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Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions

Deborah S. Gordon*

The dead have departed, but gestures and glances and tones of voice of theirs, even scraps of clothing—that pale-yellow Saks scarf—reappear unexpectedly, along with accompanying touches of sweetness or irritation.¹

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.²

INTRODUCTION

Franz Kafka is credited with observing that “the meaning of life is that it stops.”³ This recognition—that life’s one certainty is certain death—has been the source of great inspiration. Indeed, much of what we do and create depends on our very human desire to make a mark on this world that will outlast our sentient selves.⁴ How we have lived over the course of

* Associate Professor of Law, Drexel University Thomas R. Kline School of Law. I am tremendously grateful to Emalee Popoff, Karen Sneddon, and Allison Tait for reading and commenting on earlier drafts of this Article. Thanks also to Peter Egler and Jill Fitzgerald, who provided valuable research assistance. Finally, I would like to dedicate this Article to my father, Norman Gordon, who tells some of the best stories.

1. Roger Angell, *This Old Man: Life in the nineties*, THE NEW YORKER, Feb. 17, 2014.

2. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

3. See David Remnick, *Philip Roth’s Eightieth-Birthday Celebration*, THE NEW YORKER, March 20, 2013; Daniel Sandstrom, *My Life as a Writer: Interview of Philip Roth*, N.Y. TIMES BOOK REVIEW, March 2, 2014; see also Martha C. Nussbaum, *Human Functioning and Social Justice — In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 216 (1992) (“All human beings face death and, after a certain age, know that they face it. This fact shapes more or less every other element of human life.”).

4. See Nathan Roth, *The Psychiatry of Writing a Will*, 41 AM. J. PSYCHOTHERAPY 245, 246 (1987) (“all of our thinking, feeling, and acting are directed to the obliteration of death and the achievement of immortality”); Karen J. Sneddon, *Memento Mori: Death and Wills*, 14 WYO. L. REV. 211, 222-23 (2014) (“Recognizing our own mortality is not only a distinguishing characteristic of humanity, but also a motivating force in the development of the humanities.”); see also ATUL GAWANDE, BEING MORTAL 127 (2014) (“The only way death is not meaningless is to see yourself as part of something greater: a family, a community, a society. If you don’t, mortality is only a horror.”);

our days—our individual and collective histories—and how we will be remembered by those who survive us—our legacies⁵—are bridged not only by our achievements and relationships but also by items of property that we have accumulated and decided to pass on.⁶ This property often has a narrative that accompanies and empowers it.⁷ Incorporating that narrative into the decision-making associated with the transfer of a cherished possession at death can help a property owner transcend her *mortality* by infusing it with her morality, her “particular system of values and principles of conduct.”⁸

Although many people tell stories about how they acquired their wealth, this Article does not argue that every will or trust should contain an exhortation about achieving success or should turn into an ethical will that espouses the decedent’s theories on life.⁹ Nor does it claim that every item

Karen Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 356-57 (2013) [hereinafter Sneddon, *Will as Narrative*] (relating story of Albert Nobel reacting to his own erroneously published obituary).

5. Matthew Fox, Leigh Plunkett Tost & Kimberley A. Wade-Benzoni, *The Legacy Motive: A Catalyst for Sustainable Decision Making in Organizations*, 20 BUS. ETHICS Q. 153, 153 (2010) (“[L]egacies are vehicles that extend one’s identity and one’s life work and meaning into the future to outlive the physical self.”).

6. Shelly Kreiczler-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. & TRUST L.J. 495, 501-06 (2012) (explaining how “inheritance is one of the cultural artifacts that establishes the continuity that allows us to transcend our limited existence”); Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 346, 374 (1969) (“The things a man owns do not die when he dies; his wealth—which is the *value* of his things—is relatively immortal. If he is what he owns, then he will, in a way, survive his own death. That is what testation is all about. . . . A person *wants* to arrange his property for immortality and he feels better when he understands his arrangement, approves of it and thereby prepares to transcend the grave.”) (emphasis in original); David Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 SOC. PROBS. 340, 343-45 (1983) (“dying people begin to make sense of their lives by accentuating portions of their personal histories for which they wish to be remembered” and by “accumulating” and “distributing . . . artifacts” that they use to represent their stories and reminiscences); Kimberly A. Wade-Benzoni & Leigh Plunkett Tost, *The Egoism and Altruism of Intergenerational Behavior*, 12 PERSONALITY & SOC. PSYCHOL. REV. 165, 183 (2009) (“[I]ntergenerational beneficence can function as a form of symbolic self-extension, in particular when people experience some level of death awareness.”); see also Adam J. Hirsch, *Bequests for Purposes*, 56 WASH. & LEE L. REV. 33, 56 (1999) (“Social psychologists have observed that the desire somehow to transcend mortality and sustain one’s identity beyond the grave is both common and strong. Testation aside, it often motivates the elderly to compose memoirs or to gather together artifacts of their lives.”).

7. See *infra* notes 120-28 and accompanying text (discussing power of narratives).

8. THE NEW OXFORD AMERICAN DICTIONARY 1101 (Erin McKean ed., 2d ed. 2005); see also Roth, *supra* note 4, at 246 (“A will is a wondrous thing. It confers a modicum of immortality.”); Elizabeth Stone, *The Last Will and Testament in Literature: Rupture, Rivalry, and Sometimes Rapprochement from Middlemarch to Lemony Snicket*, 47 FAMILY PROCESS, 425, 426 (2008) (“wills draw our attention to three of the most charged elements in our lives: love, death, and money”); Unruh, *supra* note 6, at 345 (“Wills and testaments are the most obvious devices used by the dying to apportion and dispense objects in which personal identities and feelings about oneself are stored.”).

9. An ethical will is a non-testamentary writing “intended to pass along values and beliefs to succeeding generations.” Zoe M. Hicks, *Is Your (Ethical) Will in Order*, 33 ACTEC J. 154, 162 (2007). There are many good reasons to use ethical wills or other types of informal devices, and practitioners are more frequently recommending their use. See BARRY K. BAINES, M.D., *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* (2d ed. 2006); Cindy E. Faulkner, *Happily Ever After: An Ethical Will May Be a Step on That Journey*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 451, 460-66 (2010); James Edward Harris, *Level Five Philanthropy: Designing a Plan for Strategic, Effective, Efficient Giving*, 26 U. ARK. LITTLE ROCK L. REV. 19, 22 (2003). On the other hand, these informal

of property has a meaningful story associated with it, nor that every testator has a benevolent goal. What this Article does recognize, however, is that nearly every individual owns at least one possession that the owner, rich or poor, male or female, old or young, sees as reflecting something important about her personality, history, and values. By acknowledging the powerful connection linking this “endowed” possession,¹⁰ the story of how the possession was acquired or used during life, and the individual owner’s beliefs and principles, those involved with inheritance law can profoundly impact both the experience of being mortal and the inheritance system itself.

