

2011

# Freedom of Testation / Freedom of Contract

Adam J. Hirsch

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Hirsch, Adam J., "Freedom of Testation / Freedom of Contract" (2011). *Minnesota Law Review*. 472.  
<https://scholarship.law.umn.edu/mlr/472>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

---

---

**Article**

**Freedom of Testation / Freedom of Contract**

**Adam J. Hirsch<sup>†</sup>**

Introduction .....	2180
I. Theoretical Prologue .....	2186
II. Forbidden Conditions .....	2193
A. Personal Conduct .....	2193
B. No-Contest Clauses .....	2207
III. Forbidden Bequests .....	2213
A. Enemy Aliens and Slayers .....	2213
B. Capricious Purposes .....	2215
IV. Compulsory Bequests .....	2221
A. Spousal Shares .....	2222
B. Filial Shares .....	2233
V. Future Interests .....	2238
Conclusion .....	2251

INTRODUCTION

How we categorize our rules helps to shape what they become. Lawmakers know their subjects, of course, and they aspire to formulate rules on the merits; no one could fairly brand these craftsmen as simple-minded. Nevertheless, they remain conspicuously *symbol*-minded. Like laypersons—only more so—lawmakers rely on abstract symbols to streamline their thinking.<sup>1</sup> By gathering doctrines under a single categorical umbrel-

---

<sup>†</sup> William & Catherine VanDercreek Professor of Law, Florida State University. M.A. 1979, J.D. 1982, Ph.D. 1987, Yale University. My thanks to Gregory Alexander, Mark Ascher, Shawn Bayern, Andrew Gold, Matthew Harding, John Langbein, Dan Markel, Grayson McCouch, Robert Sitkoff, Joshua Tate, and auditors at faculty colloquia at Arizona State University College of Law, Texas Wesleyan University School of Law, and the University of Tulsa College of Law for helpful comments. Copyright © 2011 by Adam J. Hirsch.

1. With his usual acuity, Oliver Wendell Holmes, Jr. recognized this tendency and warned against overreliance on symbols with his aphorism that “[w]e must think things not words, or at least we must constantly translate

la, we connect them symbolically and encourage lawmakers to harmonize law within the defined category. Likewise, by distinguishing categories and decorating them with different symbols, we discourage comparative analysis, and thereby obscure coincidences of policy that nonetheless link the isolated doctrines structurally. Pointless inconsistencies of law often follow. Although it may not steer rules along predetermined paths, legal taxonomy guides lawmakers to scout in given directions for relevant symmetries and analogies. It serves, in other words, as a sort of compass, which—depending on how well it is calibrated—can send lawmakers wandering down blind alleys or lead them straight to the heart of things.<sup>2</sup>

The prevailing canon categorizes gratuitous transfers as a branch of property law—“family property law,” as the American Law Institute would have it.<sup>3</sup> Accordingly, the doctrines of gifts and wills have occupied a volume of the second, and now of the third, Restatement of Property.<sup>4</sup> Considered structurally, though, the essential doctrines of property delineate rights of exclusivity, of an owner against all others—or, as legal historians are wont to say, matters of *meum* and *tuum*. By contrast, the doctrines of gifts and wills are secondary: presupposing that an exclusive right to property exists, these doctrines address owners’ subsidiary rights to move their property into other hands—matters involving economic interrelations between persons.

Thus conceptualized, doctrines of gifts and wills appear to resemble secondary doctrines governing other sorts of voluntary movements of property—to wit, exchanges, which fall under the

---

our words into the facts for which they stand, if we are to keep to the real and the true.” Oliver W. Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

2. For a fuller discussion, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L. REV. 1057, 1135–62 (1996); see also ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19–53 (2000) (weighing the virtues and vices of categorization); Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25, 39–43 (2009) (assessing the functions of legal categorization).

3. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS intro. (2003).

4. *Id.*; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS (1983); see also, e.g., 1 WILLIAM H. PAGE, PAGE ON THE LAW OF WILLS § 1.1, at 1 (Jeffrey A. Schoenblum ed., rev. ed. 2003 & Supp. 2009) (“The law of wills . . . is clearly a part of the law of property.”); Peter Birks, *Introduction to ENGLISH PRIVATE LAW* ix, xxxv–xli (Peter Birks ed., 2000) (classifying wills as a subcategory of the law of property, and contracts as a subcategory of the law of obligations). This categorical framework traces back to Roman law, if not earlier. THE INSTITUTES OF JUSTINIAN 65, 111, 198 (J.A.C. Thomas ed., 1975).

rubric of contract law. The two may feature a closer connection than even this correspondence would suggest. Whereas some benefactors may make gifts and bequests that are wholly altruistic and unilateral, gratuitous transfers frequently involve implicit elements of exchange, albeit ones not adorned with the symbol “consideration” by the legal system. Scholars from a range of disciplines have explored the phenomenon.<sup>5</sup> And even though, for want of a symbol, courts decline to enforce such quasi-exchanges as obligations, they may remain self-enforcing via the unstated threat to terminate the parties’ relationship—a sanction also lurking in the background of contractual exchange.<sup>6</sup> In reality, then, the distinction between contracts and gratuities is a blurry one. Each occasions productive activity, and although gratuities fuel a more shrouded, gray economy,

---

5. The literature on this subject is as scattered as it is vast. For a classic economic discussion, see KENNETH E. BOULDING, *THE ECONOMY OF LOVE AND FEAR* (1973). For more recent discussions, see, for example, *THE ECONOMICS OF RECIPROCITY, GIVING AND ALTRUISM* (L.-A. Gérard-Varet et al. eds., 2000); 1 & 2 *HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY* (Serge-Christophe Kolm & Jean M. Ythier eds., 2006); ODED STARK, *ALTRUISM AND BEYOND* (1995); Avner Offer, *Between the Gift and the Market: The Economy of Regard*, 50 *ECON. HIST. REV.* 450 *passim* (1997). For field studies, see Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 *J. ECON. LITERATURE* 315, 339–41 (2009); Armin Falk, Note, *Gift Exchange in the Field*, 75 *ECONOMETRICA* 1501 *passim* (2007). For an anthropological discussion, see, for example, MARCEL MAUSS, *THE GIFT* (W.D. Hall trans., 1990). For a sociological discussion, see, for example, DAVID CHEAL, *THE GIFT ECONOMY* (1988). For a historical discussion, see, for example, ILANA KRAUSMAN BEN-AMOS, *THE CULTURE OF GIVING: INFORMAL SUPPORT AND GIFT EXCHANGE IN EARLY MODERN ENGLAND* (2008). For a philosophical discussion, see, for example, DAVID J. OWENS, *Obligation and Involvement*, in *SHAPING THE NORMATIVE LANDSCAPE* (forthcoming 2012). For a psychological discussion, see, for example, *THE PSYCHOLOGY OF GRATITUDE* (Robert A. Emmons & Michael E. McCullough eds., 2004). For a study grounded in behavioral biology, see, for example, Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Exchange*, in *THE ADAPTED MIND* 163 *passim* (Jerome H. Barkow et al. eds., 1992). For a study grounded in population genetics, see, for example, Samuel Bowles, *Did Warfare Among Ancestral Hunter-Gatherers Affect the Evolution of Human Social Behaviors?*, 324 *SCIENCE*, June 5, 2009, at 1293 *passim*. For neuroeconomic research, see, for example, James K. Rilling & Alan G. Sanfey, *The Neuroscience of Social Decision-Making*, 62 *ANN. REV. PSYCHOL.* 23, 26–28 (2011). For an interdisciplinary anthology, see *THE QUESTION OF THE GIFT* (Mark Osteen ed., 2002). For additional references, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 *IND. L.J.* 1, 9 n.30 (1992).

6. Benjamin Klein, *The Role of Incomplete Contracts in Self-Enforcing Relationships*, in *THE ECONOMICS OF CONTRACTS* 59 *passim* (Eric Brousseau & Jean-Michel Glachant eds., 2002).

that economy nevertheless rivals the traditional market in its social significance.<sup>7</sup>

Nor do the linkages end there. Just as gratuities may mask quasi-exchanges, contracts may mask quasi-subsidies, where bargains are knowingly disproportionate.<sup>8</sup> The two economies, in short, can converge, and this convergence may be more than tacit. Some transfers *formally* combine exchange with gratuity. These include third-party beneficiary contracts, transfers in trust to a compensated third-party trustee, and, in a testamentary context, contracts to make wills, contracts with pay-on-death designations, the rare but interesting “bequest” of a period of employment<sup>9</sup>—plus some other compounds whose less conspicuous attributes need clarifying.<sup>10</sup>

The foundational claim of this Article is that associating the law of gratuities with the law of contracts, gathered within a reconfigured category of *transfers*, would pay conceptual dividends and, at the end of the day, promote public policy.<sup>11</sup> This

---

7. Economic studies have found that a large fraction (possibly in the range of eighty percent) of household wealth in the United States traces to gifts and inheritances, as opposed to participation in the labor economy. William G. Gale & John K. Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, 8 J. ECON. PERSP. 145, 146–47, 156–57 (1994) (citing to earlier studies); Pierre Pestieau, *The Role of Gift and Estate Transfers in the United States and in Europe*, in DEATH AND DOLLARS 64, 71–74 (Alicia H. Munnell & Annika Sundén eds., 2003) (citing to earlier studies). For a recent study of the relative importance of exchange and altruism in prompting these transfers, both in the context of gifts and of bequests, see Edward C. Norton & Courtney H. Van Houtven, *Inter Vivos Transfers and Exchange*, 73 S. ECON. J. 157 *passim* (2006) (citing to earlier conflicting studies, and finding evidence of exchange as inducing gifts but not bequests). For references to additional relevant studies, see *infra* note 212.

8. For a recognition of this social reality and its implications for the consideration requirement in contract law, see RESTATEMENT (SECOND) OF CONTRACTS §§ 71 & cmt. c, 79 & cmt. d (1981). The phenomenon of “altruistic” contracts is sufficiently familiar that, in connection with employment, we have a nontechnical word to describe them—we call these labor agreements *sinecures*. But contracts can blend elements of gift and exchange. For discussions, see George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 *passim* (1982); Offer, *supra* note 5, at 472; Florian Englmaier & Steve Leider, Gift Exchange in the Lab—It Is Not (Only) How Much You Give . . . , at 1 (2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1546364>.

9. See, e.g., *D’Arcangelo v. D’Arcangelo*, 43 A.2d 169, 170–71 (N.J. Ch. 1945) (holding such an instruction not to comprise a legacy but nevertheless to be enforceable for a testator’s wholly owned business); *Hughes v. Hiscox*, 174 N.Y.S. 564, 565–69 (Sup. Ct. 1919) (same).

10. See *infra* text following note 53 and text accompanying note 170.

11. Of course, we can continue to conceptualize property as a metacategory incorporating transfers of both sorts as sources or forms of wealth. See Birks, *supra* note 4, at xlii (categorizing wills within the law of property and

is not to say that all distinctions of doctrine between gratuities and contracts ought to be obliterated. Plainly, many are justified,<sup>12</sup> just as particular distinctions between gifts and wills within gratuitous transfers law are justified, and particular distinctions between bargains for goods and for services within contract law are justified. The categories we choose to set apart need not be pristine to be useful. Simply by identifying gratuities and contracts as kindred problems, we call attention to doctrinal asymmetries that have taken shape—and then press lawmakers either to smooth out those asymmetries *or to vindicate them*, in the face of provisional skepticism.

To be sure, the categorical relation highlighted in this Article has not escaped all notice. As early as the seventeenth century, legal thinkers asserted that, in various doctrinal contexts, “a valid argument runs from contracts to last wills, and vice-versa.”<sup>13</sup> Commentators have continued to make the point now and again.<sup>14</sup> Nevertheless, the relation has never gone

---

contracts within the law of obligations but accepting that “[a]t the highest level of generality” both “arise from a manifestation of the consent of some grantor . . . . Manifestations of consent include contracts, conveyances, and wills.”). See generally Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009).

12. For a defense of one such doctrinal distinction that nevertheless draws attention to the categorical relation, see Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821 *passim* (1997).

13. R.H. Helmholz, *The Origins of Holographic Wills in English Law*, 15 J. LEGAL HIST. 97, 102 (1994) (quoting English formulary manuscript c. 1620, translated from the Latin text).

14. In the eighteenth century, as organized by Blackstone, “contract and succession are both dealt with as means by which the title to property gets transferred. There is no doubt that freedom of contract and freedom of testation were then, and later, closely connected ideas.” P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 89 (1979). In the nineteenth century, Jeremy Bentham identified wills as a subcategory of contracts. JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 6 *THE WORKS OF JEREMY BENTHAM* 189, 530 (John Bowring ed., Russell & Russell 1962) (1827). In the twentieth century, H.L.A. Hart grouped the law of wills with the law of contracts as coequal bodies of “power-conferring rules,” allowing individuals “to vary their initial positions under the primary rules,” which Hart rated as “one of the great contributions of law to social life.” H.L.A. HART, *THE CONCEPT OF LAW* 28, 94 (1961). Still more recently, in the course of elaborating the conventional scheme of classification, the American Law Institute paused to acknowledge the relation: “This part of the Restatement . . . excludes . . . commercial transactions in property, even though some of the property problems dealt with herein may arise in a commercial context as well as in a donative one.” *RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS* intro. (1983); see also, e.g., JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 3.2(b), at 109 (6th ed. 2009) (observing that, with regard to the formal requirements for contractual and testamentary transfers, “[t]he Statute of Frauds and the Statute of Wills

through the rigors of systematic inquiry. Formal reclassification of wills and contracts as branches of transfers law within codes and Restatements would function to prompt such inquiry.

In earlier work, I cross-examined default rule principles within the law of wills and contracts, concluding that the theory applicable to contractual defaults readily carries over to inheritance defaults and should serve as a model for both.<sup>15</sup> The present Article broadens the comparison to mandatory rules—more exactly, mandatory substantive rules,<sup>16</sup> setting limits on freedom of testation and freedom of contract, respectively. I shall leave for another day mandatory limits on a transferor's right to create *any* will or contract on account of the transferor's state of mind, embodied in structurally corresponding doctrines of testamentary and contractual capacity. Likewise, the problem of encroachment by third parties upon the exercise of testamentary or contractual freedom, addressed by doctrines of fraud, duress, undue influence, and tortious interference—again, each with a parallel in the law of wills and the law of contracts—merits separate treatment. More than enough remains to occupy us for awhile.

Part I lays a theoretical foundation by comparing the justifications for freedom of contract, together with rationales for limiting it, with freedom of testation and its limits. The sections following proceed to measure and reassess from a contracts perspective the sphere of freedom of testation in greater depth. Part II inspects prevailing restrictions on conditional bequests. Part III takes up restrictions applicable even to unconditional bequests. Part IV explores the polar-opposite topic

---

embody similar considerations"). An analogous connection has been drawn between the laws of trusts and contracts, although it remains a matter of controversy. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625 *passim* (1995); see also David Horton, *Unconscionability in the Law of Trusts*, 84 *NOTRE DAME L. REV.* 1675 *passim* (2009) (arguing that trust law should absorb the unconscionability doctrine from contract law); cf. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 *N.Y.U. L. REV.* 434, 469–72 (1998); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *CORNELL L. REV.* 621, 627–34 (2004); Joshua C. Tate, *Should Charitable Trust Enforcement Rights Be Assignable?*, 85 *CHI.-KENT L. REV.* 1045, 1056–67 (2010).

15. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031 *passim* (2004) [hereinafter Hirsch, *Default Rules*]. For an extension of this analysis, see Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 *WASH. U. L. REV.* 609, 633–35, 659–63 (2009) [hereinafter Hirsch, *Obsolescence*].

16. For a discussion of mandatory procedural rules for formalizing wills in comparison to contracts, see Hirsch, *supra* note 2, at 1078–82.

of compulsory bequests. Part V turns finally to the temporal dimension of testation—that is, the power of a testator to project his or her estate-planning edicts into the future.

### I. THEORETICAL PROLOGUE

*“[L]iberty is not a value but the ground of value.”*

—W.H. Auden<sup>17</sup>

Many thinkers (not least Patrick Henry) would take issue with Auden’s dictum. We may prize economic autonomy along with other liberties for their own sake.<sup>18</sup> Freedom of contract and of gift-giving fit snugly within a libertarian ethic, but freedom of testation, narrowly defined, carries that ethic into new existential territory: Must we respect persons’ autonomy embodied in a last will, even after they have become *disembodied*? Philosophers perennially debate the matter,<sup>19</sup> and we shall have to leave it there. Yet, as Auden suggests, the problem does not end there; we can identify virtues in liberty without embracing libertarianism. Our analysis can focus, alternatively, on utilitarian concerns. Whether or not we deem it a good *per se*, economic autonomy facilitates our obtaining other goods.

Freedom of contract, coupled with legal mechanisms of contract enforcement, create the conditions under which markets proliferate. Voluntary trade is utility-enhancing for both parties to a transaction, channeling items of property to the

---

17. W.H. Auden, *Introduction* to HENRY JAMES, *THE AMERICAN SCENE*, at xviii (W.H. Auden ed., 1946) (1907).

18. See *In re Wilkins’ Estate*, 211 N.W. 652, 653–54 (Wis. 1927) (exalting freedom of testation as a “sacred right”); *Printing & Numerical Registering Co. v. Sampson*, [1875] L.R.Eq. 462 at 465 (Eng.) (“Contracts when entered into freely and voluntarily shall be held sacred.”); see also, e.g., CHARLES FRIED, *CONTRACT AS PROMISE 2* (1981) (lauding freedom of contract as an expression of “liberal individualism”). For a broader discussion distinguishing the “opportunity” and “process” components of freedom, see AMARTYA SEN, *RATIONALITY AND FREEDOM* 506–27, 583–695 (2002).

19. For a summary, see Hirsch & Wang, *supra* note 5, at 7 & n.23. For broader discussions, see DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* (2008); Kirsten R. Smolensky, *Rights of the Dead*, 37 *HOFSTRA L. REV.* 763 *passim* (2009). For a literary observation of the conundrum, see CHARLES DICKENS, *OUR MUTUAL FRIEND* 4–5 (New York, Macmillan & Co. 1895) (1865) (“What world does a dead man belong to? T’other world. What world does money belong to? This world. Can a corpse own it, want it, spend it, claim it, miss it?”).

party who values them more.<sup>20</sup> And these gains from trade are only the beginning, since the opportunity for trade facilitates the division of labor, thereby unlocking productive energies and efficiencies that expand the sum of tradable property available—hence contributing not merely to a Pareto optimal allocation of resources, but to plenty.<sup>21</sup>

Analogous benefits flow from freedom of testation. Gratuitous transfers obviously benefit recipients, but they simultaneously gratify a benefactor, whose happiness depends on theirs (given an interdependent utility function, in the icy jargon of economics)—a Pareto optimal gain from transfer, as opposed to trade.<sup>22</sup> Although benefactors cannot share in a beneficiary's utility from an inheritance at the time of its receipt, they can envision it, and derive present utility from its anticipation.<sup>23</sup> Giving persons the right to make a will therefore encourages them to produce and to save more wealth,<sup>24</sup> again adding to the sum of capital stock.<sup>25</sup> Freedom of testation can

---

20. *E.g.*, Anthony T. Kronman & Richard A. Posner, *Introduction: Economic Theory and Contract Law*, in *THE ECONOMICS OF CONTRACT LAW* 1, 1–4 (Anthony T. Kronman & Richard A. Posner eds., 1979).

21. *E.g.*, Douglass C. North, *Institutions and Economic Growth: An Historical Introduction*, 17 *WORLD DEV.* 1319, 1319–21 (1989). For an early discussion, see 1 ADAM SMITH, *THE WEALTH OF NATIONS* 7–20 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776). For a judicial recognition, see *Diamond Match Co. v. Roeber*, 13 N.E. 419, 421–22 (N.Y. 1887) (“It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain.”). For an argument that the division of labor (and, by extension, the free trade permitting that division) played a part in our survival as a species, see Richard D. Horan et al., *How Trade Saved Humanity from Biological Exclusion: An Economic Theory of Neanderthal Extinction*, 58 *J. ECON. BEHAV. & ORG.* 1 *passim* (2005).

22. Theodore C. Bergstrom, *A Survey of Theories of the Family*, in 1A *HANDBOOK OF POPULATION AND FAMILY ECONOMICS* 21, 59–62 (Mark R. Rosenzweig & Oded Stark eds., 1997).

23. Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, in *CHOICE OVER TIME* 213, 213–15, 223–28 (George Loewenstein & Jon Elster eds., 1992).

24. For a recent empirical analysis, see Wojciech Kopczuk & Joseph P. Lupton, *To Leave or Not to Leave: The Distribution of Bequest Motives*, 74 *REV. ECON. STUD.* 207 *passim* (2007) (finding that households with bequest motives spend significantly less on lifetime consumption). For references to earlier discussions, see Hirsch & Wang, *supra* note 5, at 7–9. For judicial acknowledgements, see *Licata v. Spector*, 225 A.2d 28, 30 (Conn. C.P. 1966); *Wogan v. Small*, 11 Serg. & Rawle 141, 145 (Pa. 1824) (“[F]reedom of disposition by last will . . . is one of the greatest excitements to enterprise and industry.”).

25. Still, the marginal impact of interdependent utilities on productivity and saving is tempered by the benefactor's simultaneous regard for self. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 282, 284 (1976).

simultaneously give rise to a virtual market for reciprocal altruistic transfers, beneficiaries providing social services that benefactors value in implicit exchange for a share of their estates.<sup>26</sup> In theory, beneficiaries could offer those same services within a contract-based market, but cultural taboos inhibit explicit exchanges within families and other social networks.<sup>27</sup> What is more, the very offer of services *for sale* can alter their social nature, paradoxically reducing the utility of transferors, and also sometimes cheapening the services' value to recipients.<sup>28</sup> In the language of economics, things *given* and things *sold* are imperfect substitutes.

---

*But cf.* Louis Kaplow, *Utility from Accumulation*, NAT'L TAX ASSOC., PROC. 102ND ANN. CONF. (forthcoming 2011) (suggesting that self-regard can *encourage* saving). This regard has figured in several popular works on inheritance aimed at the "Me" generation. ELMER OTTE, *INHERIT YOUR OWN MONEY* (1978); STEPHEN M. POLLAN & MARK LEVINE, *DIE BROKE* (1998). For an early discussion, see DAVID HUME, *A TREATISE OF HUMAN NATURE* 486–87 (P.H. Nidditch ed., Oxford Press 2d ed. 1978) (1739–1740) (observing that individuals embedded within families exhibit a mixture of altruism and selfishness). For a further psychological insight into saving behavior, see Wojciech Kopczuk & Joel Slemrod, *Denial of Death and Economic Behavior*, 5 *ADVANCES THEORETICAL ECON.*, no. 1, 2005, available at <http://www.bepress.com/bejte/advances/vol5/iss1/art5>.

