The Property of Death

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A funeral director was asked in a recent radio interview, "What happens . . . if the deceased has left instructions for a very simple funeral, but the survivors insist on something more elaborate?" The funeral director answered, "Well, at a time like that, who are you going to listen to?"†

Who owns death and why do we care? The question of who owns death is implicitly deliberated each time a legal dispute ensues over who can direct the manner of a decedent's burial. There is no definitive legal rule as to who has the right to control the disposal of mortal remains because there is no agreement as to who owns a body after death or whether the cadaver is subject to traditional property rights.† Although most states have probate laws and health codes which authorize a decedent (or in the alternative, a priority list of family members) to direct the

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disposal of mortal remains, litigation persists among battling mourners. This Article examines the proprietary claims which are raised in mortal remains disputes and concludes that the legal system has not adequately addressed the need for decedent autonomy in confronting death and defining family.

An illustration of the present inadequacy in the legal system is the New York case of Betty Brannam v. Edward Robeson Funeral Home, in which a decedent executed a will requesting that his remains be cremated and that his ashes be in the sole control of his executor who was his long-term female companion and the mother of three of his children. Yet, the funeral home had to be legally enjoined from following the contrary burial directions of the decedent’s estranged wife. Upon the death of the decedent, the executor contacted the decedent’s estranged wife to advise her of the decedent’s testamentary wish to be cremated and invited her to participate in making the funeral arrangements. Thereafter, the decedent’s wife surreptitiously had the decedent’s body removed from a hospital morgue and transferred to a funeral home for burial rather than cremation. The executor was reduced to calling all funeral homes in the nearby vicinity in order to locate the decedent’s body. Even though the executor provided the funeral home with a copy of the decedent’s will and his instructions to be cremated and not buried, the funeral home refused to abide by the decedent’s expressed preferences. The difficulty of

2. See Ariz. Rev. Stat. Ann. § 32-1365.01 (West 1996 & Supp. 1998) (“A legally competent adult may prepare a written statement directing the cremation or other lawful disposition of the legally competent adult’s own remains pursuant to § 36-831. The written statement may but need not be part of the legally competent adult’s will.”); Ark. Code Ann. § 20-17-102 (Michie 1991) (allowing an individual to execute a binding declaration governing the final disposition of bodily remains); Cal. Health & Safety Code § 7100 (West 1997 & Supp. 1999) (clarifying that if decedent fails to provide interment instructions, the right to control the disposition of bodily remains devolves to statutory list of family members); S.D. Codified Laws § 34-26-1 (Michie 1997) (asserting that every person has the right to direct the disposition of his or her bodily remains and body parts); 1997 Tex. Sess. Law Serv. 967 (West) (setting forth that a person may provide written directions for the disposition of bodily remains in a will or other written instrument signed and acknowledged by the person).

3. This Article employs the modern academic definition of property as defining relationships among people. See, e.g., Joan Williams, The Rhetoric of Property, 83 Iowa L. Rev. 277, 278 (1998).


5. See Plaintiff’s Verified Petition at 3, Brannam v. Edward Robeson Funeral Home, No. 43141/96 (N.Y. Sup. Ct. Nov. 14, 1996) (unpublished) (copy on file with author). I will use the term “funeral” to broadly encompass the variety of ceremonies and manners for disposal of mortal remains such as burial, cremation, and memorial services.

6. See id. at 4.

7. See id.
the situation was only compounded when the decedent’s wife physically barred the executor and the decedent’s three children from the wake ceremony. Despite the existence of an executed will with explicit cremation instructions and a clear statutory right for decedents to direct the disposal of their remains by will, the executor was compelled to litigate the matter of control of the decedent’s mortal remains. It was only with a hard fought court order that the funeral home complied with the decedent’s wishes. Given the inherent time constraints and emotional upheaval attached to burial arrangements, few people would similarly seek to enforce a testator’s burial preferences with a court order.

The refusal of the funeral home and the decedent’s estranged wife to respect the testamentary wishes of the decedent exemplifies an approach to death contrary to that explicitly propagated by the law of wills. Specifically, funeral homes generally maintain a familial approach to death which focuses upon the needs of the biological family and spouse rather than upon the articulated preferences of a testator. The familial approach to death can conflict with the individualistic focus of trusts and estates doctrine which values the autonomy of the individual. This conflict is particularly demonstrated by recent state legislative battles over mortal remains bills. Mortal remains legislation would permit a decedent to delegate the control over his or her mortal remains to a proxy. Such bills have been enacted in Oklahoma, Oregon, and Texas, and are

8. See id.
9. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 1-2.19(a) (McKinney 1998) ("A will is an oral declaration or written instrument . . . whereby a person . . . disposes of his body or any part thereof . . . ").
11. Mortal remains bills have been proposed because the law of wills has been viewed as insufficient to ensure that the burial wishes of a decedent will be carried out. Although probate codes authorize the placement of burial instructions in a will, the survivors of a decedent may not consult the contents of the will until after the funeral has been conducted and the bodily remains disposed of. Furthermore, funeral homes are often unsure as to whether they should respect the burial instructions of a will if the will has not yet been probated, even though probate proceedings are not required for burial instructions and cannot be pragmatically concluded before the body must be disposed of. See infra notes 270-75 and accompanying text.
12. See Okla. STAT. ANN. tit. 21, § 1151(B) (West 1983 & Supp. 1999) ("A person may assign the right to direct the manner in which his or her body shall be disposed of after death by executing a sworn affidavit stating the assignment of the right and the name of the person or persons to whom the right has been assigned.").
13. See Or. REV. STAT. § 97.130(3) (1997) ("The decedent or any person authorized in subsection (2) of this section to direct the manner of disposition of the decedent's remains may delegate such authority to any person 18 years of age or older. Such delegation shall be made by completion of the written instrument described in subsection (7) of this section.").
under consideration in New York.\textsuperscript{15} Opposition to the mortal remains proxy bills has been rooted in concerns that the legislation is not "family friendly" because the proposed legislation will permit any competent adult to be named a proxy. Opponents assert that the naming of an unrelated proxy could hamper the ability of biological family members and spouses to work through their grief, as this process is directly related to their involvement in the rituals that surround the disposition of mortal remains.\textsuperscript{16}

At issue is a conflict between the possessory claims and sentiments of biological family members\textsuperscript{17} based on their status as family members with a decedent's contrasting definitions of what a family is. The instant study of the mortal remains context reveals that this same conflict is more generally present in the law of wills. In fact, the mortal remains proxy debate is a useful lens for elaborating the tension between the status of biological family members and the autonomy of the decedent evident in the law of wills. Specifically, the family-decedent conflict inherent in trusts and estates doctrine can often be obscured by a court's tangible concern with ensuring financial support to family members who have depended upon the decedent or assisted him or her accumulate the probate assets.\textsuperscript{18} In the disposal of mortal remains there is no such con-

\begin{itemize}
\item \textsuperscript{14} See Tex. Health & Safety Code Ann. § 711.002(a) (West 1997 & Supp. 1999) (allowing a decedent to designate in a signed written instrument a person with the right to control the disposition of mortal remains).
\item \textsuperscript{15} See S. 1437, 220th Leg. (N.Y. 1997); A. 7556, 220th Leg. (N.Y. 1997).
\item \textsuperscript{16} See Memorandum of Opposition to S. 1437, 221st Legis. Sess. (N.Y. 1997) by the NYS Funeral Directors Association (Feb. 7, 1997). Similarly, the N.Y. Hospital Association opposes the legislation for fear it would disrupt the priority list of family members who can consent to the donation of body parts for organ transplantation. See N.Y. Pub. Health Law § 4301 (McKinney 1985 & Supp. 1999). Yet, such a concern is easily resolved by amending the organ donation lists to include those persons named in mortal remains proxy designations.
\item \textsuperscript{17} I will use the term biological family to contrast the more expansive sense of family which an individual determines for himself or herself from a broader base of persons. But the term biological family will encompass those persons who are not genetically related to a decedent yet are viewed as family by probate codes, such as spouses and adopted children. I purposely refrain from using the alternative term "traditional family" in order to avoid engaging in the fiction that families of choice are a recent novelty. Although I shall elaborate in Part II.B. the ways in which the law has begun to recognize self-defined families of choice, this is distinct from viewing such families as without a historical framework.
\item \textsuperscript{18} See Gary Spitko, Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. REV. 275, 279 (1999) ("The public policy concern for the financial security and fair treatment of spouse and children, and their belief that most property owners probably intend to provide for their spouses and lineal descendants, create a presumption in favor of the family."); Melanie B. Leslie, Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract, 77 N.C. L. REV. 551, 619-35 (1999) (elaborating the ways in which family members can facilitate a decedent's accumulation of property).
\end{itemize}
cern with ensuring financial support, and yet the bias favoring the preferences of biological family members persists. Accordingly, an examination of the mortal remains proxy debate permits an investigation into the nature of the biological family bias generally present in the law of wills without the obfuscation of monetary and support issues that enter into other aspects of the trusts and estates practice. In short, the mortal remains context is an instructive paradigm of the problematic family-decedent tension in the law of wills. This Article concludes that the family-decedent tension can be alleviated with a deeper understanding of the importance of decedent autonomy in coming to terms with death and in determining who is family beyond the confines of biological ties.

In Part I, I set forth the law of wills’ explicit doctrinal emphasis upon an individual-centered approach to death and death transmissions and contrast it with its implicit but predominant concern with the status of a decedent’s biological family. Part II delineates the health law and family law trends which should inform efforts to resolve the doctrinal tension between respect for individual autonomy and concern with the family in trusts and estates. Specifically, the evolving changes in attitudes toward death and the definition of the family, support the law of wills’ doctrinal focus upon the individual. Part III concludes by demonstrating how mortal remains legislation is a mechanism for modernizing the practice of trusts and estates to engage the changing approach to death and definitions of family and simultaneously to address the individual-family dichotomy in a more nuanced manner by employing a pragmatic view of autonomy.

I. DOCTRINAL TENSION IN TRUSTS AND ESTATES APPROACH TO MORTAL REMAINS

The debate over mortal remains legislation highlights the underlying doctrinal tension in the law of trusts and estates between enforcing the wishes of an individual or those wishes of surviving family members. In particular, the trust and estates freedom of testation principle is in tension with the tendency of probate courts to favor preferences of biological family members in deference to their status as biological family members. The tension between individualism and family status is one which mortal remains legislation can begin to alleviate.
A. Focus on the Individual

That the primary obligation of Surrogates' Courts is to effectuate the expressed wishes of a testator insofar as this process involves no infringement of positive rules of law, is axiomatic. 19

The law of wills focuses upon the individual to provide a decedent with autonomy in keeping with the individualism of the Western concept of property 20 and the individualistic philosophy of life that forms the foundation of the U.S. liberal democracy. 21 To live as a self-governing individual is the essence of the value of autonomy, so that to be autonomous is the "core of a valuable human existence." 22 Accordingly, autonomy is the foundation for many rights to control one's life and one's possessions, including the law of wills. 23 In fact, the freedom of testation is a fundamental value in the law of wills 24 because it accords with the strong human desire to exert control over one's own property. 25 By law,
complete freedom of testation is permitted except to the extent that there is an important public policy concern which should constrain it.26

As fundamental as the concept of autonomy is to law generally and to the law of wills specifically, it should be noted that autonomy is primarily a Western value which is not without its critique.27 Critical Legal Studies scholars have observed that the systemic focus on individual autonomy is one of the main impediments to egalitarian social reforms.28 Similarly, Rawl's conception of justice cautions against valuing autonomy so highly that society risks "a mere collision of self-righteous wills."29

A heroic pursuit of autonomy, particularly if widespread throughout a society, is understandably thought to jeopardize communal values, to disturb the society's continuities with its past, and to foster individual life-styles in which the idea of doing one's duty has no prominence.30

For instance, in the context of tort law, legal theorist Leslie Bender argues that the "no duty to rescue" rule places too high a premium on the abstract value of personal autonomy and thereby discounts the relational

which interferes seriously with the need people have to do something about death, or the almost universal human desire to leave lessons and symbols and bits of power behind—especially to our children and their surrogates—when we die.

Thomas L. Shaffer, Death Property and Ideals, in DEATH, TAXES AND FAMILY PROPERTY 26, 35 (Edward C. Halbach, Jr. ed., 1977). But see Williams, supra note 3, at 278-82 (asserting that the view of property as mandating exclusive control has only become "common sense" because of a theoretical entrenchment).

26. See JOHN STUART MILL, ON LIBERTY 9 (1859) (Elizabeth Rapaport ed., Hackett Publ'g Co., Inc. 1978) (characterizing the only valid constraint on an individual's autonomy as harm to the collective). Some public policy concerns that constrain a property owner's freedom of testation are creditors' claims, estate taxes, probate costs, and the financial support of a surviving spouse. See SIMES, supra note 25, at 5 & 21. Even the testamentary freedom restriction of mortmain statutes has been abolished by the majority of states. See Shirley Norwood Jones, The Demise of Mortmain in the United States, 12 MISS. C. L. REV. 407, 410 (1992). Mortmain statutes restricted testators from devising a large part of their estates to charitable organizations shortly before their deaths and instead permitted heirs to receive those bequests instead. See id. at 408.

27. See JOSEPH H. KUPFER, AUTONOMY AND SOCIAL INTERACTION 1 (1990) ("Nevertheless, it is good to remember that autonomy is a distinctively Western value and one that has emerged only in the last few hundred years of 'Modern' philosophy and commitment."); Lawrence M. Friedman, The Law of Succession in Social Perspective, in DEATH, TAXES AND FAMILY PROPERTY 9, 12 (Edward C. Halbach, Jr. ed., 1977) (explaining that freedom of testation is a key element in Western societies).

28. See DIANA T. MEYERS, SELF, SOCIETY AND PERSONAL CHOICE xii-xiii (1989) (asserting that theorists have condemned autonomy as excusing egotism and "disguising the perpetuation of wrongful forms of social and economic domination"); see also MARTHA CHAMallas, INTRODUCTION TO FEMINIST LEGAL THEORY 73, 74 (1999) (emphasizing that the legal system's focus upon individual rights makes it difficult for courts to recognize the rights of social groups and communities).

30. LAWRENCE HAWORTH, AUTONOMY 200 (1986).
injuries suffered.\textsuperscript{31} Robin West views the autonomy principle as inherently masculine and thus inapplicable to the experiences of women.\textsuperscript{32} West derived her gender-based analysis of the autonomy concept from the empirical research of developmental psychologist Carol Gilligan, which suggested that women primarily value an ethic of care based on the importance of nurturing relationships and connections to others.\textsuperscript{33} Gilligan's research suggested that men, in contrast to women, primarily value an ethic of justice based upon the importance of individual rights—hence her thesis that women speak in a "different voice" than men.\textsuperscript{34} At the same time, Gilligan premised her analysis with the proviso that the gendered associations were not absolute and that the contrasts were presented to demonstrate the distinction between two modes of thought rather than to represent generalizations about either sex.\textsuperscript{35} In fact, Gilligan specifically noted that there is an interplay of both voices in each sex.\textsuperscript{36} Regardless of whether one labels the two voices male or female, the critique of autonomy as incompatible with concern for others remains.\textsuperscript{37}

The critique of autonomy as being in contravention to communal concerns hails from an idealization of autonomy that can never comport

31. See Leslie Bender, \textit{A Lawyer's Primer on Feminist Theory and Tort}, 38 J. LEGAL EDUC. 3, 33-36 (1988) (proposing that tort law be reconceptualized to provide damages to persons who are "interconnected" with others and whose well-being substantially affects the lives of others, such as the stranger in the no-duty-to-rescue rule).

32. See Robin West, \textit{Jurisprudence and Gender}, 55 U. CHI. L. REV. 1 (1988) (arguing that women's values of intimacy and connection to others as developed by their biological connections to others are not incorporated into contemporary jurisprudence's emphasis upon individual autonomy and freedom).

33. See CAROL GILLIGAN, \textit{IN A DIFFERENT VOICE} 98 (1982).

34. See id. at 21-23, 71.

35. See id. at 2 ("No claims are made about the origins of the differences described or their distribution in a wider population, across cultures, or through time.").