This Article proceeds in three parts. Part I explores formative and more recent scholarship discussing the link between property law and language, first figurative and then narrative. It explains how property law theorists have used language about “things” to explore the political and economic communities the property creates among the people who have interests in those things.¹¹ From this background on the relationship between property regimes and metaphorical language, the section then telescopes to the cognitive purposes narratives serve and, more particularly, to the associations between narratives and inheritance. Several prominent scholars have recognized that stories are often buried in testamentary documents; their work has focused on the complexities of unearthing and interpreting these narratives¹² and on describing how these narratives express the testator’s personal identity.¹³ Building on this foundation, this Article explores the potential for stories about cherished possessions to enhance the purposes of inheritance. To this end, the final section of Part I describes empirical studies from the social sciences that document how and why individuals identify with their cherished possessions.¹⁴ This research linking identity and wellbeing to cherished possessions and the stories those possessions tell suggests that these seemingly insignificant items have a potentially significant role to play in estate planning.

writings have no legal authority; accordingly, their prevalence prompts the question of what gaps exist in the legal system that necessitate or at least encourage creation of these deliberately non-binding supplemental documents. See Deborah S. Gordon, *Letters Non-Testamentary*, 62 U. KAN. L. REV. 585, 588-93 (2014).

10. See Cathren Koehlert-Page, *Like A Glass Slipper on A Stepsister: How the One Ring Rules Them All at Trial*, 91 NEB. L. REV. 600, 603 (2013) (defining and discussing “endowed” objects).

11. See MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 14-17 (1981) (defining things and their relationship to people).

12. Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 632 (1992) (“wills ought to be, but are not, understood as stories”); see also Cathrine O. Frank, *Of Testaments and Tattoos*, 18 LAW & LITERATURE 323, 327 (2006) (“[T]he will—that legalistic fetish expressing its testator’s state of mind—also served as a legal technology for textualizing people and making them legible.”).

13. CATHRINE O. FRANK, *LAW, LITERATURE, AND THE TRANSMISSION OF CULTURE IN ENGLAND, 1837-1925*, 60 (2010); Sneddon, *Will as Narrative*, *supra* note 4, at 368-410. Frank’s book, which focuses on Victorian and Edwardian England, devotes its entire first chapter to what she calls “will stories,” discussing “both the legal and symbolic function the will served,” “its narrative potential, [and] its ‘authors’ (the testator, the solicitor, and the novelist alike).” FRANK, *supra*, at 23.

14. See *infra* notes 78-131 and accompanying text.

One way to defend the notion that estate planners should deliberately integrate narratives into legal texts, like wills, is to show how prevalent stories already are in this area of the law, which is both so technical and yet so intimate. Part II parses different forms of “inheritance texts” to explore the longstanding and vibrant relationship among narratives, property transfers, and personal, familial, and cultural values.¹⁵ Section A describes fictional works that depict characters who, facing mortality, struggle with whether and how their property creates ties to others.¹⁶ Section B moves to legal texts, primarily cases, exploring some of the archetypal narratives that permeate inheritance law and prompt questions about how individual values intersect with property ownership.¹⁷ Section C uses sample testamentary documents to show the range of possibilities for testators to link narratives to death-time transfers.¹⁸ All of the genres demonstrate the multiple ways narratives and inheritance intersect and “unconsciously transmit traditions, cultural values, and ideologies.”¹⁹

Part III argues that including narratives about cherished possessions in testamentary documents serves many purposes—psychological, social, and legal—and can be accomplished with minor effort. The first section in this final Part proposes model language to assist individuals and their lawyers in drafting conveyances that acknowledge the narrative power of a cherished possession.²⁰ Having surmounted this procedural hurdle, the remaining sections argue that such stories in testamentary documents can help make estate planning more accessible and meaningful to a broad range of property owners, poor and rich alike.²¹ The current practice of trivializing personal property dispositions, either by relegating them to separate non-binding memoranda or not dealing with personal property at all other than in a general or residuary clause, are missed opportunities.²²

15. See KENJI YOSHINO, *A THOUSAND TIMES MORE FAIR* xi (2012) (“[T]he law itself is a set of stories. . . . We cannot understand the law unless we see how its formal texts are embedded in the narratives that accord them shape and meaning.”).

16. See *infra* notes 136-94 and accompanying text.

17. See *infra* notes 195-268 and accompanying text.

18. See *infra* notes 269-95 and accompanying text.

19. Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor & Narrative*, 50 WASHBURN L. J. 275, 278 (2011); see JACQUELINE L. ANGEL, *INHERITANCE IN CONTEMPORARY AMERICA* 18 (2008) (“Money and wealth in all their forms are complex symbols, and their exchange is profoundly moral in the same sense that it defines the relationship between the giver and the recipient.”); J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 2-6 (1998) (describing “diverse tools of human understanding” and how they are used to understand and evaluate the social world).

20. See *infra* notes 312-23 and accompanying text.

21. Naomi Cahn & Amy Zietlow, “*Making Things Fair*”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 327 (2015) (“[C]lass distinctions in the wealth transmission process are not acknowledged. Instead, trusts and estates jurisprudence focus on issues like will formality and dead hand control without addressing socioeconomic context.”); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 492 (2010) (“The ways in which the law of inheritance affects those with minimal wealth have been little noted. Also scarce are descriptions of how people with modest wealth experience inheritance and how they interact with the current law of succession.”).

22. Carolyn Folkman Curasi, Linda L. Price & Eric J. Arnould, *Understanding the*

Moreover, while the practicing bar may be reluctant to include what might be characterized as superfluous language in wills, there is little legal support for this trepidation and what does exist, this Article argues, should succumb in the face of real world support for a proposed change.²³ Encouraging personal property dispositions that include narratives—“lexicons of normative action”²⁴—also will benefit survivors; psychological research shows a relationship between family stories and resilience,²⁵ and sociological studies support the idea that sharing stories aids in bereavement.²⁶ Recipients of cherished property and its associated stories therefore may reap benefits from the narratives, even if those recipients ultimately decide that retaining the property is unappealing, burdensome, counterproductive, or just plain messy.

Finally, using this narrative approach as a strategy for encouraging broader participation in estate planning will benefit the inheritance system more holistically. For example, survivors will receive the guidance that they have identified as being of primary importance following the death of a loved one.²⁷ Also, under current circumstances, wealthier and older individuals are more likely to engage in estate planning,²⁸ with younger and less affluent individuals relying on default rules or non-probate vehicles²⁹ that often do not serve their unique interests or goals. Strategies to democratize estate planning not only ensure that individuals will be less likely to rely on approaches that may be ill-suited to their circumstances, but also that the stories inheritance law tells will be more reflective of society as a whole.³⁰

Intergenerational Transmission of Cherished Possessions: Insights for Estate Planning, Trust Officers and Other End-of-Life Professionals, 7 J. FIN. SERVS. MKT'G. 369, 372 (2003) (“Even as important as the transference of cherished possessions seems to be for family members, few estate planners or other end-of-life professionals incorporate cherished objects into professional consultations.”).