26. Hirsch & Wang, *supra* note 5, at 9–11 (citing to prior discussions). For a further discussion, see Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the Fresh Start*, 45 *HASTINGS L.J.* 175, 211–14 (1994). For an early discussion recognizing both rationales, see BENTHAM, *supra* note 14, at 531 ("In this way, value is created, as it were, out of nothing."). For an early spoof of the phenomenon within popular culture, see BEN JONSON, *VOLPONE* (Alvin B. Kernan & Richard B. Young eds., Yale Univ. Press 1962) (first performed as a stage play in 1606).

27. For a historical discussion, see William I. Miller, *Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland*, 61 *SPECULUM* 18, 21–25, 42, 46–50 (1986). For economic and social interpretations, see Rachel E. Kranton, *Reciprocal Exchange: A Self-Sustaining System*, 86 *AM. ECON. REV.* 830 *passim* (1996) (arguing that reciprocal altruism and exchange tend to be mutually exclusive and path-dependent); Offer, *supra* note 5, at 454 (noting the preference against cash as a medium of inter vivos reciprocal altruism, which would make the transfer appear "too much like a wage"). Taboos against formal exchange are occasionally explored, once again, within popular culture. In a disturbing scene in the feature film *Carnal Knowledge*, a mistress complains to her self-absorbed, emotionally distant paramour, played by Jack Nicholson (who else?), that, ensconced in his apartment, she has no life and no career. In an extended soliloquy, he angrily responds by offering to employ her—paying her fixed dollar amounts for each type and item of household service that she performs for him within the apartment. *CARNAL KNOWLEDGE* (AVCO Embassy Pictures 1971).

28. PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 112 (1964); STEPHEN A. SMITH, *CONTRACT THEORY* 223–24 (2004) ("[P]art of the value of a gift lies in the fact that it is given *as a gift* . . . . The expression of [donative] intent is considered valuable in and of itself."); RICHARD TITTMUS, *THE GIFT*

Of course, only the stoniest of hearts views an estate plan exclusively as a medium of exchange. And if the state does not intend to confiscate property upon the deaths of its owners, it must devolve according to some plan of distribution to survivors. Assuming a family is tied together by bonds of affection, leaving estate plans to owners' discretion exploits their knowledge (and hence their comparative advantage as contrasted with legislators or courts) to devise a plan that enhances the family's welfare.<sup>29</sup> By analogy, what Dean Roscoe Pound called "contractual dirigism"<sup>30</sup>—a command economy in which the state orders industrial exchange—would squander the knowledge that market signals provide and again lessen the welfare of society.

As a historical matter, the laws of exchange have tended in the direction of expanding freedom and hence have evolved "from [s]tatus to [c]ontract," in Sir Henry Maine's celebrated phrase.<sup>31</sup> We can discern an analogous trend from status-based rights of inheritance toward unfettered testation.<sup>32</sup> It is easy to generalize today that "[t]he organizing principle of the American law of donative transfers is freedom of disposition."<sup>33</sup> Still and all, neither freedom of contract nor freedom of testation has ever become absolute under our law.<sup>34</sup> Each has its limits,

---

RELATIONSHIP 263–64 (Ann Oakley & John Ashton eds., 1997); Offer, *supra* note 5, at 454. And vice versa: just as cultural taboos may require exchanges to be clothed as gifts, decorum sometimes demands that the benefactor dress up a gift as a contract. Miller, *supra* note 27, at 22. The social more against gifting typically arises in situations where an act of charity would cause the recipient to lose status. See BOULDING, *supra* note 5, at 26.

29. Hirsch and Wang, *supra* note 5, at 12 (citing to prior discussions).

30. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 161–63 (rev. ed. 1954) (borrowing the phrase from French jurists).

31. HENRY S. MAINE, ANCIENT LAW 172–74 (Frederick Pollock ed., J. Murray 10th ed. 1920) (1897).

32. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 284–94, 435–37 (1990) (describing early legal currents); RAY D. MADOFF, IMMORTALITY AND THE LAW 5–11 (2010) (noting modern trends). For an example of a limitation on freedom of testation that has become extinct, see Shirley N. Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407 *passim* (1992). *But cf. infra* note 281 (concerning trust law).

33. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

34. See *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005) ("It is an elementary principle that a person can dispose of his or her property by will as he or she pleases *so long as that person's intent is not contrary to any principle of law or public policy.*" (emphasis added)). Likewise: "The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by

in theory and in practice. As the foregoing pages have suggested, rationales for granting freedom of contract and of testation roughly correspond. Do rationales for *restricting* freedom of contract and of testation also correspond?

One justification for confining freedom of contract stems from its dependence on suitable conditions to ensure its proper exercise. When a market operates imperfectly, unfettered freedom of contract can lead to inefficiency. Thus, an agreement between two contractors might impose a cost on others that they would pay to avoid. Yet, third parties sometimes cannot bargain with contractors due to coordination impediments or for other reasons. The market can sustain such an agreement, even if its spillover costs (also known as negative externalities, in the parlance of economics) exceed its benefits. Under these conditions, lawmakers preserve efficiency by restraining freedom of contract.<sup>35</sup> Rules barring contracts to commit crimes represent an obvious example, and various other market regulations also trace to this source. The classic (but not exclusive) justification for disallowing clauses in contracts for credit that waive the bankruptcy discharge is that such clauses would harm family members and burden the state's welfare apparatus by weakening the incentives of hopelessly insolvent debtors to labor.<sup>36</sup>

A second, more controversial, justification for limiting freedom of contract follows not from market failure, but (so to say) from personal failure. Lawmakers could anticipate that con-

---

public policy, and by the nature of things." *Sternaman v. Metro. Life Ins. Co.*, 62 N.E. 763, 764 (N.Y. 1902). "[C]ontractual freedom is . . . not fundamental to the notion of the contract . . . . Public order is . . . a constituent aspect thereof, as it specifies the conditions under which the law recognizes its binding force." Jacques Ghestin, *The Contract as Economic Trade*, in *THE ECONOMICS OF CONTRACTS*, *supra* note 6, at 99, 105–06. For a recognition of limitations on both freedom of testation and of contract, see MAX WEBER, *ECONOMY AND SOCIETY* 668, 691–92 (Guenther Roth & Clause Wittich eds., Bedminster Press 1968) (1922). For a comparative geographical study of freedom of testation, see JENS BECKERT, *INHERITED WEALTH* 21–82 (Thomas Dunlap trans., Princeton Univ. Press 2008) (2004).

35. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178–179 (1981); *see id.* § 178 cmts. b–c (recognizing that the analysis requires a “balancing of interests”); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 58–77 (1993). An alternative, more flexible response would be to *tax* contracts that implicate spillover costs, causing contractors to adjust to actual costs—what economists call a Pigouvian tax, in honor of the theorist who developed the concept. *See infra* note 135.

36. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 243–45 (1986).

tracting parties may come to regret an agreement, either because they will have misjudged what would contribute to their utility or because they will have failed to take evolving, time-inconsistent preferences into account. Lawmakers might then take it upon themselves to proscribe a type of contract or term that they have reason to believe will produce regret systematically.<sup>37</sup> Although critics object to this paternalistic response as either speculative, growth inhibiting, or morally inappropriate for adults,<sup>38</sup> a number of existing laws appear motivated by this aim. Rules barring the sale of social security and other pension benefits, for example, protect “myopic”<sup>39</sup> employees, those who discount their future security, from decisions their later selves would likely condemn.<sup>40</sup> At the same time, most if not all such rules also involve spillover costs (radiating, for example, from destitution in old age) that comprise a dual policy consideration.<sup>41</sup>

If paternalism is grounded in utilitarian concerns, other limitations on freedom of contract are equitable or welfarist in conception. Lawmakers minded to bring about a “fair” division of wealth in society may regulate the allocation of gains from trade in order to achieve what they perceive as distributive justice.<sup>42</sup> Regulations of this sort have taken either of two forms.

---

37. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 *passim* (1983). Professor Radin argues that rendering inalienable those aspects of property central to “personhood” is freedom enhancing rather than paternalistic, for once they are lost the individual forfeits the capacity for “proper self-development” that is itself essential for freedom. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1898–99 (1987). This criticism may largely revolve around semantics, for advocates of paternalism agree that the regret they seek to avert in others can be profoundly demoralizing. *E.g.*, Kronman, *supra*, at 782.

38. TREBILCOCK, *supra* note 35, at 147–63; Rochelle Spengel, Note, *Paternalism and Contract: A Critique of Anthony Kronman*, 10 CARDOZO L. REV. 593, 607–24 (1988). For more general critiques, see, for example, DONALD VANDEVEER, PATERNALISTIC INTERVENTION 69–70 (1986); Danny Scoccia, *Paternalism and Respect for Autonomy*, 100 ETHICS 318 *passim* (1990).

39. On the phenomenon of myopia (also known as akrasia or hyperbolic discounting in the nomenclature of cognitive psychology), see, for example, JONATHAN BARON, THINKING AND DECIDING 470–83 (3d ed. 2000).

40. Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275, 1299, 1317–18 (1991). For additional references, see Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 23 & n.78 (1995).

41. See Kronman, *supra* note 37, at 764 (acknowledging this common duality).

42. For the seminal discussion, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 *passim* (1980); see also Kronman,

Some rules operate across the board to police specific relationships where lawmakers apprehend a danger of systematic distributive inequities resulting from unequal bargaining power. Hence, rules limiting interest rates for loans, requiring warranties of habitability, or setting minimum wages regulate contractual relations between creditor and debtor, landlord and tenant, employer and employee, shifting wealth in each instance from the first group to the second.<sup>43</sup> Alternatively, lawmakers can enforce equitable limits on freedom of contract case-by-case. The defense of substantive unconscionability appears premised on the notion that when contracts become too “one-sided,” possibly for that reason alone, but more clearly when the party disproportionately enriched also has less need, they produce distributive injustice.<sup>44</sup>

Turning, by comparison, to freedom of testation, one rationale for narrowing contractual freedom has no general bearing: paternalism cannot underlie a critique of testamentary liberty. A will takes effect only after a testator dies. Once that event occurs, lawmakers need fret no longer about the testator’s wellbeing; the dead lose their capacity either to regret or, for that matter, to celebrate their decisions. Paternalism could hold merit for parties who would otherwise kick themselves (including, perhaps, beneficiaries).<sup>45</sup> Decedents just spin in their graves.

At the same time, testamentary transfers do have distributive consequences that commentators sometimes condemn as

---

*supra* note 37, at 771–72. Dean Kronman propounds a normative defense of this use of contract law both within the parameters of liberal political theory and even libertarian theory. For a response to the second claim, see Larry Alexander & William Wang, *Natural Advantages and Contractual Justice*, 3 LAW & PHIL. 281 *passim* (1984).

43. Kronman, *supra* note 42, at 473. *But see* TREBILCOCK, *supra* note 35, at 252–53 (questioning the need for regulation so long as businesses of comparable size and power compete with each other to trade with consumers).

44. Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 135–36 (2008) (“While the doctrine of unconscionability is not explicitly framed in distributive terms, its distributive aspects have been often noted . . . [C]ourts usually do not apply the doctrine to the benefit of rich victims.”). On the doctrine of substantive unconscionability, see generally Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 748–85 (1982); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 509–17 (1967).

45. For a further discussion, see Hirsch & Wang, *supra* note 5, at 26. Nonetheless, limitations on the right to make inter vivos gifts, concerning which the donor’s capacity to regret remains intact, could be premised on paternalism. For discussions, see E. ALLAN FARNSWORTH, CHANGING YOUR MIND 143–47 (1998); E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385 *passim* (2000).

unjust.<sup>46</sup> The injustice in these instances flows from the distribution not of net gains, but of gross receipts, in relation to preexisting inequalities. Likewise, testamentary transfers sometimes implicate market failures that lawmakers and commentators cite to justify constraints on freedom of testation.

In sum, although the problems of freedom of contract and freedom of testation are not identical, they do appear closely enough connected to make comparative analysis a useful exercise. To the extent that substantive asymmetries between the boundaries of each freedom emerge, they demand either justification or rectification within a consolidated theory of freedom of transfer. There remains, though, a second and even more important correspondence to bear in mind—one of *substitutability*, as opposed to analogy. A contract resembles a will sufficiently that one can sometimes replace the other; a testator could look to either as a tool of estate planning. To the extent contracts and wills can perform equivalent functions, asymmetric restrictions on freedom of transfer become not merely inconsistent, but incompatible. As such, they are also inequitable, allowing the better counseled to accomplish through clever exploitation of instrumental “loopholes” what the more poorly counseled cannot. These asymmetries should carry an indelible mark of illegitimacy.

Let us keep all of this in view as we turn to a more detailed examination of freedom of testation and its limits.

## II. FORBIDDEN CONDITIONS

### A. PERSONAL CONDUCT

A testator may saddle a bequest with conditions. So long as the beneficiary fulfills a condition, he or she can receive the inheritance (either as a delayed lump sum or as a continuing income stream). Otherwise, the beneficiary forfeits the interest. Conditional bequests are ordinarily valid—but not always. If

---

46. To be sure, the very institution of inheritance is open to criticism within liberal political theory. *Cf., e.g.*, BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 201–07 (1980); D.W. Haslett, *Distributive Justice and Inheritance*, in *IS INHERITANCE LEGITIMATE?* 133 *passim* (Guido Erreygers & Toon Vandeveldede eds., 1997); Michael B. Levy, *Liberal Equality and Inherited Wealth*, 11 *POL. THEORY* 545 *passim* (1983). The instant analysis accepts that institution as a given and considers only the distributive consequences of freedom of testation within a legal system that permits private inheritance of property by successive generations.

the condition entails conduct “contrary to public policy or violative of some rule of law,” the condition is void.<sup>47</sup> Thus, a condition attached to a bequest requiring the beneficiary to commit a crime is invalid.<sup>48</sup> This much is readily justifiable as avoiding spillover costs. The rule shadows one within contract law, voiding contracts that call for or comprise the commission of crimes.<sup>49</sup>

Intriguingly, lawmakers have gone farther. As elaborated in the Restatement of Property, if a testator conditions a bequest on the beneficiary’s marital decisions, the condition may fail. The issue hinges on whether or not the condition was intended “unreasonably [to] limit the . . . opportunity to marry.”<sup>50</sup> A conditional bequest intended to encourage separation or divorce likewise fails.<sup>51</sup> At the same time, a conditional bequest designed to influence religious affiliation, or personal habits (such as abstemiousness), or pursuit of an education or a particular occupation is valid, according to the Restatement.<sup>52</sup>

Although less detailed in its treatment, the Restatement of Contracts tracks these limitations.<sup>53</sup> That is as it should be, for conditional bequests are not true gratuities at all. Like a contract, they require performance of a quid pro quo. Considered structurally, in fact, we may just as well describe a conditional bequest as a unilateral contract offer made at death. No reason appears why a contract offer made during life, calling for per-

---

47. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 5.1 (1983). The third Restatement of Property fails to revisit the problem, although it acknowledges generally the doctrine limiting “unreasonable restraints on . . . marriage.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003). The third Restatement of Property also endorses the “[p]ublic policy . . . limit[s] [on the] freedom of disposition” set out in the third Restatement of Trusts, discussed *infra* notes 65, 72 and accompanying text, although the third Restatement of Property contains no express proposal to duplicate those limits and apply them to conditional bequests out of trust. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS div. VIII, scope of div. VIII (Tentative Draft No. 6, 2010) (approved May 2010).

48. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 5.1 cmt. c (1983).

49. RESTATEMENT OF CONTRACTS § 512 (1932); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

50. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (1983). The limitation only applies to conditions that continue postmortem. A condition that a beneficiary must meet before the death of the testator is indistinguishable from a threat of disinheritance and hence is per se valid. *Id.* § 6.1 cmt. c & illus. 5; RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(2) (2003).

51. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.1 (1983).

52. *Id.* §§ 8.1–3.

53. RESTATEMENT (SECOND) OF CONTRACTS §§ 189–190 (1981).

formance that could continue after death, should be judged according to a different standard.

It is therefore striking, and sadly typical, that as concerns void terms and conditions, neither the Restatement of Contracts nor the Restatement of Property ever once cross-references the other. Rather than analogize contractual restraints on marriage to testamentary ones, the Restatement of Contracts analogizes the problem to restraints on *trade*, covered elsewhere in the same Restatement.<sup>54</sup> Model lawmakers working in the areas of contracts and wills have launched doctrinal ships in the night. That the two have managed nonetheless to chart an approximately parallel course testifies to lawmakers' like-mindedness concerning these problems. Still, when lawmakers sail along independently, some scattering becomes predictable. Their doctrines have drifted apart in a number of respects, as reflected in the two Restatements.

One inconsistency involves the scope of permissible restraints. Under both Restatements a *comprehensive* restraint on any first marriage is invalid.<sup>55</sup> Both Restatements also agree that the validity of *partial* restraints on first marriages depends on their reasonability. But in the course of elaborating this characteristic, the two Restatements offer illustrations that appear to conflict. For instance, under the Restatement of Property, a condition in a bequest to a sixty-year-old unmarried sister that she not marry before the age of eighty is invalid.<sup>56</sup> By comparison, under the Restatement of Contracts a condition not to marry in a contract between a fifty-year-old unmarried niece, promising housekeeping services, and her seventy-year-old uncle, promising a payment upon his death, is reasonable

---

54. *Id.* § 189 cmt. a. Nevertheless, some commentators, along with the occasional court, have spied the categorical analogy. See *Estate of Robertson*, 859 N.E.2d 772, 775–76 (Ind. Ct. App. 2007); see also *Cooke v. Turner*, (1846) 153 Eng. Rep. 1044, 1047 (L.R. Exch.); 15 M. & W. 727, 736; 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 933, at 1955 (4th ed. 1918) (“intimately connected . . . and depending upon the same principle”); 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 16:17, at 429–30 (Richard A. Lord ed., 4th ed. 1997). The third Restatement of Trusts, covering a category straddling contracts and property, refers to provisions on conditions found in the Restatements of both of those subjects, see RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. i(2), j (2003), although the Restatement of Trusts declines to follow either. See *infra* note 65.

55. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1(1) (1983); RESTATEMENT (SECOND) OF CONTRACTS § 189 illus. 1 (1981) (by implication).

56. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 illus. 6 (1983).

and hence effective.<sup>57</sup> Although the probability that such a contract would continue to bind the fifty-year-old until the age of eighty is doubtless small,<sup>58</sup> the two restraints seem roughly comparable.

Of course, reasonability is a standard, and dueling illustrations in a contractual and testamentary setting do not imply that a court must read and apply the two standards differently; by their nature, standards are fuzzy. The Restatements part company more tangibly, however, in two other respects. One concerns the relevance of motivation. The Restatement of Contracts follows an objective standard of reasonability, never taking into consideration why a party to the contract imposed the condition.<sup>59</sup> By contrast, the Restatement of Property follows a subjective standard. A bequest conditioned on not marrying takes effect without the condition only “[a]bsent any admissible evidence as to [the testator’s] motive.”<sup>60</sup> Were evidence to disclose a “dominant motive” simply to provide support *until* marriage, the condition would remain valid.<sup>61</sup>

The other discrepancy concerns the consequences of invalidity. Under the Restatement of Property, when the court finds a condition void, the bequest remains effective and becomes unconditional.<sup>62</sup> By contrast, under the Restatement of Contracts, the court can either invalidate the condition and excuse its nonperformance but still enforce the other party’s promise *or* invalidate the entire contract, depending on whether the court

---

57. RESTATEMENT (SECOND) OF CONTRACTS § 189 illus. 2 (1981).

58. According to the Social Security Administration’s 2006 actuarial tables, the average life expectancy of a man of seventy is 13.55 years. *Period Life Table*, SOC. SECURITY ADMIN., <http://www.ssa.gov/OACT/STATS/table4c6.html> (last visited April 27, 2011).

59. See RESTATEMENT (SECOND) OF CONTRACTS §§ 189–190 (1981). The Restatement cites approvingly a case expressly distinguishing its objective approach from a subjective one. *Id.* § 190 reporter’s note to cmt. a (citing *In re Marriage of Dawley*, 551 P.2d 323, 328 (Cal. 1976)).

60. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 illus. 1 (1983).

61. *Id.* § 6.1(2) & cmt. e; see also *id.* §§ 6.2 cmts. g–h, 6.3 cmt. f & illus. 7, 7.1 & cmt. d, 7.2 & cmts. d–e, 8.1 cmt. d, 8.2 cmt. c, 8.3 cmt. d (applying subjective analysis to other conditions); cf. RESTATEMENT (SECOND) OF CONTRACTS § 189 cmt. a (1981) (allowing contracts that objectively “serve some purpose other than that of merely discouraging marriage”).

62. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1(1) & cmt. d & illus. 8 (1983); see also, e.g., *Home For Incurables of Balt. City v. Univ. of Md. Med. Sys. Corp.*, 797 A.2d 746, 751 (Md. 2002). Some early cases invalidated the entire bequest, however. Olin L. Browder, *Illegal Conditions and Limitations: Effect of Illegality*, 47 MICH. L. REV. 759, 760–62 (1949).

finds that the unenforceable condition “was [or was not] an essential part of the agreed exchange.”<sup>63</sup> If the void condition, such as not marrying, comprised the *sole* consideration for the transfer, then the court presumably would find the contract invalid and not enforce the transfer.<sup>64</sup>

These asymmetries aside, we may question the soundness of limitations on the validity of conditional transfers of this sort. Those limitations have now been cast into sharp relief by the promulgation of still another Restatement project, the third Restatement of Trusts. In contrast to the second Restatements of Property and Contracts, and contrary to most of the case law, this new Restatement would broadly invalidate trust conditions restraining marriage, divorce, religious practice, and occupation—thereby cutting back on the current latitude of freedom of testation.<sup>65</sup>

The rationale articulated in the Restatements of Property and Contracts for limits on the validity of marital conditions is the public policy in favor of ensuring that citizens have an opportunity to marry. As expressed in the Restatement of Contracts, “the freedom of individuals to marry should not be impaired except for good reason.”<sup>66</sup> As reiterated in the

---

63. RESTATEMENT (SECOND) OF CONTRACTS § 185 & cmt. b (1981).

64. Compare *McCoy v. Flynn*, 151 N.W. 465, 468 (Iowa 1915) (holding that a party who had fulfilled a promise not to marry for three years in exchange for a promised payment of \$5000 could not recover under the invalid contract), with *King v. King*, 59 N.E. 111, 112 (Ohio 1900) (holding that a party who had fulfilled a promise to provide caregiving services for the second party and not to marry during the second party’s lifetime was enforceable against the second party, even though the term in the contract restraining marriage was void, because that term comprised “a mere incident to the main purpose” of the contract).