36. See id.

37. See id. at 71. Gilligan's empirical associations of men valuing autonomy and women valuing intimacy have been challenged as inexact. See LAWRENCE KOHLBERG ET AL., \textit{MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS} 17-29, 121-50 (1983). Feminist scholars also criticize Gilligan's gender-based analysis. See Clare Dalton, \textit{Where We Stand: Observations on the Situation of Feminist Legal Thought}, 3 BERKELEY WOMEN'S L.J. 1, 10 (1987) (arguing that women are nurturers because they are often forced to be not because they choose to be); Isabel Marcus et al., \textit{Feminist Discourse, Moral Values, and the Law—A Conversation}, 34 BUFF. L. REV. 11, 27 (1985) (paraphrasing Catherine A. MacKinnon who argues that women who live under conditions of subordination have never had the freedom to develop their own authentic voice); Joan C. Williams, \textit{Deconstructing Gender}, 87 MICH. L. REV. 797, 807 (1989) (clarifying that Gilligan's portrait of women as nurturers does not accurately describe all women but instead updates old stereotypes of women).
with the actualization of autonomy. Because it is the rare person who can live in isolation and without the influence of any other individual, the actualization of autonomy often operates in concert with consideration for other people. It is perhaps the broad fashion in which the term autonomy can be used which accounts for the decontextualization of the concept from the reality of socialization and community. But whether the focus is upon political autonomy, moral autonomy, legal autonomy or personal autonomy, there are ways in which society influences the exercise of each. Perhaps when the abstraction of autonomy is conflated with egotistical selfishness, theorists feel compelled to discount the value of autonomy and emphasize a communal-care ethic to replace it. Unfortunately, entreaties for emphasizing concern with others can be viewed as a form of communitarianism that can stifle diversity and individuality and stultify personal growth with an ethic of selflessness. The concept of autonomy employed in this Article envisions social interaction as shaping autonomy and autonomy as fostering voluntary reciprocal dependency and care. This "pragmatic" conception of autonomy contemplates individuals being influenced by a community of persons with whom they have chosen to form interdependent connections rather than proceeding as atomistic entities or completely selfless dependents.

38. See GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 7-8 (1988) ("There should be no empirically grounded or theoretically derived knowledge which makes it impossible or extremely unlikely that anybody ever has been, or could be, autonomous.").

39. See MEYERS, supra note 28, at 135 ("I have argued that our understanding of personal autonomy is not advanced by positing an innate or self-generated inner self which autonomous action must express. Not only is socialization inescapable; it is also beneficial. Thus, inquiry into the nature of autonomy is seriously impeded when the true self is taken to be an asocial core.").

40. See DWORKIN, supra note 38, at 10 (opining that autonomy is used in such a broad fashion that it is sometimes used as the equivalent for liberty, sovereignty, dignity, self-assertion, etc.).

41. See id. at 10-12 (detailing the various conceptions of autonomy).

42. See MEYERS, supra note 28, at 17 (arguing that objections to autonomy as the province of selfishness, because of its rejection of self-sacrificial attendance upon others, overlooks the way in which moral deliberation takes into account one's own needs and desires as well as those of others); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION 30-78 (1984); JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 106-08 (1993).

43. See TRONTO, supra note 42, at 161; see also BEROFSKY, supra note 22, at 6 (asserting that communitarianism fails "to take seriously the actual predicament of individuals who both live in many disparate communities and participate as well in a global environment which expands our awareness of life styles and ideology").

44. See KUPFER, supra note 27 at 5 (explaining the "reciprocity between autonomy and social interactions"); MEYERS, supra note 28, at 85 (explaining how autonomy can foster a form of affection compatible with reciprocal dependency and care).

45. See DWORKIN, supra note 38, at 32 ("And, if I am to recognize others as persons, as independent centers of consciousness, as them, then there is a requirement that I give weight to the way they define and value the world in deciding how I should act.").
tonomy need not be an "all-or-nothing" concept that excludes concerns with group harms.\textsuperscript{46} Pragmatic autonomy is not a proposed compromise of the autonomy ideal in order to meet real world constraints, but an acknowledgment that absolute individualism is not a laudable goal to begin with.\textsuperscript{47}

In articulating what I term the pragmatic conception of autonomy that balances the needs of the individual with his or her community of choice, the tensions in the law of wills' idealization of autonomy can be revealed.\textsuperscript{48} That said, pragmatic autonomy does not countenance a paternalistic imposition of moral judgments upon the individual.\textsuperscript{49} The important feature of traditional autonomy as implemented by law is its protection of an individual's ability to form values which conflict with those held by the state.\textsuperscript{50} For example, in the trusts and estates context, the freedom of testation principle values the right of a testator to completely disinherit even his or her own adult children.\textsuperscript{51} The freedom of testation's right to disinherit one's children is what may inspire some to condemn

\textsuperscript{46} Id. at 9.

\textsuperscript{47} This is in contrast to traditional autonomy as articulated by Kant which idealizes the individual as his own moral agent. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Mary Gregor trans., 1991).

\textsuperscript{48} I employ the term pragmatic autonomy to describe the communal facets of autonomy theories articulated by philosophers such as Gerald Dworkin, Lawrence Haworth and Robert Young. See DWORKIN, supra note 38, at 7-9 (explaining that autonomy as a theory requires the understanding that an individual's values will be influenced by others); HAWORTH, supra note 30, at 207 ("It cannot be said that in every case where a trade-off is required communal values should give way to pursuit of autonomy; nor can it be said that the opposite should occur.")\textsuperscript{52}; ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY 110 (1986) ("Individualism neglects the social situation of the individual, and . . . neglects the concerns of individuals in the round.").

\textsuperscript{49} See YOUNG, supra note 48, at 64 (arguing that sometimes strong paternalism is needed in order to preserve the ideal of autonomy by seeking to protect individuals from harming their own interests). Young's advocacy of strong paternalism seems to presume a homogeneous society in which the best interests of individuals can be accurately determined and then protected with a constraint on autonomy. In contrast, the existence of a heterogeneous society in tandem with systems of subordination makes paternalistic constraints on autonomy a concern to subordinated groups who have frequently been denied rights to individual autonomy. See CHAMALLAS, supra note 28, at 77 ("Particularly since women have traditionally been denied rights to individual autonomy in the family because of power exercised by fathers and husbands, they have something to gain from insisting on individual rights.").

\textsuperscript{50} See SIMES, supra note 25, at 25.

\textsuperscript{51} See Langbein, supra note 24, at 2042 (noting the liberality of the U.S. law of wills' freedom of testation in contrast to European countries that constrain testamentary freedom with imposed obligations to a decedent's children). The freedom of testation critique also disregards the financial support protections for minor children embedded in most probate codes. See, e.g., UNIF. PROBATE CODE §§ 2-301-2-404 (amended 1993). But see Deborah A. Batts, I Didn't Ask to Be Born: The American Law of Diseninheritance and a Proposal for Change to a System of Protected Inheritance, 41 HASTINGS L.J. 1197, 1267 (1990) (arguing for inheritance protection of adult and minor children).
the individualistic focus of the doctrine as insufficiently concerned with one’s connections to others. Yet such a critique of the law of wills’ embodiment of autonomy fails to appreciate the way in which a testator’s ability to disinherit biological family members can facilitate a testator’s acknowledgment of his or her more intimate connections to others. Thus, the concern with the freedom of testation doctrine should be more accurately directed toward the way in which the probate courts disregard the doctrine to promote the interests of biological families over a testator’s “family of choice.” In doing so, probate courts conceive of freedom of testation as promoting a traditional autonomy for “rugged individualism” which thereby motivates their constraint of the doctrine with considerations of biological family and spouses. If freedom of testation were instead to incorporate the pragmatic vision of autonomy, probate courts might be less inclined to override the preferences of individual testators. This is because the communal aspects of pragmatic autonomy would enable probate courts to see that biological family members and spouses are not the only connections worth nurturing and acknowledging in a testamentary fashion. An application of the pragmatic conception of autonomy in Part III of this Article demonstrates the manner in which testamentary freedom can harmonize with communal values.

The context of mortal remains is particularly useful for highlighting doctrinal inconsistencies in the enforcement of the freedom of testation principle. This is because the trust and estates cannon’s commitment to freedom of testation is more clearly put to the test when the benefits of protecting autonomy are least tangible to the testator. Although the Romans developed a modern and complete theory of testation which specif-

52. See Friedman, supra note 27, at 15 (theorizing that the ease with which one may disinherit his or her own children is perhaps reflective of the latitude of American law with respect to freedom of testation). Cf. Trent J. Thornley, Note, The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence, 71 Ind. L.J. 513, 516 (1996) (“The standard of undue influence would more closely conform with human intuition and experience if it were grounded in part on an alternative theoretical framework to that of autonomy, namely, the ethic of care.”).

53. See Friedman, supra note 27, at 16 (explaining that freedom of testation is constrained by the imposition of community norms). Part II of this Article will use the terms “functional family” and “family of affinity” explicated in family law cases interchangeably with the more expansive term “family of choice.” Elvia R. Arriola, Law and the Family of Choice and Need, 35 U. Louisville J. Fam. L. 691, 691-93 (1996-97) (explaining that a “family of choice” is not necessarily one’s biological family-of-origin but instead those persons who one turns to for emotional, physical and spiritual support to survive in the world).

54. Dworkin, supra note 38, at 28 (identifying theorists’ conflation of autonomy with rugged individualism).

55. See infra notes 260-61 and accompanying text for a discussion of policy justifications for enforcing freedom of testation.
ically included the right of the deceased to direct his burial as he chose by testament, early English common law did not recognize property interest in a dead body and thus forbade a decedent to dispose of his body by will, and any testamentary instructions were without probative effect. In contrast, even though probate courts in the United States universally recognize that there is no property in a dead body in a commercial sense, the courts do respect a decedent’s right to assert burial preferences and to otherwise dispose of his or her own body by will as part of the freedom of testation. But as the next section will detail, a kind of familial property right in dead bodies has been recognized for burial purposes.


57. See Williams v. Williams, 20 Ch. D. 659 (1882). One jurist attributes the English resistance to abide by a decedent’s testamentary burial instructions to the early English reluctance to countenance cremation preferences.

The case grew out of the disinterment and cremation of the body by a stranger to the family, under written directions of the deceased; and with great respect for the tribunal I cannot help thinking that the decision was unconsciously influenced by the English conservatism in regard to burial, and the attendant reluctance to countenance in any way the innovation of burning. Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. 1904). This theory accords with the general 17th century English practice of providing directions for a funeral in a will before the advent of cremation in England. See E.A.J. Honigmann, The Second-Best Bed, in THE GRIM READER: WRITINGS ON DEATH, DYING AND LIVING ON 330, 331 (Maura Spiegel & Richard Tristman eds., 1997) (explaining that after the preamble of a gentleman’s will there were often directions for the funeral).

58. See N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (McKinney 1998); O’Donnell v. Slack, 55 P. 906, 907 (Cal. 1899) (holding that if a decedent makes a testamentary disposition of his body the probate court must execute the will in that regard because an individual has sufficient proprietary interest in his body to make binding testamentary disposition of it); Holland v. Metallious, 198 A.2d 654, 656 (N.H. 1964) (stating that decedent’s funeral and burial instructions by will or otherwise should be preferred to opposing wishes of survivors); In re Estate of Moyer, 577 P.2d 108, 110 (Utah 1978) (explaining that interest of a person in his body permits binding disposition of it as long as within the limits of reason and decency); Wood v. E.R. Butterworth & Sons, 118 P. 212, 214 (Wash. 1911) (finding that burial wishes of decedent should be given controlling force); PERCIVAL E. JACKSON, THE LAW OF CADAVERS 41-55 (2d ed. 1950) (asserting that because a dead body is not property in the commercial sense, it is not part of the assets of an estate but its disposition may be affected by the provision of the will).

B. Focus on the Family

The family preference has led states to erect barriers to donative freedom.\textsuperscript{59}

Probate courts in many instances have minimized the importance of the doctrine of testamentary freedom with respect to directions for the disposal of mortal remains to gratify the contrary burial wishes of next of kin.\textsuperscript{60} For instance, even though the will of Grace Metalious (author of the novel \textit{Peyton Place}) specifically forbade funeral services, the court refused to enjoin the funeral services preferred by the family.\textsuperscript{61} The disregard for the doctrine of testamentary freedom is heightened when a testator favors persons other than biological family members and spouses. Legal conflicts often ensue because there is no clearly governing rule as to who has the right to make funeral arrangements. Not surprisingly, funerals are fraught with potential conflicts between biological families and families of choice.\textsuperscript{62}

For example, traditional and non-traditional family members may suppress confrontations that will surface only after a death. The traditional family may want a religious ceremony with family members only. The life partner in a non-traditional family, on the other hand, may want a service that is non-religious and includes lovers and friends (perhaps even excluding family who neglected the deceased because of objections to a "chosen lifestyle").\textsuperscript{63}

\textsuperscript{59} Fellows, \textit{supra} note 20, at 640.

\textsuperscript{60} See \textit{In re Baskin's Appeal From Probate}, 484 A.2d 934, 939 (Conn. 1984) ("The wishes of a decedent as to the disposition of his body, except to the limited extent that they have been recognized in permitting donations for anatomical purposes . . . are similarly not controlling, though they may deserve consideration under some circumstances."); Rosenblum v. New Mt. Sinai Cemetery Assoc., 481 S.W.2d 593, 595 (Mo. Ct. App. 1972) ("How far the desires of decedent should prevail against those of a surviving spouse depends upon the particular circumstances of each case."); McEntee v. Bonacum, 92 N.W. 633, 634 (Neb. 1902) ("That a dying request by a decedent as to the disposition of his remains is obligatory upon his next of kin, we very much doubt."); Burnett v. Surratt, 67 S.W.2d 1041, 1042 (Tex. Civ. App. 1934) (holding that a surviving spouse's burial preferences are paramount to those of decedent except where spouse has forfeited right to control burial due to estrangement, divorce, or separation at which point decedent's wishes are entitled to a respectful consideration by the court).

\textsuperscript{61} See Holland v. Metalious, 198 A.2d 654, 656 (N.H. 1964) (concluding that since testamentary direction forbidding funeral was coupled with donation of body for scientific use which was rejected by the designated medical schools, it was not unreasonable to accede to the wishes of the surviving family).

\textsuperscript{62} See Wojcik, \textit{supra} note 1, at 423; Mary L. Bonauto, \textit{Advising Non-Traditional Families: A General Introduction}, 40 Boston B.J. 10, 12 (Sept/Oct. 1996) ("Family members, especially those unhappy or surprised about learning a loved one was gay or lesbian, may challenge a will based on fraud, duress, undue influence or mental incapacity of the decedent.").

\textsuperscript{63} Wojcik, \textit{supra} note 1, at 422-23.
Estate planners with clients who foresee such conflicts often advise their clients to purchase a funeral plan in order to dissuade biological family members from challenging their burial preferences. Yet this estate planning technique does not directly address the failure of courts to enforce the freedom of testation doctrine for those testators who have not purchased a prepaid funeral plan or for those families with sufficient resources who remain undeterred by a prepaid plan. For instance, although two life partners in Pennsylvania executed wills designating their respective burial wishes and the decedent had purchased a burial plot, the survivor was initially unable to implement the will’s instructions to have the tombstone read “beloved life partner” because the cemetery officials chose to honor contrary instructions from the testator’s parents. These conflicts highlight the inherent tension in the law of wills between the doctrine’s explicit focus upon the individual’s autonomous right of testation, and its implicit concern with the status of a decedent’s biological family. The conflict is doctrinally depicted as the balancing of individual autonomy with presumed community welfare needs. I charac-

64. See Rhonda R. Rivera, Lawyers, Clients and AIDS: Some Notes From the Trenches, 49 Ohio St. L.J. 883, 901 (1989) (“To be blunt, I have found that families who wish to impose their wishes as to funeral arrangements are often unwilling to overturn prepaid plans and thus become financially liable for new plans. In other words, the biological family is presented with a fait accompli.”). Indeed, there has been a growing trend in the use of prepaid funerals. See Leonard Sloane, Your Money: Looking Ahead at Funerals, N.Y. Times, May 31, 1986, at A1.

My spouse, Alexah, and I set up a file with a funeral home so that there would be some record of our relationship and our wishes. We distributed copies of our directives regarding medical care, disposition of our bodies and services to our priest, doctor and select family members. We knew that if Alexah died, her family of origin, from whom she is estranged would think nothing of usurping my prerogative as her life partner, confiscating her body and giving her a burial consistent with their religious tradition, which is expressly against her wishes.


66. See Lambda Legal Defense and Education Fund, Press Release, Lambda Wins Agreement for Headstone at Lesbian's Unmarked Grave (Sept. 5, 1997) (visited Sept. 30, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=60> (discussing Barone v. Har Jehuda Cemetery, No. 97-2599 (E.D. Pa. filed Apr. 15, 1997) a case alleging in the complaint that the cemetery had breached its contract with surviving partner who purchased burial plot to carry out the decedent’s burial wishes as designated in the will). The case later was settled out of court and the cemetery agreed to install the headstone as designated by the decedent. See id.

67. See Fellows, supra note 20, at 658 n.1. This tension between family focus and individual intent is also evident in the ethics of trusts and estates practice in which the lawyer is hired by one person but called upon to effectively represent the family in the preservation of assets over many generations. See Roberta Cooper Ramo, Musings of a Family Lawyer, THE PROB. LAW., Summer
terize the doctrinal concern with the needs of the biological family as implicit rather than explicit because of the manner in which the majority of probate codes (with the exception of Louisiana) explicitly permit disinheritance of all family except for a surviving spouse. Even the statutory protections against disinheritance provided for a surviving spouse can be waived and otherwise circumvented under specific circumstances. Thus, the overt doctrinal concerns for the biological family are limited to the financial support of certain spouses and some limited financial support for children under the age of eighteen. In contrast, the doctrinal commitment to an individual decedent’s autonomy is explicitly encoded in the broad based tenet of freedom of testation.