23. See *infra* notes 324-51 and accompanying text.

24. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983).

25. See *infra* notes 358-63 and accompanying text.

26. See *infra* notes 352-57 and accompanying text.

27. Cahn & Zietlow, *supra* note 21, at 331 (“Regardless of whether they agreed with the decedent’s choices, [survivors] acknowledged that formal statements of intent, ranging from disposition of bodily remains to money, provided important literal guidance and emotional understanding of the next steps.”).

28. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36, 54 (2009); CAROLE SHAMMAS ET. AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 147 (1987) (“Inheritance decisions in the twentieth century are usually made by the elderly.”); see also ANGEL, *supra* note 19, at 54-57 (summarizing data); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 2-2 to 2-3 (4th ed. 2006) (same); see generally Marsha A. Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills*, 22 J. FAM. & ECON. ISSUES 243 (2001) (exploring variables impacting whether older adults have written wills).

29. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1101 (2004) (defining default rules); Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61 (2015) (describing challenges posed by non-probate transfers).

30. See *infra* notes 379-89 and accompanying text.

I. THE LANGUAGE OF PROPERTY

It is tremendously difficult to discuss the importance of property—“things”³¹—without relating those things to people: those who possess the things; those who covet the things; those who want to use or share or purchase or sell or hold or destroy the things.³² For that reason, property theorists have relied on metaphor and narrative to describe the link between people and things. This section begins by describing the use and purposes of such figurative language. It then focuses more specifically on the handful of scholars who have used narrative theory to describe, in particular, will creation and interpretation. Finally, this section discusses social science research linking personal identity and wellbeing to possessions and the stories those possessions tell.

A. *Property Theory and Language*

The figurative and narrative language used by courts and theorists to discuss property has already attracted significant scholarly interest.³³ Indeed, in the introduction to a conference and symposium dedicated to her work, Carol Rose recognized that the topic of “Property and Language” might be seen as “obscure, idiosyncratic, unconventional”³⁴

31. Property law scholars are engaged in a centuries-old but still lively debate over how to define “property,” the purposes property law plays (and should play), and the social regimes property law gives rise to and perpetuates. See, e.g., Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 40-41 (1990) (“We often think of property as some version of entitlement to things . . . [i]n a more sophisticated version of property, of course, we see property as a way of defining our relationships with other people.”); Joseph William Singer, *Property As the Law of Democracy*, 63 DUKE L.J. 1287, 1291 (2014) (“Property is more than the law of things; property is the law of democracy. Property law shapes social relations, and because we live in a free and democratic society that aspires to treat each person with equal concern and respect, a crucial function of property law is to interpret what that means.”); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012) (“For information-cost reasons, property is, after all, a law of things.”); see also Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 109 (2013) (describing debate). Because this Article addresses testamentary documents and associated language, it restricts the definition of “property” to items that are available for gratuitous transfer at death.

32. See Jeremy A. Blumenthal, *To Be Human: A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609, 610 (2009) (explaining claim that “to study property is to study ‘what it means to be human’”).

33. See, e.g., Berger, *supra* note 19, at 287-88 (describing property as an “ideograph”); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J. L. & HUMAN. 1 (2006) [hereinafter Rose, *Fifth Panel*] (describing author’s life work on property and language); Rose, *supra* note 31, at 1 (using game theory, narrative theory, and feminist theory to examine how property is storytelling); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 626 (1988) (using “plant closing” cases to show how “[p]eople persuade each other, not by demonstrating the logical consequences of shared principles, but by appealing to shared experience”); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003) (describing how property law faces a tradeoff between intensiveness and extensiveness of information, depending on the nature and size of the audience to whom the information is communicated); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 360 (1998) (describing a rhetorical approach to property law that refers both to persuasion and to “a sustained examination of chaos, inarticulateness, inconsistency, and silences within the law”).

34. Rose, *Fifth Panel*, *supra* note 33, at 2. Rose made this argument in the context of explaining how the topic, which she saw as her “central project as a legal scholar” had been eliminated from the symposium when organizers agreed that “five panels would be just too many for a day’s conference,”

but went on to describe how “stories and pictures, texts and subtexts, matter in property law”³⁵ because “[p]roperty is both an *economic* institution of great power, but it is also a highly *sociable* institution, dependent on *symbolic gestures* that link claimants and audiences.”³⁶ In general, such “symbolic gestures,” otherwise known as metaphorical language, function “by mapping or transferring the characteristics, reasoning processes, and outcomes of one domain (the source) onto another (the target).”³⁷

The idea that metaphor plays an important role in property law and property scholarship is no surprise. After all, the “bundle of sticks” metaphor, the roots of which are traced to the work of Wesley Newcomb Hohfeld,³⁸ appears regularly in property texts³⁹ and is now well accepted in American jurisprudence.⁴⁰ Other figurative language, though perhaps less dominant, has helped property theorists tease out how to define “property,” the purposes property law plays (and should play), and the social regimes property law gives rise to and perpetuates. Margaret Radin, for example, has looked at property as “personhood,” describing the “connection between the self and things in the world outside the self.”⁴¹ Henry Smith has put forth an “architectural” view of property that rejects the bundle of sticks in favor of a “modular” theory, which consists of a bunch of features that relate to each other.⁴² Progressive property theorists,

causing Rose to dub it the “Missing Fifth Panel” or the “Ghost Panel.”

35. *Id.* at 2.

36. *Id.* at 28 (emphasis added).

37. Berger, *supra* note 19, at 278.

38. See Smith, *supra* note 31, at 1695-96 & nn. 13-15 (describing the metaphor’s origin and citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59 (1913) and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917)); see also Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1413-14 (2012) (discussing metaphor’s origin); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 877-80 (2013) (same).

39. E.g., JESSE DUKEMINIER ET AL., PROPERTY 218 & n.11 (8th ed. 2014); THOMAS MERRILL & HENRY SMITH, PROPERTY: PRINCIPLES AND POLICIES 1 (2d ed. 2012); JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES POLICIES & PRACTICES xxxii (6th ed. 2014); JOHN SPRANKLING & RAYMOND COLETA, PROPERTY: A CONTEMPORARY APPROACH 25 (3d ed. 2015); WILLIAM B. STOEUBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 6 (3d ed. 2000).