65. RESTATEMENT (THIRD) OF TRUSTS § 29 & cmts. i–l (2003); cf. RESTATEMENT (SECOND) OF TRUSTS § 62 & cmts. b–j (1959) (giving greater deference to testamentary intent). The position taken by the third Restatement of Trusts is adopted by the Uniform Trust Code, see UNIF. TRUST CODE § 404 cmt. (amended 2005), 7C U.L.A. 484 (2006), and several non-Uniform state statutes. Because only trusts fall within the remit of this Restatement, a testator can create a conditional bequest out of trust in order to avoid its potential application. The case law, however, has not traditionally distinguished the treatment of conditions in and out of trust. 2 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS §§ 9.3.5–8 (5th ed. 2006); see also *In re Estate of Feinberg*, 919 N.E.2d 888, 895, 902 (Ill. 2009) (observing, in a marital restriction case not directly concerned with a trust, that “[t]he public policy of the state of Illinois . . . is . . . one of broad testamentary freedom,” and that “[w]e have not yet had reason to consider whether any section of the Restatement (Third) of Trusts . . . is an accurate expression of Illinois law”).

66. RESTATEMENT (SECOND) OF CONTRACTS § 189 cmt. a (1981).

Restatement of Property, “coercing abstention from marriage” via a gratuitous transfer is “socially undesirable.”<sup>67</sup>

Taken literally, this rationale should lead toward doctrinal qualifications that fail to emerge from the case law. Under this theory, only conditions unreasonably proscribing marriage could potentially violate public policy; those *prescribing* marriage should not. Thus, consider a bequest conditioned on not marrying outside a particular group—typically, but not necessarily, adherents of a specified religious faith. The Restatement of Property offers as its example a bequest of income “to my son S for life, provided that, if he ever marries a person not of the Catholic faith” the income interest terminates.<sup>68</sup> The Restatement would give effect to such a condition so long as the number of permitted marital partners is sufficiently large as to make marriage realistically possible, and so long as the beneficiary’s own beliefs (such as devotion to a different faith) will not preclude marriage to one of those permitted partners.<sup>69</sup> This approach follows logically from the Restatement’s rationale<sup>70</sup> and could be extended to proscriptions of marriage to persons outside a given ethnic group or, in the twenty-first century, to persons of a given gender.

Yet, suppose the bequest were worded differently: income to S for life “if he marries a person of the Catholic faith.” Thus framed, the bequest creates an incentive to marry a Catholic, but creates no disincentive to marry anyone else; a beneficiary who abstains from marriage receives the same treatment as one who marries a Protestant. Such a condition should not vi-

---

67. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 cmt. a (1983).

68. *Id.* § 6.2 illus. 3.

69. *Id.* § 6.2 cmts. a, c, f & illus. 3. For case law, see *Maddox v. Maddox's Adm'r*, 52 Va. (11 Gratt.) 804, 808–09 (1854).

70. One of the Restatement’s illustrations appears flawed, however. It addresses the scenario of a bequest to a daughter to be forfeited if she ever marries a named person, leaving a nearly universal set of permitted marital partners. Nevertheless, the Restatement posits, if the daughter was engaged to that named person when the bequest matured, the condition is void, because in that event “a marriage permitted by the restraint was not likely to occur.” RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 illus. 1 (1983). *But see* *Graydon's Ex'rs v. Graydon*, 23 N.J. Eq. 229, 236–38 (Ch. 1872) (holding to the contrary), *rev'd on other grounds*, 25 N.J. Eq. 561 (1874). What a sentimental notion! If the beneficiary is prevailed upon to break her engagement, the illustration assumes, she is unlikely to marry anyone else. More realistically, the circumstance of engagement to a forbidden partner does not make marriage by the beneficiary improbable—it simply makes her willingness to carry out the condition improbable.

olate public policy, at least as propounded by the Restatement. The case law, however, fails to distinguish proscriptive and prescriptive conditions, assessing both under a reasonability standard.<sup>71</sup>

This being so, the cases appear to reflect a more far-reaching public policy than the one indicated in the Restatements: a policy not to favor marriage, strictly speaking, but to favor marital *choice*. As concerns a decision so personal as marriage, lawmakers wish citizens to be free from “unreasonable” interference by third parties, which would include incentives they create either to remain unmarried or to marry within closely confined groups. The third Restatement of Trusts adopts this position and expands it to cover most marital conditions. To give effect to these conditions would allow the testator to “exert[] a socially undesirable influence on the exercise or nonexercise of fundamental rights that significantly affect the personal lives of beneficiaries and often of others as well.”<sup>72</sup>

Nevertheless, in assessing the public policy of all conditional bequests, we must remember that the influence they exert comes in the shape of a blandishment, and not a shotgun. The weddings (or bachelorhoods) that ensue stem not from coercion, but from the beneficiary’s appraisal of what matters more to him or her—money or matrimonial preference.<sup>73</sup> If

---

71. The Restatement’s illustrations cover only proscriptions of marriage. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 illus. 1–3 (1983); *cf. In re Silverstein’s Will*, 155 N.Y.S.2d 598, 599 (Sur. Ct. 1956) (prescriptive condition held valid if “reasonable”); *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 826, 828–29 (Ohio Ct. Com. Pl. 1974) (same); *In re Estate of Keffalas*, 233 A.2d 248, 250–51 (Pa. 1967) (upholding one prescriptive condition, but striking down another that encouraged divorce). No published cases have tested the validity of a condition proscribing marriage to anyone but a named person, or, by contrast, of a condition prescribing marriage to a named person, so their respective legality remains uncertain. Some courts have distinguished the validity of conditions on the basis of their technical form. The Restatement criticizes these distinctions, as have many courts. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 cmt. b & reporter’s note 3 (1983); *see also, e.g., Pacholder v. Rosenheim*, 99 A. 672, 674 (Md. 1916); *Winters v. Miller*, 261 N.E.2d 205, 208 (Ohio Ct. Com. Pl. 1970) (“a purely semantic whimsy”).

72. RESTATEMENT (THIRD) OF TRUSTS § 29 & cmt. i (2003). This statement is generally applicable to marital conditions, religious conditions, and occupational conditions. *See id.* § 29 cmt. i(2). The third Restatement retains a reasonability standard but redefines it to bar all religious restrictions on marriage, although restrictions on underage marriage continue to be deemed reasonable. *See id.* § 29 cmt. j & illus. 2–3.

73. In this connection, the case law uniformly denies that marital conditions in wills raise constitutional issues under *Shelley v. Kraemer*, 334 U.S. 1

lawmakers deem this sort of bargain undesirable, they must address the nature of its undesirability—what is it about the bargain that justifies interference with freedom of transfer?

Surely, it is not enough to say that the condition imposes a *cost*, at least by comparison to an unconditional bequest. As in connection with other bargains, this cost is offset by the utility benefactors gain from performance of a condition, which they forfeit when confined to making unconditional bequests. All else being equal, the bargain is Pareto optimal; whenever the cost to a beneficiary exceeds the value on offer, he or she will simply decline the bequest.

Nor is social disapproval of tyrannical conditions an adequate basis for intrusions by government upon freedom of transfer. As one court put the matter arrestingly, “a man’s prejudices are a part of his liberty.”<sup>74</sup> Freedom of transfer brings economic benefits. When lawmakers mind people’s business for reasons other than market failures, business suffers. And, whether we like it or not, the incentives created by a conditional bequest are indistinguishable from other mercenary considerations that might factor into a person’s decision to marry, or to forebear from marrying, a potential partner.<sup>75</sup>

---

(1948). *See, e.g., In re Estate of Feinberg*, 919 N.E.2d 888, 904–05 (Ill. 2009); *Shapira*, 315 N.E.2d at 827–28 (citing *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955) and *U.S. Nat’l Bank v. Snodgrass*, 275 P.2d 860 (Or. 1954)); *see also In re Kempf’s Will*, 297 N.Y.S. 307, 312 (App. Div. 1937) (observing that a conditional bequest setting forth religious affiliation conditions could have been declined on conscience grounds), *aff’d*, 16 N.E.2d 123 (1938) (per curiam); *In re Estate of Laning*, 339 A.2d 520, 525–26 (Pa. 1975) (same).

74. *Keffalas*, 233 A.2d at 250 (citation and internal quotation marks omitted). *See also infra* notes 144–47, 158 and accompanying text.

75. *See Chaachou v. Chaachou*, 73 So. 2d 830, 838 (Fla. 1954) (“If marriage for convenience and business reasons is sufficient to hold the agreement illegal, it might be hard to sustain the legality of countless thousands of marriages.”); *Piper v. Hoard*, 13 N.E. 626, 629 (N.Y. 1887) (“Marriage has its sentimental and its business sides.”). As empirical evidence shows, rich persons have small difficulty finding marital partners. *See Gary Burtless, Effects of Growing Wage Disparities and Changing Family Composition on the U.S. Income Distribution*, 43 EUR. ECON. REV. 853, 856 tbl.2 (1999) (showing marriage rates as correlated with higher earnings). Once again, popular culture has often depicted or parodied these social verities. *See, e.g., A NEW LEAF* (Aries Productions 1971); *HOW TO MARRY A MILLIONAIRE* (20th Century Fox Corp. 1953); *cf. THE DEVIL AND MISS JONES* (Frank Ross-Norma Krasna Inc. 1941) (reversing the formula, for comic effect, into an aversion to marrying wealth). For a further parody offered in connection with a conditional bequest, *see BERNARD SHAW, The Devil’s Disciple, in THREE PLAYS FOR PURITANS* 3, 22 (New York, Brentano’s 1906) (1897). Needless to add, these influences move men and women alike. *See, e.g., SARAH BRADFORD, AMERICA’S QUEEN* 67–68 (2000) (noting Jacqueline Bouvier’s pursuit of wealth through marriage); Mar-

One conceivable ground for invalidating marital conditions is the prospect of errors of judgment—that is, the risk that beneficiaries will in time regret fulfilling a marital condition in order to obtain a bequest. Unlike testators, beneficiaries accepting conditions that from their perspective are *inter vivos* can profit from paternalistic protection, if lawmakers deem it warranted.<sup>76</sup> Still, marital decisions are reversible, making the regret associated with them transitory. If a beneficiary regrets a “convenient” marriage, or bachelorhood, as an error in judgment, he or she can still take steps to redress the error.

Another possible ground for invalidating marital conditions is their potential inefficiency when they generate spillover costs—what the third Restatement of Trusts refers to in plainer language as the adverse impact of conditions on the “lives of beneficiaries *and often of others as well.*”<sup>77</sup> The fact remains that when a condition bars marriage, no individual apart from the beneficiary directly experiences the consequences. Perhaps freedom to marry implicates a kind of network effect by increasing the likelihood that others can discover a preferred partner; vice versa, impediments to marriage reduce that likelihood. But so long as conditions restraining marriage remain relatively uncommon, leaving a large universe of available partners, the effect should be negligible.

Other possible costs merit attention. English courts identified *state* interests as the original public policy against conditions restraining marriage, namely the political imperative of demographic growth—plainly an archaic notion today.<sup>78</sup> Modern economists contemplating marriage as an institution associate with it various private efficiencies but no social benefits lost by abstention from marriage.<sup>79</sup> At the same time, sociolo-

---

go Howard, *The Warner Touch*, NEW REPUBLIC, Feb. 7, 1983, at 9, 9 (noting the same pursuit by the young John Warner, who married a Mellon and became a U.S. senator).

76. See *supra* note 45 and accompanying text. Conditional bequests may themselves stem from testators’ efforts to paternalize beneficiaries, encouraging choices that testators believe will serve beneficiaries’ best interests. Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV. (PAPERS & PROC.) 240, 240–44 (1988).

77. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003) (emphasis added); see also *supra* text accompanying note 72.

78. Olin Browder, Jr., *Conditions and Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288, 1288–89 (1941).

79. The efficiencies of marriage involve the division of labor within families, risk pooling, and economies of scale. GARY S. BECKER, A TREATISE ON THE FAMILY 30–79 (enlarged ed. 1991); WILLIAM A. LORD, HOUSEHOLD DYNAMICS

gists posit benefits of marriage that are more dispersed and hence of potential interest to lawmakers. Studies suggest that unmarried persons—“bare branches” in a Chinese idiom<sup>80</sup>—are more likely to commit crime or to enter unstable substrata of society,<sup>81</sup> a predicament that can occur naturally by virtue of unbalanced sex ratios that now loom in some Asian countries,<sup>82</sup> resulting in a “marriage squeeze.”<sup>83</sup> In the instant case, though, a beneficiary subject to an *artificial* marriage squeeze receives a transfer in compensation for remaining unmarried. This aggrandizement of economic status should tend to counteract whatever social hazards attend his or her marital status.

A condition that encourages marriage within a prescribed group fails even to implicate social hazards. Such a condition could affect the happiness of marital partners whom beneficiaries would not otherwise have agreed to marry, yet those partners—like beneficiaries themselves—embark upon marriage willingly and with their eyes open. A testamentary condition that functions to encourage divorce, on the other hand, does entail spillover costs, at least if there are children of the marriage.<sup>84</sup> Lawmakers may nevertheless treat those costs as functionally internal, assuming the inheriting spouse has inter-

---

288–92 (2002). Marriage also contributes to health and longevity, with secondary ramifications for the social welfare system that have yet to be examined, and which do not necessarily yield a net economic gain (given the potential costliness of longevity). LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 47–64 (2000). Preliminary empirical research also suggests that marriage increases the rate of household saving, which affects the national economy, although the optimal level of national saving remains a controversial point among economists. Joseph P. Lupton & James P. Smith, *Marriage, Assets, and Savings*, in *MARRIAGE AND THE ECONOMY* 129 *passim* (Shoshana A. Grossbard-Shechtman ed., 2003).

80. VALERIE M. HUDSON & ANDREA M. DEN BOER, *BARE BRANCHES* 4, 187–88 (2004).

81. *Id.* at 229–41; LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 119–21 (2006); S. Alexandra Burt et al., *Does Marriage Inhibit Antisocial Behavior? An Examination of Selection vs Causation via a Longitudinal Twin Design*, 67 *ARCHIVES GEN. PSYCHIATRY* 1309, 1313–15 (2010) (citing to earlier studies); Steven F. Messner & Robert J. Sampson, *The Sex Ratio, Family Disruption, and Rates of Violent Crime: The Paradox of Demographic Structure*, 69 *SOC. FORCES* 693, 705–08 (1991).

82. *See supra* note 80.

83. H.V. Muhsam, *The Marriage Squeeze*, 11 *DEMOGRAPHY* 291 *passim* (1974).

84. Sociologists have debated how serious those costs are; some scholars maintain that the harm to children caused by divorce is merely transient. The debate is summarized, and the dueling scholarship cited, in JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 7–11, 166–75 (2002).

dependent utilities with his or her children and will decide whether the benefits attendant to inheriting exceed the costs for the family as a whole. Like marriage, a “divorce of convenience” can find its justification in such a mercenary calculus.<sup>85</sup>

The same analysis applies when benefactors meddle in beneficiaries’ affairs as concerns selection of a career or devotion to a religious faith.<sup>86</sup> Such conditions, concerning reversible decisions, affect only the utilities of inheriting parties, creating no spillover costs in the bargain.<sup>87</sup> And again, the financial inducements on offer merely blend into the *mélange* of considerations, mercenary and otherwise, that persuade a beneficiary to pursue one line of work or another, and even to join one sect or another.<sup>88</sup>

---

85. See Audrey Light & Taehyun Ahn, *Divorce as Risky Behavior*, 47 DEMOGRAPHY 895, 916–17 (2010) (finding empirical evidence of a correlation between the propensity to divorce and individual economic risk tolerance); see also MCCLAIN, *supra* note 81, at 127–29 (“[A]lthough children in [single-parent] families are at higher risk for certain unfavorable schooling and behavioral outcomes, much of this disadvantage appears to stem from poverty rather than single parenting as such.”); WILSON, *supra* note 84, at 169 (“Matters may be better among the most affluent single moms, but most mothers will suffer a significant loss of income after they divorce.”).

86. For other sorts of behavioral conditions held valid by courts, see, for example, *Griffin v. Sturges*, 40 A.2d 758, 762 (Conn. 1944) (bequest conditioned on abstemiousness); *In re Estate of Lewis*, 770 A.2d 619, 622–23 (Me. 2001) (bequest conditioned on not harassing other family members).

87. See, e.g., *In re Estate of Laning*, 339 A.2d 520, 524 (Pa. 1975) (“Inasmuch as the result which the testatrix sought to accomplish—*viz.*, affiliation of the beneficiaries with her religious faith via a conditional bequest—is neither illegal, immoral, tortious, or productive of any social evil, we see no basis upon which she should be denied the power to dispose of her property in this fashion.”). Arguably, voluntary military service produces substantial spillover benefits for society, and conditions against such service are treated specially under the Restatement. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 8.3 cmt. e (1983).

88. The suggestion that persons might respond to mercenary incentives when choosing a religion (as opposed to, or along with, a marital partner) would hardly surprise a social historian and, once again, is recognized within popular culture. A song popular in eighteenth-century Britain, *The Vicar of Bray*, recounted the career of a clergyman whose protean faith kept evolving to conform to the theology of each succeeding monarch. With every verse, the chorus recapitulated the clergyman’s most deeply held conviction:

And this is Law, I will maintain  
Unto my Dying Day, Sir,  
That whatsoever King shall Reign,  
I will be Vicar of Bray, Sir!

Anonymous, *The Vicar of Bray*, in A COLLECTION OF ENGLISH POEMS: 1660–1800, at 693, 693–94 (Ronald S. Crane ed., 1932) (emphasis omitted).

In sum, economic analysis—applicable both to freedom of contract and freedom of testation—potentially justifies nullification only of conditions that involve irreversible choices or that entail tangible spillover costs. Viewed dispassionately in that light, conditions encouraging tortious or criminal conduct plainly offend public policy; other conditions currently abrogated by law do not. Legal restrictions on those conditions ought to be relaxed, not—as the third Restatement of Trusts contemplates—expanded.<sup>89</sup> But assuming lawmakers do place some restriction on conditional bequests, surely their validity should turn on their objective characteristics, as under the Restatement of Contracts, rather than on their subjective ones, as under the Restatement of Property.<sup>90</sup> Were a testator, for example, to bequeath an income interest to a beneficiary that terminates upon marriage, under the Restatement of Property the bequest's validity hinges on whether the testator's "dominant motive" was to deter marriage or to provide support until marriage.<sup>91</sup> Yet, the presence or absence of a particular mental

---

89. See *supra* note 65 and accompanying text. As currently formulated, the restrictions found in the Restatement of Property on the validity of marital conditions appear inconsistent with its rules concerning conditions pertaining to other personal choices, such as religious faith, of which the Restatement is more tolerant. In particular, the rules governing marital and religious conditions coexist uneasily. If a beneficiary holds beliefs making marriage to a Catholic unlikely, and a bequest is conditioned on marrying a Catholic, the condition is void. Yet, a bequest to the same beneficiary conditioned on *becoming* a Catholic is valid, according to the Restatement. See *supra* notes 59–61 and accompanying text. The third Restatement of Trusts would invalidate both sorts of conditions. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j & illus. 3, cmt. k (2003).

90. See *supra* notes 59–61 and accompanying text. The third Restatement of Trusts hedges: "[T]his Section is generally concerned with the objective effects of a provision rather than with the settlor's underlying motive(s). Nevertheless, a subjective inquiry into the settlor's reasons for including a provision in a trust may be relevant." RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003).

91. See *supra* note 61 and accompanying text. The subjective test endorsed by the Restatement of Property is confirmed by most of the case law. See, e.g., *Graydon's Ex'rs v. Graydon*, 23 N.J. Eq. 229, 236–37 (Ch. 1872), *rev'd on other grounds*, 25 N.J. Eq. 561 (1874); *In re Estate of Romero*, 847 P.2d 319, 322–23 (N.M. Ct. App. 1993). *But see* *Latorraca v. Latorraca*, 26 A.2d 522, 526 (N.J. Ch. 1942) ("[I]n this instance the court cannot, and does not, attempt to probe testator's mind and determine his object in making provision for his widow and in terminating her estate upon remarriage."); *In re Estate of Keffalas*, 233 A.2d 248, 250 (Pa. 1967) ("We cannot accept the contentions of appellants that evidence of an actual subjective intent to cause divorce is a prerequisite to striking down a condition based on divorce."). Note that the requirement of an agreement between the parties to a contract is not a factor dictating an objective approach to the consideration of *motive*, in contradistinction to the *meaning* of a contract.

state on the part of the testator has no bearing on the presence or absence of spillover costs. Subjective considerations are theoretically anomalous when the problem is viewed through an economic lens.<sup>92</sup> If anything, the case for objectivity is stronger in respect of bequests than of contracts, given the relative magnitude of the evidentiary obstacles facing the court. Parties to a contract can testify as to their motives; testators cannot.

As concerns the consequences of invalidity, the rule announced by the Restatement of Contracts whereby the court can invalidate either the condition or the contract provides greater flexibility than the rule established by the Restatement of Property, which invariably invalidates only the condition, never the underlying bequest.<sup>93</sup> At the same time, the risks of a flexible rule loom larger in connection with bequests. Once again, the court cannot quiz the testator (unlike a contracting party) about his or her preferences in the wake of invalidity, complicating the evidentiary process and heightening the risk of fraud. The Restatement of Property avoids this risk by following a fixed default rule (although whether the Restatement has chosen the optimal default rule remains unclear).<sup>94</sup> Even

---

92. Compare, by analogy, the treatment of bequests for purposes that *subserve*, rather than *disserve*, public policy: in judging whether a trust purpose qualifies as charitable, “the motive of the settlor . . . is immaterial . . . . Even if the motive . . . is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable.” RESTATEMENT (SECOND) OF TRUSTS § 368 cmt. d (1959); *accord* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).

93. See *supra* notes 62–64 and accompanying text. Again, the third Restatement of Trusts hedges: whereas “[o]rdinarily” a court reforms an invalid conditional interest under a trust by striking the condition but still providing the interest, “[a] different result may be reached . . . to avoid distorting the settlor’s underlying general plan for allocating his or her estate . . . .” RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003).

94. The Restatement’s default rule, invalidating the offensive condition rather than the whole bequest, is justified in the accompanying comment on the theory that

[i]f the law were . . . to take away the same economic benefit on the ground that the restraint, although invalid, was nevertheless a stated condition to the enjoyment of such benefit, the entire effect of the rule . . . would be vitiated, and the transferor would merely accomplish the purpose by another method.

RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 cmt. d (1983). This analysis is erroneous. If a bequest were void by virtue of an invalid condition, then the intended beneficiary would lose the bequest whether or not he or she fulfilled the condition, and he or she would have no incentive to do so. Thus, a rule invalidating the condition and one invalidating the bequest are equally compatible with public policy, and lawmakers should install the rule that a majority of testators would prefer. See Hirsch, *Default Rules*, *supra* note

so, the Restatement of Property remains internally inconsistent, in that it allows courts to consider extrinsic evidence when they reform *impossible* conditions, as opposed to void ones.<sup>95</sup> Either alternative has its merits, making the issue double edged.<sup>96</sup>

All of this is not uncontroversial.<sup>97</sup> Indeed, the suggestion that marital conditions in wills are compatible with public policy has come under challenge by a scholar who, one might suppose, would have inclined toward a laissez-faire approach. Addressing the problem in his treatise on law and economics, Judge Richard Posner observes that, on their face, legal restrictions on marital conditions “may seem wholly devoid of an economic foundation.”<sup>98</sup> Nevertheless, he continues, “the possibilit[y] [of] modification . . . would exist if the gift were *inter vivos* rather than testamentary . . . [because the benefactor] might be persuaded to . . . relax the condition. If the [benefactor] is dead, this kind of ‘recontracting’ is impossible, and the presumption that the condition is a reasonable one fails.”<sup>99</sup>

Judge Posner here focuses on another form of market failure to justify restrictions on marital conditions—one having to do not with spillover costs, but with an internal impediment to bargaining. Living parties come to terms by negotiating or reasoning with each other; decedents, in the nature of things, respond neither to pleas nor to price signals. This disability, if significant, would suggest a principled distinction not only between conditional gifts and bequests, but also between contractual terms and conditional bequests. But in fact, the concern

---

15, at 1039–42. Do most testators who seek to create conditional bequests deem the property transfer as of primary importance and the condition as secondary, or vice versa? The answer to this question is by no means self-evident and demands empirical study.

95. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 5.2 & cmts. a–h (1983).

96. For academic commentary in favor of the flexible approach, see THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 415 (2d ed. 1953); Browder, *supra* note 62, at 762–67.

97. For academic criticism of the validity of personal conduct conditions in wills, see Matthew Harding, *Some Arguments Against Discriminatory Gifts and Trusts*, OXFORD J. LEGAL STUD. (forthcoming 2011); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273 *passim*. For an academic defense, see Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. (forthcoming 2011).

98. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.7, at 548 (7th ed. 2007).

99. *Id.*

extends beyond conditions to all forms of dead-hand control, exerted once a testator becomes deaf to all importunities. Because the issue transcends conditions, we shall put off analysis of it until a later part of this Article.<sup>100</sup>

#### B. NO-CONTEST CLAUSES

There remains one other type of condition that lawmakers have cordoned off for special treatment. A testator might provide that beneficiaries forfeit their bequests under a will if they contest the will's validity. States have divided over whether such a "no-contest" or "in terrorem" clause<sup>101</sup> is effective. By statute in two jurisdictions, a no-contest clause is void per se.<sup>102</sup> Under the historical common law, though, a no-contest clause was effective per se,<sup>103</sup> and this rule remains in place today in a minority of states.<sup>104</sup> The modern majority rule, established either by statute or by case law, lies in between: under the second and third Restatements of Property, together with the Uniform Probate Code, a no-contest clause is void when the court finds probable cause for the contest. The clause only takes effect in the absence of probable cause, where the contest comprises a frivolous suit or a strike suit.<sup>105</sup>

Common-law cases following the historical rule enforcing no-contest clauses have justified it on the ground that in the matter of deterrence of will contests "the state has no interest

---

100. See *infra* notes 245–79 and accompanying text.

101. Thinking intercategory, one Canadian court has referred to this as a "poison pill" clause. *Foote Estate (Re)* (2007), 431 A.R. 338, para. 9 (Alta. Q.B.). For a distinctly unconventional form of no-contest clause, see *Virginia Court Voids Norwegian Man's Will*, VA. L. WKLY., Nov. 1, 2004, available at 2004 WLNR 22725297 (noting a testamentary threat to haunt anyone who challenged the validity of the will).

102. FLA. STAT. ANN. § 732.517 (West 2010); IND. CODE ANN. § 29-1-6-2 (West 2011).

103. This view was "represented by the vast preponderance of American opinion" in 1935. *In re Brush's Estate*, 277 N.Y.S. 559, 561 (Sur. Ct. 1935).

104. WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 13.3, at 643 & n.81 (4th ed. 2010); T. Jack Challis & Howard M. Zaritsky, *State Survey of No Contest Clauses* (Feb. 7, 2011) (unpublished manuscript) (on file with author) (reporting that eleven states follow the common-law rule).

105. UNIF. PROBATE CODE § 2-517 (amended 2008), 8 pt. 1 U.L.A. 161 (1998); *id.* § 3-905, 8 pt. 2 U.L.A. 272 (1998); *RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS* § 9.1 (1983); *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 8.5 (2003); Challis & Zaritsky, *supra* note 104 (reporting that thirty states follow the probable cause standard or a similar standard, and also noting various other permutations in other states).

whatever apart from the interest of the parties themselves.”<sup>106</sup> Phrased in more technical language, no spillover costs of the sort sometimes found in connection with other kinds of conditions appear in this instance. At least one court contrasted no-contest clauses with marital conditions in this regard.<sup>107</sup> Meanwhile, testators can deter litigation that might stymie testamentary intent while potentially damaging their posthumous reputation. In the words of Justice David Brewer:

[C]ontests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and, as a result, the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result.<sup>108</sup>

Justice Brewer grasped intuitively what we would today call the second-best problem at work here. A no-contest clause becomes necessary only because of, and to compensate for, the testator’s ineluctable disappearance, hence his or her inability to testify at a proceeding challenging the will’s effectiveness, or to deal with contestants otherwise. But again, the impact of a no-contest clause is largely confined to the parties contemplating the challenge. If it has any significant spillover effects, these appear salutary in nature. The clause discourages costly litigation that the state traditionally subsidizes and that “engenders animosities and arouses hostilities among the kinfolk of the testator, which may never be put to rest and which contribute to general unhappiness.”<sup>109</sup>

Defenders of the modern rule nullifying no-contest clauses where probable cause exists for the contest focus on the possibility that a contest *is* meritorious—that the will is the product of incapacity, fraud, undue influence, or some other debility that will remain hidden if a will contest is successfully suppressed. Indeed, undue influencers or perpetrators of fraud

---

106. *Cooke v. Turner*, (1846) 153 Eng. Rep. 1044, 1047 (L.R. Exch.); 15 M. & W. 727, 736.

107. *See id.* (“The conditions said to be void . . . are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state, from obvious causes, is interested that its subjects should marry . . .”).

108. *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898); *see also, e.g., Rudd v. Searles*, 160 N.E. 882, 886 (Mass. 1928) (reiterating this reasoning).

109. *Rudd*, 160 N.E. at 886. A no-contest clause thus helps to ensure “peace and harmony of the living.” *Id.*

might themselves be responsible for including no-contest clauses in wills executed as a result of their wrongdoing.<sup>110</sup> In such an event, public policy demands that “the jurisdiction of the court to determine the validity of a donative transfer not be defeated.”<sup>111</sup> To rule otherwise would furnish wrongdoers “with a helpful cover for their wrongful designs.”<sup>112</sup> A probable cause rule for no-contest clauses ostensibly reconciles these policies by fending off unmeritorious litigation, while at the same time blocking efforts to avert bona fide challenges.

On first sight, this rule seems ideal. Yet appearances can deceive, and a number of problems emerge when we examine the issue more closely.<sup>113</sup> One difficulty is simply the rule’s want of economy. If a no-contest clause were valid per se, then the case would turn on a single determination: whether or not a contest succeeds. If it did succeed, then the will would fall, and the no-contest clause would fall with it. Otherwise the will would stand and the no-contest clause would take effect. Vice versa, when a no-contest clause operates only in the absence of probable cause, and the contestant’s challenge succeeds, then once again the will and the no-contest clause would fall together. But now, by contrast, if the will were upheld, then the case would turn on a *second* determination, namely, whether probable cause for the contest existed. In other words, the probable cause rule can give rise to an extra layer of litigation, and thus to additional costs.<sup>114</sup>

On top of that, we have reason to doubt whether courts will resolve the issue of probable cause correctly. The difficulty is that the second determination—whether or not probable cause

---

110. Olin L. Browder, Jr., *Testamentary Conditions Against Contests*, 36 MICH. L. REV. 1066, 1073 n.13 (1938).

111. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. b (2003).

112. *S. Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917); see also, e.g., *In re Friend’s Estate*, 58 A. 853, 855 (Pa. 1904) (opining that a no-contest clause, if valid per se, would “intrench [sic] fraud and coercion more securely”).

113. For a prior academic criticism of the probable cause rule, see Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 631–48 (1994). For a proposal to retain but modify the probable cause rule to narrow the circumstances under which a no-contest clause is ineffective, see Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 261–74 (1998).

114. See, e.g., *In re Estate of Shumway*, 9 P.3d 1062, 1063–69 (Ariz. 2000) (appealing the issue of probable cause); *Russell v. Wachovia Bank*, 633 S.E.2d 722, 725–28 (S.C. 2006) (same).

existed—follows the initial determination on the merits of the suit. Psychological studies conducted in an assortment of settings find that when persons review events in hindsight they tend to conceive of the outcome as obvious and inevitable, a phenomenon known in the literature as “hindsight bias.”<sup>115</sup> Like all cognitive limitations and heuristics, this tendency affects judges too, for they are no less human.<sup>116</sup>

How might hindsight bias distort the outcome of no-contest clause cases resolved under the probable cause rule? As defined in the Restatement, probable cause for a contest exists if, when viewed through the eyes of “a reasonable person, . . . there was a substantial likelihood” that the contest would succeed.<sup>117</sup> This rule comes into play only if the contest fails; otherwise, the will (and all its clauses) are void. So, assuming the contest does fail, courts examining the contest in hindsight should tend to see it as having been destined to fail all along. In short, they are likely to find the absence of probable cause, with the result that the no-contest clause will remain valid. If this tropism exists, then the probable cause rule—so easy to distinguish in theory—should in practice lean closer to the historical common-law rule, which is cheaper to implement.

Putting all of this to one side, how might we examine the problem comparatively from the perspective of contract law? No direct analogue to a no-contest clause appears within contracts because such a clause serves a purpose only if a party is absent

---

115. For summaries of, and references to, the relevant studies, see BARON, *supra* note 39, at 145–46; SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 35–37 (1993).

116. For scholarly discussions of hindsight bias in other legal contexts, see, for example, Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 799–805 (2001); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 73–81 (2000). *But cf.* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 24–29 (2007) (suggesting that where judges operate within “a web of complex rules” governing the outcome, such as Fourth Amendment jurisprudence, they can more easily overcome hindsight bias—a circumstance lacking with regard to no-contest clause jurisprudence); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1314–18 (2005) (finding no evidence of judicial hindsight bias in an experimental study based on a Fourth Amendment scenario).

117. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. c (2003).

when issues concerning the transfer's validity arise.<sup>118</sup> Nevertheless, as regards transfers at death we can envision an equivalent to a no-contest clause that accomplishes the same purpose via contractual means. Suppose a testator anticipates a will contest and wishes to forestall it. He or she could include a no-contest clause in the will. Or, he or she could make a unilateral contract offer to disinherited heirs, promising them a consideration in exchange for their promise not to contest the will. Is such a contract binding? Uniformly, the cases hold that it is.<sup>119</sup> Yet, notice how the two strategies coincide: if a testator leaves potential contestants nothing under a will, a no-contest clause becomes toothless because would-be contestants have nothing to lose by bringing the contest. The clause weighs upon the minds of potential contestants only if the testator *does* bequeath to them. Then they face a choice between (1) gambling on litigation, and (2) settling for the certainty of whatever amount the testator has left them under the will as an alternative to bringing the contest. That sum, offered under the will, is the functional equivalent of the sum offered by a testator to induce a potential contestant contractually not to contest the will postmortem. In those jurisdictions that limit the effectiveness of a no-contest clause, freedom of contract appears broader than freedom of testation, even though the first can be applied to the very same purpose as the second. Courts and commentators have remained oblivious to the inconsistency.<sup>120</sup> In Florida, for example, no-contest clauses are void per se by statute.<sup>121</sup> Yet, courts enforce contractual waivers of rights to contest wills, on the theory that "[t]he public policy of . . . Florida . . . highly favors settlement agreements."<sup>122</sup>

---

118. See *supra* text accompanying note 109. Thus, no-contest clauses would serve no purpose within the context of an antemortem probate proceeding, were that option available to testators. Only a handful of jurisdictions currently permit antemortem probate, however. MCGOVERN ET AL., *supra* note 104, § 13.3, at 638–39. The nearest contracts analogue to a no-contest clause is an arbitration clause, which serves to streamline the process of dispute resolution. Similar sorts of provisions appear occasionally in wills. See Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539 *passim* (2008).

119. See *infra* notes 120, 122.

120. Compare ATKINSON, *supra* note 96, at 408–10, with *id.* at 527. Likewise: compare 5 PAGE, *supra* note 4, § 44.29, at 566–67, with 2 *id.* § 25.7, at 702–03, and 3 *id.* § 26.63, at 171.

121. FLA. STAT. ANN. § 732.517 (West 2010).

122. *Hernandez v. Gil*, 958 So. 2d 390, 391 (Fla. Dist. Ct. App. 2007).

---

---

Nor is the case any different when a wrongdoer is pulling the strings, manipulating the testator into inserting a no-contest clause in the will. If the wrongdoer wanted to recreate the instrumentality of a no-contest clause in a jurisdiction limiting its effectiveness, he or she would not even have to persuade the testator to offer potential contestants a contractual inducement not to contest. The matter could be handled just as easily postmortem. Compare the following scenarios:

*Scenario # 1:*

Exerting undue influence, A, unrelated to the testator, T, induces T to make A the primary beneficiary under T's will but also induces T to include in the will a bequest of \$50,000 to B, T's heir who would inherit in the absence of a will, coupled with a no-contest clause.

*Scenario # 2:*

A induces T to bequeath T's entire estate to A. B brings suit challenging the will's validity on the ground of undue influence. A offers B the sum of \$50,000 to settle B's suit.

The two scenarios are equivalent. B is put to the same stark choice in each instance between the certainty of \$50,000 and the uncertainty of winner-take-all litigation. Yet, in a probable cause jurisdiction, the validity of the no-contest clause in the first scenario will depend on the retrospective merits of the contest. By comparison, the validity of a litigation settlement does *not* depend on the merits of the suit.

If these scenarios are functionally indistinguishable, then they ought also to be legally indistinguishable. If they saw fit to do so, lawmakers could make contracts not to contest wills and private settlements of disputes about inheritance rights ineffective, or contingent on the absence of probable cause, in order to ensure—by analogy to the Restatement's analysis of no-contest clauses—that “the jurisdiction of the court . . . [is] not . . . defeated.”<sup>123</sup> Such a rule would rhyme with one partially or completely invalidating no-contest clauses. On the contrary, though, lawmakers have acted to facilitate probate settlement,

---

123. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. b (2003).

whether before or after a contest is brought.<sup>124</sup> Apart from avoiding the “animosities” of estate litigation that at least one court has labeled socially destructive,<sup>125</sup> these agreements serve to minimize administrative costs, which to some extent the state would bear.

Once again, the categorical segregation of wills and contracts has created a legal blind spot, *even at a point of functional overlap*.

### III. FORBIDDEN BEQUESTS

Conditional bequests demand lawmakers’ scrutiny because performance of the condition might affect third parties. In addition, lawmakers have elected to forbid certain unconditional bequests. Those proscriptions may also hold merit, but only after we establish that the bequests at issue implicate deleterious collateral consequences.

#### A. ENEMY ALIENS AND SLAYERS

Suppose a testator makes a bequest to an enemy alien. Because the bequest strengthens the foreign power, lawmakers have reason to interdict the transfer. For the same reason, lawmakers often prohibit *trading* with enemy aliens. Thus, by federal law today, American citizens can neither bequeath to, nor contract with, Cuban nationals residing in Cuba.<sup>126</sup> Because both sorts of transfers have the same spillover effect they should be treated alike, as at present they are.<sup>127</sup>

---

124. UNIF. PROBATE CODE § 3-912 (amended 2008), 8 pt. 2 U.L.A. 279 (1998) (giving effect to settlement agreements and barring personal representatives from probating wills in spite of them); ATKINSON, *supra* note 96, at 528–30 (“[The] law favors the settlement of disputes as to property matters.”).

125. See *supra* note 109 and accompanying text.

126. 31 C.F.R. §§ 515.201, 515.310, 515.327 (2009); OFFICE OF ATTY GEN. FLA., INHERITANCE BY CUBAN NATIONAL, ADVISORY LEGAL OPINION No. 84-02 (1984), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/1589BD5973E2CFFF85256584004DDEC4>.

127. The only other current national proscription applies to citizens of North Korea. 31 C.F.R. §§ 500.201, 500.310, 500.327 (2009). Erstwhile proscriptions applicable to citizens of Cambodia and Vietnam were lifted in the 1990s. *Id.* §§ 500.570, 500.578. A further regulation bars property transfers of any sort to identified terrorists without restriction as to nationality. *Id.* §§ 594.201, 594.312. Because the matter involves foreign relations, state statutes affecting these rights are constitutionally suspect. See *Zschernig v. Miller*, 389 U.S. 429, 430–41 (1968) (invalidating a state statute limiting the inheritance rights of foreign citizens).

In a related vein, a will could include a bequest to a beneficiary who proceeds to slay the testator. By statute in the vast majority of jurisdictions, the bequest is void.<sup>128</sup> This rule adjusts the estate plan to the probable intent of the victim in most instances, for testators rarely wish to provide for their assassins; only the speed of the assault typically stymies formal disinheritance of the slayer.<sup>129</sup> Yet, suppose we face the atypical case. A mortally wounded testator might linger for a time, and in the aftermath forgive his or her slayer, republishing the original will. Or the testator might include Dr. Kevorkian in his or her will, in return for assisting in the testator's suicide. *The testator's intent makes no difference.* In the large majority of states, statutes barring inheritance by a slayer lay down mandatory rules, not default rules of imputed intent.<sup>130</sup>

Is this restriction on freedom of testation defensible? Here, no harmful condition is attached to the bequest. It simply provides property to a particular party. Nonetheless, by insistently rewarding behavior that the state deems criminal, the testator's choice of bequest itself causes social harm, operating perversely to encourage that behavior. Allowing a testator to override the bar would tend to undermine deterrence.<sup>131</sup> In similar fashion, a contract for life insurance that expressly pays off even if the insured commits suicide is illegal, given the con-

---

128. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 reporter's notes 1, 6 (2003).

129. For a further discussion, see Hirsch, *Obsolescence*, *supra* note 15, at 620–23.

130. Only slayer statutes in Louisiana and Wisconsin allow a testator to override the statutory bar. LA. CIV. CODE ANN. arts. 941, 943, 945 (2000); WIS. STAT. ANN. § 854.14(6) (West 2002).

131. *But see* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 *passim* (1993) (suggesting that mercy killings be removed from the scope of statutory bans on inheritance by slayers). Professor Sherman argues that “because mercy killing cases clearly involve no mercenary motives,” lawmakers could carve out an exception from statutes barring inheritance by slayers without compromising deterrence. *Id.* at 860, 873. He offers no evidence to support this empirical claim; yet, in some mercy killing cases, mixed motives have been alleged. *E.g.*, *Woman Denies Manipulating Euthanased Partner*, AUSTL. BROAD. CORP. NEWS, June 4, 2008, available at 2008 WLNR 10523189 (reporting an instance where the victim of an assisted suicide changed his will a week before his death, naming his slayer as primary beneficiary). On the other hand, in those few jurisdictions that have legalized assisted suicide, *see, e.g.*, *Baxter v. State*, 224 P.3d 1211, 1215–21 (Mont. 2009), inheritance by an assisting physician should be permissible, given the state's determination that the activity for which the bequest acts as an incentive is not socially harmful.

tract's tendency to induce illegal behavior.<sup>132</sup> The two problems are structurally equivalent. That lawmakers have treated them alike attests to their capacity, at least on occasion, to maintain structural symmetry despite categorical division and without explicit comparative analysis.

#### B. CAPRICIOUS PURPOSES

Another sort of bequest that lawmakers forbid in certain instances takes a different form. Some wills allocate funds for the accomplishment of purposes, as opposed to the enrichment of individual beneficiaries. Testators usually fashion these bequests as trusts, whereby trustees are charged with expending trust funds in pursuit of testators' objectives. If the purpose serves the public interest the trust is deemed *charitable*, and lawmakers not only give it effect but exempt it from taxation.<sup>133</sup> Conversely, if the purpose harms the public interest the trust is deemed *against public policy*, and lawmakers prohibit its creation.<sup>134</sup>

In both of these instances, by definition, the testator's estate plan touches third parties, and these spillover effects dictate legal doctrine. Where the effect is a positive one, lawmakers encourage creation of the trust with what is technically called a Pigouvian subsidy (in the form of tax relief), as economic theory dictates.<sup>135</sup> Where the effect is a negative one, lawmakers disallow the trust, lest it impose costs on others.

Yet, bequests for some purposes neither help nor harm society. In economic terms, their spillover effects are either inconsequential or negligible. As a matter of judicial doctrine, such a trust for a *noncharitable* purpose is permissible but not fully enforceable. Whereas the state attorney general has standing to sue a charitable trustee for breach of trust, no one has like standing to compel performance of a noncharitable-purpose trust. Alternative beneficiaries can sue only to terminate the trust when the trustee either initially or subsequently declines to carry it out. A noncharitable-purpose trust thus

---

132. *Supreme Commandery of the Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 447 (1882); RESTATEMENT OF CONTRACTS § 572 & cmt. a & illus. 5 (1932); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 192 (1981) (reiterating the general principle but omitting the specific example).

133. I.R.C. §§ 501, 2055 (2010); RESTATEMENT (THIRD) OF TRUSTS § 28 (2003).

134. RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).

135. For the seminal discussion, *see* A.C. PIGOU, *THE ECONOMICS OF WELFARE* 192–94 (4th ed. 1932).

takes effect as a mere *power*, technically (but confusingly) known as an honorary trust.<sup>136</sup>

The leading scholar on trusts in his era, Professor Austin Scott, claimed that allowing testators to make enforceable provisions for noncharitable purposes was contrary to public policy.<sup>137</sup> Professor Scott failed to state the nature of his objection, however, and no other scholar or court has ever articulated a substantive justification for limiting bequests for noncharitable purposes to powers. The only explanation for honorary trust doctrine found in the cases and commentary is the absence of an enforcement mechanism. This assertion is tautological, for an honorary trust lacks an enforcement mechanism only because judges never created one.

Modern statutory law does so. Every state today allows benefactors to settle enforceable noncharitable-purpose trusts, either for defined purposes (preservation of a gravesite in some states, care of a pet animal in others), or for all purposes.<sup>138</sup> Both the Uniform Probate Code and the Uniform Trust Code include omnibus provisions for noncharitable-purpose trusts, enforced against the trustee by a party named in the will or trust instrument, or appointed by the court.<sup>139</sup>

A further limitation applies to these bequests, however. If a bequest for a noncharitable purpose, although benign, is utterly pointless—such as publication of a worthless manuscript<sup>140</sup>—or if a bequest for an otherwise valid noncharitable purpose is too extravagantly funded—Leona Helmsley’s \$12 million bequest for the care of “Trouble,” her white Maltese dog, in 2007 affords a notorious example<sup>141</sup>—the bequest becomes “capricious” and thereby contrary to public policy. This rule began as a qualification to the effectiveness of honorary trusts,

---

136. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. a (2003).