1996, at 12.

68. LA. CIV. CODE ANN. art. 1493 (West 1997). Yet even the special treatment for children in Louisiana has been severely curtailed with a 1995 amendment to the forced share statute which limited forced share protection to children under the age of twenty-one and otherwise incapacitated adult children. The 1995 amendment effectively transformed the forced share statute into a support provision for minor children which exists in most other jurisdictions as well. One commentator concludes that the forced share statute was amended to exclude adult children generally because of societal changes in the constitution of the family and the growth of individualism. See Cynthia Samuel, "Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage," 12 Tul. Eur. & Civ. L.F. 183, 184 (1997) ("[D]ivorce and remarriage had caused many parents to become estranged from the children of their earlier marriages."). It should also be noted that Louisiana’s forced heirship for a decedent’s children can be circumvented for just cause with the “disinherition” method. LA. CIV. CODE ANN. art. 1617 (West 1997).


70. See McGovern, Jr. et al., supra note 24, at §§ 3.9 & 3.10 (outlining delineation of waiver provisions in elective share statutes and community property jurisdictions). See, e.g., UNIF. PROBATE CODE § 2-213 (amended 1993) 8 U.L.A. 129 (1998); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(e) (McKinney 1998) (asserting that spouses can waive their right to an elective share). Furthermore, protection for the surviving spouse can be circumvented with the use of certain nonprobate transfers. See McGovern, Jr. et al., supra note 24, at § 3.8; see, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b) (McKinney 1998) (omitting life insurance policies from list of testamentary substitutes included in the augmented probate estate). Some elective share statutes disqualify spouses from exercising a forced share against the estate if the marriage was void as bigamous, incestuous or if the spouse abandoned or failed to support the decedent when obliged to do so. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 1998) (setting forth surviving spouse grounds for disqualification from elective share entitlement).

71. See ATKINSON, supra note 56, at § 34 (noting that most jurisdictions have statutory provisions that pass certain designated property and a nominal cash allowance to a spouse and minor children apart from the provisions of the will or the spouse’s elective share and community property). See, e.g., UNIF. PROBATE CODE § 2-401 (amended 1993) 8 U.L.A. 139 (1998); N.Y. EST. POWERS & TRUSTS LAW § 5-3.1 (McKinney 1998) (recognizing limited family allowance).

72. See In re Scheck’s Estate, 14 N.Y.S.2d 946, 952 (Sup. Ct. 1939) (“That the primary obligation of Surrogates Courts is to effectuate the expressed wishes of a testator insofar as this process involves no infringement of positive rules of law, is axiomatic.”).
Nevertheless, some commentators perceive the principle of freedom of testation as hollow in that a probate court validates wills on the basis of whether the dispositions in the will are bequeathed to the "natural" bounty of the testator's affections, and not on whether all the formal testamentary requirements have been met.

Many courts do not exalt testamentary freedom above all other principles [instead they] impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse or persons related by blood to the testator.

Such commentators view the rules of strict will formalities, undue influence, duress, and fraud as not determinative of whether a will should be probated or not. Rather, the courts' sense of "moral duty to family" is understood to determine the outcome of probate. A five year study of undue influence challenges litigated in various U.S. jurisdictions revealed that courts were much more likely to honor testamentary intent when the will provided for biological family members and spouses as opposed to non-relatives. The study concluded that the implicit "presumption in favor of family members generally can be overcome only where the court views the testator's reason for disinheriting relatives as morally ac-
ceptable." The implications of the study are expansive when one considers that will challenges are primarily brought by adult biological children who have been effectively disinherited.

The public policy concern for the financial security of biological family members and the doctrinal belief that most property owners usually intend to provide for their spouses and natural family creates a predisposition toward favoring family. Because of this implicit doctrinal presumption, courts tend to require a substantial showing why the preference for spouses and biological family should not determine a probate outcome. Even probate codes are constructed to prefer the biological family. For instance, in the construction of antilapse statutes, state legislatures typically make close biological family members the substitute takers when a testator's bequest fails.

79. Leslie, supra note 74, at 257. "[R]ather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families." Ray D. Madoff, Unmasking Undue Influence, 81 MINN. L. REV. 571, 576 (1997). It should be noted though that the undue influence doctrine can appropriately preserve freedom of testation in situations where elderly testators are institutionalized in nursing homes and thus more vulnerable to coercive influence. See, e.g., Hassell v. Pruner, 286 S.W.2d 266, 270 (Tex. Civ. App. 1956) (finding undue influence committed by convalescent home caretaker). But see Jeffrey P. Rosenfeld, Will Contests: Legacies of Aging and Social Change, in INHERITANCE AND WEALTH IN AMERICA 173, 175 & 179-81 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (observing the increase in the number of elderly persons who form close attachments with nursing home workers and other non-family members and choose to provide them with testamentary bequests).

80. See Langbein, supra note 24, at 2042 (noting that the U.S. probate system's failure to provide a forced share for children results in disinherited children being "the prototypical plaintiffs" in capacity litigation). Langbein asserts that there would be a decrease in will challenges if probate laws were reformed to provide children with a forced share, to abolish the right to jury trial of will challenges, to mandate losing plaintiffs to pay for all attorney's fees, and to provide for authorization of authenticated wills. See id. at 2042-44.

81. See Fellows, supra note 20, at 621. But see CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 212 (1987) ("The biographies of the contemporary superrich suggest that desire to deprive the government of its estate tax revenue rather than love of lineage motivates a larger share of complex estate planning schemes."); John H. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 MICH. L. REV. 722, 723 (1988) (arguing that longer life-spans and the fundamental change in the nature of wealth from land to financial assets has altered the timing of intergenerational wealth transmission from after death to during the parents' lifetimes with payments of educational expenses and other investments in skills resulting in children's lowered expectations for an inheritance).

82. See Fellows, supra note 20, at 622. The biological family preference can also encompass contexts in which parents who financially neglected or refused to openly acknowledge their children are still allowed to inherit from their children's intestate estates. This is a particular danger for those jurisdictions that have failed to adopt UNIF. PROBATE CODE § 2-114(c)'s preclusion against such parents.

83. See id. at 637. Antilapse statutes save gifts in wills for close family members that would otherwise be invalidated because the named beneficiary died before the testator, or because the
Admittedly, with its focus upon financial support for a spouse and the biological family, testamentary transfer law operates poorly for deces-
dents who prefer loved ones not encompassed by the doctrinal priority scheme.\textsuperscript{84} The law of wills focuses upon the familial status of the benefi-
ciary rather than upon the quality of the beneficiary's relationship to the dece-
dent.\textsuperscript{85} It is only when a blood relative has done something to "de-
serve" being disinherited that the testator's freedom of testation will be respected to favor a non-relative.\textsuperscript{86} In fact, one commentator asserts that only the wealthy have expansive testamentary freedom because their re-
sources are extensive enough to fulfill societal expectations of support to biological family members and simultaneously include bequests to others.\textsuperscript{87}

Yet, it is curious that the biological family preference extends be-
yond the parameters of the financial support context and into a dece-
dent's decision of how to dispose of his or her mortal remains.\textsuperscript{88} Although seemingly not a property issue, control over mortal remains disposal triggers a proprietary interest in people akin to their expectations named beneficiary is unable or unwilling to accept the gift. See REUTLINGER, \textit{supra} note 73, at 81; UNIF. PROBATE CODE \textsection 2-605 (amended 1993) 8 U.L.A. 423 (1998) (limiting antilapse protection to testator's grandparents and their descendants). \textit{But see} UNIF. PROBATE CODE \textsection 2-603 (amended 1993) 8 U.L.A. 386 (1998) (extending antilapse protection to stepchildren).

Few states have adopted \textsection 2-603's antilapse protection for stepchildren. See ALASKA STAT. \textsection 13.12.603(a) (Michie 1999); ARIZ. REV. STAT. \textsection 14-2603(a) (1999); CAL. PROB. CODE \textsection 21110(c) (Deering 1999); HAW. REV. STAT. \textsection 560:2-603(b) (1998); MONT. REV. CODE ANN. \textsection 72-2-613(1)(g)(2) (Smith 1998); N.M. STAT. ANN. \textsection 45-2-603(b) (Michie 1998); S.D. CODIFIED LAWS \textsection 29A-2-603(a) (Michie 1999); UTAH CODE ANN. \textsection 75-2-603(1)(g)(2) (1998). Kansas is unique in its antilapse pro-
tection for spouses. See KAN. PROB. CODE ANN. \textsection 59-615(a) (West 1997). A minority of jurisdictions extend antilapse protection to any legatee regardless of bloodline connection. See D.C. CODE ANN. \textsection 18-308 (1998); GA. CODE ANN. \textsection 53-2-103 (1998); KY. REV. STAT. ANN. \textsection 394.400 (Michie 1998); MD. CODE ANN., EST. & TRUSTS \textsection 4-403 (1998); N.H. REV. STAT. ANN. \textsection 551:12 (1999); R.I. GEN. LAWS \textsection 33-6-19 (1998); TENN. CODE ANN. \textsection 32-3-105 (1999); W. VA. CODE \textsection 41-3-3 (1999).

84. \textit{See} Fellows, \textit{supra} note 20, at 657.
85. \textit{See} Madoff, \textit{supra} note 79, at 589.
86. \textit{See id.} at 591; Leslie, \textit{supra} note 18, at 551.
88. Even within the context of familial financial support it is primarily the surviving spouse who has a binding claim on the estate because minor children are presumably cared for by the surviving spouse's estate share, and adult children are thought not to need financial support. See Ralph C. Brasher, \textit{Disinheritance and the Modern Family}, 45 CASE W. RES. L. REV. 83, 163 (1994) (noting that spousal election laws traditionally presumed that a surviving spouse would provide for a dece-
dent's children out of the spousal elective share because the surviving spouse had a legal obligation to provide for his or her own children); \textit{see also} SIMES, \textit{supra} note 25, at 24 ("In America the rules crystallized in a land of pioneers. It was recognized that a man could begin with nothing and achieve a fortune. Children did not need inherited capital to start life. Hence the moral obligation to give a child a share in the parent's estate was weaker.").
for support and recognition in a decedent's testamentary plan.\(^{89}\) Thus, to the extent that family members are preferred in the law of wills in the context of traditional forms of property, by a parity of reasoning probate courts also prefer family members in the context of the quasi-property of mortal remains.\(^{90}\) What has never been comprehensively explored is what societal benefit results from a biological family preference over mortal remains control, as opposed to respecting the explicit doctrinal commitment to a decedent's freedom of testation to designate preferred burial instructions or an agent to direct such instructions. This Article suggests that although there was a historical benefit from the biological family preference, the evolution in mortuary practice and changing attitudes toward death and family no longer warrant such a preference over a decedent's autonomy. Before assessing the benefits of a biological family preference in the mortal remains context, it is important to examine the general societal significance of death rituals.

II. REFORMING TRUSTS & ESTATES TO ADDRESS INDIVIDUAL-FAMILY DOCTRINAL TENSION

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death.\(^{91}\)

The doctrinal tension in the law of trusts and estates between upholding the status of the biological family and enforcing the right of the individual to determine the distribution of his or her property, is one which has been exacerbated by two particular legal and social trends. Specifically, the changing attitudes toward death and dying in law and society and the expanding definition of the family are both legal trends which focus upon the autonomy of the individual. Disposal of mortal remains is a context which demonstrates the need for the law of wills to

\(^{89}\) See Jackson, supra note 58, at 41-55 (discussing familial interest in control over disposition of dead body).

\(^{90}\) Cf. Martha Minow, All In The Family & In All Families: Membership, Loving and Owing, 95 W. Va. L. Rev. 275, 297 (1993) (recognizing that "our legal system reflects simultaneous devotion to neutrality toward—or better yet, tolerance of—private choices and devotion to officially articulated values").

\(^{91}\) Louisville & N. R.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905).
incorporate these new legal trends and to adhere more closely to its individualism focus by respecting the individual's stake in funeral planning and his or her own definition of what constitutes family.

A. Changing Attitudes Toward Death and Dying

The transformation in attitudes toward death and dying in law and society has been centered in a shift from a family focus model to a focus on the autonomous individual. Evolving changes in the therapeutic value of the funeral ritual emphasize the individual emotional needs of the dying in addition to those emotional needs of loved ones who survive.\(^9\)

Similarly, the death awareness movement embodied in the development of hospice care and the discourse surrounding the debate over access to physician-assisted suicide and euthanasia have also contributed to the growing focus on the needs of the dying individual over that of a surviving family.\(^9\)

This shift from family focus to individual focus in the health law context of matters surrounding death and dying is one to which the law of trusts and estates should respond through the vehicle of mortal remains legislation.\(^9\)

1. Historical Family Focus of the Funeral Ritual

... the corpse is more than a utilitarian object ... \(^95\)

\(^92\). See infra note 145 and accompanying text.

\(^93\). See Jack M. Zimmerman, Hospice: Complete Care for the Terminally Ill 2 (2d ed. 1986).

\(^94\). Cf. Thomas L. Shaffer, Death, Property, and Lawyers 3 (1970) (stressing the importance of trusts and estates attorneys examining social attitudes toward death).

\(^95\). Dorothy Nelkin & Lori Andrews, Do the Dead Have Interests?: Policy Issues for Research After Life, 24 Am. J.L. & Med. 261, 261 (1998) (asserting that irrespective of one's religious affiliation or lack of religious affiliation corpses have sacred meaning as reflected in the law's desire to respect remains); see also Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 Geo. Wash. L. Rev. 1, 9 (1990) ("Even atheists do not usually divorce themselves from the symbolic recognition of the sanctity of the human body; few will that their physical remains be treated as mere carrion."). Some may argue that the law's continued concern with the sacredness of mortal remains may interfere with the need to address the shortage of organ donations. Cf. Michael H. Scarmon, Note, Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred With Their Bones?, 37 S.D. L. Rev. 429, 448-49 (1991/1992) (recognizing rights in the human body will add confusion to the supply of organs). What continues to make mortal remains sacred in a secular society is their objectification for dealing with the pain of loss. This is not an association which need be at odds with the importance of organ donation. In fact, studies of organ donors and their families demonstrate a psychological benefit to donation that comports with a sacred view of mortal remains. See Sarah Oates, Nurse Promotes Organ Donations, Orlando Sentinel, Oct. 1, 1990, at E1 (surviving families report the ongoing psychological benefit.
In addition to serving as a religious ceremony for a decedent's survivors, a funeral service addresses the emotional needs of a decedent's survivors by providing a socially acceptable outlet for feelings of grief and pain. Planning for the funeral service also assists survivors in coming to terms with the loss and their grief, particularly where the death was unexpected. In the grief process, the psychological role of planning a funeral can be explained by the manner in which personalizing the service and participating in the details of the death ritual are perceived as loving acts and thereby an extension of a caregiver's role. Furthermore, primary participation in the death ritual is a public acknowledgment of the survivor's importance to the decedent and vice-versa. At the center of knowing that decedent's body was instrumental in saving and improving the lives of the organ recipient. Furthermore, commentators have noted that other psychological issues apart from the sacredness of the corpse form an even greater barrier to donation. See Mark F. Anderson, The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?, 5 HEALTH MATRIX 249, 309 (1995) (explaining fear of compromised health treatment after consenting to organ donation); Cohen, supra note 95, at 9 (explaining fear that death will be hastened by overagery doctors); Lisa E. Douglass, Organ Donation, Procurement and Transplantation: The Process, The Problems, The Law, 65 UMKC L. REV. 201, 213-15 (1996) (arguing that health care providers fail to ask for the consent to organ donation because of their unfounded fears about litigation). "[O]rgan shortage is not due to public refusal or objection to organ donation, but rather to a system that has failed to carry out the wishes of the decedent donor." Id. at 202; see also Oates, supra note 95, at E1 (organ shortage due to fact that there are not enough medical personnel available to counsel families about the option). Although the focus upon dignified treatment of corpses may moderate the speed with which society adapts to intervention with cadavers it does not foreclose such changes. For instance, the context of anatomical dissection reveals that although public sentiment was historically opposed to such intervention, autopsy has continued as an essential part of medical education and criminal investigations. See Nelkin & Andrews, supra note 95, at 262-65 & 285-87.


8. See Kenneth J. Doka, Expectation of Death, Participation in Funeral Arrangements, and Grief Adjustment, 15 OMEGA J. OF DEATH & DYING 119, 126-27 (1984-85); Chris Sommernagel, The Most Awful Wonderful Thing, in CARING FOR THE DEAD: YOUR FINAL ACT OF LOVE 36, 36-40 (Lisa Carlton ed., 1998) (observing that parents who have directly handled the death arrangements for their terminally ill children are more able to cope with the death of their children because of the therapeutic value of being engaged in the process of arranging for the disposal of mortal remains).