40. In United States Supreme Court opinions alone, the metaphor appears regularly. See, e.g., *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015); *United States v. Craft*, 535 U.S. 274, 278 & 283 (2002); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 384 & 393 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). A Westlaw search of lower court decisions turns up hundreds of federal and state references. *But see* Williams, *supra* note 33, at 280-95 (describing how the “intuitive image of property” as absolute dominion endures over Hohfeld’s “alternative imagery”).

41. Margaret Jane Radin, *The Colin Ruagh Thomas O’fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 424 (1995) [hereinafter Radin, *Reconsidering*]; see also Radin, *supra* note 2, at 959-61.

42. Smith, *supra* note 31, at 1709 (analogizing this modular theory to a diamond which could be seen as “a collection of carbon atoms . . . but there is a lot more to them”).

who contend that property theory is less about rights to exclude others from property than about the social value and corresponding obligations that property ownership has on community,⁴³ have described property in terms of “democracy,”⁴⁴ “human flourishing,”⁴⁵ “virtue,”⁴⁶ and “memory.”⁴⁷ Jane Baron has described progressive property theories as a “conversation” that contrasts with prior information theories that are more akin to a “machine.”⁴⁸ These metaphors, or framing devices, make it easier for audiences to understand unfamiliar or complex theoretical topics.⁴⁹

While the use of metaphor in property law and property scholarship may be well recognized, the use and appearance of narratives—storytelling—seems at first to be more attenuated.⁵⁰ After all, narratives are understood as not just figurative, demonstrative language for use as illustration or comparison but trajectories with “history and destiny, beginning and end, explanation and purpose.”⁵¹ They establish “paradigms for behavior” and “a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past.”⁵² In this regard, though, Rose convincingly shows that stories

43. See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743-44 (2009); see also Rosser, *supra* note 31, at 109 (progressive property scholars argue “that property is about more than just exclusion and sees more areas of the law that should be changed to account for societal interests”).

44. Singer, *supra* note 31, at 1291; Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1010 (2009) (“Property is a social and political institution and not merely an individual entitlement.”).

45. Gregory S. Alexander, *Intergenerational Communities*, 8 LAW & ETHICS OF HUMAN RIGHTS, May 2014, at 21, 24-27 [hereinafter Alexander, *Intergenerational Communities*]; Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1875-86 (2012); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009); see also Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1034-35 (2011) (describing theorists like Margaret Radin, Amartya Sen, and Martha Nussbaum who embrace pluralist views of human flourishing and thus property).

46. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 821 (2009).

47. Eduardo M. Peñalver, *Property’s Memories*, 80 FORDHAM L. REV. 1071, 1072 (2011).

48. Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 966 (2010).

49. Berger, *supra* note 19, at 279-80 (“[B]ecause metaphor transfers inferences from one domain to another, we are able to perceive and understand abstract concepts in the same way that we see and grasp physical ones.”).

50. For a discussion of the differences, and cognitive contributions, of metaphor and narrative, see Berger, *supra* note 19, at 278-83; see also Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 886-91 (2010) (defining and describing narrative, metaphor, and myth); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 820-22 (1993) (describing how cognitive psychology literature “seems to support the existence of practical reason and suggests that it is linked with storytelling”).

51. Cover, *supra* note 24, at 5; see also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113-14 (2002) (defining the “bare bones” of narrative as an account of events with characters and plot; the plot involves a steady state, some disruption, resolution or transformation, and a moral); Berger, *supra* note 19, at 280-81 (“Compared with metaphor, a story is more path than template, and its outcome is more an expected ending than a compelled one.”).

52. Cover, *supra* note 24, at 8; see also Kirsten Matoy Carlson, *Priceless Property*, 29 GA. ST. UNIV. L. REV. 685, 692 (2013) (narratives “do not simply recount happenings; they give them shape, give them a point, argue their import, [and] proclaim their results.’ Narratives help us to understand this system of meaning by providing a way of ordering discourse”); John A. Robinson & Linda Hawpe, *Narrative Thinking as a Heuristic Process*, in *NARRATIVE PSYCHOLOGY: THE STORIED*

have played a role in property law from early on and continue to have an impact in particular on moral behavior.⁵³ Rose describes how John Locke, for example, in the *Second Treatise of Government* “clearly unfolds a story line, beginning in a plenteous state of nature, carrying through the growing individual appropriation of goods, then proceeding to the development of a trading money economy, and culminating in the creation of a government to safeguard property.”⁵⁴ William Blackstone similarly “described human beings beginning in a state of plenty, gradually accumulating personal and landed property, and finally creating government and laws to protect property.”⁵⁵ Even modern property discourse requires a narrative, Rose reminds us; the most popular model from game theory—the prisoner’s dilemma—would have no meaning without the accompanying story in which the puzzle and theory is situated.⁵⁶ The storytelling that appears in property theory, Rose explains, is a “moral discourse” where narratives are used to exhort the listener to “overcome” pure self-interest in favor of cooperation.⁵⁷ Because narratives are part of a shared family identity, culture, or experience, they transcend pure rationality and logic to convey traditions, morals, and ideologies.⁵⁸

NATURE OF HUMAN CONDUCT 111, 117 (Theodore R. Sarbin ed., 1986) (“[N]arrative transactions are a primary procedure for producing mutual understanding and social cohesion.”); Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2455 (1989) (describing how “empathic narrative” is not adequate to persuade but storytelling that “creat[es] a relationship between oneself and others” by making “them aware of connections that they already have” will allow them to clarify thinking and redefine values).

53. Rose, *supra* note 31, at 38 (detailing how classical theorists’ discussions of property, and the political economy more generally, took “a narrative or ‘diachronic’ explanatory mode, treating property regimes as if they had origins and as if they developed over time”).

54. *Id.* at 38 (citing JOHN LOCKE, 2D TREATISE, §§ 31, 36-38, 45-48, 123-24); *see also id.* at 51 (revisiting the Locke story).

55. *Id.* (citing 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3-9 (1766 & reprint 1979)); *see also id.* at 52 (revisiting the Blackstone story).

56. *See id.* at 38 (explaining that narratives used to describe traditional economic property concepts like utility maximization or exclusion rights give context to those concepts and, accordingly, “the expressive qualities of property are located squarely at the center of the intersection between economic and humanistic studies”).

57. *Id.* at 39-40 (explaining that property regimes need stories to counter-balance a purely predictive logic-based account because, for “property regimes to function, some of us have to have other-regarding preference orderings that the classical property theory would not predict and can only explain post hoc, through a story”); *see also* CAROL M. ROSE, PROPERTY AND PERSUASION 5-6 (1994) (“How do people *change* norms to accommodate different property arrangements that might enhance their well-being? This is where narrative matters: stories, allegories, and metaphors can change minds. Through narratives, or so it is said, people can create a kind of narrative community in which the storyteller can suggest the possibility that things could be different. . . .”); Farber & Sherry, *supra* note 50, at 823 (“Narratives, then, as ‘the fullest reflective accounts there are of deliberation and action in specific circumstances,’ help us understand both the universal and particular aspects of moral personhood.”) (quoting RICHARD ELDRIDGE, ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM, AND SELF-UNDERSTANDING 26-27 (1989)).