137. 2 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 124, at 246 (4th ed. 1987) (“It is submitted that it is not in accordance with public policy that a decedent should be permitted to control the disposition of his property to this extent.”). The current editor of Scott’s treatise, Professor Mark Ascher, has quietly stricken this passage from the work. See 2 SCOTT ET AL., *supra* note 65, § 12.11.

138. For a recent tabulation of statutory law, see Adam J. Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, EST. PLAN., Nov. 2009, at 13, 15–16.

139. UNIF. PROBATE CODE § 2-907 (amended 2008), 8 pt. 1 U.L.A. 239 (1998); UNIF. TRUST CODE §§ 408–409 (amended 2005), 7C U.L.A. 490, 493 (2006).

140. *E.g.*, *Fid. Title & Tr. Co. v. Clyde*, 121 A.2d 625, 629–30 (Conn. 1956).

141. Jeffrey Toobin, *Rich Bitch*, NEW YORKER, Sept. 29, 2008, at 38, available at [http://www.newyorker.com/reporting/2008/09/29/080929fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin).

set out in the Restatement of Trusts and followed in most (though not all) of the cases.<sup>142</sup> The Commissioners subsequently imported the qualification into the Uniform Acts, and it is reproduced in most (though not all) of the state statutes validating full-fledged noncharitable-purpose trusts.<sup>143</sup>

Mere caprice appears a doubtful standard on which to judge the validity of purpose-based bequests.<sup>144</sup> Although these can again implicate spillover costs by virtue of the moral indignation they provoke—as reflected, for instance, in the death threats Trouble received after news reports playing up her inheritance began to circulate<sup>145</sup>—estate plans rarely draw much publicity, and in any event the ill feelings they elicit, either within or without the family, are purely emotional; like other

---

142. RESTATEMENT (THIRD) OF TRUSTS § 47(2) (2003). For the original assertion of the rule, see RESTATEMENT OF TRUSTS § 124 & cmt. g (1935). For the case law, compare Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 71 n.140 (1999), with *id.* at 82 n.182. An equivalent qualification now exists on wastefully funded charitable trusts under the Uniform Trust Code and the third Restatement of Trusts. Such a trust becomes not merely noncharitable but void as against public policy (although a court can subject the trust to cy pres). UNIF. TRUST CODE §§ 404 & cmt., 413 & cmt. (amended 2005), 7C U.L.A. 484–85, 509–10 (2006); RESTATEMENT (THIRD) OF TRUSTS §§ 8 & cmt. g & illus. 18, 67 & cmt. c(1) (2003). This qualification on charitable trusts did not, however, appear in the second Restatement of Trusts. Compare RESTATEMENT (SECOND) OF TRUSTS § 399 (1959), with *id.* § 400 (contemplating cases where the charitable purpose is “fully accomplished” as opposed to wastefully funded). This qualification has also remained absent from much, but not all, of the case law. See 6 SCOTT ET AL., *supra* note 65, § 39.5.2, at 2726–28; Roger G. Sisson, Note, *Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 641–44 (1988).

143. UNIF. PROBATE CODE § 2-907(c)(6) (amended 2008), 8 pt. 1 U.L.A. 240 (1998); UNIF. TRUST CODE §§ 404 & cmt., 409 & cmt. (amended 2005), 7C U.L.A. 484, 493–94 (2006). The meaning of the Uniform Probate Code’s provision on point is ambiguous, however. For further analysis and legislative history, see Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 918–20 (1999). Among the states, Delaware is notable in its validation of trusts for capricious noncharitable purposes. Hirsch, *supra* note 138, at 17. Under the Uniform Acts (albeit again not without ambiguity) and some non-Uniform state statutes, a court can cut capriciously overfunded trusts down to a reasonable size—a power that was invoked in the case of Helmsley’s trust for Trouble. *Id.* at 17 nn.43–44; Toobin, *supra* note 141, at 41. Lawmakers could reasonably characterize wasteful trusts for charitable purposes as noncharitable on account of their want of social benefit, but lawmakers need not deem these trusts void as against public policy. *Cf. supra* note 142.

144. For a further and fuller discussion, see Hirsch, *supra* note 142, at 69–84.

145. Toobin, *supra* note 141, at 40. Indeed, any type of “unnatural” estate plan could trigger indignation of this sort.

emotional responses, these should dissipate rapidly.<sup>146</sup> At any rate, political theorists have long disputed the legitimacy of moral indignation as a social “harm,” especially where (as here) few directly witness the offensive transfer.<sup>147</sup>

The drafters of the Restatement fail to state in concrete terms the nature of their objection to trusts for capricious purposes. Their commentary on the matter is cryptic and conclusory:

Although one may deal capriciously with one’s own property, self-interest ordinarily restrains such conduct. In any event, society may be properly reluctant to interfere with such a use of property by its current owner. Where, however, a former owner has attempted to [do so,] . . . it is contrary to sound public policy.<sup>148</sup>

The distinction this annotation draws between wasteful consumption and capricious trusts is doubtful at best. Assuming the drafters object to the capricious use of property on normative grounds, then that norm should apply equally to personal use or use through an intermediary trustee. In consequential terms, each is equally objectionable or unobjectionable, so why should society be more “reluctant to interfere” with the one than with the other?<sup>149</sup> Self-interest will operate as a natural restraint on conduct to exactly the same extent, whether an owner spends a sum of money or hands it over to a trustee to spend. Possibly, by a “former”<sup>150</sup> owner, the drafters mean to refer to a *dead* owner, which is our focus in any case. In this context, self-interest is not quite equally implicated, because once they die owners no longer need to provide for themselves; the removal of this concern frees them to squander wealth. Yet, even so, their propensity to squander is unlikely to rise on that account. Although spared from personal expenses, the dead still face opportunity costs. Every dollar a decedent

---

146. See Timothy D. Wilson et al., *Making Sense: The Causes of Emotional Evanescence*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS 209, 209–10 (Isabelle Brocas & Juan D. Carrillo eds., 2003) (reporting studies demonstrating the transience of emotional reactions).

147. For a summary of the debate and further references, see TREBILCOCK, *supra* note 35, at 61–64.

148. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003); see also *id.* § 29 cmt. m. For references to judicial discussions, see Hirsch, *supra* note 142, at 73–74.

149. See *supra* text accompanying note 148. Lawmakers could regulate wasteful consumption via the tax system if they were disposed to do so. For a further discussion, see Hirsch, *supra* note 142, at 79–80.

150. See *supra* text accompanying note 148.

wastes is a dollar he or she could devote to loved ones, or to purposes that truly mattered to him or her.<sup>151</sup>

Perhaps, though, the drafters' assertion of public policy also follows from an implicit assessment of capricious estate planning in light of the economic aims of freedom of testation. Lawmakers grant freedom of testation, inter alia, because it reinforces testators' incentives to produce and save. But when—or to the extent—a testator cares so little about estate planning that he or she would throw away the opportunity to make meaningful bequests, by hypothesis, the testator's indifference suggests that freedom of testation will have little impact on his or her economic proclivities.

If this is the policy behind the capricious purpose doctrine, then lawmakers are again applying it inconsistently. A testator remains free to select his or her beneficiaries carelessly. These occasionally resemble lottery winners, showing up in wills out of the blue—as when a testator bequeaths to a favorite entertainer,<sup>152</sup> a favorite politician,<sup>153</sup> a favorite student,<sup>154</sup> a favorite waitress,<sup>155</sup> a favorite paperboy,<sup>156</sup> or a litigant who had once tried his case before the testator, sitting as a judge.<sup>157</sup> In choosing beneficiaries, at least, a testator can make an estate plan “as eccentric, as injudicious, or as unjust as caprice, frivolity, [or] revenge can dictate.”<sup>158</sup>

---

151. Even the reclusive Leona Helmsley left the bulk of her estate to relatives and charity. Toobin, *supra* note 141, at 38.

152. *Fan Death Wish? A Richer Bronson*, CINCINNATI POST, Feb. 25, 1999, at A22, available at 1999 WLNR 972899 (remarking bequest of an entire estate of nearly \$300,000 to the screen actor, Charles Bronson).

153. Eileen Keerdoja et al., *Living Well Is the Best Revenge*, NEWSWEEK, May 23, 1983, at 12 (remarking bequest of \$200,000 to Senator, and one-time presidential candidate, George McGovern).

154. Karen Houppert, *A Room of Her Own*, WASH. POST, Nov. 1, 2009, at W44 (Magazine), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102302144.html> (reporting \$75,000 life insurance policy that named as beneficiary a student who had taken several classes with the insured twenty years earlier, and who had had only occasional contact with her since, to the bewilderment of the beneficiary).

155. *Cranky Patron Leaves \$50K, Car to Waitress*, CINCINNATI POST, Dec. 29, 2007, available at 2007 WLNR 25674180.

156. *Customer Leaves \$50,000 to His Former Paperboy*, ORLANDO SENTINEL, June 29, 1998, at A6, available at 1998 WLNR 6660036.

157. The testator felt he had judged the case poorly and limited the bequest to the litigant's court costs. DAVID PANNICK, JUDGES 2 (1987).

158. *Schneider v. Vosburgh*, 106 N.W. 1129, 1130 (Mich. 1906). “Heirs lawfully may be disinherited for no reason.” *In re Estate of Koch*, 849 P.2d 977, 992 (Kan. Ct. App. 1993).

At any rate, we ought not be too quick to assume that capricious purposes or arbitrary distributions signal indifference to estate planning. Seemingly wasteful bequests could find their logic—and utility—in the statements they make, allowing a testator to influence how he or she is remembered.<sup>159</sup> Out-sized bequests for the care of pet animals may also signify emotional attachments comparable to ones that more commonly tie testators to human beneficiaries.<sup>160</sup> It also bears noting that testators must possess testamentary capacity before they can exercise freedom of testation, and one element of capacity is the ability to recognize the natural objects of one's bounty.<sup>161</sup> In other words, testators cannot make *any* estate plan unless they retain the mental wherewithal to appreciate the opportunity costs that lend gravity to seemingly wasteful or arbitrary bequests.

Finally, and importantly for present purposes, the capricious-purpose doctrine conflicts with contracts doctrine, where one discovers no equivalent limitation. A contracting party remains perfectly free to enter into an agreement for the purpose of pursuing what inheritance law would brand as capricious ends. Of course, service contracts typically are paid for and performed during life—yet they need not be. Leona Helmsley could have negotiated an executory contract with an individual or company to wait on Trouble paw and paw, requiring payment and performance only upon death, in which case the service provider would have comprised a contract creditor with a claim against Helmsley's estate. Such a contract would remain invulnerable to challenge by beneficiaries or heirs on grounds of capriciousness (although they could seek to negotiate an accord with the service provider to terminate the contract).<sup>162</sup> If indi-

---

159. For a fuller discussion, see Hirsch, *supra* note 142, at 75–78.

160. Helmsley “treated [her dog Trouble] like a person, and took her everywhere. She would take that dog to bed with her every night.” Toobin, *supra* note 141, at 40 (quoting a business acquaintance of Helmsley) (internal quotation marks omitted).

161. Alternative beneficiaries have sometimes challenged testamentary capacity, often successfully, when presented with capricious estate plans. Hirsch, *supra* note 142, at 81 nn.179–81. An announced challenge to the Helmsley will resulted in a pretrial settlement. Toobin, *supra* note 141, at 39. For a further discussion asserting an apparent contradiction between the capricious purpose doctrine and the sound mind doctrine, see Hirsch, *supra* note 142, at 80–83.

162. For a recognition that a contract can play the same role as an honorary trust, without comparing their doctrinal attributes, see Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Stat-*

viduals can fashion a contract to suit their purposes, then the law's refusal to give effect to a bequest for the same purposes is dubious or even, we might say, a bit capricious.

#### IV. COMPULSORY BEQUESTS

The antithesis of a forbidden bequest is a compulsory bequest.<sup>163</sup> Lawmakers could *require* individuals to distribute portions of their estates to particular beneficiaries. Carried to the extreme, such mandates would function to abolish freedom of testation. Carried less far, a legal system can combine specific compulsory bequests with residual freedom of testation. Once again, contract law affords an analogy in the form of so-called compulsory contracts—that is, the mandatory offers of services at fixed tariffs that public utilities and other common carriers have had to make to ordinary citizens.<sup>164</sup>

Obviously, compulsory bequests encroach upon a testator's liberty more aggressively than forbidden bequests. A testator faced with a prohibition on a preferred estate plan can substitute the next best alternative. Compulsory bequests form a part of the estate plan no matter how much the testator loathes the idea. Lawmakers might again cite spillover costs to justify compulsory bequests. To do so, however, lawmakers must have reason to conclude that *failure* to make a bequest would prove more costly to third parties—or to the state—than the cost of the bequest itself, thereby creating inefficiency. Lawmakers might also point to a second justification for compulsory bequests that we have not encountered up to now. Precisely because compulsory bequests impose themselves more intrusively than forbidden ones, a welfarist or “liberal” state could wield them to achieve objectives of distributive justice.

---

*utory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1837 (1996); see also Hirsch, *supra* note 143, at 946 n.147. For cases, see, for example, *French v. Kensico Cemetery*, 30 N.Y.S.2d 737, 737–38 (Sup. Ct. 1941) (contracting for care of a grave); *Kahlmeyer v. Green-Wood Cemetery*, 23 N.Y.S.2d 17, 20 (Sup. Ct. 1940) (same); *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 143–46 (Tex. App. 2008) (contracting for care of animals held not to create a trust). On the doctrine of accord and satisfaction, see RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981). Bilateral monopoly problems might tend to hamper such an accord.

163. Although an oxymoron, the expression “compulsory bequest” is adopted here in preference to the wordier, but more accurate, “compulsory uncompensated transfer upon death.”

164. Todd D. Rakoff, *Is “Freedom from Contract” Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 478. In recent decades, deregulation has done away with most compulsory contracts in the United States.

As earlier noted, distributive considerations appear to have inspired certain compulsory rules within contract law, a move Dean Anthony Kronman has defended.<sup>165</sup> Under Dean Kronman's analysis, though, a redistributive rule of contract accords with liberal political theory only if it meets certain conditions: it must redistribute wealth according to some accepted criterion of fairness, it must achieve the agreed theoretical goal in practice, and it must do so more efficiently than alternative legal avenues to the same goal, such as taxation.<sup>166</sup> No reason appears to assess a redistributive rule of testation according to a different standard.

Historically, lawmakers in the United States and elsewhere have contemplated two sorts of compulsory bequests, although their functionality for purposes of achieving either efficiency or distributive justice is hardly manifest.

#### A. SPOUSAL SHARES

American lawmakers accord spouses inheritance rights that have varied over time. The primary and predominant right today is the "elective share," also commonly known as the "forced share," whereby a surviving spouse can claim a specified fraction of the net probate estate, real and personal, of the decedent spouse, as an alternative to the sum bequeathed to the survivor under the decedent's will. The right is set by statute and varies in its details from state to state.<sup>167</sup>

In analyzing the elective share conceptually, it is helpful to consider that the right arises only in consequence of a couple's decision to embark upon a relationship that is itself often described as contractual in nature—their exchange of vows both solemnizes and symbolizes a meeting of the minds. Couples remain free to waive many of the terms of the "marital con-

---

165. See *supra* notes 42–44 and accompanying text.

166. Kronman, *supra* note 42, at 498, 507–08.

167. For an overview, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 9 (2003). Instead of the elective share, nine states (with variations) accord immediate and reciprocal rights to both spouses in half the property earned by each during the marriage. This system of marital property law (as opposed to inheritance law) is known as community property. Uniquely in the United States, one jurisdiction (Georgia) grants no right of either sort to spouses (although they do receive a one-year support allowance). For a state-by-state survey, see ROBERT B. JOSLYN, SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE (2004), available at <http://www.actec.org/resources/publications/studies/Study10.pdf>.

tract,”<sup>168</sup> rendering marital rights at least partly mutable.<sup>169</sup> To the extent that it determines rights of inheritance, the marital contract is also a kind of *contract to make a will*.<sup>170</sup> Accordingly, the problems of freedom of contract and freedom of testation come together at this juncture. If couples have freedom to forgo the elective share as a term in the marital contract, they will also gain greater freedom of testation.<sup>171</sup> If they lack the first, then they will also lose the second.

Under American law, couples do enjoy freedom to modify inheritance rights via prenuptial agreements.<sup>172</sup> The elective share therefore operates as a default rule under *contract* law and does not wholly confine freedom of testation.<sup>173</sup> This need not be so, and it is not so under British law, for example, which

---

168. This term has come into common use in the literature. *E.g.*, Lloyd R. Cohen, *Marriage: The Long-Term Contract*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 10 passim* (Antony W. Dnes & Robert Rowthorn eds., 2002); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 *passim* (1998). For an early discussion, see *Ditson v. Ditson*, 4 R.I. 87, 101–02 (1856) (rejecting this characterization).

169. Although commentators observe a trend in the direction of greater freedom to modify the marital contract, that freedom remains far from absolute—many of its terms do remain compulsory in the United States. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 834–42 (2004).

170. For a further discussion of this hybrid category, see Hirsch, *supra* note 2, at 1078–82.

171. Testators will still lack complete freedom of testation unless they can *unilaterally* avoid the elective share. Although unilateral strategies for avoiding the elective share do exist under current law, they involve uncertainty, inconvenience, and expense. For discussions, see Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 INST. ON EST. PLAN. ¶ 9, at 1, 19–47 (1998); Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 781–87 (2006).

172. For an early example, see *Naill v. Maurer*, 25 Md. 532, 538–40 (1866). *Accord* *Stratton v. Wilson*, 185 S.W. 522, 525 (Ky. 1916) (distinguishing prenuptial agreements concerning rights at death from rights upon divorce, the first being valid and the second—at that time—invalid). For modern doctrine, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.4 (2003); Stephen R. Pitcher, *Waiver of Spousal Rights in Estate of Deceased Spouse*, 7 AM. JUR. 2D *Proof of Facts* 443 *passim* (1975). A prospective spouse who would prefer a prenuptial agreement may nevertheless hesitate to request one, because of the signals it would send to the other party. MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 39 (2000); Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEGAL F. 265, 274. Even so, these agreements have become increasingly common. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997).

173. For a recognition, see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1233, 1243.

disallows couples from overriding by contract spousal inheritance rights.<sup>174</sup>

In assessing the elective share, then, we have several issues before us. Should lawmakers allow couples contractually to avoid the elective share? Assuming so, what form (if any) should the elective share take? And assuming not, what form should it take? Analysis in light of the articulated rationales for spousal-inheritance rights suggests that lawmakers have poorly coordinated the elective share in its contractual domain with the elective share in its testamentary domain—a disconnection that could again trace to the traditional separation of the law of contracts from the law of wills.

One historical rationale for the elective share is that it operates “to ensure that the surviving spouse has continuing financial support after the death” of the other spouse.<sup>175</sup> In want of such support, the surviving spouse would have to turn to the state as benefactor of last resort. Translated into the vernacular of economics, the absence of an elective share would produce spillover costs.

This rationale corresponds with and justifies the prevailing nonreciprocal structure of the elective share, which protects only the *surviving* spouse. Under elective-share doctrine, a decedent spouse cannot bequeath any portion of the survivor’s property, a qualification that makes sense when the objective is to avoid impoverishment. Decedents have no need for financial support.

At the same time, an elective share tailored to avoid spillover costs would require a more refined calculation of the size of the share than current law stipulates. With this end in view, lawmakers should match the elective share with the amount necessary to render a surviving spouse ineligible for public assistance. The Uniform Probate Code responds to this concern

---

174. Stewart Leech, “*With All My Worldly Goods I Thee Endow*”? *The Status of Prenuptial Agreements in England and Wales*, 34 FAM. L.Q. 193 *passim* (2000).

175. *Mongold v. Mayle*, 452 S.E.2d 444, 447 (W. Va. 1994). As the quotation intimates, the elective share extends in this respect spouses’ responsibilities to provide for each other’s essential expenses while both are alive and still married, whether they are living together or separated. For a discussion of the living support obligation, see HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §§ 7.1, 7.3–4 (2d ed. 1987). For like commentary on the purpose of the elective share, see, for example, *In re Estate of Amundson*, 621 N.W.2d 882, 886–87 (S.D. 2001); UNIF. PROBATE CODE art. 2, pt. 2, gen. cmt. (amended 2008), 8 pt. 1 U.L.A. 67 (Supp. 2010).

via rough approximation on the downside, by setting a minimum dollar amount for the elective share that supplements its fractional amount for smaller decedents' estates.<sup>176</sup> The Code nevertheless fails to take account of the absence of spillover costs on the upside, setting no maximum amount for the elective share.<sup>177</sup>

What is more, hardly any lawmakers have addressed the problem of spillover costs in connection with freedom to contract around the elective share. Yet, this concern has not escaped attention in other contexts. Under the Uniform Premarital Agreement Act, a party can avoid a prenuptial agreement that would cause him or her "to be eligible for support under a program of public assistance," in the wake of divorce.<sup>178</sup> Inexplicably, and perhaps accidentally, the Act fails to extend this caveat to prenuptial agreements that take effect in the wake of death.<sup>179</sup> Likewise, after rehearsing the support rationale for the elective share, and after adjusting the (downside) amount of the elective share with this rationale in mind, the drafters of the Uniform Probate Code saw fit to allow a prenuptial agree-

---

176. UNIF. PROBATE CODE § 2-202(b) (amended 2008), 8 pt. 1 U.L.A. 76 (Supp. 2010). This provision "implements the support theory." *Id.* § 2-202 cmt.; *see also id.* art. 2, pt. 2, gen. cmt. (placing the minimum elective share amount in the context of social security and other entitlements).

177. The Commissioners are aware that for large estates the elective share "may go far beyond the survivor's needs," and that it disregards whether or not the survivor has "ample independent means." *Id.* art. 2, pt. 2, gen. cmt. Nonetheless, the Commissioners recognized these features of the elective share as "conventional" and included them in the Uniform Probate Code on that basis. *Id.*

178. UNIF. PREMARITAL AGREEMENT ACT § 6(b) (1983), 9C U.L.A. 35, 49 (2001) (adopted by twenty-six states). By the same token, spouses cannot waive by prenuptial agreement the doctrines requiring them to provide for each other's necessary expenses while both are alive and they remain married. *Id.* (covering separation); Hasday, *supra* note 169, at 838-40 (noting the immutability of the doctrine of necessities, applicable to couples living together).