9. See Doka, supra note 98, at 124; see also Thomas Lynch, Misplaced Mourning, N.Y. TIMES, Aug. 31, 1998, at A1 (funerals are considered “good” when they serve the living by caring for the dead).

10. See LeRoy Bowman, The American Funeral: A Study in Guilt, Extravagance, and Sublimity 120 (1959) (explaining that one function of the funeral is to give the attending family sta-
of the death ritual is the presence of the corpse which also assists in the
grief process "to the extent that it is easier to grieve the loss that we see,
than the one we imagine."\textsuperscript{101} It is the psychological and social facets of
the death ritual which center it in litigation struggles between biological
family members and the persons a decedent chooses as family. Thus, be-
bcause the burial obligation is accompanied by the benefit of assistance
with the mourning process, a decedent's delegation of such authority can
be considered as a type of bequest. Viewed in this light, it is easier to
comprehend the anguish that families of choice endure when a decedent's
biological family members bar them from such participation, or even at-
tendance, at the funeral.\textsuperscript{102}

The rationale for presupposing that one's biological family is pre-
ordained to care for the disposal of mortal remains and the rituals that
surround the disposal is based historically on the slow development of a
mortuary profession in modern America to which the details of mortal
remains disposal could be relegated.\textsuperscript{103} Until the 1880's, the cleansing of
a cadaver, its dressing and care until the time of the funeral service, the
arrangements for the construction of a coffin and the like were all tasks
that often fell to a decedent's family in the absence of an organized mor-
tuary industry.\textsuperscript{104} Because personal care of the body of a decedent was
traditionally the primary responsibility of the family,\textsuperscript{105} the judiciary


"The presence and participation of the dead human body at its funeral is, as my father told it, every
bit as important as the bride's being at her wedding, the baby at its baptism." \textit{Id.} at 24.

\textsuperscript{102}. See Gay's Push for Legal Protections Marriage Offers, \textsc{The Phoenix Gazette}, Jan. 17,
1997, at A27 (example presented of a decedent's biological family claiming body and barring life
partner from the funeral). \textit{See also} Brannam v. Edward Robeson Funeral Home, No. 43141/96 (N.Y.
tranged wife barred decedent's long-term companion and their three children from wake).

\textsuperscript{103}. See VANDERLYN R. PINE, CARETAKER OF THE DEAD: THE AMERICAN FUNERAL DIRECTOR
15-16 (1975).

\textsuperscript{104}. See JAMES J. FARRELL, INVENTING THE AMERICAN WAY OF DEATH, 1830-1920, at 147
(1980) ("Before the 1880's, undertaking was largely an informal, unorganized enterprise, often the
adjunct of a furniture business" that would build the coffins.). The devastating number of Civil War
casualties which had to be shipped across the country impelled the growth and organization of the
funeral and cemetery industry. \textit{See id.} at 115.

\textsuperscript{105}. See Charles O. Jackson, \textit{Death Shall Have No Dominion: The Passing of the World of
the Dead in America}, in \textsc{Death and Dying: Views from Many Cultures} 47, 48 (Richard A. Kalish
ed., 1980). In ancient Greece and feudal England, the family also prepared the dead body for burial,
whereas the Romans utilized a professional undertaker for the wealthy. \textit{See} PINE, \textit{supra} note 103, at
12-15.
viewed family members as having a kind of property right to the possession of a deceased family member’s body for burial.\(^\text{106}\) Some jurisdictions officially label the familial right to possession of mortal remains for disposal as a “quasi-property right.”\(^\text{107}\) This is in contrast to the English common law rule that there is no property right in a dead body.\(^\text{108}\) Because a separate system of ecclesiastical courts did not exist in the United States as they did in England to adjudicate spiritual disputes and ensure a proper burial for corpses, U.S. courts developed the quasi-property right to protect the sanctity of a corpse in its civil courts.\(^\text{109}\)

\(^{106}\) See Anderson v. Acheson, 110 N.W. 335, 337 (Iowa 1907) (holding that those who bury their dead have legal right to protect remains against disturbance); Doxtator v. Chicago & W.M. Ry. Co., 79 N.W. 922, 922 (Mich. 1899) (finding that the person with duty to bury has legal right to possession of body for burial); Larson v. Chase, 50 N.W. 238 (Minn. 1891) (holding that in absence of testamentary disposition right to possession of dead body belongs to spouse and then to next of kin); Parker v. Quinn-McGowen Co., 138 S.E.2d 214, 216 (N.C. 1964) (explaining that the next of kin has a qualified property right in dead body for possession to bury); Pettigrew v. Pettigrew, 56 A. 878 (Pa. 1904) (the paramount right to control burial of dead is in spouse and then next of kin); Sullivan v. Catholic Cemeteries, 317 A.2d 430, 432 (R.I. 1974) (spouse has primary right over next of kin to control burial of decedent); Terrill v. Harbin, 376 S.W.2d 945, 947 (Tex. Civ. App. 1964) (surviving spouse has primary right to possession of body of decedent spouse); Nichols v. Central Vermont Ry. Co., 109 A. 905, 906 (Vt. 1919) (in absence of testamentary disposition surviving spouse or next of kin have exclusive right to possession of body for purpose of burial); Koerber v. Patek, 102 N.W. 40, 41 (Wis. 1905) (lawful custodian of body for burial is next of kin).

\(^{107}\) Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) (noting that Arkansas law recognizes a quasi-property right in a dead body by next of kin). See also Cohen v. Groman Mortuary, 41 Cal. Rptr. 481, 483-84 (1964) (holding that quasi-property right to possession of dead body is recognized for limited purpose of determining who shall have its custody for burial); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 26 (Ga. 1905) (finding that a quasi-property right exists in the dead body of a relative); Weld v. Walker, 14 N.E. 57, 58 (Mass. 1880) (explaining that spouse’s right to dispose of decedent spouse’s mortal remains considered a quasi right of property in the remains of the spouse for the purpose of burial); Radomer Russ-Pol Unterstitzunf Verein v. Posner, 4 A.2d 743, 746 (Md. 1939) (holding that next of kin have a quasi property right in a dead body for burial preparation in absence of testamentary disposition); Strachan v. John F. Kennedy Mem’l Hosp., 507 A.2d 718, 725 (N.J. Super. Ct. App. Div. 1986), aff’d in part and rev’d in part, 538 A.2d 346 (N.J. 1988) (explaining that there is a quasi right in property for next of kin to claim dead for burial); Barela v. Hubbell Co., 355 P.2d 133, 136 (N.M. 1960) (recognizing that there is a quasi-property right in a dead body vesting in nearest relatives of deceased arising out of their duty to bury their dead); Sanford v. Ware, 60 S.E.2d 10, 12 (Va. 1950) (holding that the right to bury and preserve bodily remains is protected as a quasi-property right); England & Bishop v. Central Pocahontas Coal Co., 104 S.E. 46, 47 (W. Va. 1920) (holding that the right to bury a corpse and preserve the remains is a legal right regarded as a quasi right in property).

\(^{108}\) See 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 203 (1644).

\(^{109}\) See, e.g., Renihan v. Wright, 25 N.E. 822, 824-25 (Ind. 1890) (holding England’s no property rule unsound in light of the rights of next of kin with regard to burial). The English ecclesiastical court system held jurisdiction over matters pertaining to the religion and ritual of the established church including disputes over burial. See BLACK’S LAW DICTIONARY 268 (5th ed. 1983).
Thus, out of the burial obligation arose the familial sense of a proprietary right in the cadaver and control over the details of its death ritual.

The courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.110

When a professional mortuary industry developed in the 1880's, the focus upon next of kin became entrenched because the family was viewed as the industry's organizational frame of reference.111 The grave was portrayed as a final resting place for the family home based on the understanding that a family wanted to travel to the afterlife together as a group. At the same time, the development of a professional mortuary industry that could immediately attend to all the details of cadaver disposal diminished the societal need to accord biological families and spouses primary control over mortal remains disposal. Today a cadre of professionals do the death work which families were once compelled to do in their absence.

Despite the notion that funeral rituals assist loved ones in coming to terms with their grief, there is pervasive documentation that modern funeral arrangements purposely distance people from the reality of death in order to avoid the confrontation with an individual's fear of death.112

110. W. PROSSER, THE LAW OF TORTS 44 (2d ed. 1955) (footnotes omitted) (emphasis added). Some jurisdictions have statutory mandates to obligate spouses and biological family members to bury the dead. See ARIZ. REV. STAT. ANN. § 36-831 (West 1997) (explaining the rank order of which family members have the duty to bury a body followed by county government when family unwilling or unable to perform the duty); CAL. HEALTH & SAFETY CODE § 7100 (West 1997) (ranking order of family with duty to inter); N.D. CENT. CODE § 23-06-03 (1997) (ranking order of family members with duty to bury); OKLA. STAT. ANN., tit. 21, § 1158 (West 1997) (mandating a duty of burial descends to proxy named by decedent and then to spouse and next of kin); S.D. CODIFIED LAWS § 34-26-16 (Michie 1997) (explaining the family rank order of burial obligation). Other jurisdictions have located a familial duty to bury in the right to bury itself. See, e.g., Caen v. Feld, 371 S.W.2d 209, 212 (Mo. 1963) ("it has been said that the duty of burial and the right of burial are concomitant so that the duty of burial has been held to rest on the person in whom the right resides"). But only two jurisdictions extend criminal sanctions to those family members who fail to uphold the duty to bury. CAL. HEALTH & SAFETY CODE § 7103 (West 1997) (mandating misdemeanor sanction for those who fail to uphold duty of interment); S.D. CODIFIED LAWS § 34-26-18 (Michie 1997) (mandating a class I misdemeanor sanction for those who omit to perform duty to bury).

111. See FARRELL, supra note 104, at 106.

112. See GARY LADERMAN, THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799-1883, at 3 (1996) (explaining that the dead's "location in society is securely regulated and con-
Freud theorized that few persons can envision their own death and unconsciously view themselves immortal. The fear of death is one that exists despite religious affiliation or spiritual beliefs. The growth of an organized funeral and cemetery industry is attributed with purposely shielding individuals from the realities of death, through funeral practices that deflect survivors from thoughts of the pervasiveness of death. As urbanization and changes in social order, such as occupational mobility and the decline of the extended family, made families less inclined to attend to the details of the death ritual, funeral tasks evolved into an occupation. The modern world's distaste for considering the realities of death grew in concert with the greater focus upon the trappings of the funeral service rather than the meaning of death.

Some commentators characterize death as a cultural event in which the changes in death ritual practice are directly related to social phenomenon. In the 1800's, as the nation became a center of industry, rural cemeteries began to replace centrally located graveyards and churchyards. Increasing population density compelled many cities to disinter mortal remains for transport to rural cemeteries. Simultaneously, the aesthetic beauty of rural alternatives to centrally located burial grounds distracted the bereaved from focusing on the actuality of death. The growing spatial distance between residential areas and the rural cemeteries further estranged individuals from the materiality of death.

trolled by numerous specialists, so the physical trace left behind at death in no way threatens the equilibrium of living society”). But see IRION, supra note 97, at 72 (“The funeral is also based upon a psychological need for the individual to feel the meaning of death.”).


114. See Herman Feifel, Religious Conviction and Fear of Death Among the Healthy and the Terminally Ill, in DEATH AND IDENTITY 120, 125 (Robert Fulton ed., 1976); see also ERNEST BECKER, THE DENIAL OF DEATH 20-24 (1973) (noting that fear of death is normal and not the result of neurosis); Robert A. Burt, Disorder in the Court: Physician-Assisted Suicide and the Constitution, 82 MINN. L. REV. 965, 976 (1998) (observing that the opinions of Supreme Court Justices in the initial death penalty cases revealed the “disturbing quality of the confrontation with death”).

115. See FARRELL, supra note 104, at 98.

117. See RICHARD HUNTINGTON & PETER METCALF, CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL 210 (1979); FARRELL, supra note 104, at 146 (“these new funeral practices directed attention from death to the trappings of death, from the deceased to the survivors”).

118. See FARRELL, supra note 104, at 3.

119. See id. at 100-101, 111.

120. See Windt v. German Reformed Church, N.Y. Ch. Ann. 471 (1847).

121. See FARRELL, supra note 104, at 104.
Furthermore, the professional organization of cemetery officials introduced an industry preference for visual uniformity in burial grounds that discouraged family members from enclosing and personally embellishing burial plots.\textsuperscript{122} The routinization of cemetery landscaping also gave birth to the use of flat tablets for marking graves rather than vertical tombstones, a shift which similarly deflects mourners from fully confronting the materiality of death.\textsuperscript{123} Commentators interpret the removal of overt symbols of death from the visual landscape of cemeteries constructed to look like gardens and parks as a purposeful appeal to cemetery customers who do not want to be reminded of their own mortality.\textsuperscript{124} “Today cemetery making is an art . . . and gradually all things that suggest death, sorrow, or pain, are being eliminated.”\textsuperscript{125}

Despite the cultural heterogeneity of the United States, the overall form of funerals is remarkably uniform across the states.\textsuperscript{126} This form is characterized by quickly removing the corpse to a funeral parlor, embalming, institutionalized viewing, and disposing by burial. Although embalming was not widely used until the Civil War in order to preserve the soldiers for transport to their homes for burial, it is now customarily favored for the peaceful aspect it lends to the characterization of death.\textsuperscript{127} But the practice of cosmetically restoring the corpse to a more lifelike appearance has been critiqued as perpetuating the tendency to deny death.\textsuperscript{128} Similarly, funeral directors have tried “to make [their] places of business as cheerful and pleasant as possible,” by removing coffins and caskets from funeral home windows and replacing them with flowers, and by isolating the show room from the reception room.\textsuperscript{129} The modern prevalence of death in institutional settings rather than death in one’s own home also accounts for the dissociation from the realities of death.\textsuperscript{130} Yet, as the next section shall demonstrate, there has been a re-

\textsuperscript{122.} See id. at 113, 115, 118. The mandate against enclosed family plots also reduced the cemetery’s maintenance expenses as open meadows are easier to maintain. See id. at 121.
\textsuperscript{123.} See id. at 122.
\textsuperscript{124.} See id. at 116, 121-22.
\textsuperscript{125.} Id. at 120 (quoting Sidney J. Hare, The Cemetery Beautiful, 24 PARK AND CEMETERY 41 (1910)).
\textsuperscript{126.} See HUNTINGTON & METCALF, supra note 117, at 187-88.
\textsuperscript{127.} See id. at 205.
\textsuperscript{128.} See LYNNE ANN DESPELDER & ALBERT LEE STRICKLAND, THE LAST DANCE: ENCOUNTERING DEATH AND DYING 160 (1983); GEOFFREY GORER, DEATH, GRIEF, AND MOURNING 196 (1965) (“the art of the embalmers is an art of complete denial”).
\textsuperscript{129.} FARRELL, supra note 104, at 174-75.
\textsuperscript{130.} See DESPELDER & STRICKLAND, supra note 128, at 13 (setting forth that in 1900, 75% to 80% of U.S. residents died in their own beds whereas today 80% of deaths occur in an institutional
cent death awareness movement in health law that has operated in con-
travention to the denial of death and has accorded the funeral ritual a
greater therapeutic value for individuals who are dying. The death aware-
ness movement has located the rights of the individual at the center of its
focus on the materiality of death. An examination of health law’s re-
response to the changes in social attitudes toward death and dying is illu-
minating for the mortal remains context.

