DELIBERATIVE ACCOUNTABILITY RULES IN INHERITANCE LAW: PROMOTING ACCOUNTABLE ESTATE PLANNING

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In the last few decades, the emerging trend in trust and estate law has been a steady loosening of the limitations on testamentary freedom. The 1990 Uniform Probate Code pioneered some of these developments. Construction rules are no exception. It is widely accepted that testamentary construction rules should track the owner's presumed intent. In this Article, I argue that there is also room, alongside these intent-furthering rules, for intent-defeating rules in inheritance law. A property owner lacks incentives to internalize the relational, familial, or economic effects of her allocation. Such rules, termed deliberative accountability rules, are therefore designed to foster accountability in estate planning. These rules burden the owner with requirements to think her decision through, and to give reasons for and face the relational consequences of her act. These rules work to counterbalance the freedom of the owner by requiring her to make an informed decision.

INTRODUCTION

Testamentary freedom is a pivotal value in trusts and estates jurisprudence. The trend in the last few decades has been a steady loosening of its limitations. The 1990 Uniform Probate Code was a leading force in these developments. One of the attested goals of the UPC is to "to discover and make effective the intent of a decedent in distribution of his property."[1] And, indeed, faithful to its purpose, the UPC has generated many reforms in this vein. Examples range from will formalities[2] to intestate succession rules.[3] Construction rules are no exception. It is widely accepted that testamentary construction rules should also follow a similar logic—tracking the owner's presumed intent.[4] The donor's presumed

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1. UNIF. PROBATE CODE § 1-102 (2011), 8 U.L.A. pt. I, at 26 (1998).

2. UNIF. PROBATE CODE § 2-502 prefers the intent of the testator to will formalities, if such intent can be proved by clear and convincing evidence. For the liberal application of formalities, see Ronald J. Scalise, Jr., *New Developments in United States Succession Law* 54 AM. J. COMP. L. 103 (2006).

3. The 1990 Uniform Probate Code has increased the share of the surviving spouse to accord with the presumable preference of decedents. *See* UNIF. PROBATE CODE § 2-102 (1990) (amended 2006), 8 U.L.A. pt. I, at 81 (Supp. 2008).

4. 1990 UNIF. PROBATE CODE art. II, prefatory note (1990) (amended 2006); RESTATEMENT (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003); *see*

intent is a rather strong constructional preference.[5] Therefore, most discussions regarding a rule of construction center on the intent of the majority of testators as a major consideration in drafting.

Since constructional rules are set as defaults, crafting majoritarian rules makes perfect sense according to traditional contract law theory[6] and other justifications.[7] Yet I argue that there is also room, alongside these intent-furthering rules, for intent-defeating rules in inheritance law. Intent-defeating rules are a familiar concept in contract law theory, often referred to as penalty rules. In contract law, penalty rules are purposely set at what the parties would *not* want, in order to encourage them to reveal information to each other.[8] In the context of inheritance, penalty rules are purposefully designed to be intent-*defeating*, to promote a responsible and accountable estate planning procedure.

In particular, intent-defeating rules in inheritance encourage the testator to give reasons, design a full and complete distributive plan, disclose information and opinions on the nature of the relations, and generally assume responsibility for consequences to others. These rules are therefore not typical contract law penalty rules, whose sole purpose is to encourage the disclosure of information. Inheritance penalties and contract penalties occasionally also differ in structure. I therefore suggest the novel concept of "deliberative accountability rules" (DARs) to describe intent-defeating rules whose purpose is to foster accountability in estate planning. These rules, however, should not be confused with mandatory intent-defeating rules, whose purpose is to counterbalance freedom of testation with other values, such as dead-hand control.[9]

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also Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659 (1993). For a critique, see Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 644–45 (1993).

5. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003).

6. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 372 (3d ed, 1986); Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law*, 89 HARV. UNIV. PRESS (1991).

7. *See generally* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031 (2004).

8. The term was coined by Ayres & Gertner. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 89–91 (1989).

9. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003); John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 379 (2010). For the rule against perpetuities see RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).

Mandatory rules interfere with the content of the instrument rather than reverse the default rule or adding a requirement of form.

Inheritance is an intricate legal field. Decisions made in the field influence the well-being of others and have a significant social and economic impact. We therefore expect the decision-maker to reflect on the possible consequences of her actions and consider whether the benefits outweigh the costs. However, she will not always do so, because of an inherent risk of opportunism in *post-mortem* donative transfers.[10] I offer a way of dealing with the possible threats to the decision-making process of the testator. DARs function as a new method for internalizing externalities, which incorporates a requirement for accountability in the decision-making process.

Since current DARs clearly digress from the intent-tracking construction, they have suffered attacks and undergone reforms. By offering a fresh take on very unpopular rules, I invite scholars to reconsider their critiques and acknowledge the function of these rules.

Part I of the Article depicts the role of default rules in American inheritance law. It also describes the debates surrounding these rules. Part II articulates the problem with relying on the presumed intent of the testator and introduces the concept of accountability in family property. Part III explains the concept of deliberative accountability rules and their function in inheritance law. Part IV presents two examples of DARs: pretermitted heir rules and the negative will doctrine. Although many scholars think these rules are obsolete, characterizing them as deliberative accountability rules sheds new light on their normative power. Part V reviews the advantages and shortcomings of these rules. Finally, I offer some concluding remarks.

I. INHERITANCE: VALUES AND DEFAULTS

Inheritance law is a distinct private law field. It deals with the transfer of property after death, which is understood as a donative transfer. Accordingly, testamentary freedom is of pivotal value in the Anglo-American legal tradition. The property owner holds the power to make free choices regarding the allocation of her property after death.[11] Reviewing the case law shows that testamentary

10. *See infra* Part II.
11. *See id.*

freedom is frequently assumed.[12] The freedom is expansive and includes the person's ability to control receivers' lives by setting conditions or creating a trust.[13] As such, inheritance is often referred to as a one-sided transaction,[14] and the receiver of the property is characterized, at best, as passively accepting the property.

In contrast to this mainstream view, some scholars have suggested that other interests should be included in designing the law.[15] Several writers have advocated recognizing the rights of minor children, for example.[16] Others go even further and claim that testators have an obligation, which is socially entrenched, toward certain family members, mostly children and spouses.[17] In addition, I have argued elsewhere that inheritance is a property institution that creates and maintains continuity through property. Continuity through property serves both the giver and the receiver, and therefore the law should acknowledge the interests of the receiver as well.[18] Alongside these normative critiques, others argue that inheritance law actually does recognize some relatives' claims to the estate.[19] So, while the guiding rationale of inheritance law is an owner's wishes, there are voices in legal academia that claim otherwise. There is, in fact, an ongoing debate over the proper conceptualization of inheritance.

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12. *See* Fischer v. Heckerman, 772 S.W.2d 642, 645 (1989); Williams v. Vollman, 738 S.W.2d 849, 850 (1987); *see, e.g.*, Shapira v. Union National Bank, 315 N.E.2d 825 (1974); Moore v. Anderson, 109 Cal.App.4th 1287 (2003).

13. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003); Judith G. McMullen, *Keeping Peace in the Family While You are Resting in Peace: Making Sense of and Presenting Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 78 (2006); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445 (2006).

14. *See supra* notes 12–13.

15. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. 84 (1994); *see also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (hereinafter Leslie, *The Myth*) (explanation of family protection); Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L.J. 631, 680 (1995); Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387 (1987).

16. *See, e.g.*, Brashier, *supra* note 15.

17. Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 6 (1998), 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, 1197–98 (1990).

18. Shelly Kreiczer-Levy, *The Riddle of Inheritance: Connecting Continuity and Property* (2012) (on file with author); Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL. PROP. TRUST & EST. L. J. 495 (2012).