58. Berger, *supra* note 19, at 278; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 55 (2008); *see also* AMSTERDAM & BRUNER, *supra* note 51, at 30-31 (describing how the human mind shapes all experience into narrative form, including “strivings and adversities, contests and rewards, vanquishings and setbacks”); Rose, *supra* note 31, at 55-57 (explaining that storyteller turns audience into a “moral community” by providing memories and consciousness, by offering opportunities to “reconsider and reorder” approaches to events, and by providing options that defy formula).

They are “the most basic way we have of organizing our experience and claiming meaning for it.”⁵⁹ In Rose’s words, narratives create a “moral community” between narrator and audience.⁶⁰

B. How Scholars Have Linked Wills and Stories

Several scholars have already recognized a connection between written dispositions of property at death—wills in particular—and the stories that lie embedded in them.⁶¹ Baron, for example, argues that “wills ought to be, but are not, understood as stories.”⁶² Using as a springboard the wills of her father and father-in-law, who died within a “nightmarish” six weeks of each other,⁶³ Baron explains the adherence of private law, and wills law in particular, to the commonly accepted “meaning of words” model of interpretation.⁶⁴ This seemingly “objective” mode of will interpretation, which reduces a testator’s individual intent to her “idiosyncratic use of words,” is far less humanizing, Baron contends, than a mode of interpretation that would understand the will as a distinct narrative, explaining:

The will’s pliant structure permits expression of innumerable variations on common themes. Readers of a story do not seek merely to decode the meaning of words; neither should readers of a will. When a will’s literal commands have given rise to an interpretive dispute, we are more likely to effectuate the testator’s wishes—and thus to fulfill the accepted objective of wills law—by *seeking the story behind those commands* rather than by seeking only to define the terms used in formulating the commands.⁶⁵

Where a will’s words are uncontested, Baron recognizes that the testator’s underlying story likely would be ignored.⁶⁶ Where there is a dispute over the will’s meaning, however, Baron argues that attending to the buried story can both humanize and democratize the process of will

59. AMSTERDAM & BRUNER, *supra* note 51, at 30, 110-20; JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985); *see also* Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW’S STORIES 14, 14 (P. Gewirtz & P. Brooks eds., 1996) (“Narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time.”); Robinson & Hawpe, *supra* note 52, at 112 (“Stories seem to be the natural way to recount experience” and “are a solution to a fundamental problem in life, viz., creating understandable order in human affairs.”).

60. Rose, *supra* note 31, at 55; *see also* WHITE, *supra* note 59, at 172 (“[T]he idea of community itself depends upon both language and a story: a community is a group of people who tell a shared story in a shared language. . . . Another way to put this is to say that telling a story can never be a purely private art.”); Alexander, *Intergenerational Communities*, *supra* note 45, at 29-33 (community members may be intergenerational, so long as they share ideas, purposes, and a sense of identity).

61. *See supra* notes 12 & 13.

62. Baron, *supra* note 12, at 632.

63. *Id.*

64. *Id.* at 636-52 (describing “doctrinal obsession with [a] will’s words” as opposed to testator’s intended meaning).

65. *Id.* at 657 (emphasis added).

66. *Id.*

interpretation.⁶⁷ She acknowledges that using this methodology would be “neither familiar nor comforting” because it would require acknowledging “the multiplicity of ways in which the same event can be perceived” and rejecting the traditional understanding of property distributions as being rooted in “liberal notions of individual autonomy.”⁶⁸ Baron points out, though, that freedom should not be seen as the desire of an isolated individual but rather as the choices of a socially constructed and morally responsible member of society.⁶⁹ Ultimately, Baron urges her reader to see the “transformative *potential*” of story-based interpretation for linking the individual to others—to the larger culture and community in which she is situated.⁷⁰ Thus, in many ways, Baron describes the very enterprise that Rose identifies: that of using narratives to build and bridge communitarian concerns.

Karen Sneddon has taken a somewhat different approach, arguing that a will should be conceptualized and written as a “personal narrative,” which she defines as a story that “captures the actions and thoughts of one individual, the narrator, in the act of remembering.”⁷¹ Sneddon explains the will’s origin as a spoken “vessel of truth”⁷² and then describes how wills “both famous and ordinary” allow their authors to recount their personal experiences through various component parts, including first person voice, present tense, overture, beneficiary descriptions, and property descriptions.⁷³ Embracing the personal narrative conception of wills, Sneddon explains, reinforces testamentary intent, improves the attorney-client relationship, and furthers the goals of estate planning.⁷⁴ Cathrine Frank, in her book examining the role of wills in the Victorian and Edwardian eras, agrees that wills have a “dramatic arch,” commencing when “the principal actor introduces himself and appoints his executor” and concluding “with a reaffirmation of its intentions and the invocation of witnesses.”⁷⁵ Although what falls between may be “sheer climax . . . with neither introductory comment nor reflexive peroration” or may be busy “with smaller details, setting a scene as it were,” every type along the spectrum assumes a “discursive form.”⁷⁶

In many ways, this Article picks up where prior inheritance scholarship left off: with the question of how an individual’s testamentary documents can create a legacy that connects that individual to her survivors and

67. *Id.* at 668-69.

68. *Id.* at 673-75.

69. *Id.* at 674-75.

70. *Id.* at 675-77 (emphasis in original).

71. Sneddon, *Will as Narrative*, *supra* note 4, at 365.

72. *Id.* at 368-73.

73. *Id.* at 382-405.

74. *Id.* at 409-10.

75. FRANK, *supra* note 13, at 60; *see also* Baron, *supra* note 12, at 657-59 (describing conventional patterns of wills as stock stories).

76. *Id.* at 60-62.

allows her to live on after death. In other words, can a decedent use property narratives to infuse traditions and morals into death-related transfers and thereby transform her staid legacy into a more meaningful one, both for herself and her larger communities? Baron, Sneddon, and Frank all recognize the important role that personal possessions, in particular, play within the overarching will narratives.⁷⁷ The following section explores the value of personal property in greater detail, because property that may seem insignificant based on economic value alone has tremendous expressive, and in particular narrative, potential.