179. Whereas the Act covers prenuptial agreements disposing of property "upon separation, marital dissolution, [or] death," *see* UNIF. PREMARITAL AGREEMENT ACT § 3(a)(3) (1983), 9C U.L.A. 43 (2001), the provision overriding agreements rendering a spouse eligible for public assistance refers only to spouses eligible for such assistance "at the time of separation or marital dissolution." *Id.* § 6(b). By distinguishing death from marital dissolution, section 3 implies that under the terminology of the Act "marital dissolution" does *not* include termination of a marriage on account of death. *See id.* § 3(a)(3). Nevertheless, the Act's prefatory note states that the limitation contained in section 6 covers spouses rendered eligible for public assistance "at the time of separation, marital dissolution, *or death.*" *Id.* prefatory note (emphasis added). This statement suggests that the drafters were confused about the implications of their wording of sections 3 and 6.

ment to waive the elective share, even to the point of destitution.<sup>180</sup> It would appear the Commissioners contemplated freedom of contract and freedom of testation as separate and distinct problems. Only one state today bars contractual waivers of the elective share that impose spillover costs.<sup>181</sup>

A second historical justification for the elective share requires a different analysis. Lawmakers and commentators have often maintained that the united efforts of spouses cause them over time to contribute either directly or indirectly to each other's wealth. This implicit economic partnership stands beside the explicit aspects of their partnership, entitling them both to share in their collective wealth at death.<sup>182</sup>

The Uniform Probate Code observes the partnership rationale by varying the amount of the elective share with the dura-

---

180. See UNIF. PROBATE CODE § 2-213 (amended 2008), 8 pt. 1 U.L.A. 129–31 (1998). The drafters of the Uniform Probate Code fail to explain this decision, stating only that the Code “incorporates the standards by which the validity of a prenuptial agreement is determined under the Uniform Premarital Agreement Act § 6.” *Id.* § 2-213 cmt.

181. See N.D. CENT. CODE § 30.1-05-07 (2010) (“A surviving spouse’s waiver is not enforceable if the surviving spouse proves that . . . [it] would reduce the assets or income available to the surviving spouse to an amount less than those allowed for persons eligible for . . . [government] assistance . . . on the basis of need.”).

182. *E.g.*, *In re Estate of Amundson*, 621 N.W.2d 882, 887 (S.D. 2001); *Mongold v. Mayle*, 452 S.E.2d 444, 447 (W. Va. 1994); UNIF. PROBATE CODE art. 2, pt. 2, gen. cmt. (amended 2008), 8 pt. 1 U.L.A. 67 (Supp. 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 9.1 cmt. b, 9.2 reporter’s note 2 (2003). Indirect contributions typically (or stereotypically) take the form of childcare and other household services performed by one spouse that free up the wage labor of the other spouse. For discussions, see, for example, POSNER, *supra* note 98, § 5.1, at 143–46; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 92–111 (1998). The fact remains that the marital partnership theory is reductionistic, failing to take account of the variety of circumstances that could affect the level of uncompensated contributions from one spouse to the other. That contribution could prove greater in a joint business venture held in one spouse’s name, see, e.g., *In re Honigman’s Will*, 168 N.E.2d 676, 677 (N.Y. 1960), or less if the marriage is a childless one, see *Rosenbury*, *supra* note 173, at 1287, or greater again if one spouse provided end-of-life care for the other, Silbaugh, *supra*, at 137 (“Elder care in second marriages may be the moral equivalent of childcare in first marriages.”); see also *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18–20 (Ct. App. 1993) (holding that a contract between spouses under which one promised to nurse the other, who had suffered a stroke, in exchange for a bequest under the disabled spouse’s will was not supported by consideration, given the preexisting duty between spouses to provide mutual support).

tion of the marriage.<sup>183</sup> At the same time, the restriction of the elective share to the surviving spouse under the Uniform Probate Code, as is conventional under state law, clashes with this rationale. Elective share doctrine gives the first spouse to die no right to bequeath any portion of the survivor's property, although this right should follow from the proposition that the wealth of each derived from pooled effort.<sup>184</sup> This structural feature of the elective share fits only the support rationale and seems to repudiate the partnership rationale.

At any rate, switching to the perspective of contract law, the partnership rationale suggests no reason to curtail couples' freedom to waive their inheritance rights in a prenuptial agreement. As a general proposition, parties are free to give up entitlements to property via contract. Yet, once we fashion the elective share as a default rule in contract law, other issues

---

183. UNIF. PROBATE CODE §§ 2-202 & cmt., 2-203 & cmt. (amended 2008), 8 pt. 1 U.L.A. 76, 78 (Supp. 2010). In light of the variety of forms and levels of marital contributions, *see supra* note 182, lawmakers could alternatively give courts discretion to assign a forced share, as is true under British law. For proposals to this effect, see Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 732-39, 780-81 (1993); Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519 *passim* (2003). For criticisms of this idea, see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1185-91 (1986); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 314, 320-21 (1987). For a contracts analogy, see *supra* note 44 and accompanying text.

184. UNIF. PROBATE CODE § 2-202(a)(amended 2008), 8 pt. 1 U.L.A. 76 (Supp. 2010). In addition, a surviving spouse must live long enough to exercise a right of election; if, hard on the death of one spouse, the surviving spouse dies in turn, his or her personal representative cannot exercise the right in favor of his or her estate. *Id.* § 2-212(a) & cmt. In both of these respects, the elective share differs fundamentally from the community property system. *See supra* note 167. The drafters claim that the Uniform Probate Code's redesigned elective share suffices "to bring elective-share law into line with the contemporary view of marriage as an economic partnership," *see id.* art. 2, pt. 2, gen. cmt., but plainly the community property system accomplishes this goal more fully. The Commissioners had considered the possibility of a right of election exercisable by the estate of the first spouse to die, or by the estate of a surviving spouse who dies shortly after the first to die, which they recognized was "more consistent with the marital partnership theory." Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 731 n.123 (1992). The Commissioners nevertheless rejected the idea because it "would contravene the purpose of an elective-share system," which "states traditionally view as . . . personally benefitting the surviving spouse rather than the beneficiaries of a spouse's estate." *Id.* at 738 n.146.

arise that most commentators on the elective share—fixated on its testamentary aspect—have overlooked. Orthodox default rule theory requires that the mutable terms of a contract correspond with the intent of a majority of parties, in the interest of minimizing transaction costs.<sup>185</sup> The question then becomes whether most couples drafting a marital contract would prefer that it include rights of inheritance and, assuming so, how most would prefer to structure those rights.

That is a matter demanding empirical study, although we can speculate about couples' probable preferences on the basis of logical conjecture. The best way to think about the problem is to break down the reasons why persons sometimes prefer to disinherit their marital partners and then inquire whether most couples would have cause to value a forced share *vel non*, despite those reasons.

One obvious explanation for spousal disinheritance is marital disharmony. In this connection, spouses might understandably wish the marital contract to include a right to recoup wealth owned by the other spouse that they had a hand in creating, or even a broader right to share wealth as a means of coinsurance against want.<sup>186</sup> Still, spouses nowadays are likely to terminate a failed marriage prior to death, making property rights upon divorce the key component of contractual protection.<sup>187</sup> Given a spouse's unilateral power to sue for divorce, in-

---

185. On inheritance default rules, see Hirsch, *Default Rules*, *supra* note 15. For a rare recognition of the potential of spousal inheritance rights to minimize transaction costs, see POSNER, *supra* note 98, § 18.8, at 550.

186. See Rick Geddes & Paul J. Zak, *The Rule of One-Third*, 31 J. LEGAL STUD. 119, 126–30 (2002) (presenting an economic model showing that an efficient division of labor within the family cannot occur unless marital partners precommit to provide the childrearing spouse with long-term support); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 498 (1995) (remarking the insurance attribute of marriage); *supra* note 182 and accompanying text. To the extent the preference for insurance stands over and above the preference to recoup mutual contributions to wealth, the Uniform Probate Code's decision to tie the elective share amount to the duration of the marriage, see *supra* note 183, becomes problematic.

187. DEP'T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 21–22 (2002), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_022.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf) (“Most separated women make the transition to divorce very quickly: 84 percent . . . divorce within 3 years, and 91 percent do so within 5 years.”). Broken down along ethnic lines, the divorce rate five years after separation among black, Hispanic, and white women is sixty-seven percent, seventy-seven percent, and ninety-seven percent, respectively. *Id.* But cf. Langbein & Waggoner, *supra* note 183, at 313 (observing that within certain religions “di-

insurance against disinheritance becomes largely superfluous. Nevertheless, assuming that risk aversion motivates a majority of couples to prefer this sort of insurance anyway, the restriction of the elective share to the surviving spouse would lie in doubt. If the happenstance of survival determines whether a spouse can claim the elective share, then his or her entitlement is exposed to greater risk, reducing the usefulness of the elective share as a form of insurance—not insurance against privation in this context, but rather as *life* insurance.<sup>188</sup> Empirical evidence could still reveal that most spouses prefer to include only a right to insurance against lifetime privation, and not life insurance, in the marital contract. In that event, the current structure of the elective share would correspond with majority preferences. Assuming, though, that most spouses *also* prefer to include in the marital contract a right to recoup their implicit contributions to the wealth of the other spouse—a right that is not logically tied to survival, and hence which spouses should prefer to maintain whether or not they are the first to die—then lawmakers ought to craft an elective share that both spouses can claim, but one that is *greater* for a surviving spouse than for a decedent spouse.

Even when happily married, one spouse might prefer to disinherit the other in order to protect the inheritance of his or her children from prior relationships, who cannot count on benefitting in turn when the other spouse—from the children's perspective, a stepparent—dies. It is this scenario, in fact, that inspires the lion's share of prenuptial agreements today.<sup>189</sup> Under these circumstances, risk aversion might move a spouse who lacks independent means to welcome a forced share, especially given that in the context of a harmonious marriage divorce would comprise an unattractive option. In those instances where both spouses have independent means, however, and even more so where both have children from prior relationships to protect, it is hard to imagine many spouses insisting on a

---

orce is not an option"); Pennell, *supra* note 171, at 13–14 (noting anecdotal examples of spouses disinherited while permanently separated).

188. By the same token, risk aversion suggests a preference for an elective share that the executor of a surviving spouse can exercise. *See supra* note 184.

189. Prenuptial agreements are far more common for second marriages than for first ones, where protection of children from prior marriages becomes the primary consideration. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05 cmt. e (2000); Marston, *supra* note 172, at 891; *see also* Randall J. Gingsiss, *Second Marriage Considerations for the Elderly*, 45 S.D. L. REV. 469, 473–77 (2000) (noting that prenuptial agreements represent an important element in estate planning for remarried testators).

forced share. Intriguingly, the elective share laws of a minority of jurisdictions already make some allowance for this scenario: fourteen states vary the size of the elective share depending on whether the decedent spouse left children and, in three of those fourteen, depending on whether the surviving spouse was also the parent of those children.<sup>190</sup>

Ultimately, only empirical inquiry can gauge couples' probable preferences with any degree of authority. Plausible analysis in lieu of data suggests only that the correspondence between spousal preferences and existing elective-share laws is by no means assured.

Finally, two other critiques of the elective share bear noting, each of which has focused on its contractual dimension. Professor Gail Frommer Brod submits that lawmakers ought to curtail prenuptial agreements waiving the elective share because they "contribute to the financial vulnerability of women as a class, and . . . magnify society's unequal distribution of resources along gender lines."<sup>191</sup> Professor Brod here identifies robust spousal inheritance rights as an instrument of distributive justice.

The persuasiveness of this argument remains questionable. Historically, at least, American women in the aggregate have owned less than men and thus represent "an already disadvantaged socioeconomic class."<sup>192</sup> Reducing this aggregate disad-

---

190. Rosenbury, *supra* note 173, at 1253, 1256–58 & n.133. The Uniform Probate Code fails to refine the elective share on the basis of whether decedent spouses leave children, or children from prior relationships. See UNIF. PROBATE CODE §§ 2-202 to -203 (amended 2008), 8 pt. 1 U.L.A. 76, 78 (Supp. 2010). Nevertheless, the drafters intended that by tying the scale of the elective share to the duration of the marriage, the Code would reduce the elective share amount for marriages occurring later in life. *Id.* art. 2, pt. 2, gen. cmt. For a further discussion, see Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 11–33 (2003).

191. Gail Frommer Brod, *Prenuptial Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 240 (1994). In prior formulations, this argument had been confined to prenuptial agreements modifying rights to property upon divorce. *Id.* at 239 n.46. For a related analysis, see Silbaugh, *supra* note 182, at 122–43.

192. Brod, *supra* note 191, at 241–42, 294. For more recent evidence, see MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 133–36 (1999) (citing to studies); Dalton Conley & Miriam Ryvicker, *The Price of Female Headship: Gender, Inheritance, and Wealth Accumulation in the United States*, 13 J. INCOME DISTRIBUTION 41 *passim* (2004); Lena Edlund & Wojciech Kopczuk, *Women, Wealth, and Mobility*, AM. ECON. REV. 146 *passim* (2009); Richard W. Johnson et al., *Gender Differences in Pension Wealth and Their Impact on Late-Life Inequality*, 22 ANN. REV. GERONTOLOGY & GERIATRICS 116 (2002); Wojciech

vantage promotes gender egalitarianism, an accepted social objective, even if the imbalance is disappearing rapidly.<sup>193</sup> And although on its face the elective share represents a gender-neutral rule, traditional disparities between spouses' ages, coupled with different life expectancies, conspire to make wives likelier on average to survive their husbands, thereby allowing more women than men to exercise rights to the elective share.<sup>194</sup> Hence, its waivability jeopardizes the rights of more widows than widowers.

But who gains as a result? No evidence suggests that male testators systematically favor beneficiaries of their own gender.<sup>195</sup> Accordingly, freedom to opt out of the elective share produces no *intergenerational* gender-based wealth stratification. Even with respect to the parties themselves, the matter is far from clear. An empirical study of Georgia wills found that wives disinherit husbands nearly twice as often as husbands disinherit wives.<sup>196</sup> If this datum reflects a national pattern, then even if fewer men than women stand in a position to claim an elective share by virtue of surviving their spouses, more surviving men than surviving women have cause to exercise a right of election and thus would benefit from its existence as an unwaivable right.

What is more, we have to consider the *ex ante* consequences of an unwaivable elective share. If lawmakers curtailed prenuptial agreements, some would-be spouses might prefer not to marry, even though some of their would-be partners would rather sign away rights under enforceable prenup-

---

Kopczuk & Emmanuel Saez, *Top Wealth Shares in the United States, 1916–2000: Evidence from Estate Tax Returns* 13–15 (Nat'l Bureau of Econ. Research, Working Paper No. 10399, 2004).

193. The latest study finds a dramatic shift of income and wealth toward American women in recent decades, which suggests today “gender role reversals in both the spousal characteristics and the economic benefits of marriage.” RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., *WOMEN, MEN, AND THE NEW ECONOMICS OF MARRIAGE* 1 (2010), available at <http://pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf>.

194. Brod, *supra* note 191, at 244–45, 249; Rosenbury, *supra* note 173, at 1232.

195. For the most recent empirical study comparing men's and women's patterns of testation, also citing to earlier studies, see Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3, 21–39 (2008).

196. Pennell, *supra* note 171, at 16–18. This study—which appeared after Brod published her analysis—harvests data from nine counties featuring different socioeconomic characteristics and hence may suggest broader testamentary patterns. *Id.* at 8–10.

tial agreements than remain unmarried.<sup>197</sup> A redistributive tax regime could avoid such distortions. Kronman's condition that redistributive contract rules operate more efficiently than alternatives appears unmet in this instance.<sup>198</sup>

Professor Melvin Eisenberg offers another critique of spousal inheritance rights that again explores their contractual element. Professor Eisenberg argues for a restrictive approach to waivers of the elective share on the basis of paternalism.<sup>199</sup> Citing empirical evidence that overoptimism bias disposes prospective spouses "systematically [to] understate" the risk of marital disharmony, and also questioning their ability to anticipate the eventual impact a prenuptial agreement will have, given evolving "income[], . . . obligations[, and] . . . personal expectations," Eisenberg suggests that waivers of the elective share tend to engender subsequent regret.<sup>200</sup> Therefore, prenuptial agreements should take effect only where "the parties were likely to have had a mature understanding that the agreement would apply even in the kind of marriage scenario that actually occurred."<sup>201</sup>

Eisenberg's analysis presupposes the existence of marital inheritance rights; he offers no independent justifications for those rights. But assuming they do exist, Eisenberg's paternalistic rationale for making inheritance rights unreceptive to contractual modification is troubling. Perhaps as concerns prenup-

---

197. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 169–70, 204, 207 (1998); Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 315–17; Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005).

198. See *supra* note 166 and accompanying text.

199. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 217–19, 254–58 (1995). Although Professor Eisenberg fails to make explicit that paternalism underlies the limits on freedom of contract that he advocates, all such limits intended to preempt anticipated errors of judgment rest on a paternalistic foundation. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541–43 (1998).

200. Eisenberg, *supra* note 199, at 254. For the empirical study of overoptimism bias toward marital success cited by Eisenberg, see Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993). For a subsequent study reporting equivalent findings, see Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 7–10, 15–16 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 436, 2003), available at [http://lsr.nellco.org/harvard\\_olin/436](http://lsr.nellco.org/harvard_olin/436); see also PLOUS, *supra* note 115, at 134–35 (discussing overoptimism bias generally).

201. Eisenberg, *supra* note 199, at 258.

tial agreements governing rights within a failed marriage, where evidence shows systematic overoptimism bias to exist, lawmakers have cause to protect adults from unrealistic predictions of marital success. But it is quite enough to do so in the context of divorce, the usual endpoint of a failed marriage.<sup>202</sup> By extending paternalism to instances of regretted waivers of the elective share within harmonious marriages ending in death, where the regret stems from faulty expectations of a random nature, we could open the door to paternalistic intrusions on the autonomy of contracting adults in countless other situations without any clear, limiting principle to cabin the intrusions.

In sum, the case for assigning a compulsory bequest to the surviving spouse is convincing only as concerns the narrow subset of estates where the absence of a bequest would burden the welfare state with spillover costs.<sup>203</sup> Excepting that subset, lawmakers have no cause to deny couples the right to agree to dispense with the elective share, and even no compelling reason to assume that they would prefer a more expansive elective share as a default rule. And again, we may note the failure of most lawmakers and commentators to relate prenuptial agreements as an issue in freedom of contract to the elective share as an issue in freedom of testation, despite the interconnection of those issues.

#### B. FILIAL SHARES

In most countries, bequests to children are compulsory.<sup>204</sup> Not so in the vast majority of American states, where parents remain free to disinherit children, even while they are minors.<sup>205</sup> This power comprises a true instance of American legal exceptionalism.

---

202. See *supra* note 187 and accompanying text.

203. For prior commentary that questions the wisdom of an elective share, see Pennell, *supra* note 171, at 7–16, 48–52; Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 *passim* (1966); Turnipseed, *supra* note 171.

204. Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 & n.3 (1996) (“[P]rovisions protecting children from disinheritance are in place in most modern nations throughout the world.”); see also *Where There's a Will There's a Row*, ECONOMIST, Oct. 17, 2009, at 65 (making the same observation within Europe). For ancient law, see THE HAMMURABI CODE §§ 150, 168–169 (Chilperic Edwards ed., 1921) (Code of Babylonia, c. 2084–2081 B.C.).

205. For the minority of states carving out limited exceptions from this principle, see *infra* note 218.

We may observe initially that, although the problems of a compulsory share for spouse and child are sometimes treated together,<sup>206</sup> when viewed from a contracts perspective the two raise different policy issues. Lawmakers may, or may not, hold a surviving spouse to the terms of a prenuptial agreement. No comparable “prenatal” agreement ever governs the rights of would-be children. Filial rights, then, have to do uniquely with freedom of testation, not contract.

Some commentators posit a moral obligation on the part of parents to bequeath portions of their estates to their children.<sup>207</sup> The theoretical framework developed in this Article offers no insight into the merits of that proposition, at least insofar as it draws strength from noneconomic factors—natural expectations or some sort of “birthright.” To pursue the matter would lead us into deontology. This Article follows a different road, and for present purposes we shall assume that no claim to a patrimony derives simply from the fact of birth.

Granting parents leeway to vary or deny bequests to children produces economic benefits of the sort that freedom of testation ideally achieves. This leeway enables a parent to fine-tune bequests to children in order to enhance their individual and collective welfare—an outcome that parents’ familiarity with, and attachment to, their children helps to ensure.<sup>208</sup> And this leeway also enables parents to extract preferred behaviors from children.<sup>209</sup> Disinheritance has long rounded out the ar-

---

206. *E.g.*, LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 20–31 (1955); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 *passim* (1994).

207. *See, e.g.*, Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1222–25 (1990); Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 5–6. For assertions of children’s more limited moral claim to economic support during their minority, see, for example, ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 33–47 (2004); Brashier, *supra* note 204, at 5–6, 23. For an early discussion, see 1 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY bk. 2, ch. 2, § 3, at 284–86 (New York, D. Appleton & Co. 1895) (1848) (“I cannot admit that [a parent] owes to his children, merely because they are his children, to leave them rich . . .”). *See also* Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1207–17 (summarizing the debate over filial inheritance rights).

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

209. *See supra* note 26 and accompanying text. The core idea is centuries old. Hirsch & Wang, *supra* note 5, at 10. Legislators explicitly justified the abolition of forced heirship for children in Texas in 1856 as necessary “to restore to parents that control over their children, which the present law has . . . com-

senal of threats a parent can aim at a wayward child—as Paris Hilton is now discovering.<sup>210</sup> By the same token, a parent can augment bequests as an encouragement to dutiful children. Compulsory bequests to children would hinder either strategy.

Of course, the behaviors parents might seek to elicit take many forms, but one of them now looms in importance. As Professor Joshua Tate has recently argued, rising longevity in the United States has heightened the need for end-of-life care giving, which children may be enlisted to provide.<sup>211</sup> New empirical evidence suggests that parents are increasingly exercising freedom of testation to reward supportive children, although equal treatment of children remains the norm.<sup>212</sup> In fact, we can carry Professor Tate’s analysis a step further. Freedom of testation allows a testator to favor an unrelated or more distantly related caregiver over the heads of his or her children when they fail to provide care. Doubtless such cases arise rarely, but they are hardly unheard of.<sup>213</sup>

---

pletely destroyed.” Joseph W. McKnight, *Spanish Legitim in the United States—Its Survival and Decline*, 44 AM. J. COMP. L. 75, 92 (1996) (quoting JOURNAL OF THE SENATE OF THE STATE OF TEXAS, 6th Legis., 59–60 (1855)). Similarly, Virginia abolished entails in 1776 because they had “render[ed children] independent of and disobedient to their parents.” Act of Oct. 1776, ch. 26, in 9 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 226, 226 (William Waller Hening ed., 1821) (preamble). For a psychological discussion, see Gerald Schneiderman, *The Will as a Vehicle of Family Dynamics*, 31 CANADIAN J. PSYCHIATRY 662 *passim* (1986).