19. Leslie, *The Myth*, *supra* note 15; Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV 571 (1997); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 139–40 (2nd ed. 1953).

The legal structure of inheritance follows the mainstream rationale but also betrays this basic tension to some extent. Generally, there are two possible ways to bequeath property: by executing a will or through intestate succession rules.[20] The two methods of inheritance are quite different. The will is mainly a manifestation of the owner's choice and an exercise of her free will. Intestacy is a bit more complex. When a person does not write a will, or when the will is invalid for some reason, the law distributes the property according to a set of default rules.[21] This is, therefore, a state-prescribed allocation of property. Following the value of testamentary freedom, intestacy rules are commonly understood as patterning the way most people would like to bequeath their property.[22] Other scholars remind us, however, of the expressive function of the rules. People's preferences are not exogenous to the rules. Accordingly, intestacy law not only reflects society's norms but also "helps to shape and maintain them,"[23] and these scholars argue that the message the law communicates should be considered when the rules are designed.[24]

Although intestacy rules are probably the most significant type of default rules in inheritance law, there is also another type, which includes rules of interpretation and construction. The latter rules fill gaps in wills when, with regard to a specific issue, the intent of

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20. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. c (2003) (suggesting intestate succession prescribes estate distribution when no valid will has been executed).

21. *See id.*

22. *See generally* Hirsch, *Default Rules in Inheritance Law*, *supra* note 7. This approach is very common. Most scholars who deal with intestate succession support some version of it. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 2-1 (2006); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 11–12 (1998); William J. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1047 (1966); Thomas P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1523 (1999); Thomas J. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 301, 306 (1970); Daniel H. O'Connell & Richard W. Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 209 (1972).

23. E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1100 (1999); *see* Ronald J. Scalise, Jr. *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents* 37 SETON HALL L. REV. 171, 173–76 (2006). For a general theory of the expressive function of law, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). For a philosophical theory, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

24. *See* Spitko, *supra* note 23.

the testator does not clearly arise from the will itself.[25] Not surprisingly, both intestacy and construction rules share a common rationale. Both are understood to pattern the decedent's intent.

Indeed, construction rules are generally designed to track the owner's intent.[26] This is a rather strong constructional preference.[27] Accordingly, the drafters of the Uniform Probate Code have advanced several reforms to comply with the presumed intent of testators. The example of ademption clarifies the intent-furthering preference of construction rules.

Under the doctrine of ademption, if at death the owner no longer owns the property that was the subject of a specific devise,[28] the devise is adeemed, i.e., becomes ineffective, and the beneficiary takes nothing.[29] This strict rule is often referred to as the identity theory. According to this theory, which predominates in the case law, ademption depends solely upon the existence of the specific asset.[30] By contrast, under the intent theory, the testator's intent guides the inquiry,[31] and the devise fails unless the evidence establishes that failure would be inconsistent with the decedent's

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25. *See, e.g.*, the anti-lapse rule and the rules of ademption and abatement. These rules solve problems created by the time gap between the execution of the will and the transfer of property at death. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, §§ 1.1, 5.2, 5.5 (2003) (abatement, ademption and lapse and anti-lapse respectively); Ascher, *The 1990 Uniform Probate Code*, *supra* note 4 at 644–45 (discussing ademption); Fellows, *Traveling the Road of Probate Reform*, *supra* note 4.

26. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003); UNIF. PROBATE CODE art. II, prefatory note (1990) (amended 2006).

27. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003).

28. Testamentary devises are generally divided into four categories in American law: general, specific, demonstrative, and residuary. *See* ATKINSON, *supra* note 19 at 731–32; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.1 (2003). A specific devise is a "specific article or particular fund which the will distinguishes from all the rest of the testator's estate." *See* ATKINSON, *id.* As opposed to a general devise, which is payable out of the general assets of the estate, specific devises require the delivery of a specific property. *Id.*

29. Ascher, *The 1990 Uniform Probate Code, supra* note 4 at 643; WAGGONER ET AL, *supra* note 22 at 6-3, JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES 380 (8th ed., 2009); Wasserman v. Cohen, 414 Mass. 172 (1993).

30. *See* WAGGONER ET AL., *supra* note 22 at 6-3, 6-8; Mayberry v. Mayberry, 886 S.W.2d 627 (Ark. 1994); McGee v. McGee, 413 A.2d 72 (R.I. 1980). In jurisdictions following the identity theory, courts developed some escape routes to avoid ademption. *See* DUKEMINIER ET AL., *supra* note 29 at 386. These escape routes included classifying the devise as general or demonstrative, classifying the inter vivos disposition as a change in form and not in substance, and construing the meaning of the will as of the time of death rather than the time of execution. *Id.*

31. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.2 (2003); *see also* WAGGONER ET AL., *supra* note 29 at 328; Ascher, *The 1990 Uniform Probate Code, supra* note 4.

intent. The Restatement prefers the latter theory.[32] The explanation states, "Although the testator's intent is nominally irrelevant under the identity theory, it is well documented in the case law that courts purportedly following the identity theory frequently manipulate doctrine to effectuate intent anyway."[33] The UPC concurs,[34] and the law offers specific exceptions to the strict ademption rule.[35] The UPC also includes two more general exceptions, dealing with replacement[36] and pecuniary devise.[37]

The UPC's approach has provoked criticism. Mark Ascher attacks both general exceptions as being open-ended, unreasonable, and encouraging too much litigation.[38] Even though he initially claims that the testator's intent should not be a decisive factor in drafting[39] and that the simplicity of the rule should be determinative, he later asserts that the presumption against ademption actually frustrates most testators' wishes.[40] Mary-Louise Fellows responds to his challenge,[41] claiming that Ascher ignores the circumstances surrounding a subsequent relinquishing of the asset and the connection between the asset and other assets in the estate. She further argues that, instead of frustrating the giver's wishes, the UPC promotes them by acknowledging the testator's unattested intent.

This debate is but one example that illustrates the rhetoric surrounding construction rules in inheritance. Although there are

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32. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 5.2 cmt. b (2003); *see also* Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law* 55 ALB. L. REV 1067 (1991) (supporting the intent theory and the change in the UPC as furthering testamentary freedom).

33. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.2 cmt. b (2003).

34. Interestingly, if a person makes a lifetime gift to a devisee, the gift might be treated as satisfying the devise. *See* UNIF. PROBATE CODE § 2-609 (2011), 8 U.L.A. pt. I, at 179 (Supp. 2011).

35. UNIF. PROBATE CODE § 2-606 (2011), 8 U.L.A. pt. I, at 176 (Supp. 2011).

36. UNIF. PROBATE CODE § 2-606(5) (2011), 8 U.L.A. pt. I, at 176 (Supp. 2011) ("[R]eal or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property . . . .").

37. UNIF. PROBATE CODE § 2-606(6) (2011), 8 U.L.A. pt. I, at 176 (Supp. 2011). ("[A] pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.").

38. Ascher, *The 1990 Uniform Probate Code*, *supra* note 4 at 645–49.

39. *Id.* at 641.

40. *Id.* at 644.

41. Fellows, *supra* note 4.

other considerations in drafting such default rules,[42] they do not include purposely defeating the owner's intent in order to foster accountability. It is quite the opposite—the notion of accountability is foreign to the law, which centers on the rights and freedoms of the owner, not on her responsibilities.

II. ACCOUNTABILITY IN TRUST AND ESTATES

We have seen that the dominant rationale for default rules in inheritance is tracking the testator's intent. This perception is in accordance with pivotal values in trust and estate jurisprudence. Tracking the testator's intent is indeed an important goal for various reasons.[43] Nonetheless, trust and estate lawyers and academics must not forget the effect of estate plans on family members and society at large.