C. Cherished Possessions

A possession, be it a keepsake, jewelry, a home, or even a business, often takes on meaning that is unrelated to the item's material worth or market value.⁷⁸ The property's significance may result from the memories it evokes, either for the individual owner or for the owner's larger community.⁷⁹ For example, Edward Peñalver describes the nostalgia associated with the "boxes of family photos, childhood toys, and keepsakes" that were painfully abandoned by Cuban-Americans who fled Castro's regime⁸⁰ and the memories of communities seeking repatriation of antiquities that defined their cultural identities.⁸¹ Other researchers have described how individuals' cherished possessions and keepsakes are transformed into "inalienable objects" that the owner's families believe to be "irreplaceable" and "sacred" through the power of memory.⁸² A possession's meaning also may derive from how the individual owner's connectedness with the property has contributed to her wellbeing and flourishing or, conversely, by the kind of pain the item's loss would

77. FRANK, *supra* note 13, at 61-62 ("[P]ossessions had tremendous symbolic potential even in the will as expressions of the taste and status of the person who owned them."); Sneddon, *Will as Narrative*, *supra* note 4, at 400-05 ("[d]escriptions of specific property can be used to complement the personal narrative of the will"); see also Baron, *supra* note 12, at 676 ("[T]he will often 'speaks' of objects (such as wedding rings and rocking chairs) or places (such as homes and farms) that may have been integral to the testator's self-definition and whose transmission may establish or affirm a relationship to another.").

78. Jane Kroger & Vivienne Adair, *Symbolic Meanings of Valued Personal Objects in Identity Transitions of Late Adulthood*, 8 IDENTITY: AN INT'L J. OF THEORY AND RES., January 25, 2008, at 5, 5-6; Carolyn Folkman Curasi, Linda L. Price & Eric J. Arnould, *How Individuals' Cherished Possessions Become Families' Inalienable Wealth*, 31 J. CONSUMER RES. 609, 609 (2004) ("[c]herished or special possessions are treasured independent of their exchange value, and private or personal meanings are central to their worth. These possessions attract psychic energy" and often are viewed "as sacred"); Marsha L. Richins, *Valuing Things: The Public and Private Meanings of Possessions*, 21 J. CONSUMER RES. 504, 504-05 (1994) (possessions' values derived from meaning ascribed by owner (private) and meaning ascribed by society (public)).

79. Peñalver, *supra* note 47, at 1079 (describing property as a "vehicle of memory").

80. *Id.* at 1071-72.

81. *Id.* at 1073-74; see generally Russell W. Belk, *Possessions and the Sense of Past*, HIGHWAYS & BUYWAYS, 114, 117-24 (1991) [hereinafter Belk, *Sense of Past*] (describing how possessions evoke individual and collective memories of the past).

82. Curasi *et al.*, *supra* note 78, at 609-10; see also Unruh, *supra* note 6, at 348-49 (discussing sanctifying symbols as a collective act for survivors).

occasion for the owner.⁸³ The loss of a wedding ring to a jeweler, for example, is qualitatively different than the loss of that same ring to its owner.⁸⁴ Radin, who helped pioneer this idea that certain types of property “are part of the way we constitute ourselves as continuing personal entities in the world,”⁸⁵ argues that the law should confer greater recognition to, and protections on, property that is connected to an individual’s “personhood” as opposed to merely “fungible property,” which is property that can easily be replaced.⁸⁶ Radin’s article about property as personhood has given rise to an industry of legal scholarship.⁸⁷ But this recognition that some items of property have significance that exceeds their inherent and apparent value does not derive from the law nor is it exclusive to the law. Fiction writers have a term for this type of property, calling the possession an “endowed” object because it “reverberates with symbolic significance.”⁸⁸ Radin herself relied heavily on philosophical traditions contemplating the meaning of “personhood,”⁸⁹ although her thesis about how property relates to identity is primarily psychological.⁹⁰

Empirical studies conducted by social scientists confirm that personal possessions can have a profound impact on their owners’ lives, especially as people age.⁹¹ For example, in a study of one hundred older people in

83. Radin, *supra* note 2, at 959-60, 1004-06. Many of the progressive property ideas, linking property to human rights, were forecast in a 1927 article by Morris R. Cohen, titled *Property and Sovereignty*, 13 CORNELL L. REV. 8; for a discussion of this article, see Alfred L. Brophy, *[Re]Integrating Spaces: The Possibilities of Common Law Property*, 2 SAVANNAH L. REV. 1, 17 (2015).

84. Radin, *supra* note 2, at 959-60.

85. *Id.* at 959; see also Radin, *Reconsidering*, *supra* note 41, at 426 (“certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and what is outside, between what is subject and what is object”).

86. Radin, *supra* note 2, at 991-1013; see also Radin, *Reconsidering*, *supra* note 41, at 426-28 (defining fungible property). But see Russell W. Belk, *Attachment to Possessions*, in PLACE ATTACHMENT: HUMAN BEHAVIOR & ENVIRONMENT (Setha M. Low and Irwin Altman eds., 1992) at 37, 45-46 (describing how money can be non-fungible).

87. As of December 2015, more than 850 law review articles had cited to Radin’s *Personhood* article. Radin also is listed as one of the most-cited property law professors over the past five years, and the article is one of the most frequently cited articles of all time in the field of property. See Steve Clowney, *Most Cited Property Law Professors, 2011-2015* PROPERTYPROFBLOG (December 9, 2015), <http://lawprofessors.typepad.com/property/2015/12/most-cited-property-law-professors-2011-2015.html>.

88. Koehlert-Page, *supra* note 10, at 603.

89. See Radin, *supra* note 2, at 962-78.

90. Blumenthal, *supra* note 32, at 615-16.

91. See, e.g., Kroger & Adair, *supra* note 78, at 7-12 (summarizing theoretical research in the fields of psychology, gerontology, nursing, and consumer behavior about how cherished objects reflect their owners’ personal identities and describing systematic study of how cherished possessions affect adults’ identity maintenance and revision); Linda L. Price, Eric J. Arnould & Carolyn Folkman Curasi, *Older Consumers’ Disposition of Special Possessions*, 27 J. CONSUMER RES. 179, 183 (2000) (charting key findings of literature relevant to consumers’ disposition of special possessions); Edmund Sherman & Evelyn S. Newman, *The Meaning of Cherished Personal Possessions for the Elderly*, 8 INT’L J. AGING & HUM. DEV. 181, 183-91 (1977-1978) (describing interviews of 94 elderly persons, 81% of whom were able to identify cherished possessions; observing that lack of such possessions correlated with lower life satisfaction scores); Unruh, *supra* note 6, at 341-49 (describing link between personal property, memories, and “identity”). For a comprehensive study and theoretical discussion on how possessions take on symbolic importance in peoples’ lives, see CSIKSZENTMIHALYI &

nine different nursing homes, researchers found that residents who were able to keep “cherished” possessions with them in their rooms were better adapted, had a sense of belongingness, felt more in control, responded more appropriately to conflict, and felt less helpless.⁹² The study defined a possession as “cherished” if the owner considered it to be “special” because it either “embod[ied] goals, serve[d] a valued purpose, or reflect[ed the owner’s] identity.”⁹³ Approximately seventy-four percent of the participants reported having at least one cherished object, with the most frequently mentioned including entertainment and communication devices (television sets and radios), furniture, and keepsakes (including photographs and artwork).⁹⁴ The objects’ primary value, the researchers observed, came from providing continuity for the owners and making their transitions less disorientating.⁹⁵ Although there is always a danger that a property owner who is attached to a possession will fetishize it,⁹⁶ more commonly the owner’s emotional and psychological flourishing and the owner’s attachment to the property derive from the life experiences the owner associates with the property rather than with the possession itself.⁹⁷ And, just as these cherished possessions can have positive effects on their owners’ wellbeing, the converse is also true; the loss or destruction of a treasured item can have a detrimental effect.⁹⁸ For example, where the elderly are prohibited from taking special possessions with them to a

ROCHBERG-HALTON, *supra* note 11, at 55-89.