2. Contemporary Focus on the Individual—the Death Awareness
Movement

.. . [D]eath is strictly the concern of the living, and that means the living per-
son who is about to die as well as those who survive the death.131

The modern pervasiveness of terminal illness is slowly shifting the
collective attitude toward death from denial to acceptance of death as part of life.132 One commentator terms this shift in attitude the “death awareness” movement.133 Although advances in medical technology and science have given great hope to persons battling illness, the advances have simultaneously demonstrated the limits of man over death.134 Terminal illness also provides a time for contemplation of death from the mo-
ment of diagnosis, which is unlike the case of sudden death. The plethora
of cancers and the continuing struggle to find a cure for AIDS have
forced many to confront the inevitability of death, despite the natural in-
clination to deny one’s own mortality and view death as unnatural.135

132. See NATIONAL CANCER INSTITUTE, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, FACT
BOOK 27 (1996) (other than heart disease, cancer is the leading cause of death in the United States);
Lawrence K. Altman, Dismaying Experts, H.I.V. Infections Soar, N.Y. TIMES, Nov. 24, 1998, at F7
(“During 1998 U.S. & Western Europe recorded little progress in reducing the number of HIV infec-
tions. . . . ‘The epidemic has not been overcome anywhere.’. . . AIDS now kills more people
world wide than any other infection.”).
133. HUNTINGTON & METCALF, supra note 117, at 3. The increasing public fixation on matters
of death is reflected in the growing number of books whose primary subject matter is the considera-
tion of death. See Death Be Not Unpublishable: The Literature of Good Grief, N.Y. TIMES, Nov. 29,
1998, at Week in Review section, p. 7 (discussing nine recent books about death which reveal the
public mood of considering one’s mortality). In fact, in 1995 the Open Society Institute founded the
Project on Death in America to understand and transform the culture of dying through initiatives in
research and scholarship.
134. See FARRELL, supra note 104, at 223-24 (“An activist culture which can do a great many
things about disease can ultimately do nothing about death.”).
135. See Freud, supra note 113, at 15 (explaining that human beings are usually reticent to
confront the inevitability of death); Langbein, supra note 81, at 741 (“Roughly three of every four
When humans perceive a ubiquitous occurrence of death, the attitude toward death shifts from denial to acceptance. \(^{136}\) “Our death-conventions (as I would like to call them) can no longer be adhered to. Death is no longer overlooked; we are forced to believe in it.” \(^{137}\) This shift in attitude is parallel to the shift which occurred in the Middle Ages during the bubonic plague and in the nineteenth century during the Civil War. \(^{138}\)

During the bubonic plague epidemic in the Middle Ages, the dying prepared their own memorials before they died. \(^{139}\) “In that plague-ridden time, they believed that dying would be easier if they were more comfortable with their own deaths.” \(^{140}\) The memorialization for the deceased was orchestrated by the dying person in his or her will, with a designation of the choice in tomb and funds provided for the religious services and masses. \(^{141}\) “[D]eath was a concern for the person threatened by it” rather than solely a concern of the surviving family. \(^{142}\) The ancient view of funerals was as a vehicle primarily for the benefit of the dead and not the living. \(^{143}\) In the nineteenth century, when death was more prevalent than the twentieth century as indicated by its higher mortality rates, there was greater individual and familial involvement in the burial ritual as well. \(^{144}\) Similarly, the AIDS pandemic and other terminal illnesses in present times have returned a therapeutic value to funeral planning for the dying individual. \(^{145}\) This is reflected in the growing demand for deaths in the United States today stem from three causes: cardiovascular disease, cancer, and automobile accidents. The prominence of cardiovascular disease and cancer as killers is related to the elimination of infectious diseases.” \(^{136}\).

\(^{136}\) See Despelder & Strickland, supra note 128, at 418 (noting that the large scale threat of death, evident in concerns with nuclear war and environmental pollution, brings death into the consciousness of people).

\(^{137}\) Sigmund Freud, Death and Us, in Freud and Judaism 11, 18 (David Meghnagi, ed. & Mark Solms trans., 1993).

\(^{138}\) See Philippe Ariès, Western Attitudes Toward Death: From the Middle Ages to the Present 2, 13 (Patricia M. Ranum trans., 1974); Laderman, supra note 112, at 89-157 (describing the public’s open confrontation with death in face of the devastation of the Civil War).


\(^{140}\) Ariès, supra note 138, at 11 (explaining that “death was a ritual organized by the dying person himself, who presided over it and knew its protocol” in the Middle Ages).

\(^{141}\) See id. at 49-51 & 64.

\(^{142}\) Id. at 63.


\(^{144}\) See Despelder & Strickland, supra note 128, at 7-8.

\(^{145}\) See Nelkin & Andrews, supra note 95, at 279 (arguing that the legal system through estates laws and organ donor laws recognizes the psychological benefits to the living of determining the disposition of their mortal remains); Telephone Interview with Denise Miles, Director of Research Services, Howard Brown Health Center, HIV & AIDS Research Organization (July 18, 1998)
greater involvement and customization of funeral services and products.\textsuperscript{146} What distinguishes the current shift toward accepting death is the attempt to institutionalize, and thus make permanent, that shift. Two national trends are indicative of the recent shift in the attitude toward death: the hospice movement and the debate over euthanasia and physician-assisted suicide.\textsuperscript{147} Both trends have been propelled in part by the growth of a patient’s rights culture which values the autonomy of the individual to set the parameters of his or her own health care.\textsuperscript{148}

The hospice movement has had an influence on the changing approach to death. Hospices are health care facilities for the terminally ill which can also provide home care.\textsuperscript{149} Its focus is upon pain control; dignity in dying, with a conservative approach to aggressive and invasive medical care; and treatment of the psychological pain of death for the individual and his or her family, all in order to promote a more “natural” death for the individual.\textsuperscript{150} The modern hospice movement in the United

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\textsuperscript{146} See Thomas Lynch, \textit{Socko Finish}, \textit{N.Y. Times}, July 12, 1998, Magazine section, at 34 ("Everything is customized. The [baby boomer] generation now in the market for mortuary wares is redefining death in much the same way that, three decades back, it redefined sex and gender.").

\textsuperscript{147} The demographics of the aging population may also contribute to the changing attitude toward death. "[B]oomers are now grieving and dying, so grief and death are all the rage. The market is bullish on ritual and metaphor, for acting out our hurts the way our ancients did." \textit{Id.}

\textsuperscript{148} See JAMES M. HOEFLER, DEATHRIGHT: CULTURE, MEDICINE, POLITICS, AND THE RIGHT TO DIE 122 (1994).

\textsuperscript{149} [A] hospice is a medically directed, nurse coordinated program providing a continuum of home and inpatient care for the terminally ill patient and family. It employs an interdisciplinary team acting under the direction of an autonomous hospice administration. The program provides palliative and supportive care to meet the special needs arising out of the physical, emotional, spiritual, social and economic stresses which are experienced during the final stages of illness and during dying and bereavement.


States began in 1974 and grew tremendously in the 1980's as patients became discontented with the impersonal care of large medical institutions and desired the dignity and control of dying more naturally in a home-like environment. The movement was also propelled by patient concerns that aggressive medical treatments were prolonging the duration of life at the expense of the quality of life. The hospice philosophy empowers the patient to be immediately involved in decisions regarding his or her care and in plans for death. Thus, in encouraging patients to face the inevitability of death, the hospice movement has also placed a focus on individual autonomy and involvement in one's own death. The success of the hospice movement's emphasis upon directly addressing the reality of death has also influenced the care of the dying in traditional hospital facilities. In turn, the hospice movement has had a residual effect upon the societal approach to death in confronting the materiality of death and respecting the autonomy of the individual to determine the issues surrounding his or her death.

Similarly, the national debate regarding the propriety of euthanasia and physician-assisted suicide (PAS) has contributed to a shift in the collective attitude toward death. Although hospice care has been viewed as fundamentally distinct from the demands for euthanasia and PAS in that hospice care focuses on having the patient accept his or her death

151. See Kessler, supra note 139, at xv; Webb, supra note 150, at 227.
152. See Kessler, supra note 139, at xv; see also Webb, supra note 150, at 224 (hospice movement “has brought Americans back to a familiarity with dying that once was there when death occurred mainly at home”). “That simple move from dying person to sick person, from the home to the hospital, had hidden, undreamed of consequences. When we left our homes, we lost power over our own deaths, and over the deaths of those we love. Once inside the hospital walls, dying became the sole province of medicine.” Louise Harmon, Fragments on the Deathwatch 19 (1998). “[T]he hospice movement was in many ways a reaction against the dehumanizing experience of a hospital death.” Id. at 173. Most people die in hospitals and those who die in hospitals often have acute illnesses which may involve invasive medical procedures and technology. See Connie Zuckerman, United Hospital Fund & Milbank Memorial Fund, End-of-Life Care and Hospital Legal Counsel: Current Involvement and Opportunities for the Future 1 (1999).
155. See id.
156. See Webb, supra note 150, at 224. But see Harmon, supra note 152, at 169 (“Despite the hospice movement, it is not clear that the medical profession has truly changed its attitudes and practices toward the dying patient. . . . [For instance] hospital patients [have] more diagnostic tests and laboratory charges [than hospice patients].”).
158. See Hoeffler, supra note 148, at 165-66 (arguing that recent debate on assisted suicide will lead to a new activism for death with dignity).
whereas euthanasia and PAS are critiqued as an escape from natural death,159 both movements have contributed to a national dialogue on matters of death in general. Regardless of one’s opinion about the ethics of euthanasia and PAS, exposure to the debate alone has effectuated a consciousness about the importance of “dying with dignity” and its resulting focus on the autonomy of the individual to define for himself or herself what death with dignity means.160 In addition, the death with dignity discourse and its legislative manifestation in living will documents have encouraged personal reflection about death, further dispelling the taboo nature of deathtalk.161 Living wills are directly implicated in the death awareness movement because of their ability to permit an individual to refuse life-sustaining treatment. Whereas Freud identified death as taboo because of the individual’s refusal to envision his or her own mortality,162 living wills and the death with dignity movement encourage individuals to visualize their own deaths. Contemporary fears generally center more on concerns with dying in pain or as an invalid rather than upon death itself.163 Yet, medical professionals note that a full realization of a death-as-natural culture will not occur until health care professionals are systematically trained in how to discuss death and dying issues.164 For instance, despite the development of a public discourse about death and the utility of advance medical directives, it is terminally ill patients who are

159. See Miller, supra note 154, at 132 (arguing that the hospice movement teaches us to “learn to accept the truth of our ultimate fate, that pain, loss and death are part of life . . . . We cannot eliminate death. Euthanasia serves only to avoid dealing with death . . . . Killing people is not the mature way to deal with dying, and not the best way to relieve suffering.”).  
160. See James M. Hoefler, Managing Death 70 (1997) (“A wealth of survey data, largely collected in the early 1990’s . . . suggests that the relatively progressive positions on end-of-life decisions expressed by religious bodies and adopted by mainstream medical, ethical, and legal thinkers resonate well with the sentiments of the general public.”). The inability for a long period of time to find a jury that would convict Jack Kevorkian despite his flagrant infraction of the law may be indicative of the public consensus regarding the importance of autonomy even if it is not a choice all persons would make for themselves. See A Death on Videotape, N.Y. Times, Nov. 24, 1998, at A26 (“the public has been sympathetic to his crusade, and three juries have already acquitted him of charges relating to five deaths”).  
162. See Freud, supra note 137, at 12-13.  
164. See Ezekiel J. Emanuel, Care for Dying Patients, Lancet, June 14, 1997, at 1714 (“It will require a systematic education, from medical school through to continuing medical education, using practical techniques about how to introduce the topic, how to discuss prognosis, how to explore options, and so on.”).
the primary users of advance medical directives. Thus, the shift in the collective attitude toward death coexists with a continued reluctance to actualize a plan with respect to death. But the absence of widespread adoption of advance medical directives does not diminish the force of the public preference for autonomy in the death context.

Although some commentators trace the origins of the modern discussion of the right to die to the 1870's when intellectuals from Great Britain proposed active euthanasia for the hopelessly ill, it did not emerge as an important social and political issue in the United States until 1975 when the Karen Quinlan case was first brought in the New Jersey trial court. Karen Quinlan was twenty-one years old when problems with her respiration resulted in irreversible brain damage. She was not brain dead but was comatose and in a persistent vegetative state and remained so for eight years despite her family's ability to win a court order permitting the cessation of artificial respiration.

Karen Quinlan's tragedy highlighted for the public and legal system the ways in which advancements in medical technology made it possible to prolong life long after an individual might desire it. After the Karen Quinlan case received great notoriety, California became the first state to adopt a living will law in 1976. Moreover, after the President's Health Care Commission endorsed living wills and other advance medical directives in 1983, the National Conference Commission on Uniform State Laws proposed a model living will law in 1984. During the past two decades virtually all states have formally recognized the right of patients to forego treatment, including artificial nutrition and hydration, and nearly all have given legal sanction to advance medical directives such as

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165. See id. at 1714 (noting that the general population does not use advance medical directives to the extent that cancer patients do).

166. See Lynn M. Peterson, Advance Directives, Proxies, and the Practice of Surgery, AM. J. OF SURGERY, Mar. 1992, at 227, 280 (“The public and individual attention this matter receives reflects its enormous importance.”).


169. See GLICK, supra note 167, at 64-66 (discussing the importance of Quinlan for the public).

170. See Quinlan, 355 A.2d at 653-55.

171. See id. at 635-55, 671-72.

172. See GLICK, supra note 167, at 74.

173. See id. The term “advance medical directives” refers to legal documents such as the health care proxy and the living will which “facilitate efforts by competent people who wish to plan for their medical decision making should they become incompetent.” FURROW ET AL., supra note 161, § 17-20, at 352.
a do-not-resuscitate order, living will, and health care proxy. In fact, the Patient Self-Determination Act of 1990 requires health care institutions to inform their patients about their state law rights to execute advance directives and to otherwise control their own health care.

Even though there is an ongoing debate on what the legal parameters for medically ending life should be, there appears to be a public consensus about the horrors of dying a prolonged death as defined by the individual. Both sides of the public discourse regarding euthanasia generally, and physician-assisted suicide specifically, focus upon the concern with the autonomy of the individual. Those who promote euthanasia assert the importance of validating personal integrity and the individual decision to value quality of life over the prolongation of life. Those who oppose euthanasia focus upon the concern that an individual's autonomy can be compromised by outside pressures to end life. Such outside pressures include a family's concern about the ongoing costs of medical and institutional care for the patient, and a medical institution's concern with managing costs. The concern with autonomy is so central to the euthanasia debate that one proponent of the right to die equates the denial of a right to die with the imposition of tyranny. Certainly, the

174. See Introduction to LAST RIGHTS? ASSISTED SUICIDE AND EUTHANASIA DEBATED 3 (Michael M. Uhlmann ed., 1998); HOEFLER, supra note 148, at 196-202. A health care proxy or durable power of attorney for health care is a document “to appoint another to make health care decisions for [the individual] when he [or she] becomes incompetent to make them . . . . As a matter of course, any competent adult may be appointed an agent under durable power statutes.” FURROW ET AL., supra note 161, § 17-22, at 359.


176. See id. § 1395cc(f); FURROW ET AL., supra note 161, § 17-80, at 442. A study of hospital clinicians and hospital legal counsel revealed that neither group considers initiating patient discussions about advance directives. This may in part account for the small percentage of individuals who execute advance directives. See ZUCKERMAN, supra note 152, at 19.

177. See Patricia Brophy, Death with Dignity?, in MEDICAL FUTILITY AND THE EVALUATION OF LIFE-SUSTAINING INTERVENTIONS 15, 23 (Marjorie B. Zucker & Howard D. Zucker eds., 1997); George J. Annas, The Right to Die in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian, 34 DUQ. L. REV. 875, 891-92 (1996) (“Even people who don't think they would ever use Kevorkian think he should be available because in America we don't want to limit our 'choice, even our choice of how to die.'”).


179. See Cass R. Sunstein, The Right to Die, 106 YALE L.J. 1123, 1125 (1997) (theorizing that state opposition to physician-assisted suicide can be justified by the danger that it “would, in practice, decrease rather than increase patient autonomy”).


181. See Ronald Dworkin, Do We Have a Right to Die?, in LAST RIGHTS? ASSISTED SUICIDE
difficulty with prioritizing one form of autonomy over another informed the recent Supreme Court decisions authorizing states to enact legislation outlawing physician-assisted suicide.\textsuperscript{182}

In short, the pervasiveness of terminal illness along with the growth of a hospice movement and death with dignity national debate have all contributed to a changing attitude toward death in health law that the law of wills should begin to emulate. The new perspective on death is characterized by the shift from denying death to accepting death as a natural occurrence, and by the shift from a focus on the familial role in funeral planning to a focus on the autonomy of the individual to control the disposal of his or her mortal remains. As discussed below, the renewed focus on the autonomy of the individual is a dynamic also evident in the expanding definition of the family which the law of wills should also begin to embody.

\section*{B. Recognition of the Expanding Definition of the Family}

The human family is a social relationship, not an entity defined in nature.\textsuperscript{183}

Family law has slowly started to incorporate a more expansive definition of family that more closely reflects social trends in the formation of families rather than the restrictive notion of family used in the law of wills. Only one in four families conforms to the idea of the traditional nuclear mold because of the rising incidence of divorce, the decreasing stigma of sexual relations outside of marriage and alternative lifestyles.

\textsuperscript{182} See Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997) (finding that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by due process and a state can ban assisted suicide if the statute is rationally related to a legitimate government interest like preserving human life); Vacco v. Quill, 117 S. Ct. 2293, 2301-02 (1997) (holding that the distinction between banning the assistance of suicide while permitting the withdrawal of life-sustaining treatment is rational under the Fourteenth Amendment equal protection clause).