Family property involves the distribution of wealth, power, and control in the family. Property can be a source of independence[44] and identity,[45] and it can shape meaningful connections and ties, as gift-giving theories suggest.[46] On the other hand, property is also a source of inequalities,[47] and the transfer of property poses the risk of objectifying our identities and relations.[48] When we add intimate

42. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003).

43. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992). I argue elsewhere that testamentary freedom allows the giver to fulfill her interest in continuity. *See* Kreiczer Levy, *Inheritance Systems and the Intergenerational Bond*, *supra* note 18.

44. Money is an enabler and provides wider freedom of choice, greater power to achieve goals, and higher status. Lee Ann Fennell, *Death, Taxes, and Cognition*, 81 N.C.L. REV. 567, 578 (2003); *see also* Wayne E. Baker & Jason B. Jimerson, *The Sociology of Money*, 35 AM. BEHAV. SCI. 678, 680 (1992). At the same time, however, it is also perceived as tainting personal relationships. *See* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C.L REV. 551, 556 (1999) (arguing that family members keep their agreement implicit in order to preserve the norm of reciprocity).

45. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1992).

46. The starting point for most of these studies is the work of the French anthropologist Marcel Mauss. *See* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (Ian Cunnison trans., 1974); *see also* Barry Schwartz, *The Social Psychology of the Gift*, 73 AM. J. SOC. 1 (1967); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151 (1995); PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 89 (1964). For legal writing, see Jane B. Baron, *Do We Believe in Generosity?: Reflections on the Relationship Between Gifts and Exchange*, 44 FLA. L. REV 355 (1992); Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J 155 (1989); Carol M. Rose, *Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchange and (More Importantly) Vice Versa*, 44 FLA. L. REV 295 (1992).

47. *See infra* notes 54–58 and accompanying text.

48. For a critique of Radin's theory, see Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV 347, 353 (1993). ("[T]he law can never simply implement some consensus regarding property and personhood [be-

relations to the picture, all of these attributes become even more complex and ambivalent. Family property transfers symbolize belongingness,[49] love, and dedication,[50] and at the same time exclusion and hierarchy.[51] The potential benefits accrue within the family through fostering family ties, but the potential hazards express themselves both inwardly and outwardly. Property distributes control in the family and shapes hierarchal structures,[52] and it ensures the status of family members in society by preserving the family's wealth.

Decisions in family property have a profound effect on the well-being of family members.[53] Freedom of choice in family property has its costs—not only relational and familial, but also social and economic.[54] Moreover, it is a field particularly susceptible to opportunistic behavior.[55] This Part briefly enumerates these familial and social costs.

Family property reinforces the role of the family in the distribution of power among members of society.[56] A person's path in life is partly a product of her background and, most importantly, the opportunities her family provided for her. The family's influence is manifested in many ways, such as education and social connections, and also, of course, through gifts and inheritances.[57] Our chances of succeeding in terms of wealth, career, and political power are far from equal. The opportunities of each individual do

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cause t]he social constitution of personhood is always at stake when issues of property and commodification are decided.").

49. Shelly Kreiczer-Levy & Meital Pinto, *Property and Belongingness: Rethinking Gender Bias as Disinheritance*, 21 TEXAS J. WOMEN & L. 119 (2011); Shelly Kreiczer-Levy, *Religiously Inspired Gender Bias Disinheritance: What's the Law Got to Do with It?*, 43 CREIGHTON L. REV. 669 (2010).

50. *See, e.g.*, B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111(4) J. POL. ECON. 733 (2003) (explaining that children see bequests as a signal of love); *see also* Marlene S. Stum, *Families and Inheritance Decisions: Examining Non-Titled Property Transfers*, 21 J. FAM. & ECON. ISSUES 177 (2000) (discussing the economic and psychological effects of inheritance decisions concerning non-title property on relatives).

51. Marsha Garrison, *Towards a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241 (explaining governance in the family); *see also* Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 48–49 (2000).

52. Garrison, *supra* note 51.

53. See *infra* notes 63–69.

54. See *infra* notes 56–62.

55. *See infra* notes 79–85 and accompanying text.

56. *See generally* the articles in UNEQUAL CHANCES—FAMILY BACKGROUND AND ECONOMIC SUCCESS (Samuel Bowles et al. eds., 2005); *cf.* Nigel Tomes, *The Family, Inheritance, and the Intergenerational Transmission of Inequality*, 89 J. POL. ECON. 928 (1981); Samuel Bowles and Herbert Gintis, *The Inheritance of Economic Status: Education, Class and Genetics*, (Santa Fe Institute, Working Paper No. 01-01-005, 2001).

57. Bowles & Gintis, *supra* note 56, at 7–20.

not depend solely on her merits.[58] Therefore, besides the familiar objections to windfalls, and a concern that a receiver will not have sufficient incentives to work and save money,[59] the main problem is that not all people receive family property, and the sums of different inheritances vary enormously.[60] In short, family property is a powerful legal and cultural institution that shapes a great deal of the socioeconomic landscape. The institution has therefore come under attack for infringing democratic values,[61] leading to recurring calls for the curtailment of family transfers.[62]

Freedom in family property also exerts a considerable relational-familial influence, a conclusion supported by studies in various fields. Property distribution is closely connected to shaping and reaffirming familial roles, relations, and interrelations. Generally, inheritance is understood as communicating judgments on potential heirs.[63] Inheritance is frequently perceived as making a statement on the child's belongingness to the parent, and more generally, to the family.[64]

Several sociological studies have assessed the responsibility associated with such transfers. Testators see themselves as under certain obligations, and acknowledge the effects their choices have on their family.[65] When a testator disregards her duty, her act is con-

58. RONALD CHESTER, INHERITANCE, WEALTH AND SOCIETY 74, 77 (1982); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 70–76, 88–89 (1990); D.W. Haslett, *Is Inheritance Justified?*, 15 PHIL. & PUB. AFF. 122, 128–31 (1986).

59. Haslett, *supra* note 58, at 146.

60. *See* Palma Joy Strand, *Inheriting Inequality: Wealth, Race and the Laws of Succession*, 89 OR. L. REV. 453 (2010).

61. BRUCE A ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 112, 203–04 (1982); JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY (1983); James S. Fishkin, *The Limits of Intergenerational Justice*, *in* JUSTICE BETWEEN AGE GROUPS AND GENERATIONS 62, 73–82 (Peter Laslett & James S. Fishkin eds., 1992);.

62. *See, e.g.*, CHESTER, *supra* note 58; Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007) (advocating for inheritance tax from the first dollar); Ascher, supra note 58; Haslett, *supra* note 58.

63. Indeed, according to some empirical findings, parents often choose one of two possibilities. Hacker explains that equal distribution among children is the norm, and only rarely do parents deviate from it. Daphna Hacker, *The Gendered Dimension of Inheritance: Empirical Food for Legal Thought*, 7 J. OF EMPIRICAL LEGAL STUD. 322 (2010). Tate, on the other hand, discusses economic studies and claims that wills compensate devoted children for providing care. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 176–80 (2009). Either way, both understand will-making as reflecting a judgment on potential heirs. Parents may either love and cherish all their children equally, or they may want to express appreciation for exceptional behavior.

64. *See* sources at note 49, *supra*.

65. MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 4–7 (1970). ("[W]ill makers conform, by and large, to cultural prescriptions of familial responsibility over generational time.").

strued as socially deviant.[66] Wills, then, involve normative assessments of potential receivers. At the same time, family members have expectations of a fair distribution. Disinherited family members often feel offended by an estate distribution,[67] as it says something about them and excludes them from participating in the family property—and, perhaps, in the family in general.[68] Bequest decisions also affect the relatives' sense of identity, connectedness, and roots.[69]

The relational benefits and costs of donative transfers are supported by gift-giving theories. These studies often suggest that gifts create and cement social bonds.[70] Giving a gift thus may be a proposal to begin a relationship,[71] or an offering that reaffirms and perpetuates the existing relationship between the giver and receiver.[72]

Donative transfers thus include a relational message within the family that communicates information about the position of the receiver in the family, her relationship with the owner, and a normative judgment of her behavior. Therefore, inheritance and gifts impact the receiver's well-being in terms of forming an identity. As Charles Taylor explained, significant others, such as family members, have a great influence on our sense of identity.[73] Gifts and

66. Jeffery P. Rosenfeld, *Disinheritance and Will Contests*, *in* FAMILY SYSTEMS AND INHERITANCE PATTERNS 75, 77 (Marvin B. Sussman & Judith Cates eds., 1982) (claiming that vindictive disinheritance is deviant from social norms); *cf.* M.J. Farrelly, *State Creation of Old Age Distress in England: An Aspect of Old Age Pensions*, 4 INT'L J. ETHICS 188 (1894) (noting that "[t]he vindictive, the vainglorious, the superstitious testator was enabled to defy justice by a posthumous robbery of those who naturally depended on his succession"). In a more recent work, Rosenfeld goes farther to conclude that all disinheritance acts (and will contests) are deviant. *See* Jeffery P. Rosenfeld, *Will Contests—Legacies of Aging and Social Change*, *in* INHERITANCE AND WEALTH IN AMERICA 171, 173 (Robert K. Miller & Stephan J. McNamee eds., 1998).

67. *See* Douglas B. Bernheim, et al., *The Strategic Bequest Motive*, 4 J. LAB. ECON. S151 (1986).

68. A New Zealand court explained, "A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition *of belonging to the family and of having been an important part of the overall life of the deceased*." *See* Williams v Aucutt [2000] NZLR 479, para 52 (N.Z.).

69. Kreiczer-Levy, *The Riddle of Inheritance*, *supra* note 18.

70. ROSALYN DIPROSE, THE BODIES OF WOMEN: ETHICS, EMBODIMENT AND SEXUAL DIFFERENCE 67 (1994).

71. *See* Alvin W. Goulander, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 176–77 (1960).

72. ANDERSON, *supra* note 46, at 151.

73. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 32–33 (Amy Gutmann ed., 1994).

inheritances from them affect our connection to the world, self-understanding, and sense of belongingness and roots.[74]

The law seems to incorporate some of these insights. Courts, especially juries,[75] occasionally engage in normative judgments of wills.[76] Therefore, certain wills are more easily invalidated than others, based on the relational effect of the distribution.[77]

To summarize, family property transactions distribute wealth and power and make a familial or relational declaration of belongingness. Decisions in the field have huge effects on others, be it society at large or close relations. In the relational-familial sphere, decisions affect excluded relatives' sense of self, identity, and roots. The freedom of the owner may have significant benefits for the productivity or well-being of the owner,[78] but, at the same time, this freedom comes with a price. The cost may be harm to the well-being of family and friends who consider disinheritance a message of exclusion and uprootedness. In the social sphere, the price includes a disregard for democratic values such as access to equal opportunity.

Family property decisions thus influence the well-being of others and have a significant social and economic impact. In light of that, we expect the decision-maker to reflect on the possible consequences of her actions and consider whether the benefits outweigh the costs. Yet she will not always do so. There are situations where she is likely to dodge her responsibilities. Family property creates unique conditions—"opportunistic traps"—that invite the risk of negative externalities. I borrow the term externalities from economic literature to suggest that the donor does not internalize all the possible consequences of her decision.[79]

The main reason for externalities is death. Many donative transfers, most often wills and trusts, are transferred after death. Death creates a risk of externalities, because the owner will not be around

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74. *See A Place of Learning*, *in* THE VOICE OF LIBERAL LEARNING: MICHAEL OAKESHOTT ON EDUCATION, 28–29 (Timothy Fuller ed., 1989).

75. *See* MELANIE B. LESLIE & STEWART E. STERK, TRUSTS & ESTATES 98, 102 (2006); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 654–55 (1987).

76. Leslie, *The Myth*, *supra* note 15; Leslie, *Enforcing Family Promises*, *supra* note 44, at 586–87.

77. *Id.*

78. *See* Hirsch & Wang, *supra* note 43; *see also* Tate, *Caregiving and the Case for Testamentary Freedom*, *supra* note 63, at 176–80.

79. "Externalities arise when one party uses his property in a way that imposes a cost (or confers a benefit) on another party without first obtaining that party's consent." HANDBOOK OF LAW AND ECONOMICS 229 (Steven Shavell & Michael A. Polinsky, eds., 2007).

to experience the consequences of her actions.[80] The owner does not have sufficient incentive to seriously consider the financial, relational, and social costs of her decisions. First, since the property owner never lets go of the property, she never has to make the simple calculation we all do when we give up an asset: Is it worth it?[81] Do the benefits—either in monetary value or the affection we will receive—outweigh the costs of not having the property anymore? Second, the owner will not experience the effect of her will on informal relations. She will not have to endure the resentment of disappointed heirs or witness family disputes developing into feuds.[82] Third, from a social and economic perspective, she does not get to see bad title-holders misuse, neglect, or waste property.[83]

But death does not necessarily mean that an owner will disregard the outcomes of her decision. Although she may not actually experience these outcomes, she might still care about her legacy, close relations, or a specific social or political goal. In other words, she might be concerned with whether the effect of her transfer symbolizes her vision of continuity.[84] Even so, the conditions of *post mortem* donative transfers create the potential for dodging their possible negative effect. This "opportunistic trap" is particularly troubling considering the impact of donative transfers, both in relational and socioeconomic terms.

One could argue that the existence of opportunistic traps, coupled with the considerable effect of family property, suggest that inheritance should be curtailed or that we should place heavy limitations on testamentary freedom.[85] However, considering the strong tradition in favor of this legal freedom in Anglo-American jurisprudence, that may be a drastic solution. Instead, I offer a more moderate way of dealing with the possible threats to the decision-making process of the testator. I introduce a new method for

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80. *Cf.* Ariel Porat & Avraham Tabbach, *Willingness to Pay, Death, Wealth, and Damages*, 13 AM. L. & ECON. REV. 45 (2011).

81. Ascher, *Curtailing Inherited Wealth, supra* note 58.

82. *See* Sandra L. Titus et al., *Family Conflicts over Inheritance of Property*, 28 FAM. COORDINATOR 337 (1979); Wendy Lustbader, *Conflict, Emotion, and Power Surrounding Legacy*, 20 GENERATIONS 54 (1996) (discussing the emotional difficulties and effects of distributing property after death).

83. It has been argued that testamentary freedom promotes efficient estate planning. Hirsch & Wang, *supra* note 43, at 12–13. This is the implied assumption of Atkinson. *See* Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 197 (1935) (proposing escheat when no will was written in order to encourage efficient estate planning). However, Hirsch & Wang note that we cannot know for sure what guides the testator in executing a will. *Supra* note 43, at 12–13.

84. *See* Kreiczer-Levy, *The Riddle of Inheritance*, *supra* note 18.

85. Some scholars suggest curtailing testamentary freedom for a number of reasons. *See, e.g.*, sources at note 16; *see also* Leslie, *Enforcing Family Promises*, *supra* note 44.

internalizing externalities, namely, deliberative accountability rules (DARs) that incorporate a requirement for accountability in the decision-making process.

These rules are inspired by requirements of accountability, which include justifications and explanations, disclosure of information, and deliberation.[86] The question remains, however, as to how rules of inheritance successfully inspire a testator to be accountable in her planning. I now turn to discussing the structure of DARs, highlighting their differences from and similarities to the construction of other familiar legal rules. I will then present some examples of DARs in inheritance law.