92. Seymour Wapner, Jack Demick & Jose Pedro Redondo, *Cherished Possessions and Adaptation of Older People to Nursing Homes*, 31 INT’L J. AGING & HUM. DEV. 219, 221-22 (1990).

93. *Id.* at 219-21; *see also* Kroger & Adair, *supra* note 78, at 6 (“[C]herished, treasured, and valued objects or possessions . . . refer to those physical objects that hold a special meaning for the individual. The object is more than a possession serving a utilitarian purpose. It holds a meaning for the owner that may defy rational explanation, but provides the owner with a sense of pleasure, comfort, attachment, or well-being.”); Sheldon S. Tobin, *The Meaning of Things*, 20 GENERATIONS (1996) at 2 (defining cherished possession as “a possession for which there is a special fondness.”).

94. Wapner *et al.*, *supra* note 92, at 225-27.

95. *Id.* at 226; *see also* Kroger & Adair, *supra* note 78, at 17-20 (describing how possessions create continuity); Dena Shenk, Kazumi Kuwahara & Diane Zablotsky, *Older women’s attachment to their possessions*, 18 J. AGING STUD. 157, 161-67 (2004) (describing how in-depth interviews with four widows, aged 64-80, who were living in homes where they had previously lived with deceased husbands, revealed inhabitants’ attachment to place and possessions); Edmund Sherman & Joan Dacher, *Cherished Objects and the Home: Their Meaning and Roles in Late Life*, in ESSENCE OF HOME 63, 71-72 (2005) (surveying studies on significance and association of treasured objects with wellbeing of older adults).

96. Fetishism is defined as a “situation in which a focus on property can lead to unhealthy functioning.” Blumenthal, *supra* note 32, at 642; *see also* Radin, *supra* note 2, at 968-70 (discussing the “problem of fetishism”).

97. *See* Blumenthal, *supra* note 32, at 642; *see also* Denise E. Delorme, George M. Zinkhan & Scott C. Hagen, *The Process of Consumer Reactions to Possession Threats and Losses in a Natural Disaster*, 15 MARKETING LETTERS 185, 195 (Dec. 2004) (“[O]ur study provides further indication that consumer meaning derives not from possessions per se but from experiences associated with the process of possessing and ownership, a cycle that encompasses disposition as well as acquisition.”).

98. Brandon Berry, *Reflections of Self from Missing Things*, 642 ANNALS AM. ACAD. POL. SOC. SCI. 228, 228 (July 2012); Delorme *et al.*, *supra* note 97, at 194-95; Kroger & Adair, *supra* note 78, at 17; Ann McCracken, *Emotional Impact of Possession Loss*, 13 J. GERONTOLOGICAL NURSING 14, 14-17 (1987); *see also* Sherman *et al.*, *supra* note 91, at 182 (describing study by Frankl on how concentration camp residents whose personal possessions were taken away lost any link to their former lives).

nursing home, health suffers.⁹⁹ As a result of these studies, practical and clinical uses for cherished objects have been proposed to aid in providing integrative long-term care.¹⁰⁰

In sum, the connection between a cherished item of personal property and its owner's wellbeing has been firmly established. The question becomes what role the property—and its symbolic power—plays when the item is transferred. Do the things that brought joy, solace, stability, and welfare to the *owner* continue to have meaning and purpose (above their economic value) even when the owner has died? Can gifting an item confer its unique meaning on the recipient and, if so, how?¹⁰¹ Research about *why* certain possessions have symbolic significance and how owners successfully divest themselves of such cherished items provides some insight into these issues, too.

Russell Belk, who has written on and studied object attachment theory in an effort to understand how possessions can affect consumer behavior and individual flourishing,¹⁰² attributes the power of cherished possessions to the fact that the possessions “provide security through the magical belief that we are anchored in the world and are not floating about,”¹⁰³ the possessions reflect status,¹⁰⁴ and the possessions help us to know who we are, to establish self-identity.¹⁰⁵ Other researchers agree that a possession has significance to its owner over and above the possession's replacement or monetary value—in other words, is “endowed” or “cherished”—for two primary reasons: because the item symbolizes the owner's values and thus her moral identity; and because the item is associated with memories that link the owner to others.¹⁰⁶ In a broad study involving interviews with

99. McCracken, *supra* note 98, at 17 (“possession loss by elderly women [is] a difficult and threatening event”); Sherman *et al.*, *supra* note 91, at 189-90 (“lack of a cherished possession is a meaningful fact in lives of elderly persons”) (emphasis in original).

100. McCracken, *supra* note 98, at 18-19; Sherman *et al.*, *supra* note 91, at 73-78. For an in-depth discussion of innovative elder care design, see GAWANDE, *supra* note 4, at 111-48.

101. Susan Schultz Kleine, Robert E. Kleine III & Chris T. Allen, *How is a Possession “Me” or “Not Me?” Characterizing Types and an Antecedent of Material Possession Attachment*, 22 J. CONSUMER RES. 327, 327-29 (2004).

102. See Russell W. Belk, *Collecting as Luxury Consumption: Effects on Individuals and Households*, 16 J. ECON. PSYCH. 477 (1995); Belk, *supra* note 86, at 37; Belk, *Sense of Past*, *supra* note 81, at 114; Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139 (1988) [hereinafter Belk, *Extended Self*] (citing publications).

103. Belk, *Sense of Past*, *supra* note 81, at 124.

104. *Id.*

105. *Id.*; Belk, *Extended Self*, *supra* note 102, at 139-68; see also David Ekerdt, Julie F. Sergeant, Molly Dingel & Mary Elizabeth Bowen, *Household disbandment in later life*, 59B J. GERONTOLOGY 265, 267-69 (2004) (enumerating reasons why people hold on to things, including: the things seem useful, are worth money, give pleasure, represent the owners, and conjure the future; social reciprocity to donor; responsibility to forbears; conservation; and space availability).