\textsuperscript{183} Kenneth L. Karst, \textit{The Freedom of Intimate Association}, 89 YALE L.J. 624, 647 (1980).
and the devastating effects of terminal illness. These events in turn have challenged the traditional concept of family. Furthermore, advancements in reproductive sciences have removed the determinacy of equating family with genetic connections. As of the 1960s, the modern
family has often been viewed as a group of individuals who choose to regard one another as relatives, in direct contrast to the traditional view of family as immune from manipulation of choice.\(^{187}\) Social custom is developing a concept of family as those “people who love each other and want to work to support each other”\(^{188}\) because they simply choose to, or because the need for a caretaker of the elderly, ill, disabled and other dependents has prompted the formation of a family.\(^{189}\) In response, the legal system has begun to employ a “functional approach” to defining family.\(^{190}\) The functional approach legitimizes non-nuclear relationships that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities.\(^{191}\) The paradigm of the functional family

\(^{187}\) See Dolgin, supra note 185, at 14-15; see also Mary Ann Glendon, Rights Talk: The Impeorishment of Political Discourse 122-23 (1991) (arguing that since the 1960s, family law has been restructured to correspond more closely to changing family patterns); Angela Mae Kupenda, Two Parents Are Better Than None: Whether Two Single, African-American Adults—Who Are Not In a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children, 35 U. Louis]


It should also be noted that some communities have a long history of valorizing an extended network of relationships beyond the nuclear family structure. See Carol Stack, All Our Kin 90-105 (1974) (detailing the extended family patterns of many Black families); Jack D. Forbes, The Manipulation of Race, Caste and Identity: Classifying Afro-Americans, Native Americans and Red-Black People, 17 J. Of Ethnic Stud. 1, 41 (1990) (discussing the importance of extended family to Native American clan relationships); Joyce E. Mcconnell, Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reforms, 10 Yale J. L. & Feminism 29, 54 (1998) (describing empirical studies which demonstrate the reliance upon extended family in Asian-American communities); Note, Into the Mouths of Babes: Law Familia Latina and Federally Funded Child Welfare, 105 Harv. L. Rev. 1319, 1322 (1992) (delineating the importance of extended family and special friendships in Latino communities). In fact, medical studies demonstrate that individuals with diverse social networks beyond biological family ties have an increased resistance to disease. See Susan Gilbert, Social Ties Reduce Risk of a Cold, N.Y. Times, June 25, 1997, at C11 (people with diverse webs of relationships die less frequently from heart disease, respond better to vaccines, and have lower susceptibility to colds).


\(^{190}\) See Fineman, supra note 189, at 147 (“However, the law has been altered somewhat in response to changing patterns of behavior, offering at least the promise of a more relaxed and expandable legal model of the family.”); Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Definition of Family, 104 Harv. L. Rev. 1640, 1646 (1991).

\(^{191}\) See Note, supra note 190, at 1646; see also Polikoff, supra note 185, at 573 (“Courts should redefine parenthood to include anyone in a functional parental relationship that a legally rec-
seeks to give individuals greater control over the structure of their family lives to recognize that biology is not family.\textsuperscript{192} The attempt to garner respect for a more expansive definition of "family" in the family law area has focused upon the importance of an individual's autonomy.\textsuperscript{193} Similarly, within the context of the disposition of mortal remains, legislative advocates have underscored the primacy of a decedent's control over his or her mortal remains and the persons who should exercise such control.\textsuperscript{194}

\textit{The concept of the family is culturally determined and subject to ethnic and cultural variations. . . .}

\ldots Legally, a family group may be based on consanguinity, or affinity by marriage alone; but there may be de facto relationships also, without blood relationship or marriage, and these may or may not be legally recognized.\ldots (\textit{S}mall group classifications, regardless of whether they originate in psychology, sociology, or anthropology, do not necessarily coincide with legal classifications. . . . (\textit{L}egal classifications [of family] tend to be more narrow and rigid than group classifications. . . . [\textit{They are}] cerebral . . . abstract and relatively removed from specific factual situations.\textsuperscript{195}

The legal respect for the autonomy of the individual to construct

\begin{footnotes}
192. See Note, supra note 190, at 1641, 1652. The dissatisfaction with solely relying upon blood ties and marriage ties to define a family arises from the concern that not all biological families are made up of loving and caring persons. See T.A. Tucker Ronzetti, Comment, \textit{Constituting Family and Death Through the Struggle With State Power}: Cruzan v. Director, Missouri Department of Health, 46 U. Miami L. Rev. 149, 174 (1991). In fact, "the family can be—and often is—the locus of violence and sexual abuse, hidden from view all the more effectively because it is deemed private." \textit{Id.; see also} Elizabeth M. Schneider, \textit{The Violence of Privacy}, 23 Conn. L. Rev. 973, 974 (1991) (asserting that the legal notion of family privacy has encouraged and reinforced violence against women).

193. See Note, supra note 190, at 1651 ("Autonomy to these authors entails the freedom to choose with whom and in what form individuals pursue committed and caring domestic relationships."); see also Naomi R. Cahn, \textit{The Moral Complexities of Family Law}, 50 Stan. L. Rev. 225, 248 (1997) (book review) (highlighting a new family morality that emphasizes the importance of retaining individual autonomy within the family context while remaining focused on connection, care and commitment to other family members in chosen living situations); Glendon, supra note 187, at 35, 108, 240 (arguing that family law has shifted its focus to the needs of autonomous individuals); Carl E. Schneider, \textit{Moral Discourse and the Transformation of American Family Law}, 83 Mich. L. Rev. 1803, 1805 (1985) (detailing the shift in family law from public standards to private ordering).


\end{footnotes}
families of choice finds support in Supreme Court family law cases. In *United States Department of Agriculture v. Moreno*, the Court was confronted with the issue of whether families of choice could be deemed eligible for food stamps as a common household. The principal plaintiffs included a married couple with three children who welcomed a biologically unrelated twenty-year-old girl into the family in order to assist her with her emotional problems, and a single mother with three children who welcomed a fifty-six-year-old diabetic into the family to assist her with her disability and to share common living expenses. The Court declared section 3(e) of the Food Stamp Act unconstitutional as violative of the Equal Protection Clause because it created an irrational classification between households with unrelated persons and households with only biologically related persons. Although the legislative history of the Act indicated that the classification was intended to prevent “hippies” and “hippie communes” from participating in the food stamp program, the Court reasoned that the purpose of discriminating against hippies as an unpopular group could not validate the exclusion of families of choice from the program. The Court’s decision is especially indicative of the Supreme Court’s evolving support for and recognition of families of choice given its rejection of Justice Rehnquist’s dissenting opinion which deems it reasonable to provide food stamp support only to “some variation on the family as we know it—a household consisting of related individuals.” Furthermore, Justice Douglas’s concurrence provides protection for the individual’s construction of families of choice as

196. Professor Karst classifies the ability to choose and govern one’s intimate associations as a “freedom of intimate association” that extends from the First Amendment freedom of association, which, although not explicitly named by the Supreme Court, is implicitly protected by the Court’s First Amendment, Equal Protection and Substantive Due Process doctrines. Karst, *supra* note 183, at 625-26.

197. 413 U.S. 528 (1973).

198. See id. at 531-32.

199. See id. at 532-33.

200. See id. at 534.

201. See id.

202. *Id.* at 546 (Rehnquist, J., dissenting). Although the case of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), can be viewed as limiting the legal recognition of households of unrelated persons in its authorization of single-family zoning ordinances which narrowly define family as “persons related by blood, adoption, or marriage,” the case must be understood within the context of its facts. The plaintiffs did not assert themselves as a family of choice but merely as a group of six college students who chose to lease a house together. See *id.* at 3. It is important to note that the ordinance which was upheld on the basis of rational review also permitted households with two unrelated persons to constitute a family. See *id.* at 8.
a right of association.\textsuperscript{203} In particular the concurrence recognizes the construction of families by persons who band together against adversity as parallel to other First Amendment rights like the marital right of privacy.\textsuperscript{204}

Similarly, in the Supreme Court case of \textit{Moore v. City of East Cleveland},\textsuperscript{205} the Court recognized a Due Process right to freedom of personal choice in family life in the context of a zoning ordinance. The zoning ordinance limited occupancy to single families and contained an extremely restrictive definition of "family." The practical effect of the definition was that only "nuclear families" consisting of a couple and its dependent children could legally reside in the area.\textsuperscript{206} The ordinance's focus upon the nuclear family excluded other biologically related persons from consideration as a "true" family such as the named plaintiff who was a grandmother living with two grandsons who were cousins rather than brothers.\textsuperscript{207} The Court rejected the narrow approach to defining family and expanded substantive due process beyond nuclear families to the extended family. The plurality opinion's rejection of a circumscribed approach to defining family particularly disdained cutting off legal protection of family rights at the "arbitrary boundary" of the nuclear family given the Court's long-standing Due Process protection of freedom of personal choice in matters of marriage and family life.\textsuperscript{208} In fact, Justice Stevens' concurring opinion observes that a number of state courts have permitted unrelated persons to occupy single-family residences notwithstanding ordinances prohibiting such occupancy.\textsuperscript{209} Justice Marshall also noted in his concurring opinion that the liberty right of freedom of personal choice in family life needed to encompass cultural differences in the definition of the family.\textsuperscript{210} The Court was particularly influenced by

\textsuperscript{203} See \textit{Moreno}, 413 U.S. at 541-43 (Douglas, J., concurring) ("This banding together is an expression of the right of freedom of association that is very deep in our traditions. . . . The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod.").

\textsuperscript{204} See \textit{id.} at 541 ("This case involves desperately poor people with acute problems who, although unrelated, come together for mutual help and assistance. The choice of one's associates for social, political, race, or religious purposes is basic to our constitutional scheme.").

\textsuperscript{205} 431 U.S. 494 (1977).

\textsuperscript{206} See \textit{id.} at 496 n.2.

\textsuperscript{207} See \textit{id.} at 496-97.

\textsuperscript{208} See \textit{id.} at 499, 502.

\textsuperscript{209} See \textit{id.} at 516-17 (Stevens, J., concurring in the judgment).

\textsuperscript{210} See \textit{id.} at 508-09 (1977) (Marshall, J., concurring).

In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. . . . The
the need to recognize a more expansive conception of family during times of adversity, which now resonates with the reconstitution of families in response to the devastation of AIDS specifically and terminal illness generally.211

Furthermore, the Supreme Court's decision in Eisenstadt v. Baird,212 establishing a right of privacy in the dissemination of contraceptive methods and information for unmarried persons as with married persons, implemented an individualized view of the family. In rationalizing the expansion of privacy protection with respect to contraception to unmarried persons,213 the Court stated that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."214 Janet Dolgin views the Eisenstadt opinion as particularly indicative of the shift in attitudes toward the definition of the family because the Court focused upon the family as bound not by traditional institutional ties, but instead by an agreement of autonomous individuals to play familial roles.215 As a consequence of focusing upon the family as an amalgamation of individuals, the Court begins to suggest broad constitutional protection for individuals to form families of choice rather than of biology.216 For instance, most recently the federal district court for the Southern District of New York expanded the constitutional definition of family in the foster care context. Specifically, the court held that some foster parents and children have the right to the same due process protection of their custodial relationships as birth parents when the authorities try to remove children from a home.217 The trend of recognizing autonomy and individual choice in the creation of familial relationships has been more fully realized in state court cases.218

"extended" [family] form is especially familiar among black families. Id.

211. See id. at 505.
212. 405 U.S. 438 (1972).
213. See Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that state sanctions against providing contraceptive information to married couples violates the constitutional right to privacy).
215. See DOLGIN, supra note 185, at 48.
216. See id. at 61.
217. See Rodriguez v. McLoughlin, No. 96-1986, 1999 U.S. Dist. LEXIS 61 (S.D.N.Y. Jan. 6, 1999) (limiting the court's decision to foster children whose birth parents' rights already have been terminated and to foster parents who have cared for their foster children continuously for more than 12 months since the child's infancy and who have agreed to adopt the child).
218. See DOLGIN, supra note 185, at 253 (discussing the legal trend in expanding definition of family).
One of the earliest state court cases to effectively recognize the status of families of choice was *Marvin v. Marvin.* In *Marvin,* the California Supreme Court held that nonmarital partners can contract with one another to share property just as legally constituted marital partners can. The mere fact that a couple does not choose to become formally married cannot serve as a basis for a court's inference that the couple intended to keep their earnings and property separate when a closer inquiry into the agreed parameters of the couple's relationship may reveal more communal intentions. The court observed that no public policy precludes unrelated and unmarried adults from living together and arranging their economic affairs as a traditional family would if that is their choice.

Recognition of families of choice in other state courts has occurred in a variety of legal contexts. The Minnesota Court of Appeals in *In re Guardianship of Kowalski,* recognized the right of a lesbian partner to be considered for appointment as legal guardian to her incapacitated life partner because they were a "family of affinity, which ought to be accorded respect." In the separate context of tort liability, the New Jersey Supreme Court in *Dunphy v. Gregor* held that where unrelated and unmarried persons can prove that their relationship is the functional equivalent of a traditionally intimate familial relationship, they have standing to state a tort claim for bystander liability when witnessing the harm of a member of that functional family. More recently, the Ohio Court of Appeals in *State v. Yaden* held that same-sex couples are included in the definition of cohabitation for protection under their state domestic violence statute.

New York has gone the furthest in validating the legitimacy of self-generated families of choice. In *Braschi v. Stahl Associates Co.,”* the

220. See id. at 122.
221. See id. at 117.
222. See id. at 115-16. Of course, nonmarital partners must first overcome the great difficulty of proving the existence of a contractual relationship before being entitled to its judicial enforcement as a family of choice.
224. Id. at 797.
225. 642 A.2d 372, 380 (N.J. 1994) (finding that a woman who was engaged to and cohabiting with automobile accident victim had standing to petition for bystander liability after witnessing his death because the relationship was substantial, stable and enduring).
227. 543 N.E.2d 49, 55 (N.Y. Ct. App. 1989) (finding that a gay life partner who had 10 year relationship with decedent and was his co-tenant of a rent-controlled apartment was entitled to pro-
New York Court of Appeals adopted a functional rather than a formal legal definition of family in holding that a "family member" for purposes of housing regulations includes gay lifetime partners. The court stated that:

[W]e conclude that the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.228

New York also recently used a functional definition of family in the more highly charged context of adoption. In re Jacob & Dana229 authorizes gay and heterosexual unmarried partners to become the adoptive parents of their partners' biological children. After noting the fundamental changes that have taken place in the make-up of the family over the past thirty years where fewer children are raised in heterosexual two-parent households, the court concluded that it is in the best interests of children to recognize a more functional approach to families, which permits adoption by unmarried gay and heterosexual partners.230

Apart from the more restrictive probate context, discussed below, some state legislatures use a functional test for family status as well. For instance, the Oregon legislature allows someone "who has established emotional ties creating a child-parent relationship with a child" to petition the court for custody of the child or for visitation rights.231 The statute defines parent in part as someone who "through interaction, companionship, interplay and mutuality, fulfill[s] the child's psychological needs for a parent as well as the child's physical needs."232 Similarly, New York City recently amended its charter and administrative code for greater recognition of registered domestic partners, including the right to direct the disposal of mortal remains as a spouse would.233

228. Id. at 53-54.
230. See id. at 405.
232. Id.
233. See N.Y.C. COMP. REGS. tit. 25, § 205.01(d) (1998). Because the recent amendment only
Concededly, many state legislatures limit their receptivity to an expanding definition of the family with the context of same-sex marriage proposals. But a state refusal to consider legalizing same-sex marriage with its consequent legitimization of same-sex unions as a social norm with all institutional benefits included, can coexist with legislative enactments like domestic partner registration, which respect the individual’s ability to prioritize the status of a same-sex partner or other non-biological loved one to receive private benefits. In other words, a state’s reticence to officially recognize same-sex unions has not prevented states from permitting families of choice, including same-sex partners, to utilize the law to order their private affairs like a “traditional” family. For instance, health care proxy law’s authorization of non-biologically related persons as health care agents particularly benefits same-sex partners who would otherwise not be consulted by the health care institutions that treat their life partners, and who have sometimes even been barred from seeing their partners in the hospital. Virtually every state has enacted a form of health care proxy law to permit an individual to appoint

pertains to registered domestic partners within the confines of New York City, its passage does not supplant the need for more comprehensive state-wide mortal remains legislation.