III. DELIBERATIVE ACCOUNTABILITY RULES

Default rules are essentially a gap-filling mechanism for legal instruments. Contract law scholars, particularly law and economics scholars, have been intrigued by this mechanism and have tried to explain it.[87] The most fundamental premise of law and economics scholarship is that a contract should be efficient. Default rules are legal tools that bear the potential to assist parties in achieving efficient outcomes.[88] The basic conviction is that these rules should be set at what the parties would have wanted in order to save transaction costs. Since a contract may not be entirely complete, or it may be inefficient to invest in making it complete, default rules should fill the gaps in a manner that suits the parties' intent. If the rules were set in any other way, the parties would simply contract around them, leading to wasteful results.[89]

This basic conviction found its way into trust and estate law. Adam Hirsch suggests that we import contractual default rule theory into inheritance law, particularly intestate succession.[90] He explains that intent-furthering intestacy rules ultimately save the costs of making a will, an efficient and desirable outcome that should be considered in drafting such rules. This is also the prevalent view regarding construction rules.[91]

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86. *See infra* notes 93–95 and accompanying text.

87. *See infra* notes 88–89.

88. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 301–04 (2004).

89. *See* Ayres & Gertner's review of the literature, *supra* note 8, at 89–91; *see also* ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES 1–15 (1982); Alan Schwartz, *The Default Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDIS. L.J. 390 (1993).

90. Hirsch, *Default Rules in Inheritance Law*, *supra* note 7, at 1049.

91. *See supra* notes 26–27 and accompanying text.

Nonetheless, in certain conditions, a person can dodge the consequences of her decisions. She can manipulate her reasons, withhold information, or place the blame on somebody else. Under these conditions, she disregards the negative effects of her choices. Other people may be hurt by the decisions, but the decision-maker does not internalize the damage. I have explained how the particular conditions of post-mortem transfers create such a risk.[92] A requirement of accountability will encourage the testator to internalize the effects of her decisions.

But what does it mean to be accountable to someone for your decisions? Accountability, according to Anita Allen, means that we "(1) inform others of what we do, (2) explain ourselves to others, (3) justify our conduct to others, (4) submit to punishments or other sanctions, or (5) live routinized, transparent lives."[93] Although I do not necessarily endorse every aspect of this definition, it clarifies the concept of having to account for one's actions in certain contexts that affect other people's lives. Accountability therefore has a strong relational aspect.[94] To be "accountable" means that someone or something can hold a decision-maker accountable for her actions. As Robert Keohane argues, "power-wielders" are accountable to "accountability holders."[95]

In certain conditions, therefore, the intent-defeating rationale serves as a better drafting tool. Deliberative accountability rules require the decision-maker to give reasons, make a direct statement of her intentions, and consider other options. DARs create opportunities for people to justify choices and accept their consequences. They hold the potential to allow people a voice in family property. In addition, one of the components of deliberative accountability rules ensures careful deliberation of legal transfers, especially gratuitous ones. In that sense, these rules have a cautionary function, much like legal formalities.[96] Nonetheless, they do not simply caution the owner, but also require her to account for her decisions. These rules are specifically designed to benefit certain receivers and to serve the social purpose of accountability in estate planning.

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92. *See supra* notes 80–83.

93. Anita L. Allen, *2003 Daniel J. Meador Lecture: Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 ALA. L. REV. 1375, 1377 (2003).

94. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle ed., 2006).

95. Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121 (2003).

96. Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

The inspiration for intent-defeating rules comes from Ian Ayres' and Robert Gertner's seminal work on penalty default rules, in which they challenge the conventional view of legal defaults and argue that efficient default rules would sometimes diverge from the familiar principle of "what parties would have wanted."[97] Ayres and Gertner introduce the penalty default rule. A penalty rule is designed

> to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer. In contrast to received wisdom, penalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).[98]

In sharp contrast to the common view on defaults, they maintain that efficient results depend on a varied set of rules, some of which should be intent-defeating.

Although penalty rules are the source of inspiration for deliberative accountability rules, DARs are different in their focus and purpose. First, they are designed not only to overcome information gaps, but also to promote other goals that are derived from the concept of accountability: giving reasons, allowing a voice, consideration of other options and so on.[99] Second, deliberative accountability rules are relational, and they acknowledge parties that are not normally considered part of the bargaining process. DARs are closely connected to the "accountability holders." They recognize intestate heirs as accountability holders, for example, even though the testator is free to make her own choice regarding her property distribution.[100] The rules create positions for family members who otherwise would have no tangible legal interest. Even though family members are not entitled to a portion of the estate, they do enjoy the position of accountability holders.

Third, not all DARs are default rules, and they include what I refer to as "rules of form." Default rules, as we have seen, are intent-*defeating*—designed around what the owner (or parties)

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97. Ayres and Gertner, *supra* note 8, at n.44.

98. *Id.* at 91. For a criticism of their analysis, see Eric A. Posner, Symposium, *Default Rules in Private and Public Law: An Exchange on Penalty Default Rules: There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U.L. REV. 563 (2006) (arguing there is no positive example in contract law for such a default rule).

99. *See supra* notes 91–94 and accompanying text.

100. *See, e.g.*, *infra* 108–111 and accompanying text.

would not have wanted. The decision-maker will opt out of the rule, and by doing so will be required to clearly state her preferences and views and reveal relational information. Rules of form, on the other hand, stipulate requirements regarding the form of an instrument that are easily fulfilled, and leave complete freedom regarding the content of the instrument. The formal requirement is not a mere technicality, however, as it promotes giving reasons and considering alternative decisions. Rules of form encourage the decision-maker to give reasons, design a full and complete distributive plan, disclose information and opinions on the nature of the relations, and generally assume responsibility for the consequences for others.

Moreover, these rules do not easily conform to other known types of defaults. Alan Schwartz, for example, distinguishes six types of default rules in contract law: problem-solving defaults, equilibrium-inducing defaults, information-forcing defaults, normative defaults, transformative defaults, and structural defaults.[101] It is tempting, perhaps, to consider my analysis as promoting normative or even transformative rules that are structured to achieve fair results, whether now (normative) or in the future (transformative). Nonetheless, this is not an accurate understanding of this particular project. These rules do not target actual distributive *results* in the family; rather, they promote accountability in the decision-making process. The requirement of accountability may indeed change distributive plans, but rules of form do not have to do so in order to achieve their purpose.

IV. EXAMPLES OF ACCOUNTABILITY RULES

Two doctrines in American trust and estate law are particularly appropriate for the analysis of deliberative accountability rules: pretermitted heir rules and the negative will doctrine. Under the laws of some states, both doctrines defeat the testator's intent in a way that promotes accountability. These doctrines are often considered obsolete and problematic mistakes that should promptly be fixed. Once we recognize their role as DARs, and acknowledge accountability in family property, these rules can be regarded in a new light. Naturally, these doctrines have different constructions in different jurisdictions, and not all states employ intent-defeating rules. The analysis focuses on jurisdictions that contain DARs as examples of the rules.

101. Schwartz, *supra* note 89.

A. Pretermitted Heirs

When a person executes a will, she can always amend it at a later date.[102] A will is a revocable instrument that allows testators to adapt to changing circumstances, point of views, and evolving relationships. From time to time, however, people neglect to amend their wills, even after major life events like death, birth, marriage, or divorce. There may be any number of reasons for failure to revoke or amend a will. Some may prefer not to change their estate plans, some do not think about their wills in their everyday lives and simply forget to update them, while others run out of time. As a result, there are—at least potentially—testators whose wills do not reflect their wishes.

To prevent the unintentional disinheritance of children or spouses, some jurisdictions include pretermitted heir provisions.[103] These provisions impute an heir when such an heir is not provided for in the will. The particulars of pretermitted heir rules differ among jurisdictions. Most importantly, some constructions are clearly intent-furthering while others are intent-defeating. I begin with the intent-furthering construction and then proceed to states that employ deliberative accountability rules.