210. In this instance, it is Paris’s grandfather, Barron Hilton, who has cut her out of his will. Rachel Johnson, *Heir Today, Gone Tomorrow*, SUNDAY TIMES (London), Oct. 28, 2007, at 4. Ironically, Paris’s great-grandfather, Conrad Hilton, had also intended to disinherit Barron—so perhaps the tree didn’t fall far from the apple. *Together Again*, ECONOMIST, Jan. 7, 2006, at 58.

211. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 170–76 (2008).

212. *Id.* at 176–81 (citing to studies). For a recent example of an uneven estate plan explicitly prompted by caregiving, see *In re Estate of Singer*, 920 N.E.2d 943, 944 (N.Y. 2009). For several earlier examples, see MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 98–100 (1970). For additional studies, see Jere R. Behrman & Mark R. Rosenzweig, *Parental Allocations to Children: New Evidence on Bequest Differences Among Siblings*, 86 REV. ECON. & STAT. 637 *passim* (2004); Hirsch, *Default Rules*, *supra* note 15, at 1086 n.247 (citing to studies); Norton & Van Houtven, *supra* note 7, at 158–71 (citing to earlier studies).

213. Thus, the late actress and film star Lana Turner, who died in 1995, left part of her estate to her daughter—with whom she remained on good terms—but she left more to her *maid*, in whose arms she died. Peter Sheridan, *Blondes Who Had More Fun*, DAILY EXPRESS (U.K.), Sept. 27, 2008, available at 2008 WLNR 18725605; Liz Smith, *Not the Marrying Kind*, NEWSDAY, Feb. 7, 2000, at A11, available at 2000 WLNR 608013; see also Ian MacKinnon, *Maid Cleans Up with £2.6m Inheritance*, DAILY TELEGRAPH (London), July 22,

It remains instructive to compare this analysis with its analogue in the realm of spousal rights. Commentators cite each spouse's economic contribution to the other, including eldercare, as a ground for the elective share and hence for denial of freedom of testation.<sup>214</sup> On reflection, the problem appears double edged. Testamentary liberty allows one *either to reward or to slight* individual service. The alternative of compulsory bequests allows one to do *neither*. Still, we have reason to distinguish compulsory bequests to spouses and children in this respect. Residing together in the family home, marital partners share as a matter of course. Typically residing outside a parent's home, adult children provide eldercare less uniformly; recognition of their services requires testamentary flexibility.<sup>215</sup>

Notwithstanding this analysis, one potential justification for compulsory bequests to children is spillover costs, which could arise with regard to minor or disabled children who are unable to fend for themselves. The alternative to parental support then becomes public support. As a matter of law, all jurisdictions impose on living parents the burden of providing for their minor children under most circumstances, and in some jurisdictions this legal duty can extend to adult disabled children as well.<sup>216</sup> Efficiency dictates that the burden likewise fall on parents' estates, at least to the extent necessary to prevent children from becoming public charges—a policy that lawmak-

---

2010, available at 2010 WLNR 14574348; Jeffrey P. Rosenfeld, *Benevolent Disinheritance: The Kindest Cut*, PSYCHOL. TODAY, May 1980, at 48, 51; case cited *infra* note 215.

214. See *supra* note 182 and accompanying text.

215. If children or other close relatives want to ensure that they receive compensation for their efforts, they can insist that the testator agree to a will contract guaranteeing their bequest. See, e.g., *Kelsey v. Pewthers*, 685 So. 2d 953, 954 (Fla. Dist. Ct. App. 1996) (where the testator turned to a nephew for eldercare after her relationship with her child had deteriorated). A will contract can serve a function equivalent to the elective share in this connection. Under a new and unique law in China, children must visit regularly and attend to aged parents; parents can sue a child who ignores them. Editorial, *Filial Piety as Law*, CHINA DAILY (Beijing), Jan. 8, 2011, at 5, available at 2011 WLNR 418006; Xu Xiaomin, *Meet the Parents, or Pay the Price*, CHINA DAILY (Beijing), Jan. 12, 2011, at 8, available at 2011 WLNR 617781. Under such a legal regime, compulsory bequests for children can find justification as compensatory transfers.

216. CLARK, *supra* note 175, § 7.2; M.C. Dransfield, Annotation, *Parent's Obligation to Support Adult Child*, 1 A.L.R.2d 910 *passim* (1948); Noralyn O. Harlow, Annotation, *Postmajority Disability as Reviving Parental Duty to Support Child*, 48 A.L.R.4th 919 *passim* (1986); Joel E. Smith, Annotation, *Parent's Obligation to Support Unmarried Minor Child Who Refuses to Live with Parent*, 98 A.L.R.3d 334 *passim* (1980).

ers have also applied in varying degrees to dependent spouses, as earlier remarked.<sup>217</sup> In fact, statutes in a number of states do oblige parents to bequeath enough to a child for whom they are legally responsible to protect the child from penury, although most of the statutes operate only in limited situations.<sup>218</sup>

Beyond efficiency, we could question whether compulsory bequests for children would advance the ends of distributive justice in a liberal state. If anything, the opposite is true. Modern empirical evidence shows no sign of gender discrimination against children by either fathers or mothers that calls for amelioration.<sup>219</sup> More broadly, compulsory bequests for children would serve only to reinforce existing inequalities of family wealth, passed down from generation to generation. Lawmakers mitigate those inequalities both by taxing estates and by enabling testators to disinherit their offspring—especially if

---

217. See *supra* notes 175–81 and accompanying text.

218. Under the common law, the parental obligation to support a child ends at the death of the parent. *E.g.*, *McKamey v. Watkins*, 273 N.E.2d 542, 542 (Ind. 1971). Nevertheless, in four states a decedent parent's estate must provide for any child who would otherwise become a public charge if the parent while alive was obliged to support the child. CAL. FAM. CODE § 3952 (West 2004 & Supp. 2011); MONT. CODE ANN. § 40-6-213 (2009); N.D. CENT. CODE § 14-09-12 (2009); S.D. CODIFIED LAWS § 25-7-14 (2009). In two additional states, the amount of support a court can order from the decedent parent's estate is not limited by the threshold for welfare eligibility. LA. CIV. CODE ANN. arts. 1493–1495 (2000 & Supp. 2011) (entitling children aged twenty-three or younger and incapacitated children to a designated fraction of the estate); NEV. REV. STAT. ANN. § 125B.130 (LexisNexis 2010) (giving the court discretion to set the amount). Under the Uniform Marriage and Divorce Act, support decrees attendant to divorce or separation continue to bind the estate of a parent obligated to support the child. UNIF. MARRIAGE & DIVORCE ACT § 316(c) (amended 1973), 9A pt. 2 U.L.A. 102 (1998). Seven out of the eight states that adopted the Act include this provision. See *id.* at 103. For additional judicial decisions, see Susan L. Thomas, Annotation, *Death of Obligor Parent as Affecting Decree for Support of Child*, 14 A.L.R.5th 557 *passim* (1993). Under non-Uniform legislation in one other state, support orders stemming from filiation proceedings continue to bind the decedent parent's estate, see IDAHO CODE ANN. § 7-1107 (2010), while another state applies the same principle to child support orders of all sorts, R.I. GEN. LAWS § 33-11-51 (2010). See *Benson ex rel. Patterson v. Patterson*, 782 A.2d 553, 556–57 (Pa. Super. Ct. 2001) (questioning in dicta the constitutionality under the Equal Protection Clause of testamentary protection for children following divorce, but not for children within “intact families”).

219. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA* 202–03 (1987); Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 368–70; Knaplund, *supra* note 195, at 21–39. For historical patterns, see SHAMMAS ET AL., *supra*, at 42–47, 55–57, 108–12.

they prefer to bequeath to charity (as some of America's wealthiest do).<sup>220</sup>

In short, economic analysis vindicates Americans' existing, albeit distinctive, liberty to disinherit children, apart from those who lie on the doorstep of the welfare state. Although not dependent on broader amalgamation with freedom of contract for conceptual support, this deduction echoes verdicts reached in other parts of this Article that are. The overall judgment remains that freedom of testation merits confinement only in extraordinary circumstances.

## V. FUTURE INTERESTS

Some testators execute wills dictating the distribution of property not only immediately, but on into the future. In two ways, lawmakers restrict such "dead-hand" control. The rule against perpetuities limits the duration of testamentary directives.<sup>221</sup> This rule has eroded of late as applied to future interests held in trust.<sup>222</sup> Other rules, also concerning future interests held in trust, allow a court to modify trust terms in light of changing circumstances. These rules have gained strength of late.<sup>223</sup> Is either sort of limitation defensible?

---

220. See *infra* note 285.

221. Strictly speaking, the rule against perpetuities confines contingent interests and is just one of three operative doctrines regulating the longevity of future interests. A second doctrine confines the duration of honorary trusts and a third one confines accumulations. Hirsch, *supra* note 143, at 930–50; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501 *passim* (2006).

222. By statute, some twenty-eight states have now curtailed the rule against perpetuities, either by permitting perpetual trusts (nineteen states) or long-lasting trusts (nine states, with durational limits ranging between 150 and 1000 years). In three states (Arizona, Kentucky, and Pennsylvania), the statutes curtailing the rule also allow perpetual future interests out of trust. Many of the relevant statutes are noted in 2 SCOTT ET AL., *supra* note 65, § 9.3.9, at 498–506; for the most recently enacted statute, see KY. REV. STAT. ANN. § 381.224 (LexisNexis 2002 & Supp. 2010) (effective July 15, 2010). This legislative trend at the state level is being driven by competitive pressure to attract trust business from testators minded to avoid generation-skipping transfer taxes at the federal level. Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1311–16 (2003); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 *passim* (2006). For a recent discussion and criticism of the trend, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note, at 122–29 (Tentative Draft No. 6, 2010) (approved May 2010).

223. See *infra* notes 233–39 and accompanying text.

The problem of temporal boundaries on future interests is a large subject that defies easy summary. A collaborator and I have addressed the problem in economic terms at greater length elsewhere.<sup>224</sup> To put the matter briefly: several of the traditional justifications for freedom of testation lose their force as the testator extends his or her grip over property into the future. Testators cannot trade bequests for services performed by a circle of relatives who remain unborn. By the time they come into being, those relatives stand in no position to reciprocate.<sup>225</sup> Nor does the notion that freedom of testation results in better estate planning<sup>226</sup> hold up when a testator ventures to create future interests. When providing for existing family members, a testator brings to the estate-planning process a depth of knowledge gleaned from a lifetime of interaction with them. But the same temporal horizon that obstructs tacit bargains between a testator and future generations clouds his or her ability to see—and hence to see *to*—their needs. Estate planning for future generations is better delayed until those needs materialize.

At the same time, a third traditional justification for freedom of testation—namely, that it spurs testators to produce and save<sup>227</sup>—continues to apply to future interests. The longer freedom of testation persists, the greater testators' incentives to accumulate wealth.<sup>228</sup> But further extensions of this freedom

---

224. Hirsch & Wang, *supra* note 5. For another recent exploration of the subject, see Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL., PHIL. & ECON. 91 *passim* (2005).

225. BOULDING, *supra* note 5, at 97 (“Making sacrifices for a distant posterity is clearly the purest form of [gratuity] that can be imagined, for there can be no vestige of exchange in it.”). On bequests to living persons as a form of quasi-exchange, see *supra* notes 26–28 and accompanying text.

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

227. See *supra* notes 22–25 and accompanying text.

228. Tax incentives aside, a testator's appetite for extending dead-hand control may be psychological in nature. Lord Kames observed long ago:

The man who has amassed great wealth, cannot [sic] think of quitting his hold, and yet, alas! [H]e must die and leave the enjoyment to others. To colour a dismal prospect, he makes a deed . . . securing his estate . . . to those who represent him, in an endless train of succession. His estate and his heirs must for ever bear his name; [the] very thing to perpetuate his memory and his wealth.

HENRY HOME (LORD KAMES), HISTORICAL LAW-TRACTS 142 (A. Kincaid ed., 2d ed. 1761) (photo. reprint 2000). Similarly, Lord Hobhouse opined that dead-hand control “is commonly exercised to its fullest extent, merely because it exists, and without the slightest reason beyond the pleasure of exercising power.” ARTHUR HOBHOUSE, THE DEAD HAND 183 (Chatto & Windus 1880). For a modern psychological explanation of the craving for “symbolic immortality,”

should yield diminishing marginal utility, given the testator's attenuated connection with the unborn, coupled with the universal tendency to discount future benefits.<sup>229</sup>

Meanwhile, extended dead-hand control can also entail inefficiency, although the matter will vary depending on the form of control that the testator exerts. As earlier discussed,<sup>230</sup> costly conditions attached to present bequests cause no loss of efficiency, because the beneficiary can always choose to forfeit the bequest if its cost exceeds its benefit. But if a testator elects to restrict the use of property into the future, or attaches a condition that continues to apply to each succeeding owner of an interest in property, then later owners have no way to rid the interest of the restriction. Its costs will mount as they are borne again and again, and perhaps also mount by virtue of changing times. At some point, the marginal benefit to the testator of continued control must equal the marginal cost of the restriction. Theoretically, that is the efficient boundary on dead-hand control, and the trend lines suggest that it must exist somewhere.

The case for confining the dead hand is less easy when the testator merely allocates ownership of property over time. Its efficient use is then unaffected, although the testator's decisions necessarily become arbitrary beyond the horizon of his or her vision. That is not strictly an economic concern, although arbitrariness remains a welfarist concern.<sup>231</sup> There appears lit-

---

see Jamie Arndt et al., *Terror Management and Self-Awareness: Evidence that Mortality Salience Provokes Avoidance of the Self-Focused State*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1216, 1217 (1998).

229. Hirsch & Wang, *supra* note 5, at 21. For an early recognition, see 1 MILL, *supra* note 207, bk. 2, ch. 2, § 4, at 287-88.

230. See *supra* text following note 73.

231. For a further discussion, see Hirsch & Wang, *supra* note 5, at 34-38. By limiting future interests to lives the testator has known (the "measuring lives" of the rule against perpetuities, which must be lives in being when the interest is created, although anomalously they may include lives "extraneous" to the interest), the rule seeks to ensure that allocations are informed by testators' insights into their beneficiaries. Adam Smith considered this the ideal cut-off: "The best rule seems to be that we should permit the dying person to dispose of his goods as far as he sees, that is, to settle how it shall be divided amongst those who are alive at the same time with him." ADAM SMITH, LECTURES ON JURISPRUDENCE 70 (R.L. Meek et al. eds., 1978) (ms. 1762-1766). Lord Hobhouse agreed:

A clear obvious natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the

tle reason to confine the dead hand, however, when the testator fails even to dictate allocations, but instead creates a discretionary trust, whose allocations remain flexibly in the hands of a living trustee. In that event, the dead hand applies its lightest touch, resulting in neither inefficient use nor arbitrary allocation of property over time.<sup>232</sup>

The second means whereby lawmakers restrain the dead hand is by granting courts power to modify estate plans over time. Historically, judicial powers of trust modification were narrowly confined. Under the *cy pres* doctrine, courts could modify only charitable trusts, and then only if the original terms of the trust became impossible or impractical (not merely inconvenient) to implement, only if the estate plan suggested that the testator would prefer modification to termination of the trust on the ground of impossibility, and only by substituting terms as near as possible to the original ones.<sup>233</sup>

Lawmakers have progressively relaxed these restrictions, thereby enhancing judicial power over future interests. The rule that the trust purpose as modified must stray from the original purpose as little as possible appeared in the first Restatement of Trusts but was watered down in the second.<sup>234</sup> The third Restatement and the Uniform Trust Code also widen the range of circumstances potentially triggering invocation of the *cy pres* doctrine to include impossibility, impracticality, and *wastefulness*.<sup>235</sup> In addition, the Uniform Trust Code (but not the Restatement) makes invocation of the doctrine mandatory more than twenty-one years after a charitable trust's creation, even if the testator expressed an intent that the trust terminate when its original purpose becomes impossible to carry

---

latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.

HOBHOUSE, *supra* note 228, at 188. For an argument that the range of a testator's vision differs with regard to trusts for charitable and noncharitable purposes, as opposed to trusts for the benefit of individuals, see Hirsch, *supra* note 142, at 84–91.

232. For a fuller discussion, see Hirsch & Wang, *supra* note 5, at 38–49.

233. For the state of the doctrine circa 1935, see RESTATEMENT OF TRUSTS § 399 & cmts. (1935).

234. Compare RESTATEMENT OF TRUSTS § 399 cmt. c (1935), with RESTATEMENT (SECOND) OF TRUSTS § 399 cmts. b, d (1959). See also UNIF. TRUST CODE § 413(a)(3) (amended 2005), 7C U.L.A. 509 (2006) (following the second Restatement); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003) (same).

235. UNIF. TRUST CODE § 413(a) (amended 2005), 7C U.L.A. 509 (2006); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); see also *supra* notes 142–43.

out.<sup>236</sup> Finally, and most revolutionary of all, both the Uniform Trust Code and the third Restatement create a power to modify the substantive terms of *all* trusts, not just charitable ones, where modification will “further the purposes of the trust,” in light of “circumstances not anticipated by the settlor,” and in line with his or her “probable intention.”<sup>237</sup> Despite the last stricture, the Uniform Trust Code declares this new doctrine a mandatory rule.<sup>238</sup> The third Restatement goes a step farther, allowing a court to override the substantive terms of any trust when all the beneficiaries agree, even if circumstances remain unchanged, if the court “determines that the reason(s) for . . . modification outweigh the material purpose” of the trust.<sup>239</sup>

What, then, of this second, emerging restraint on the freedom to dictate future interests, pertaining to their inflexibility, as opposed to their duration—is it, too, defensible? Scholars have, in fact, connected the two issues, linking the rise of trust modification powers to the simultaneous decline of durational limits on future interests. Professor David English, reporter for the Uniform Trust Code, remarks that “the increasing use in recent years of long-term trusts” has created “a need for greater

---

236. Compare UNIF. TRUST CODE § 413(b) (amended 2005), 7C U.L.A. 509 (2006), with RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). Both the Code and the Restatement create a presumption in favor of intent to apply *cy pres*, in any event. UNIF. TRUST CODE § 413(b) cmt. (amended 2005), 7C U.L.A. 509–10 (2006); RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (2003).

237. UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006). The Restatement contains equivalent language. RESTATEMENT (THIRD) OF TRUSTS § 66(1) & cmt. a (2003). For non-Uniform legislation, see 5 SCOTT ET AL., *supra* note 65, § 33.4, at 2182–86. The antecedent rule of equitable deviation was limited to a power to modify the *administrative* terms of a trust. 2A SCOTT & FRATCHER, *supra* note 137, § 167, at 270. In light of this provision, which also applies to charitable trusts, Professor Ronald Chester questions whether the Code’s *cy pres* provision has any continuing, independent relevance, apart from its mandatory operation after twenty-one years. Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 701–03, 707–09 (2001); see also RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 47–50, 60–63 (2007). Arguably, though, the Code’s version of equitable deviation, which allows substantive modification to “further” trust purposes, operates more narrowly than *cy pres*, which allows modification of the purpose itself. Compare UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006), with *id.* § 413(a).

238. UNIF. TRUST CODE § 105(b)(4) (amended 2005), 7C U.L.A. 428 (2006).

239. RESTATEMENT (THIRD) OF TRUSTS § 65 & cmts. a, d (2003). By contrast, under the analogous provision in the Uniform Trust Code allowing the court to modify a trust with the consent of all beneficiaries, the court cannot disregard a “material purpose of the trust.” UNIF. TRUST CODE § 411(b) (amended 2005), 7C U.L.A. 498 (2006).

flexibility in the restrictive rules that apply concerning when a trust may be . . . modified.”<sup>240</sup>

Well, yes and no. To the modest extent it addresses the duration of future interests, the Uniform Trust Code does not itself empower a testator radically to prolong them, as statutes in some states have done.<sup>241</sup> Those states are competing for trust business,<sup>242</sup> and if legislators feel pressure to enhance testamentary power with respect to the duration of dead-hand control, then as a practical matter they may shy away from other restrictions on the dead hand that might make their jurisdiction comparatively less attractive as a trust situs.<sup>243</sup>

At the same time, as a policy matter, judicial power to modify future interests eases their prolongation, because then they will bend with, not stubbornly defy, evolving facts. In this sense, a power of modification can substitute for limits on duration.<sup>244</sup> Still, we make up for extensions of those limits by adding powers of modification that operate beyond the point where the old limits stood. To install powers of modification that take effect immediately when an interest commences is to curtail temporal freedom of testation. We may discover reasons for such a retrenchment, but they do not lie in the newfangled power to create *far*-future interests.

In pursuit of those reasons, we may again find the contracts analogy instructive. Recall Judge Richard Posner’s cri-

---

240. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002). For like observations, see RESTATEMENT (THIRD) OF TRUSTS ch. 13, introductory note (2003); CHESTER, *supra* note 237, at 56; LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 121–22* (2009); 5 SCOTT ET AL., *supra* note 65, § 33.6, at 2200–21.

241. The Uniform Trust Code only addresses the duration of noncharitable-purpose trusts, not trusts for individual beneficiaries. As for noncharitable-purpose trusts, the Code establishes limits on their duration that eleven states (including Delaware) have extended. Hirsch, *supra* note 138, at 16, 18 & n.55. Nor does the more general Uniform Act applicable to future interests fundamentally widen the reach of the dead hand. See UNIF. PROBATE CODE art. II, pt. 9, subpt. 1, gen. cmt., § 2-901 (amended 2008), 8 pt. 1 U.L.A. 223, 226 (1998) (suggesting that the Uniform Act serves to simplify the law rather than to modify the dead hand’s “traditional boundaries”).

242. See *supra* note 222. The competition is occurring within the context of manifold trust doctrines, not merely the law of future interests, and Delaware is leading the way. Hirsch, *supra* note 138, at 13–14.

243. It comes as no surprise that Delaware has adopted neither the Uniform Trust Code nor a mandatory rule of trust modification. See DEL. CODE ANN. tit. 12, §§ 3303, 3541(b) (2007).

244. Dukeminier & Krier, *supra* note 222, at 1327–31, 1339–41; Hirsch & Wang, *supra* note 5, at 50–51.

tique of marital conditions, quoted earlier in Part II.<sup>245</sup> His rationale for overriding them is that beneficiaries lack the opportunity to remonstrate with the late testator, to convince him or her to waive the condition—“recontracting” is Judge Posner’s phrase—as time goes by.<sup>246</sup> To put the analogy more technically: if events dictate, parties can modify a contract by mutual consent.<sup>247</sup> But in respect of testamentary marital conditions, modification by consent becomes impossible once death has removed one party from the negotiating table.