234. See Defense of Marriage Act, 1 U.S.C.A. § 7 (West 1997); 28 U.S.C.A. § 1738C (West Supp. 1998) (denying federal recognition of same-sex marriages and allowing states not to recognize same-sex marriages authorized in other states). As of April 1997, 18 states had enacted laws not to recognize same-sex marriage. See Hawaii Seeks Law to Block Gay Marriages, N.Y. TIMES, Apr. 18, 1997, at A15. Although the specifics of the same-sex marriage debate are beyond the scope of this inquiry into mortal remains legislation, this Article advocates opening the definition of family to those who function as a family regardless of whether formal marriage or blood connections form the basis of their relationships. See Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & Pol’y 107, 122 (1996) (“Singular pursuit of same-sex marriage serves to reinforce the primacy of marriage in family definitions, rather than furthering the nearly two-decade battle, often led by lesbians and gay men, to open the door to family benefits for those who function as family as well as for those who have formalized their relationships.”). But see Craig W. Christiansen, If Not Marriage? On Securing Gay and Lesbian Family Values By a “Simulacrum” of Marriage, 66 FORDHAM L. REV. 1699, 1783-84 (1998) (“It is hard to imagine any action more likely to lift the sexual outlaw onus than the legalization of same-sex marriage. In one step, society would confer, perforce, the symbolic legitimization of intimacy that is always implicit in the celebration of a marriage. It would be a civic recognition of shared humanity like no other that gay people have ever experienced. But it could only come with marriage. There is no simulacrum that would do the same.”).


236. See FURROW ET AL., supra note 161, § 17.22, at 359 (defining health care proxy, also known as durable power of attorney for medical decisions).
a proxy to make medical decisions if the individual should become incompetent.\textsuperscript{237}

Some legal scholars have suggested that state legislatures can go even further in functionally recognizing families of choice. For instance, one commentator advocates the abandonment of biological priority lists in the absence of a health care proxy designation.\textsuperscript{238} Instead, it is proposed that such medical decision-making statutes provide for the appointment of proxy decisionmakers who have demonstrated closeness to or concern for the incompetent patient.\textsuperscript{239} The search for a proxy would extend beyond the parameters of biological family in order to include a chosen family of choice. Another commentator also proposes that a functional definition of family be instituted in the judicial use of the substituted judgment doctrine.\textsuperscript{240} Such a functional definition could be implemented by using the factors of long-term emotional commitment and interdependence to identify those persons best able to assert the values of the incompetent patient and act as a substitute decisionmaker.\textsuperscript{241} In sum, state courts and legislatures have begun to incorporate a functional approach to defining family for family law issues which has thus far been generally absent in probate courts and probate codes.\textsuperscript{242}

Despite the fact that a larger number of testators are choosing to favor nonkin and relatives low on the intestacy hierarchy over their lineal

\textsuperscript{237} See id. at § 17-22, at 362.

\textsuperscript{238} See Quinn, supra note 184, at 575; see also Jacqueline J. Glover, Should Families Make Health Care Decisions?, 53 Md. L. Rev. 1158, 1160 (1994); Nancy S. Jecker, The Role of Intimate Others in Medical Decision Making, 30 GERONTOLOGIST 65, 68 (1990) (advocating that "family" be understood from the patient’s perspective in the health care context); Nancy K. Rhoden, Litigating Life and Death, 102 Harv. L. Rev. 375, 437 n.271 (1988) (arguing that family may mean close friend).

\textsuperscript{239} See Quinn, supra note 184, at 575.

\textsuperscript{240} See Ronzetti, supra note 192, at 156 ("There is no reason, however, for kinship or marriage to empower a class of decisionmakers . . . "). The substitute judgment doctrine permits courts to seek the opinions of close family members in making treatment decisions for incapacitated patients who do not execute advance medical directives; Furrow \textit{et al.}, supra note 161, at 718.

\textsuperscript{241} See Ronzetti, supra note 192, at 184.

\textsuperscript{242} See Rosenfield, supra note 100, at 8-15. But see Milton C. Regan, Jr., Family Law and the Pursuit of Intimacy 187 (1993) (advocating that family law not completely supplant a status approach with contract theory for fear that the individualism of contract theory cannot fully encourage "the kind of human caring and sense of mutual responsibility for which the contemporary world cries out—even though such sensitivities cannot always be legally required or enforced."); Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1564-67 (1992) (observing that the privatization of family law through individually ordered contracting may stunt the development of shared public values with respect to family behavior and accordingly should only be relied upon as a mechanism of transition to a publicly regulated family law system of status which is free from gender bias).
heirs, the law of wills has not been as responsive to the expanding definition of the family as the family law context. Instead, the probate area maintains a discontinuity between law and social practice. All probate codes exclude same-sex domestic partners from the list of family members eligible for intestate succession, and probate courts have refused to treat same-sex domestic partners as surviving spouses, or as adult adoption family members. In fact, few cases uphold a testator's freedom of testation when a same-sex domestic partner is the primary beneficiary of the estate. This resistance to the expanding definition of family is also evident in probate cases that do not involve same-sex do-

243. Some commentators speculate that "the new independence enjoyed by the elderly through the existence of social insurance (pensions, social security, Medicare) have resulted in a weakening of the intergenerational bond and closer relations with nonkin. . . ." SHAMMAS ET AL., supra note 81, at 208 (explaining that many elderly living in retirement communities favor their peers over biological family members in testamentary dispositions); see also ROSENFIELD, supra note 100, at 113-14.

244. See Spitko, supra note 18, at 283.

One might reasonably hypothesize that demographic changes in the structure of the typical American family and corresponding shifts in attitudes toward what constitutes a family would have diminished the problem [of probate courts overturning bequests to non-kin]. Recent studies will appear to confirm, however, that this danger to the nonconforming testator persists.

245. See Mary Louise Fellows et al., Committed Partners and Inheritance: An Empirical Study, 16 LAW & INEQ. J. 1, 89 (1998) (discussing an empirical study designed to assess public attitudes about the inclusion of surviving committed partners as heirs in which a substantial majority of the respondents consistently preferred for life partners to take a share of a decedent's estate and preferred same-sex and opposite-sex couples to be treated the same under inheritance laws).


249. See In re Spaulding's Estate, 187 P.2d 889, 893 (Cal. Dist. Ct. App. 1947) (upholding a gay partner's will against an undue influence challenge because the disposition was the product of the testator); see also Weekes v. Gay, 256 S.E.2d 901, 904 (Ga. 1979) (refusing to allow heirs at law to take one half interest in property because the exact relationship with the decedent was unclear); Succession of Bacot, 502 So. 2d 1118 (La. Ct. App. 1987) (upholding distribution to a long-time homosexual lover named "Denny" and not to other "Dennies" with whom testator had a relationship).
Domestic partners, as in the refusal to extend the protection of the equitable adoption doctrine to the extended family context.250 The failure to address the expanding definition of the family is particularly problematic in the trusts and estates context given its intimate connection with family law.251

The resistance to incorporating an expanded definition of family into probate codes may stem from a concern with not wanting to overwhelm the probate system with open-ended inquiries into who can be considered family.252 Overwhelming the probate system may be a particular concern in view of the fact that the vast majority of people in the United States die without a will and have their estates administered under the default distribution scheme of intestacy statutes.253 Intestate statutes preserve judicial economy by setting forth a predefined hierarchy of persons who qualify for distribution.254 Disregarding the hierarchy to inquire into a decedent's own definition of family in the absence of a will would result in lengthier proceedings. With the majority of estates being subject to intestate distribution, it could be troubling to burden the system with lengthier proceedings. Yet, the doctrinal concern with ensuring predictability and judicial economy in the probate of estates is one which is being valued at

250. See O'Neal v. Wilkes, 439 S.E.2d 490 (Ga. 1994) (refusing to recognize an equitable adoption where the only available person to facilitate the adoption was a distant relative without formal authority to enter into contract for adoption); see also Ronald L. Volkmer, Limits of Equitable Adoption Doctrine, 24 EST. PLANNING 95, 95-96 (1997) ("[T]he courts have generally not allowed [equitable adoption] to be used by foster parents to inherit from the equitably adopted child.").

251. See LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 1 (2d ed. 1997) (stating that inheritance law plays a crucial role in the creation and maintenance of families); Edward C. Halbach, Jr., Introduction to Death, Taxes and Family Property 3, 5 (Edward C. Halbach, Jr. ed., 1977) (suggesting that the inheritance system represents the importance of family ties which in turn support the well being of society as a whole).

252. For instance, in advocating the inclusion of step-parents and step-children in intestate distribution schemes, one commentator concedes that the proposed inclusion would compromise certainty and predictability of probate proceedings. See Margaret M. Mahoney, Stepfamilies in the Law of Intestate Succession and Wills, 22 U.C. DAVIS L. REV. 917, 918 (1989) (arguing that greater fairness in the distribution of assets would justify the shift away from certainty and predictability of probate proceedings).

253. See WAGGONER ET AL., supra note 251, at 29-30 ("One study has found that, in terms of wealth, 72.3% of persons with estates valued between $0 and $99,999 do not have wills, 49.8% with estates between $100,000 and $199,999 do not have wills, but only 15.4% with estates between $200,000 and $1 million do not have wills.").

254. See id. at 29.

No intestacy regime can hope to be "suitable" for every person who dies intestate. People whose individual intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.

Id.
the expense of undermining the stability of a testator’s family of choice in contravention of the role of inheritance to make “succession more meaningful, valuable and responsive to the needs and circumstances of a particular family.” Such a balance ignores changing social trends in family structure and attitudes toward death, which other areas of law have addressed. Furthermore, the concern with predictability is not warranted beyond the context of statutory default distribution of gifts. Specifically, when there is no record of a testator’s individual preferences and a distribution must occur by operation of a default, statutory identification of the presumed preferences of the average decedent, opening an inquiry to ascertain the most likely preferences of the individual decedent may sometimes be a fruitless endeavor of contradictory narratives that fail to yield a definitive understanding of the decedent’s preferences. The uncertainty inherent in an open inquiry into decedent preference may not merit the administrative inconvenience of an individualized assessment and therefore may justify the use of statutory default distribution schemes instead. The role of the family of choice in the intestate context merits greater study. Any future examinations of the attempt to incorporate an expansive notion of family into a default statutory scheme should explore how this might be done without reducing the concept of families of choice to a set definition in contravention to this Article’s argument for decedent-controlled definitions of family.
In contrast, when a testator has appropriately recorded his or her testamentary preferences, an individualized judicial assessment is automatically triggered, thereby undermining the doctrinal concern with administrative convenience and predictability, which would otherwise exclude a consideration of the expanding definition of family. Thus, the law of wills could start to address the expanding definition of family by thoroughly assessing who are the natural objects of a particular testator’s bounty rather than narrowly confining the analysis to a testator’s understanding of who the biological family members are. Some probate court judges have overly circumscribed the understanding of what persons can be perceived as the natural objects of a testator’s bounty by limiting them to intestate distributees. A more expansive assessment of the natural objects of a testator’s bounty would assist probate courts in more closely adhering to the principle of freedom of testation in challenges by biological family members. The context of challenges over burial instructions should be a manageable context in which to respect a testator’s own definition of family because it can be divorced from probate court concerns over a testator recognizing his or her financial support obligations to minor children and spouses.

One instance of such an approach was evident in the 1993 burial dispute of Stewart v. Schwartz Brothers-Jeffer Memorial Chapel. In the Stewart case, decedent Drew Stanton’s mother and brother took possession of his remains and had them shipped from West Virginia to New York for an elaborate Orthodox Jewish funeral and burial. The funeral plan was opposed by Mr. Stanton’s life-partner of five years who stated that the decedent had informed him of his opposition to a Jewish funeral ceremony and instead preferred that his remains be cremated. Although probate respect for any person that a testator may have preferred and viewed as family and thus is not as easily subject to a statutory definition.

260. A mental incapacity challenge to a will is based in part on whether a testator understood who were the persons who were the natural objects of his bounty. See ATKINSON, supra note 56, § 51. The natural objects of one’s bounty are “those persons whom a mentally sound testator would be expected to favor, such as a spouse or children or other close relatives.” REUTLINGER, supra note 73, at 53.

261. See In re Estate of Strozzi, 903 P.2d 852, 857 (N.M. Ct. App. 1995) (instructing jury that the natural objects of a testator’s bounty “are ordinarily those persons designated to inherit from him in the absence of a will”). Intestate distributees are those family members designated by statute to receive a decedent’s property in the absence of a valid will. See REUTLINGER, supra note 73, at 11-12.

262. 606 N.Y.S.2d 965, 966 (Sup. Ct. 1993) (issuing a judicial opinion to serve as a guidepost for other courts even though the litigants settled the case).

263. See id.

264. See id.
the decedent failed to record his cremation preference in his will, the court considered "the close, spousal-like relationship that existed between the Plaintiff and his 'significant other'" in according the life-partner standing to assert the decedent's cremation preference "as representative of Stanton's wishes."

Despite the great respect which the court accorded the decedent's life partner, the court did not fully consider the significance of the decedent's construction of a family of choice. For instance, the decedent's life-partner was accorded standing as the representative of the decedent's wishes only after the court acknowledged the strained nature of decedent's relationship with his biological family. In fact, the court noted the difficult burden such a representative would have in usurping a biological family's general right to possession of a decedent's remains. Thus, even though the court recognized the life-partner's special role, he was not legally considered "family" in the same way that the decedent treated his life-partner as family by naming him his sole heir, appointing him executor of the estate, communicating his funeral preferences, and living together as a family for five years. Probate courts would more accurately implement a decedent's intent if they used the more expansive definition of family that is being developed in the family law area. Mortal remains legislation is one mechanism for commencing the trusts and estates acknowledgment of the expanding definition of the family and the changing attitudes toward death.

III. THE USE OF MORTAL REMAINS LEGISLATION TO MAKE TRUSTS & ESTATES MORE RESPONSIVE TO CHANGING LEGAL ATTITUDES TOWARD DEATH & FAMILY

Human beings are social as well as self-determining.

A more expansive definition of family in the consideration of who is the natural object of a particular decedent's bounty, along with a greater respect for the doctrine of testamentary intent alone would not

265. Id.
266. Id. at 967.
267. See id. at 968.
268. See id. at 966.
269. GLENDON, supra note 185, at 137 (stating that because individuals are partly constituted in and through their relationships with others, the law should develop a fuller concept of human personhood to negotiate social policy issues).
radically alter the difficulties that families of choice encounter in attempting to have a decedent's burial wishes implemented. The ambulatory nature of wills\textsuperscript{270} and their attendant revocation requirements are not conducive to the summary context of making burial arrangements.\textsuperscript{271}

As a preliminary matter, many survivors do not consult the contents of a will until after the decedent has been buried, thereby obviating any formal consideration of the decedent's burial wishes stated in the will.\textsuperscript{272} Even in those instances in which the survivors do consult the will before making funeral arrangements, implementation of the decedent's burial wishes are not a straightforward matter. Funeral parlors are reticent to override a biological family's preferences if the will has not been probated. The courts that have addressed the matter have uniformly stated that because there is no property right to a dead body in the commercial sense (as opposed to the quasi-property right of possession for burial) burial instructions in a will are not testamentary in nature and need not be probated prior to implementation.\textsuperscript{273} In fact, most probate codes provide that even before testamentary letters are issued to authorize an executor's fiduciary role, the executor is authorized to bury the decedent and pay necessary funeral expenses.\textsuperscript{274} Unfortunately, the hesitance of funeral parlors to abide by an unprobated will when there is a dispute can create a barrier to enforcing a testator's wishes in the severely constrained timetable of mortal remains disposal. Those survivors who consider probating the will just to allay the concerns of a funeral parlor find that the lengthy time frame in which it takes to probate a will and the expense involved in preserving and storing a corpse before burial effectively prohibit the probate of wills to ensure that the burial wishes expressed in the will were the testator's own and not subject to mental incapacity, duress or fraud.

In contexts where probating the will is not an issue, questions can still arise as to whether a testator's post-execution words or actions re-

\textsuperscript{270} During a testator's lifetime, a will is ambulatory because it is always subject to change and revocation until the testator's death makes the will final and irrevocable. See Reutlinger, supra note 73, at 60.

\textsuperscript{271} See Wojcik, supra note 1, at 423.

\textsuperscript{272} See, e.g., In re Estate of Fischer, 117 N.E.2d 855, 856 (Ill. App. Ct. 1954) (involving a surviving spouse who buried testator in Rosehill Cemetery without knowledge that will designated the Graceland Cemetery for burial); Guerin v. Cassidy, 119 A.2d 780, 782 (N.J. Super. Ct. 1955) (stating decedent was buried in Laurel Memorial Park Cemetery before it was discovered that her will designated the Holy Cross Cemetery for burial).

\textsuperscript{273} See In re Scheck's Estate, 14 N.Y.S.2d 946, 950-51 (Sup. Ct. 1939).

\textsuperscript{274} See, e.g., 755 ILL COMP. STAT. 5/6-14 (West 1993).
voked the burial preferences stated in the will. Just as the non-testamentary character of burial instructions permit such instructions to be enforced without probating the will, their non-testamentary character also precludes the need for formal revocation if the testator should alter his burial plans. Thus, the quasi-property nature of mortal remains is a context that does not lend itself to complete enforcement under the rubric of a will. Instead, estate planners should be able to execute a separate mortal remains proxy as part of the diverse set of documents that are routinely prepared for clients as they consider their mortality.