The Uniform Probate Code's primary goal in unintentional disinheritance clauses is to facilitate the testator's intent. The rule declares in part that "if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate."[104] To make sure that the testator did not wish to disinherit her child, the code includes several refinements of the rule. For example, if the testator left her property to her spouse, who is a parent of the children, the rule does not apply.[105] In addition, if the testator had children living when the will was executed, and in the will the testator did not make a devise to

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102. Atkinson defines a will as "a person's declaration of what is to be done after his death, which declaration is (1) revocable during his lifetime, (2) operative for no purpose until his death, and (3) applicable to the situation which exists at his death." ATKINSON, *supra* note 19, at 1. The law stipulates the ways a will can be revoked. *See* Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035 (1992).

103. McGovern & Kurtz argue that the rule has its roots in Roman law. *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 139–140 (3rd ed. 2004).

104. UNIF. PROBATE CODE § 2-302(a) (2011), 8 U.L.A. pt. I, at 135 (Supp. 2011). For the changes between the original code and the revised code, and the changes in the amount given, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 9.6 cmts. b & c (2003). The rule applies only to wills and not to will substitutes. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 reporter's note 17.

105. UNIF. PROBATE CODE § 2-302(a) (2011), 8 U.L.A. pt. I, at 135 (Supp. 2011).

any of them, the omitted after-born or after-adopted child is not entitled to a share of the estate.[106] Some jurisdictions offer a similar protection for spouses in case the will was executed before marriage.[107]

The UPC focuses on the testator's intent. It therefore strives to locate cases where the testator intended to disinherit, and in these cases the disinheritance stands.[108] The intent of the testator, however, is inconclusive. An alternative intent-tracking rule might be constructed in the opposite way. Remember, a person can change his or her will at any time.[109] The fact that a particular testator did not do so is meaningful. The law could have presumed that she did not wish her child to inherit. Though such a rule might create a harsh reality, it simply employs different assumptions regarding the testator's intent. Indeed, according to current English common law, the birth of a child does not revoke the will.[110]

The UPC assumes a *prime facie* relationship between the testator and her child, and the alternative rule makes no such assumption. The UPC assumes that inheritance begins with children until indicated otherwise. It builds on the relational-familial influence of family property, backed by social expectations.[111] Pretermitted heir rules do two things. First, they make it more difficult to disinherit children and spouses, thus reinforcing the position of children and spouses as recipients of the estate. Second, the pretermitted heir rules force the testator to make her preferences clear and thus accountable.

These rules reaffirm the position of children as intestate receivers. They make it slightly more difficult to deny children this position. The alternative rule places a heavier burden on the decedent, but also makes no assumption regarding her wishes. A testator must change her will to recognize a newborn as her legatee. According to the UPC, on the other hand, an effort must be

106. UNIF. PROBATE CODE § 2-302(c) (2011), 8 U.L.A. PT. I, AT 136 (Supp. 2011). Also, the child is not entitled if it appears from the will that the omission was intentional or that she received a transfer outside the will, and that it was the testator's intent that the transfer be in lieu of a testamentary provision. *Id.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 9.6 (2003).

107. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 9.5 (2003).

108. It is interesting to note that the law does not allow for extrinsic evidence of intent, and intent must be proved from within the will. This is not the case in some jurisdictions. A desire to limit litigation on the matter might explain this fact. *Cf.* MCGOVERN & KURTZ, *supra* note 103, at 141–42.

109. ATKINSON, *supra* note 19, at 1. The law stipulates the ways a will can be revoked. *See* Whitman, *supra* note 102.

110. MCGOVERN & KURTZ, *supra* note 103, at 139–40.

111. *See supra* Part II.

made to exclude the newborn. The owner must make a conclusive statement if she is otherwise inclined. The law assumes the child is a legatee, because of social expectations arising from the familial relation. The UPC positions the newborn child as an accountability holder. An owner who wants to disinherit cannot be oblivious or complacent. She has to be ready to do so openly and clearly. Only when the testator wishes to deviate does she have to make an effort.

There are several variations of the UPC's structure,[112] which protect the position of children even more vigorously and serve as useful examples of deliberative accountability rules. In some jurisdictions, the code includes any child, even a child born or adopted before the execution of the will.[113] Furthermore, in some jurisdictions, proving contrary intent is limited to the will itself, while in others, external evidence is permissible.[114] In *Estate of Robbins*, for example, the provision, "[e]xcept as otherwise expressly provided by this will, I intentionally make no provisions for the benefit of any other heir of mine," did not, by the court's ruling, successfully disinherit the testator's children.[115]

The Arkansas Code is a clear example of a jurisdiction that combines both elements.[116] The Code stipulates, "If, at the time of the execution of a will, there is a living child of the testator . . . whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child or issue."[117]

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112. For a review of the different characteristics of these rules, see MCGOVERN & KURTZ, *supra* note 103, at 140–44. For example, some jurisdictions also include grandchildren (the descendants of a deceased child). *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 9.6 cmt. d (2003). *See also* CAL. PROB. CODE §§ 21601–21623 (2008); *In re* Estate of Laura, 690 A.2d 1011 (N.H. 1997); *In re* Estate of Treloar, 859 A.2d 1162 (N.H. 2004).

113. *See, e.g*, NEV. REV. STAT. § 133.170 (2011) ("When the child of a testator or the issue of a deceased child of a testator is omitted from the testator's will, it must be presumed that the omission was intentional. Should the court find that the omission was unintentional, the child, or the issue of the deceased child, is entitled to the same share in the estate of the testator as if the testator had died intestate."); N. H. REV. STAT. ANN. § 551:10 (2011). *See also* Robbins v. Johnson, 780 A.2d 1282 (N.H. 2001); *In re* Estate of Came, 529 A.2d 962 (N.H. 1987). Massachusetts was a prominent example, but has recently amended its statute and adopted the Uniform Probate Code. For the previous rule, see MASS. GEN. LAWS CH. 191 § 20 (2008). Now see MASS. GEN. LAWS CH. 190b § 2-302 (effective Jan. 2, 2012).

114. DUKEMINIER et al., *supra* note 29, at 532–33. For a discussion of what constitutes intent in various jurisdictions, see Annot. 83 A.L.R. 4th 779 (1991).

115. *In re* Estate of Robbins, 756 A.2d 602 (N.H. 2000).

116. *See Ark.* CODE ANN. § 28-39-407 (2011).

117. ARK. CODE ANN. § 28-39-407(a) (2011).

The statute then grants an intestate share to *any* omitted child.[118] Moreover, the code is silent regarding contrary intent, and whether and how it may be proved.[119] In fact, case law seems to support the position that the actual intention of the testator is irrelevant.[120]

This rule is a DAR. It still allows a parent to disinherit her children, but the default is reversed. Disinheritance therefore has to be explicit, and the testator is forced to disclose information about her preferences and views. Unlike under the UPC, in Arkansas every child deserves attention, contemplation, and direct evaluation. Perhaps a child would be better off without the sort of negative judgment that would result from an explicit statement of disinheritance. However, the default rule forces testators to work harder if they want to disinherit a child.

This default rule is clearly intent-defeating but not because it was ill-drafted. Quite the contrary, in fact: the rule identifies the opportunistic trap associated with death. The owner might choose to disinherit but be unwilling to endure the resentment of her potential heirs. Pretermitted heir rules are designed to give people an incentive to contract around the default rule. By contracting around the rule, the owner must reveal her choices and stand behind them. She is forced to make an evaluation—positive or negative—regarding certain relatives. If the testator wants to disinherit these relatives she must explicitly state her intention of doing so. She has to assume responsibility and reveal her preferences. A disinherited child cannot simply be left to presume that an error has occurred and she was forgotten. Furthermore, since the owner has to explicitly disinherit the potential heir, she might change her mind, or at least reconsider her decision. The DARs ensure that she will carefully think it through. This rule therefore fosters accountability to certain family members, which consists of revealing preferences and making an informed decision.