Professor John Langbein broadens this analysis to future interests generally, where it becomes “the anti-dead-hand principle.”<sup>248</sup> This principle “is fundamentally a change-of-circumstances doctrine . . . . The living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct, or as other circumstances change, but the . . . deceased . . . cannot.”<sup>249</sup> The third Restatement of Trusts reiterates: “the ‘rigor mortis’ of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances.”<sup>250</sup>

This argument holds a visceral appeal, but we must be careful to note its limits as a rationale for trammeling freedom of testation. The Restatement cites the rationale to justify the immediate invalidation of marital conditions within testamen-

---

245. See *supra* text accompanying notes 98–99.

246. POSNER, *supra* note 98, § 18.7, at 548.

247. PERILLO, *supra* note 14, § 5.14.

248. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1110 (2004).

249. *Id.* at 1111. And again: “One justification for reduced deference to the deceased transferor is that once in the grave, a decedent cannot reconsider a foolish course of conduct as its consequences emerge, or as circumstances change.” John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 B.U. L. REV. 375, 378 (2010).

250. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). The second Restatement of Property had likewise observed: “Because of an inability to consider changed circumstances, the law is less receptive to restraints imposed by the dead hand than to those imposed by the living.” RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 cmt. c (1983). For additional scholarly commentary in support of this rationale, see Chester, *supra* note 237, at 728 (“[F]lexibility . . . would appeal to many dead settlers if they could be brought back to life.”); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 652–55 (1988). *But cf.* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1261–62 (1985) (suggesting that judicial powers to modify future interests would be subject to abuse); Dukeminier & Krier, *supra* note 222, at 1331, 1340–41 (observing the uncertainty of, and the costliness to beneficiaries of, invoking a power of modification); *supra* note 183 (citing to peripherally relevant commentary).

tary trusts.<sup>251</sup> Posner himself would intervene more frugally. He advocates only subsequent modification of marital conditions.<sup>252</sup> But under the Restatement, the mere fact that circumstances *might* change without the testator being able to respond suffices to justify the condition's nullification a priori—even if circumstances never change, and the beneficiary simply prefers not to fulfill the condition. In this sense, the anti-dead-hand principle as reflected in the Restatement is not solely “a change-of-circumstances doctrine.”<sup>253</sup>

If the argument for this variant of the anti-dead-hand principle is the testator's inaccessibility not merely to subsequent but also to immediate persuasion and reconsideration of the condition upon his or her death, the rationale would prove too much. On this basis, we could justify amending any estate plan that the testator declined to divulge to beneficiaries during his or her lifetime. Once again, those beneficiaries will have had no opportunity to state their case for redividing the estate, and after the will comes to light in probate the testator can no longer “change his or her mind.”<sup>254</sup> Such a doctrine would destroy all but a remnant of freedom of testation, which no one is advocating.

The only alternative is to abandon the anti-dead-hand principle as a rationale for the immediate invalidation of conditions and fall back on the substantive public policy of the conditions themselves for that purpose. The third Restatement of Trusts takes that analytical tack as well, as we have seen.<sup>255</sup> We took pains to address this aspect of the problem earlier in this Article.<sup>256</sup>

At the same time, the anti-dead-hand principle gains plausibility as a rationale for ex post modification of conditions and future interests as events unfold. Considering the problem in connection with marital conditions, Posner raises the possibility that “[a]s the deadline [for meeting the condition] approached, the [beneficiary] might come to the [testator] and persuade him that a diligent search had revealed no marriage-

---

251. RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. i, j (2003); *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 cmt. c (1983).

252. *See* POSNER, *supra* note 98, § 18.7, at 548 (“This argues for applying the cy pres approach in private as well as charitable trust cases.”). On the cy pres doctrine, *see supra* text accompanying note 233.

253. *See supra* text accompanying note 249.

254. *See supra* text accompanying note 249.

255. *See supra* note 72 and accompanying text.

256. *See supra* notes 73–87 and accompanying text.

able . . . girl [of the required faith] who would accept him. The father might be persuaded to . . . relax the condition”—a social process foreclosed by the testator’s demise.<sup>257</sup> In other words, we can conceptualize the anti-dead-hand principle as an intent-effectuating doctrine, carrying out revisions the court concludes a testator would have acceded to if only he or she were present to exercise his or her judgment.

But here we arrive at the crux of the matter. The Uniform Trust Code styles its doctrine of trust modification as a mandatory rule.<sup>258</sup> That formulation is inconsistent with the rationale that modifications are premised on a hypothetical change of heart.<sup>259</sup> Yet, the issue is not quite so simple as that, for, though it purports to be mandatory, the Code’s doctrine of modification only covers “circumstances not anticipated by the settlor.”<sup>260</sup> If the trust expressly dictates that its terms should remain unchanged even in the event that stated contingencies occur, then those circumstances have been anticipated, and the doctrine fails to apply.<sup>261</sup> But then when, if ever, is the doctrine mandatory? Only, it appears, when the trust expresses a general prohibition on modification without anticipating specific contingencies.<sup>262</sup>

---

257. POSNER, *supra* note 98, § 18.7, at 528; *see also id.* § 18.3, at 544–45.

258. UNIF. TRUST CODE § 105(b)(4) (amended 2005), 7C U.L.A. 428 (2006).

259. Professor Langbein remarks the duality without criticism:

In one dimension, these change-of-circumstance rules are intent-serving. They are imputed-intent doctrines, which empower the court to modify the trust as the settlor would have wished had the settlor known of the changed circumstance. The dimension that requires these doctrines to be grouped with intent-defeating mandatory rules is that the settlor is forbidden to oust them.

Langbein, *supra* note 248, at 1117. By comparison, the analogous rule elaborated in the third Restatement of Trusts is not expressed as a mandatory doctrine, *see* RESTATEMENT (THIRD) OF TRUSTS § 66 cmts. a–b (2003), although the Restatement proposes an additional rule not found in the Uniform Trust Code allowing the court to override a condition or restriction in the absence of changed circumstances. *See supra* note 239 and accompanying text.

260. UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006). “To the extent practicable, the modification must be made in accordance with the [testator’s] probable intention.” *Id.*

261. Thus, a testator “concerned about the possibility of an unwanted section 412(a) modification . . . could attempt to avoid one by including in the terms of the trust a recitation of circumstances the settlor anticipated.” Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 665–66 (2005).

262. If changing circumstances transform a trust condition or restriction into one that contravenes public policy, then the court would again ignore a testamentary directive not to amend the trust. Langbein, *supra* note 248, at 1118–19.

What could justify this sort of doctrinal distinction between the general and the specific? The Uniform Trust Code itself offers no explanation, nor have commentators.<sup>263</sup> Perhaps the drafters of the Code assume a testator is less resolute when expressing a general prohibition on modification. He or she may nevertheless have only certain eventualities in mind and would have been more amenable to changing his or her mind about *not* changing his or her mind if an unforeseen eventuality materializes. This argument suggests the possibility of a rule barring general prohibitions of modification operating beyond the near term, excepting from the scope of the bar expressions of intent regarding the foreseeable future. As it happens, that is how the Code's closely related rule of *cy pres* is structured to operate.<sup>264</sup>

Still, the issue has another side to it, as the contracts analogy reveals. Just as a testator might overlook a risk when setting the terms of a future interest, so might contracting parties fail to take into account some improbable occurrence, rendering the contract economically irrational and "impractical" to perform. Under the doctrine of supervening frustration, echoing the modern doctrine of trust modification, a court can rewrite the terms of the contract.<sup>265</sup> But the doctrine again relies on the inference, which the court must draw, that had the parties anticipated the risk they would have worded the contract differently.<sup>266</sup> Under the doctrine of assumption of risk, parties nevertheless can bargain around frustration by explicitly, or even implicitly, overriding it under the terms of the contract.<sup>267</sup> In this respect, "relief for impracticability or hardship does not interfere with freedom of contract."<sup>268</sup>

If the same rationale underlies the doctrine of trust modification, then the same conclusion follows. Insofar as a testator wishes—and lawmakers could require an express statement of intent—to assume the risk that circumstances will change in

---

263. See UNIF. TRUST CODE §§ 105 cmt., 412 cmt. (amended 2005), 7C U.L.A. 428, 507–08 (2006).

264. Under the Code, application of the *cy pres* doctrine becomes mandatory only after twenty-one years have passed. *Id.* § 413(b)(2).

265. RESTATEMENT (SECOND) OF CONTRACTS § 272 cmt. c (1981).

266. *Id.* ("Since it is the rationale of this [rule] that, in a case of impracticability or frustration, the contract does not cover the case that has arisen, the court's function . . . [is that of] supplying a term to deal with that omitted case.").

267. *Id.* §§ 261 cmt. c, 265; PERILLO, *supra* note 14, §§ 13.2, 13.16.

268. PERILLO, *supra* note 14, § 13.20, at 478.

ways that he or she cannot foresee, then the testator should have the same freedom to do so that a contracting party enjoys.<sup>269</sup> To do otherwise would defeat the testator's considered intransigence,<sup>270</sup> while exposing the intent-effectuating rationale for modification as a fiction.<sup>271</sup>

But even when a testator's will is silent on the matter of modification, if our basis for it is the hypothesis that the testator might have had a change of heart, then we still must ask—again by analogy to the doctrine of supervening frustration—how likely such a change of heart would be. Under contracts doctrine, by comparison, assumption of particular risks may be implicit.<sup>272</sup> Our answer hinges on the testator's motive for saddling a bequest with future conditions, or future use restrictions, or future distributive provisions. When moved by simple benevolence, a testator ought to incline toward a more plastic estate plan. Under conditions of interdependent utility “your gain is my gain,” so any revision that enhances beneficiaries' eventual happiness should prospectively enhance the testator's. Still, other considerations can inform future interests, and the manner in which a testator frames them can signal, or at least hint at, his or her willingness to alter their stipulations.

Consider conduct and use restrictions of a moral or religious nature. These a testator may impose for selfish reasons, to express his or her own identity.<sup>273</sup> Assuming so, we have

---

269. Posner raises this possibility but hedges. He advocates taking “the cypres approach in private . . . trust cases unless, *perhaps*, the testator expressly rejects a power of judicial modification.” POSNER, *supra* note 98, § 18.7, at 548 (emphasis added).

270. The danger remains that an assumption-of-risk clause could become boilerplate language in prolonged trusts and hence escape due consideration after all. That appears unlikely, however: estate planners are sensitive to the hazard of changed circumstances and routinely counsel clients to build flexibility into prolonged trusts. *E.g.*, Harrison Gardner, *Designing Wills and Trust Instruments to Provide Maximum Flexibility*, 18 EST. PLAN. 138 *passim* (1991). By the same token, estate planners would likely counsel against assumption-of-risk clauses. Fellows, *supra* note 250, at 655. The appearance in a will of such a clause “would suggest that a fairly sophisticated drafter had considered carefully the issue of flexibility in the dispositive scheme.” *Id.*

271. See Paul G. Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L.J. 267, 283–85, 291–92 (1967) (rejecting the intent-effectuating rationale on this basis but nonetheless defending a mandatory power of judicial modification on the grounds that it “place[s] another reasonable limit upon the dispositive power” of testators, in the interest of “protecting individuals to whom the testator was responsible or felt responsible”).

272. See *supra* note 267 and accompanying text.

273. For a discussion of this element in the social psychology of testation, along with scholarly references, see Hirsch, *supra* note 142, at 52–56. In a re-

every reason to anticipate the testator's fixity of intent. Alternatively, a testator might insist on these restrictions out of paternalistic regard for beneficiaries, intending to inculcate in them values or beliefs that the testator deems salutary. Once again, in that event, we have little cause to predict a testator would answer a beneficiary's appeals for removal of a restriction, even if made in seemingly dire circumstances. After all, paternalists always act against the wishes of the paternalized party; they must not see to, but *through* all efforts to prevail upon them, while shutting their ears to cries of protest. In this regard, a paternalistic testator might even welcome the rigidity of dead-hand control as a bulwark against his or her own soft-heartedness or vulnerability to persuasion.<sup>274</sup>

The case differs with respect to restrictions on a beneficiary's consumption choices, or simply future allocations among beneficiaries. Here, apparently acting out of straightforward concern for beneficiaries' welfare, a testator would have reason to accede to revisions if and when needs change down the road. Lawmakers therefore have greater cause to apply the anti-dead-hand principle in these instances.

In sum, a doctrine of trust modification premised on imputed intent should take into consideration inferences lawmakers can draw as to the testator's resoluteness and should also take the form of a default rule.<sup>275</sup> Otherwise, such a doctrine

---

cent case, the court reflected upon the testator's reasons for imposing a religious marital restriction:

The record . . . reveals that [the testator's] intent in restricting the distribution of his estate was to benefit those descendants who opted to honor and further his commitment to Judaism by marrying within the faith. [The testator] had expressed his concern about the potential extinction of the Jewish people . . . by gradual dilution as a result of intermarriage with non-Jews. While he was willing to share his bounty with a grandchild whose spouse converted to Judaism, this was apparently as far as he was willing to go.

*In re* Estate of Feinberg, 919 N.E.2d 888, 896 (Ill. 2009).

274. The same concern may motivate some testators while alive to withhold the details of their estate plans from beneficiaries. See Robert Solomon, *Helping Clients Deal with Some of the Emotional and Psychological Issues of Estate Planning*, PROB. & PROP., Mar.–Apr. 2004, at 56, 57–58 (discussing preferences for secrecy).

275. In several recent cases, courts have denied petitions to modify the provisions of trusts on the basis of inferences concerning the settlor's probable anticipation of the changed circumstance and inferences concerning the testator's resolve. See *Smith v. Hallum*, 691 S.E.2d 848, 850 (Ga. 2010) (involving the changed circumstance of an attack by one deranged beneficiary on another beneficiary); *In re* Trust D Created Under the Last Will of Darby, 234 P.3d 793, 801 (Kan. 2010) (addressing inflation as a changed circumstance); La-

will clash for no apparent reason with its analogue in contract law. That lawmakers have allowed the paths of these laws nonetheless to diverge has a ready, and by now predictable, explanation: neither the Uniform Trust Code nor the third Restatement of Trusts ever once cites to contract doctrines of modification by way of comparison.<sup>276</sup>

Lawmakers still might premise a doctrine of modification on the costs future interests impose on beneficiaries, balanced against the benefits they bring testators.<sup>277</sup> In reworking the doctrine along these lines, lawmakers would again need to bear in mind the importance that a condition or use restriction often holds for those testators who trouble themselves to impose one, together with the ex ante consequences of a rule operating potentially to confound testamentary intent. Faced with a mandatory doctrine of modification, a single-minded testator might prefer to disinherit beneficiaries in favor of charity or simply to spend more wealth during his or her lifetime.<sup>278</sup> A weighing of interests calls for freedom to impose a condition or a use restriction for some space of time postmortem; a mandatory power of modification should come into effect only after that time has elapsed.<sup>279</sup>

---

dysmith Rescue Squad, Inc., v. Newlin, 694 S.E.2d 604, 608 (Va. 2010) (addressing disputation among beneficiaries as a changed circumstance).

276. See UNIF. TRUST CODE §§ 105(b)(4), 412–413 & cmts. (amended 2005), 7C U.L.A. 428, 507–10 (2006); RESTATEMENT (THIRD) OF TRUSTS §§ 65–67 & cmts. (2003).

277. See *supra* notes 228–30, 271 and accompanying text; see also Hirsch & Wang, *supra* note 5, at 21, 50–51. One of the Restatement rules, which does not depend on changed circumstances, authorizes judicial modification if the court “determines that the reason(s) for . . . modification outweigh the material purpose.” RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003); see also *supra* note 239 and accompanying text.

278. Under current law, future interests out of trust escape the reach of the rules of modification found in the Uniform Trust Code and the third Restatement of Trusts, so a settlor bent on imposing inflexible conditions or use restrictions could avoid the threat of modification by steering clear of trust law. Lawmakers, in turn, could foreclose this evasion by extending trust rules of modifications to future interests out of trust, but that might simply occasion further distortions of a settlor’s estate plan.

279. The Uniform Trust Code takes this approach with respect to its cy pres doctrine, which becomes mandatory after twenty-one years, but not with regard to the Code’s general doctrine of trust modification, which becomes mandatory immediately. Compare UNIF. TRUST CODE § 413(b)(2) (amended 2005), 7C U.L.A. 509 (2006), with *id.* §§ 105(b)(4), 412(a). See *supra* text accompanying notes 236–38; see also Dukeminier & Krier, *supra* note 222, at 1340 (offering a proposal for a mandatory general doctrine of trust modification taking effect only “after the income beneficiaries alive at the creation of the trust are dead”).

## CONCLUSION

This Article has advocated assimilating contracts and wills into a single genus of legal doctrine. Glimpsed from this vantage, existing rules of contracts and wills betray troubling inconsistencies between parallel doctrines and, what is worse, contradictions at points of intersection where the rules sometimes operate at cross-purposes. Lawmakers need to confront these anomalies. To be sure, categorical fragmentation is not directly to blame for them and has not caused anomalies invariably to appear. On occasion, lawmakers operating within separate categories manage to arrive at comparable conclusions without coordinating their efforts.<sup>280</sup> Nevertheless, fragmentation has tended to distract attention from the structural relationships and potential interplay of contracts and wills, thereby creating an environment in which anomalies could flourish. Categorical union would improve matters, again indirectly, by illuminating analogies and connections that the prevailing framework of categories obfuscates.

The weight of scholarly opinion nowadays favors whittling down freedom of testation.<sup>281</sup> Comparative analysis with freedom of contract suggests, on the contrary, extending liberty of will-making beyond even its existing, not inconsiderable, latitude. To adopt the more fashionable course would further aggravate the disharmony between freedom of testation and freedom of contract. Lawmakers could, of course, get to grips with the problem the other way around, by narrowing freedom of contract. Analysis mindful of the accepted grounds for invading liberty of transfer nevertheless counsels against pursuing that avenue to doctrinal consistency.

It may be worth noting that any enlargement of freedom of testation would not occur against a background of anomie and should disturb established patterns of testation only slightly, if at all. Although individuals can follow idiosyncratic paths of will-making more easily than in other actions—for they do not have to suffer the social repercussions of this action<sup>282</sup>—most

---

280. See *supra* notes 53–54, 131–32 and accompanying text.

281. For a recent discussion, see MADOFF, *supra* note 32, at 154–56. The Uniform Trust Code and the third Restatement of Trusts both make moves in this direction. See *supra* notes 65, 235–39 and accompanying text.

282. For a statement of the relative freedom of testators from social constraints, see M. Meston, *The Power of the Will*, 27 JURID. REV. 172, 173 (1982). For further discussions, see Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 639 (1989); Hirsch & Wang, *supra* note 5, at 13. For an early observation, see HOBHOUSE, *supra* note 228, at 94. Although so-

wish to be remembered in a positive light.<sup>283</sup> In the main, individuals follow prevalent norms when designing their estate plans.<sup>284</sup> When deviations occur, they may even set new trends. The occasional “norm entrepreneur” has succeeded in transforming testamentary convention over the course of American history.<sup>285</sup>

If anything, this social reality suggests additional reasons for strengthening freedom of testation. On the one hand, we can predict that doing so will yield few more aberrant estate plans. And on the other hand, by so doing we set the stage for a kind of recurring moral triumph. If Auden was wrong,<sup>286</sup> if freedom fulfilled constitutes a value in itself, then freedom self-restrained offers even greater value, by presenting an abiding testament—in both senses of the word—to the better angels of our nature.

---

cial disapproval could be accounted a “cost” of unorthodox testation—and thus potentially a spillover cost—it represents both an economically insignificant and philosophically controversial one. *See supra* notes 145–47 and accompanying text.

283. For a discussion of this reputational component of testation, see Hirsch, *supra* note 142, at 53–55.

284. For a study, see T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences*, 34 *SOC. Q.* 337 *passim* (1993).

285. *See* ERIC A. POSNER, *LAW AND SOCIAL NORMS* 30–32 (2000) (discussing the role of norm entrepreneurs within social norm theory). A leading example is Andrew Carnegie, whose testamentary preference for charity over children has influenced succeeding generations of Americans, in particular those whose wealth (like Carnegie’s) was “self-made.” Hirsch & Wang, *supra* note 5, at 44 n.170. Thus Bill Gates, currently the wealthiest American, has pledged to give away ninety-five percent of his wealth to charity, asserting that he does not want to “burden[]” his children with his wealth, *see* Nadine Brozan, *Chronicle*, *N.Y. TIMES*, Dec. 15, 1995, at B6, while the second-wealthiest American similarly characterizes a sizeable inheritance as “debilitating” to one’s children. JANET LOWE, *WARREN BUFFETT SPEAKS* 47–48 (1997). These voices echo Carnegie: “I would as soon leave my son a curse as the almighty dollar.” Andrew Carnegie, *Wealth*, 148 *N. AM. REV.* 653, 658 (1889), *reprinted in* *DEMOCRACY AND THE GOSPEL OF WEALTH* 4 (Gail Kennedy ed., 1949). In many other countries, no comparable tradition of filial disinheritance exists. *See Charity Ends at Home*, *ECONOMIST*, Apr. 6, 1996, at 39 (remarking the absence of such a norm in China); Seth Faison, *Who’s Afraid of Wei Jingsheng?*, *N.Y. TIMES*, Nov. 23, 1997, § 4, at 5 (same). But today’s American norm entrepreneurs are working on the Chinese, with mixed success. *See* Renee Haines, *We’re More Likely to Give When We See How Easy It Is*, *CHINA DAILY* (Beijing), Sept. 15, 2010, available at 2010 WLNR 18290585 (remarking efforts by Gates and Buffett to promote philanthropy in China); Michael Wines, *In China, Attitudes on Generosity Are Tested*, *N.Y. TIMES*, Sept. 24, 2010, at A4 (same).

286. *See supra* text accompanying note 17.

Doubtless, some will question the conceptual realignment proposed in this Article. The larger point, though, is the importance of the quest. Although one of law's oldest vineyards, the field of wills remains underdeveloped theoretically. Scholars have rarely tilled its soil with the implements of interdisciplinary analysis that have proven so fruitful in other regions of the legal landscape.<sup>287</sup> But that is not all: as this Article has ventured to show, *intercategorical* analysis can also cast a flood of light upon a field that heretofore has remained too insular. Toward this end, we must eschew specialization—a predisposition in most of law's fields, indeed one that transcends legal studies<sup>288</sup>—in pursuit of eclecticism and, to the fullest extent possible, synthesis.

In a word, inheritance scholars must learn to think outside the coffin. Only then can we revitalize a subject that presses so relentlessly upon the world and figures so eventfully in our lives.

---

287. Not so in the subfield of *trusts*, which—at least in part as a result—has enjoyed a renaissance of late. For an observation, see Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 AM. C. TR. & EST. COUNS. J. 314, 314–15 (2010).

288. Specialization poses risks in science as well. See, e.g., P.B. MEDAWAR, THE LIMITS OF SCIENCE 70–72 (1984).