The "dead hand control" rationale for the exercise of freedom of testation over tangible property also supports the enactment of mortal remains legislation. The justification for permitting a decedent to exert control over his or her pecuniary property after no longer being able to benefit from such decisions in death is that some dead hand control by a decedent encourages thrift and industry during the decedent's lifetime, which in turn is good for society. The very same logic can be applied to the context of mortal remains. Just as dead hand control benefits the individual and the community at large, decedent control over mortal remains disposal benefits the individual and society. Decedent control over mortal remains disposal can assist those who are dying to come to peace with their mortality and thereby enjoy living. Society also benefits through the efficiency of pre-arranged funeral plans, which can diminish familial conflicts. Dead hand control in mortal remains also furthers the goals of thrift and industry by reassuring decedents that their preferences are always paramount.

275. See Fidelity Union Trust Co. v. Heller, 84 A.2d 485, 488 (N.J. Super. Ct. Ch. Div. 1951) ("Revocation of the direction in a will with respect to burial may be accomplished without the execution of another will or codicil in writing or other writing declaring the alteration executed in the manner in which written wills are required by law to be executed.") (quoting N.J. STAT. ANN. § 3A.3-4 (West 1997).

276. The documents that most estate planners regularly prepare for their clients in addition to wills and trusts, are medical directives such as the living will and health care proxy and a durable power of attorney. One jurisdiction has instituted an alternative to a separate mortal remains proxy document. Illinois permits its durable power of attorney for health care to empower the named agent to also make necessary funeral arrangements unless specifically excluded from doing so in the document. See 755 ILL. COMP. STAT. 45/2-1 (West 1993). Yet this is not an alternative that will be attractive to a majority of legislatures because of its conflation of health care decisionmaking with the separate context of mortal remains disposal. In fact, a decedent may very well want different people assigned to the roles of health care proxy and mortal remains proxy.

277. The control that a decedent can exert over his property after his death is referred to as "dead hand control." See REUTLINGER, supra note 73, at 148.

278. See SIMES, supra note 25, at 21.

279. See ANDREWS, infra note 291, at 30.
the reciprocity justification for the laws of inheritance given the fact that
the caretakers of the elderly and the infirm are no longer guaranteed to
be biological family members but rather families of choice and other in-
dividuals to whom the decedent prefers forming reciprocal attach-
ments.\(^\text{280}\)

More importantly, mortal remains legislation can actually facilitate a
greater doctrinal respect for the freedom of testation principle because it
refocuses the trusts and estates bar on the importance of the individual’s
autonomy when familial conflicts arise.\(^\text{281}\) This would continue the mod-
ern autonomy trajectory begun by approval of the Uniform Anatomical
Gifts Act (UAGA) in 1968.\(^\text{282}\) Section 4 of the UAGA permits a person
to give his or her body to any hospital, physician, medical school, or
body bank for research or transplantation, by filling out a UAGA signa-
ture card or making such a bequest in a will.\(^\text{283}\) By 1973, all fifty states
and Washington, D.C. had adopted the UAGA in whole or in part in re-
response to the need for cadaver organs for transplantation.\(^\text{284}\) The influ-
ence of the UAGA created a climate in which a decedent’s wishes with
respect to his or her own bodily remains could take precedence over the
preferences of a decedent’s family. Although many institutions are reti-
cent to accept a decedent’s organ donation where there are strong familial
objections,\(^\text{285}\) the formal existence of the UAGA has encouraged a con-

As policies covering inheritance make clear, our society recognizes the important psychologi-
cal benefit to people when they are alive of determining what will happen to their property
after death. There is a similar psychological benefit to them, and often to their relatives, in
knowing that society will honor their wishes about disposing of their bodies after death.

Id.

280. See ROSENFELD, supra note 100, at 3, 5-6, 112-26, 123-29. See also John H. Beckstrom,
a decedent’s only biological relatives are distantly related sociobiology indicates that they would prefer
to provide testamentary recognition to stepparents and friends with whom they are more inti-
mately connected).

281. Even though some might question the need for respecting the autonomy of the individual
once the individual has ceased to be, doing so assures the living that society respects autonomy
in general and thereby indirectly supports the dead hand control goals of thrift and industry. See Halbach, supra note 251, at 5-6 (noting that inheritance systems serve as an incentive to hard work, productivity, and saving). Furthermore, respecting the autonomy of decedents provides the benefits of lifetime assistance in individual confrontation with death and grieving by the decedent and those en-
trusted to arrange the disposal of mortal remains.


1999).

284. See Daphne D. Sipes, Legislative Update on the State Adoption of the 1987 Revision to
authorization of organ donation has not eased the organ shortage. Jesse Dukeminier, Supplying Or-

285. See Gina Kolata, Families Often Block Organ Donations Study Finds, PLAIN DEALER,
sideration of a decedent’s wishes by both the surviving family and the legal profession. In the context of mortal remains where there is no commercial property right in a dead body and thus no assured testamentary power of distribution absent a probate code provision,286 legislation like the UAGA and mortal remains legislation treat the dead body like quasi-property over which the decedent has a delimited right to disposal and thereby authorizes wills to include the same information.287 The quasi-property status of the dead body also permits organ donations and burial instructions to be enforced even when the will is not submitted to probate or denied probate.288 As a consequence, the UAGA and mortal remains legislation further the principle of freedom of testation without disrupting the tangible property structure of the law of wills.

Yet mortal remains legislation does more than simply provide greater support for the freedom of testation principle. The legislation also re-envisioned the autonomy exercised by a testator. The pragmatic autonomy employed by a mortal remains proxy user treats freedom of testation as an opportunity to define who is family. The status imparted to people when they are entrusted with the important task of controlling the disposal of mortal remains is a form of familial recognition. Mortal remains legislation envisions the freedom of testation right as part of the process of defining a family of choice from non-kin and kin alike. Autonomy is re-envisioned as the ability to further communal ties rather than merely implementing an extreme form of individualism.

In this way, the pragmatic autonomy of mortal remains legislation differs from the traditional view of the freedom of testation principle.

July 11, 1995, at E9; Aaron Spital, Mandated Choice: A Plan to Increase Public Commitment to Organ Donation, 273 JAMA 504 (1995) (describing the common practice of deferring to familial objections). Non-consensual organ removal has been recently subject to civil damages. See, e.g., Whaley v. County of Tuscola, 58 F.3d 1111, 1117 (6th Cir. 1995).

286. See Unif. Probate Code § 1-201(39) (amended 1990), 8 U.L.A. 41 (1998) (stating property over which a testator has testamentary power of disposition “includes both real and personal property or any interest therein and means anything that may be the subject of ownership”). But see Florida v. Powell, 497 So. 2d 1188, 1192 (Fla. 1986) (finding Florida Corneal Removal Statute not a taking of property because next of kin have no actual property rights in the remains of a decedent).

287. The concern could arise that mortal remains legislation might inadvertently reinforce a resistance to organ donation by buttressing an individual’s attachment to his or her dead body. Yet, the contemplation of death that the mortal remains legislation encourages could very well facilitate greater interest in organ donation. See supra note 95.

288. See, e.g., N.Y. Pub. Health Law § 4303(1) (McKinney 1997) (“A gift of all or part of the body under this article [for anatomical gifts] may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.”).
Pragmatic autonomy conceives of freedom of testation as facilitating the construction and maintenance of a family of choice; whereas, the traditional view envisions testators as rugged individuals who use their autonomy to benefit or disadvantage the narrow circle of biological family members and spouses. Because the traditional view positions biological family members and spouses as the predetermined objects of a testator's bounty and authorizes testators to exclude or include them in their estates as part of their freedom of testation, it consequently overlooks the communal aspects attached to the exercise of freedom of testation. As a result, the traditional conception of freedom of testation has an impaired ability to reconcile the conflict between a biological family and a decedent's exercise of autonomy.

The ultimate question of who owns death is probably not a question that the law of wills can or should answer. The question of who owns death stems from the pervasive "intuitive image" of property as absolute power over things to the total exclusion of anyone else. In contrast, this Article has employed the view of property as a mechanism for defining relationships. Hence, to the extent that mortal remains inspire sentiments of possession, mortal remains legislation acknowledges that the property interests are shared among a number of interconnected persons and employs a theory of pragmatic autonomy that authorizes the decedent to define who those persons are. The proprietary sense that sur-

289. See Williams, supra note 3, at 278.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.


291. Because it is beyond the scope of this Article, the pragmatic autonomy analysis does not address contemporary proposals to commodify human remains and the human body for the purpose of promoting organ donation. See Lori B. Andrews, My Body, My Property, 16 Hastings Center Rep. 28, 29 (Oct. 1986) (arguing for a market in body parts to increase the supply of organs for donation); Danielle M. Wagner, Comment, Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology, 33 Duq. L. Rev. 931, 943 (stating advances in the field of biotechnology have made more urgent the need to commercialize the human body and its parts). But see Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1851 (1987) (rejecting
viving loved ones exert over mortal remains involves the way people grieve and come to terms with the loss accompanying death.\textsuperscript{292} At the same time, decedents use the disposition of mortal remains as part of their own process of accepting death.\textsuperscript{293} The materiality of death belongs simultaneously to both the decedent and those who will mourn the decedent. "Labeling something as property does not predetermine what rights an owner does or does not have in it."\textsuperscript{294} Mortal remains legislation purposefully does not settle the question of who owns death but instead appreciates the complexity of the property of death in a society where autonomy is valued but few people live their lives alone.\textsuperscript{295} Thus, mortal remains legislation transcends the critique of merely supporting an "acontextual rights-bearer seeking to vindicate his own interest notwithstanding... a web of relationships" affected by his actions.\textsuperscript{296} Instead, mortal remains legislation relies upon the concept of pragmatic autonomy to create a construct that respects individual rights while acknowledging the importance of the individual's social network.\textsuperscript{297} In fact, a decedent's ability to exercise autonomy in the disposal of mortal remains depends upon an implementation by those who survive the decedent. Death is a context in which autonomy is enforced by one's relation to others.\textsuperscript{298} Mortal remains legislation authorizes individuals to exert their autonomy...
in coming to terms with their own mortality and permits those the individual considers family to lay claim to the quasi-property of the mortal remains for their own grieving process. In the end, death implicates the needs of not only the decedent, but of those who loved him or her as well. This is a balance that the law of wills has long understood, but has narrowly interpreted by viewing spouses and biological family members as the only mourners of significance. The modern development of a professional mortuary industry has diminished the societal need to accord biological families and spouses primary control over mortal remains disposal because it is now a simple matter of hiring the services of a mortuary professional rather than searching for a willing party to cleanse and appropriately dispose of the dead body. A mortal remains proxy can just as easily be contacted and consulted as a surviving family member or spouse to ensure the public health need for a timely and dignified disposal of mortal remains.

Thus, mortal remains legislation is a principled way to deal with the conflict between a biological family and a decedent's definition of family because it supports the respect for autonomy that forms the basis of the freedom of testation doctrine, and it also incorporates the changing approach to death that focuses on the need of the individual to control disposal of his own corporeal remains in accepting the inevitability of death. To the extent that there remains fear in considering one's own death, mortal remains legislation can facilitate respecting the individual's autonomy to decide who is family for purposes of handling corporeal remains, while simultaneously permitting the individual to avoid the details of death by appointing an agent to do so. One commentator advocates that the legal system recognize "the taboo of death talk" rather than relying upon the fiction that human beings discuss death as candidly as other topics. The incorporation of mortal remains legislation into estate planning counseling sessions could very well assist clients in confronting their fear of death.

Moreover, mortal remains legislation also respects the changing definition of the family by permitting a decedent to choose the person with whom he or she feels a close familial connection to act as his or her

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299. See IRION, supra note 97, at 60 ("The funeral is also a social observance, an event that involves a community of individuals.").

300. HARMON, supra note 152, at 139.

301. See SHAFFER, supra note 94, at 125-26 (suggesting that there is evidence that when estate planning sessions include a counseling component regarding death that the sessions become therapeutic and assist clients in overcoming their denial of death).
agent rather than presuming biological members have such a connection to the decedent. Despite the fervent opposition to mortal remains legislation as "anti-family" by funeral directors, such proxy designations would be a modest addition to trusts and estates practice in comparison to a wholesale reform of what constitutes family for probate codes. Although it is certainly a worthwhile endeavor to consider an expansive modernization of trusts and estates doctrine to reflect cultural changes in the definition of family, this Article advisedly refrains from incorporating such a proposal at this time.\textsuperscript{302} To construct a new operational definition of family for probate codes that could be institutionalized would entail a designation of objective factors for consideration of what makes up a family. In effect, the construction of an institutional definition of functional family would itself constitute a preconceived notion of what a family is that could conflict with a decedent's subjective experience and understanding of family.\textsuperscript{303} In the context of mortal remains disposal where autonomous control over the management of one's death and preference of one's mourners has a therapeutic value in assisting decedents to come to terms with the materiality of their own mortality, it seems particularly misplaced to impose any limitations on what makes up a family.\textsuperscript{304} "As the cultural vision of family incorporates those who love and care for one another, strict adherence to formal definitions will only obstruct the broader social policy of supporting family nurturance, caretaking and commitment."\textsuperscript{305}


\textsuperscript{303} See Martha Albertson Fineman, \textit{Our Sacred Institution: The Ideal of the Family in American Law and Society}, 1993 UTAH L. REV. 387, 394 (1993) ("This [functional] process of analogy and justification further reinforces the role of the natural, nuclear family as the paradigmatic sexual affiliation. It accepts the nuclear family as an institution that appropriately structures the discourse about alternative intimate entities, creating the metanarrative by which others are judged."); Note, \textit{supra} note 190, at 1652-53 ("functionalism, . . . is an imperfect way to equalize the position of traditional and nontraditional relationships with respect to autonomy and stability. . . . functionalism offers little practical guidance to courts for comparing traditional with nontraditional relationships. Moreover, such comparisons require an intrusive judicial examination into the intimate details of the lives of individuals in nontraditional relationships.").

\textsuperscript{304} See \textit{JAN E. DIZARD \\& HOWARD GADLIN, THE MINIMAL FAMILY} 23 (1990) ("The modern family is, in fact, a number of different families. The specific form a given family takes is a function of what the individuals involved bring to their relationship, the sum of their convictions, their ethnic traditions, and their own, personal desires and aspirations.").

\textsuperscript{305} Eitelbrick, \textit{supra} note 234, at 152. One legal scholar has proposed that the institution of family be reconceptualized as "nurturing units" in which people who come together to provide caretaking to dependents would be legally recognized as a family. \textit{See FINEMAN, supra} note 189, at 228,
In conclusion, by instituting mortal remains legislation that acknowledges the therapeutic value of a decedent's autonomy over mortal remains disposal and the decedent's choice of what constitutes family, and by making such proxies a part of trusts and estates practice, the law of wills can begin to reflect the modern transformation in approaches to death and definitions of family evident in health law and family law, respectively.\textsuperscript{306} Mortal remains legislation shows that the doctrinal tension between the individual and the family can be addressed by respecting the individual's autonomy to define for himself or herself who constitutes family beyond biological constraints. In this way both the needs of the individual and the family of choice are validated.

\textsuperscript{231 & 235} (proposing that the “nurturing unit” model of family replace the existing sexual family model in which all families are defined in relation to the husband-wife relationship). \textit{But see} Jane S. Schacter, \textit{“Counted Among the Blessed”}: \textit{One Court and the Constitution of Family}, 74 \textit{Tex. L. Rev.} 1267, 1270 (1996) (“[W]hile there is and should be no prototypical lesbian or gay family [analogy-\textsuperscript{sing} such families to traditional families] can help to build the important, if elementary, idea that the words ‘lesbian and gay’ and ‘family’ can stand in something other than oxymoronic relation to one another. And that recognition is necessary to creating social and legal conditions that support an evolving array of diversely configured lesbian and gay—and other—families.”).

\textsuperscript{306} \textit{See} \textit{Fineman}, \textit{supra} note 189, at 236 (“The family can no longer be an assumed institution in policy discussions, but must be an explicitly self-conscious, constantly reconsidered configuration that reflects both existing reality and collective responsibility.”). Although the use of mortal remains legislation may be viewed as an incomplete response to the needs of persons in committed relationships in much the same way that reliance upon contract law to allocate rights and obligations between partners is not comprehensive enough, “the limited protections and benefits available through private law making have themselves become the basis for arguing for greater public rights.” Fellows, et al., \textit{supra} note 245, at 18-21; \textit{see also} Martha M. Ertman, \textit{Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either}, 73 \textit{Denver U. L. Rev.} 1107, 1162-63 (1996) (stating contract rights for sexual minorities can encourage the development of public rights for gays and lesbians by according homosexuals with legal personhood). \textit{But see} Craig W. Christensen, \textit{Legal Ordering of Family Values: The Case of Gay and Lesbian Families}, 18 \textit{Caro\textsuperscript{o}zo L. Rev.} 1299, 1415 (1997) (stating that “it is unlikely that unadorned laissez-faire private contracting will ever completely displace public ordering” for complete access to legal rights).