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118. *See* ARK. CODE ANN. § 28-39-407(b) (2011).

119. *See* ARK. CODE ANN. § 28-39-407 (2011). The statute's constitutionality was challenged on the grounds that it violated the due process, equal protection, and privileges and immunities clauses of the Arkansas and United States Constitutions. The plaintiff claimed that the statute creates an irrebuttable presumption, because extrinsic evidence cannot be introduced to show the testator's intent. The statute was nonetheless upheld. Holland v. Willis, 739 S.W.2d (Ark. 1987).

120. *See* Armstrong v. Butler, 553 S.W.2d 453 (Ark. 1977); Hare v. First Security Bank, 546 S.W.2d 427 (Ark. 1977); Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L.J. 631, 680 (1995).

B. Negative Wills

The negative will doctrine is an intricate one. The doctrine deals with negative provisions and originally reflected hostility towards such clauses. Today, this hostility is considered unnecessarily intent-defeating and has therefore inspired numerous reforms. However, reinterpreting the rule as a DAR reinstates its normative power. As a DAR, the rule has three purposes: the sharing of information, acknowledgment of the position of intestate heirs, and the consideration of alternative distributive plans. While it is not a default rule per se, the rule is what I refer to as a requirement of form. It allows a testator to opt out and fulfill her intent, provided she meets the standard of the law, which is pretty easily fulfilled.

A will can include positive and negative provisions. Positive provisions distribute the property. Negative ones operate to *dis*inherit an heir. The notion of disinheritance is closely connected to intestate rules.[121] The word "*dis*inheritance" indicates that there are natural heirs that have a claim to the estate and therefore must be disinherited. Inheritance by intestate succession is the baseline from which a will can digress. If a testator wishes to disinherit some heirs, she will normally name her alternative legatees. When she does not do so, her will ultimately contains nothing but negative provisions. Different systems have dealt with negative wills in different ways, yet these provisions seem to be perceived as problematic.

The negative will rule has its origin in English case law.[122] English courts have nonetheless acknowledged negative provisions in wills since the mid-nineteenth century, on two important conditions: the testator must disinherit her relative explicitly, and at least one other heir must remain to take the property passing by intestate succession rules.[123] In other words, the estate cannot devolve to the state by escheat.

American states initially endorsed the rule in a much stricter way.[124] Negative provisions were not respected at all.[125] If some provisions of the will were invalid, or if it did not dispose of the entire property, the property was distributed by intestacy, with no consid-

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121. For the function of intestate rules, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 2.1 cmt. c (2003).

122. J. Andrew Heaton, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177 (1985).

123. *In re* Wynn, [1984] 1 W.L.R. 237, 240–41 (ch. 1983) (U.K.); Heaton, *supra* note 122.

124. DUKEMINIER ET AL., *supra* note 29, at 91.

125. *Id.*

eration taken of the negative statement.[126] In *Seeman*,[127] the testator's will provided devises for certain relatives, but the will did not have a residuary clause, and therefore failed to dispose of her residence. The will also stated, "Whereas, my son, Marion Seeman, has preceded me in death, I direct that no part of my estate shall go to his Widow [sic], Darlene Seeman, or to their children Deborah Seeman Jones and Keith Seeman."[128] The court allowed the decedent's grandchildren to inherit, holding that this provision, which clearly showed intent to disinherit, had no effect on the distribution of the intestate property.[129]

Three main justifications have been offered for this strict rule. First, negative wills interfere with intestate succession, which is governed by law and not by will.[130] A disinheritance provision is an attempt to dispose of property that the testator is not entitled to dispose of. Therefore, disinheritance applies only to property actually passing under the will.[131] Second, negative wills mix testate with intestate succession.[132] Third, the enforcement of a negative will requires "judicial will drafting," since the court has to distribute the property and decide who will receive the disinherited heir's intestate share.[133] These justifications do not adequately account for the rule.[134] They offer technical explanations and formalistic reasoning. After all, a negative provision offers just as much guidance as a positive one, provided there is a set of state-prescribed default rules. Therefore, the rule has been severely criticized over the years, with commentators arguing that it unnecessarily defeats the testator's intent.[135]

New York was the first state to repeal this rule.[136] The Uniform Probate Code and the Restatement joined this conclusion followed

126. *Id.*

127. Seeman v. Seeman, 858 S.W.2d 114 (Ark. 1993).

128. *Id.* at 114.

129. *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 2.7 reporter's note 1 (2003).

130. Heaton, *supra* note 122, at 181.

131. Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 MERCER L. REV. 1137, 1140 (1997).

132. Heaton, *supra* note 122, at 182.

133. *Id.*

134. *See, e.g.*, *id.* at 186–88.

135. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 2.7 (2003); Heaton, *supra* note 122, at 186–88; Julia M. Melius, Note, *Was South Dakota Deprived of $3.2 Million? Intestacy, Escheat, and the Statutory Power to Disinherit in the* Estate of Jetter, 44 S.D. L. REV. 49 (1999); Frederic Schwartz, *supra* note 131.

136. *See* N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (2008).

by thirteen states, joined this conclusion.[137] However, not all states have reversed the rule.[138]

The revised UPC now recognizes negative provisions. The court has to consider whether the will has excluded or limited the right of an individual or a class as a matter of construction.[139] The exclusion must be expressly manifested. However, when the testator excludes all her relatives or her heirs by law, the Restatement does not adopt the English rule and allows such a general disinheritance, which results in escheat.[140] The UPC supports this position.[141] However, some courts have interpreted the rule differently, applying the English rule that disfavors escheat.[142]

I suggest we rethink this reform. The negative will doctrine is a DAR. To contend with the opportunistic trap of death, it works to ensure the owner deliberates over her distributive plan, considers alternative takers, and assumes responsibility for her choices. First, the doctrine promotes accountability to family members through the disclosure of information. If a negative provision is not valid, then intestate succession takes its place. Any limitation on negative provisions is a protection of intestate heirs, or, in other words, of family members. Since the UPC requires an express disinheritance, much like pretermitted heir rules, it ensures that the owner will reveal her preferences.

Second, the rule fosters accountability both to family members and to society by requiring a full distributive plan. In keeping with the general hostility towards negative provisions in the pre-1990 UPC and other states, one cannot simply say no in one's will, but has to say yes to somebody else by prescribing an alternative legatee. Israeli law provides another example of this principle. In Israel, a will must reflect an intention to distribute the property.[143] Therefore, a will that merely states, "I choose to disinherit my brother," would not be valid under Israeli law, but would be under English law, provided there are other intestate takers. Thus, nega-

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137. UNIF. PROBATE CODE § 2-101 (2011), 8 U.L.A. pt I, at 81 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 2.7 statutory note 1 (2003). *See also* COLO. REV. STAT. 15-11-101 (2010); MONT. CODE ANN. § 72-2-101 (2010); N.D. CENT. CODE § 30.1-04-01 (2011); 20 PA. CONS. STAT. § 2101 (2011).

138. *See, e.g.*, OR. REV. STAT. § 112.015 (2009); McClain v. Hardy, 56 P.3d 501 (Or. Ct. App. 2002); Cook v. Estate of Seeman, 858 S.W.2d 114 (Ark. 1993); *In re* Estate of Baxter, 827 P.2d 184 (Okla. Civ. App. 1992).

139. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 2.7 cmt. b (2003).

140. *Id.* statutory note 2.

