in the context of inheritance defaults, however, we may be able to disregard all parties  $\beta$ , in which event an inheritance default is optimally complex when  $p(c) - i$  reaches its maximum, via our previous formula. The reason is simple: Parties for whom  $V < c$  have no incentive to pay  $i$  in order to learn the rule. If no freeriding occurs, so that all (or at least most) parties  $\beta$  never learn the rule that lawmakers might complexify in order to reflect their preferences more accurately, then they derive no value from it *because they die before it takes effect*. The value to any party from an inheritance default flows from the anticipation<sup>282</sup> of knowing how it will operate postmortem. Parties who remain ignorant of the rule accordingly derive no value from it and lawmakers should ignore their preferences.

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282. Value from anticipation is sometimes called *savoring*. Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, in *Choice over Time* 213, 224 (George Loewenstein & Jon Elster eds., 1992).

## *Notes & Observations*