141. UNIF. PROBATE CODE § 2-101 (2011), 8 U.L.A. pt I, at 81 (Supp. 2011).

142. Estate of Jetter, 570 N.W.2d 26 (S.D. 1997). *See also* Melius, *supra* note 135.

143. RCA 5103/95 Deshet v. Eliyahu 53(3) IsrSC 97, 118–19 [1999] (Isr.). For a critique of the rule, see CA 4660/94 The Attorney General v. Lishitzky 55(1) IsrSC 88 [1999] (Isr.).

tive provisions are pointless if they are not accompanied by a positive assessment. Israeli law requires an alternative plan of bequeathal. An alternative demands thought. It requires an evaluation of other relationships.

Negative provisions clearly reflect the testator's intent, yet the law has been reluctant to accept them. The deliberative accountability rule requires the testator to state her disinheritance intentions explicitly and therefore acknowledge the *prima facie* right of certain relatives. Moreover, a will that simply says no is not a will because it does not create a testamentary plan that corresponds to the notions of accountability. If the owner has to name alternative legatees, she will probably also weigh the relative advantages of the two possible distribution schemes. If she wants to say no to someone, she has the responsibility to think of another, worthier legatee. A partial scheme sometimes means she did not fully appreciate the impact of her distribution. In other words, she did not consider all the ramifications of her plan, so the law is hesitant to support it. The owner is thus encouraged to arrive at a thoughtful, sound, and reasonable decision, taking into consideration its impact on her relatives. But it is not merely the relational motivation of accountability that inspires the rule. Taking into consideration the social impact of family property, the law respects distributive plans as long as they reflect thought and consideration, which is a signal that they carry a benefit for the owner.

Even so, the original American rule was too strict. It ignored disinheritance clauses even when the testator simply failed to appreciate the size of her estate.[144] A rule that rejects a partial distributive scheme only if it is knowingly concocted, is more moderate, and leads to better results.

One could argue that a negative sentiment is just as strong as a positive one. Indeed, it reflects an intention as loudly and clearly as possible. However, this rule is not simply concerned with the testator's intent, but rather encourages responsible estate planning that recognizes certain receivers' positions. This view makes even more sense if we consider connections in general to be stronger, last longer, or encompass greater meaning when they are positive.

The current UPC rule is a departure from the original rule. Since the original rule seemed to make no sense and frustrated the testator's intent for no apparent reason, it was repealed in some states.[145] That rule, however, was misunderstood. It is, in fact, a rule

144. *See, e.g.*, Seeman v. Seeman, 858 S.W.2d 114 (Ark. 1993).

145. *See supra* note 134.

that characterizes the requirements of executing a will. This view has to be thoroughly considered before it is overturned.

I concede, however, that both these rules (pretermitted heirs and negative wills) benefit the narrowly defined family. The subject of defining the family in the context of inheritance has been discussed before[146] and is the source of an ongoing debate, which exceeds the scope of this Article. It is important to recall, however, that the concept of relational accountability demands a more attuned understanding of relations.

V. INHERITANCE AND ACCOUNTABILITY

Crafting rules of construction is a difficult task. Critics might argue that DARs will ultimately affect less sophisticated testators. The intent of laypersons will be frustrated, as they often cannot afford expensive legal counsel. This is an important concern. We must keep in mind, however, that the law has an expressive function as well, and that the intent of the testator is not the only consideration in crafting rules. I have argued there is need for an accountability requirement in exercising freedom of testation. This requirement promotes more responsible estate planning and recognizes the position of those affected by the distribution. In addition, if a rule is simple and clear, lawyers and the general public will readily internalize it, and there will be fewer mistakes.

Rules should therefore reflect a delicate balance between the intent-tracking function and the accountability function. In light of the previous discussion, I analyze accountability requirements and emphasize two principles: the value of positive distributive clauses and the importance of a direct declaration of the testator's intent.

Both types of rules introduced here protect intestate heirs in an indirect manner. Additionally, both promote responsible and accountable estate planning. Both require that the testator clearly communicate her choices. By forcing the owner to expressly disinherit her relative from the estate, rather than creating a

146. For discussions about inheritance and the modern family, see WAGGONER et al., *supra* note 22, at 3-1; Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. J. 1 (2000); John T. Gaubatz, *Notes Towards a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497 (1977); Tania K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV 971, 1004–19 (1999); Paula A. Monopoli, *Deadbeat Dads: Should Support and Inheritance Be Linked?* 49 U. MIAMI L. REV. 257 (1994); Anne Marrie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994); Anne Marrie E. Rhodes, *Consequences of Heirs' Misconduct—Moving from Rules to Discretion*, 33 OHIO N. U. L. REV. 957 (2007); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1990).

distributive scheme that simply results in disinheritance, the law ensures that she will thoroughly consider her choice. If she has to state her scheme in a direct and clear manner, she must take responsibility for the act of disinheritance and will therefore want to be particularly sure of her decision. Although a testator can still disinherit her child, the fact that she must expressly and bluntly stipulate disinheritance from the estate ensures that she will stand by her decision. Indeed, this requirement does something more. It offers the testator a baseline for her distributive plan, which is intestacy. It thus obliges her to first acknowledge her children and only then decide whether to disinherit them.

Furthermore, the negative will doctrine imposes another limitation. If the testator wants to disinherit her relatives, she must think of alternative takers. This rule encourages responsible estate planning. If the testator wants to say no to someone, she also has the responsibility to choose a worthier legatee. She cannot execute a partial scheme, because that would mean that she did not fully appreciate the impact of her distribution.

Deliberative accountability rules in inheritance thus serve a dual role. First, they recognize certain relatives as holding a prima facie right to the estate, thereby relaxing the conventional wisdom that adheres to testamentary freedom. Second, they oblige the testator to meet certain requirements if she wants her will to be respected. Testamentary freedom is a dominant legal power that has a significant effect on people's lives. It therefore must be executed with consideration.

Finally, critics might argue that most donors do not execute a will but rather devise a will substitute in order to avoid the lengthy, cumbersome and public probate system.[147] A rule that applies only to wills is therefore not very effective. And indeed, due to will substitutes' nature and purpose, there is a tendency to subject them to substantive restrictions on testation and to rules of construction pertaining to testamentary disposition.[148] I therefore suggest that DARs apply to nonprobate transfers as well as wills.

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147. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (hereinafter Langbein, *The Nonprobate Revolution*); Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOKLYN L. REV. 1123 (1993).

148. Langbein is an enthusiastic advocate of this approach. *See* Langbein, *The Nonprobate Revolution*, *supra* note 147; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 7.2 (2003); Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769 (2000).

CONCLUSION

Family property is a unique legal area. Its profound ramifications are relationally, socially, and economically important. Despite the important consequences of this field, the notion of accountability appears to be foreign to most of it. This Article invites scholars to consider accountability as an important factor in crafting family property rules.

Focusing on gap-filling rules in wills, I have suggested that, contrary to conventional wisdom, not all these rules are targeted at realizing the testator's intent. Intent-defeating rules have become notorious and tagged as obsolete, and have often stimulated calls for reform. I have suggested a different perspective for analyzing these rules. A property owner lacks the incentive to internalize the relational, familial, or economic effects of her allocation. Since her actions have the potential to hurt people, the law prescribes rules that foster accountability. These rules burden the owner with requirements to think her decision through, give reasons, and face the relational consequences of her act. These rules work to counterbalance the freedom of the owner by requiring her to make an informed decision.

Current constructions of existing pretermitted heir rule and negative wills are not necessarily optimal. Their effect on drafting practices, family relations, and the public must be empirically studied. I therefore urge scholars and practitioners to rethink these unpopular rules and try to design better versions of them, taking into account both the need to facilitate the wishes of the testator and the need to promote responsible estate planning.