106. See Blumenthal, *supra* note 32, at 615-16; see also Kent Grayson & David Shulman, *Indexicality and the Verification Function of Irreplaceable Possessions: A Semiotic Analysis*, 27 J. CONSUMER RES. 17, 19 (2000) (“irreplaceable special possessions are indices because they have a factual, special connection with the special events and people they represent . . . and verify important moments of personal history”); Kroger & Adair, *supra* note 78, at 11 (summarizing research to conclude that “studies that have explored the symbolic meanings of cherished personal possessions have pointed to the importance of the cherished object as an expression of self or identity as well as an

three generations of participants,¹⁰⁷ researchers found that those individuals who refused to identify a cherished object, asserting that, “human relationships are so much more important” tended to lack a close network of human relationships; indeed, “[t]hose who were most vocal about prizing friendship over material concerns seemed to be the most lonely and isolated.”¹⁰⁸ While this observation did not mean that possessions were necessary to relationships, it did cause the researchers to observe that “[t]hose with ties to people tended to represent them in concrete objects.”¹⁰⁹ A more recent study involved interviews of nursing home residents who were asked about a cherished object, including how the object was important to the owner and how the owner’s life would be different if she no longer had the object.¹¹⁰ After the responses were coded, the researchers concluded that “[b]y far the most common symbolic link made by participants when describing valued possessions was to cherished relationships,” including relationships over time.¹¹¹ Accordingly, “[p]assing a cherished object down to the next generation was an important symbol of identity connection and continuity.”¹¹²

Social scientists also have studied “divestiture”¹¹³ of cherished possessions.¹¹⁴ Anthropologist Beverly Morris, for example, interviewed

expression of personal and family continuity and life history over time”); Beverly R. Morris, *Reducing Inventory*, 4 J. WOMEN & AGING 79, 82 (1992) (describing research subjects’ awareness “that the ‘value’ of their personal possessions lay in the attached memories and meanings”); Tobin, *supra* note 93, at 2 (fondness for a cherished possession comes “from the evocation of memories that are meaningful”). In a plea for additional empirical studies to test the relationship between property and personhood, Jeremy Blumenthal explains how existing psychological studies showed two lines of research underlying the “property as identity” theory: first, “sacredness and inalienability arise because of the familial nature of heirlooms; that is, that the ‘personal’ property that Radin may view as meriting increased moral and legal protection may be better thought of as ‘familial’ property, constitutive of a kinship group identity rather than a personal identity.”; and second, how psychological ownership, as distinct from legal ownership “can help individuals define themselves, maintain the continuity of the self, and express their self-identity to others.” *Id.* at 616.

107. CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 11, at 55-56.

108. *Id.* at 164.

109. *Id.*

110. Kroger & Adair, *supra* note 78, at 12-13.

111. *Id.* at 15-16; see also A. Peter McGraw, Philip E. Tetlock & Orië V. Kristel, *The Limits of Fungibility: Relational Schemata and the Value of Things*, 30 J. CONSUMER RES. 219, 221-28 (2003) (describing studies testing how the relational history of objects affected consumers’ willingness to sell or acquire those objects).

112. Kroger & Adair, *supra* note 78, at 17. These researchers concluded by calling for further study of decision-making associated with the object’s “continued existence” given owners’ concern that the “cherished object would also be treasured by the recipient.” *Id.* at 22; see also Carolyn Folkman Curasi, *In Hope of an Enduring Gift: The Intergenerational Transfer of Cherished Possessions: A Special Case of Gift Giving*, 26 ADVANCES IN CONSUMER RES. at 127-29 (1999) (describing owners’ concern that gift recipients understand the “sacred” meaning of cherished items).

113. Morris, *supra* note 106, at 80 (defining divestiture as “disposition, distribution or destruction of personal possessions and family heirlooms”).

114. *Id.* at 80-90; Curasi *et al.*, *supra* note 22, at 370; Curasi, *supra* note 112, at 125; Price *et al.*, *supra* note 91, at 179; see also Delorme *et al.*, *supra* note 97, at 185-86 (summarizing research on voluntary disposition); David J. Ekerdt & Julie F. Sergeant, *Family things: Attending the household disbandment of older adults*, 20 J. AGING STUDS. 193, 193-205 (2006) (describing empirical study of social dimensions of disbanding possessions to relocate to smaller to living quarters); Kroger & Adair, *supra* note 78, at 22 (summarizing research).

nine women associated with an elder scholars program and asked them about their cherished items and what they planned to do with them.¹¹⁵ Morris's research prompted her to observe that the act of selecting which items were to be distributed, thrown away, or destroyed is a form of "image management," by which the owner reviews her life and selects particular events that have meaning and "make life appear coherent."¹¹⁶ One divestiture strategy Morris describes, for example, is "labeling," by which the owner "mark[s] or tag[s] cherished items with a statement of the [item's] importance, value or story."¹¹⁷ Marketing scholars Carolyn Folkman Curasi, Linda L. Price, and Eric J. Arnould have studied the motivations and processes involved in the intergenerational transfer of cherished possessions, compiling data from a series of in-depth interviews conducted over a four-year period.¹¹⁸ Their research shows that owners who are considering when, how, and to whom to leave their cherished possessions are primarily interested in finding recipients who will be able to appreciate the objects' symbolic and mnemonic value.¹¹⁹ Recipients, in turn, told stories about the cherished possessions and the memories those possessions evoked.¹²⁰ Telling stories about the property, the scholars observe, is a tactic by which an owner is able to transfer meaning—lessons and values—to her survivors.¹²¹ In fact, directly addressing estate planning and other "end-of-life" professionals on how to build loyalty, avoid family conflict, and ensure that "older consumers' legacy will endure," these scholars recommend developing a written plan for cherished possessions that includes stories about the objects "as well as an explanation about what the item symbolizes and its history" and "why they selected the individual they did to receive this item."¹²²

Finally, sociologist David Unruh conducted empirical studies to test what strategies people who are facing or merely aware of death use "to preserve and communicate" how they should be remembered and what

115. Morris, *supra* note 106, at 80-81.

116. *Id.* at 90.

117. *Id.* at 88.

118. Curasi *et al.*, *supra* note 22, at 372-73 (describing methodology); Curasi, *supra* note 112, at 126 (same); see also Carolyn F. Curasi, *Intergenerational Possession Transfers and Identity Maintenance*, 10 J. CONSUM. BEHAV. 111, 114-17 (2011) [hereinafter Curasi, *Intergenerational Transfers*] (random, national study of 2000 adults, more than 18 years of age, confirmed findings from naturalistic investigations). The same group of scholars collected literature on, and conducted interviews to assess, what stimulates an "older consumer" to dispose of a cherished possession and the emotions, meanings, and goals associated with that disposition decision. See Price *et al.*, *supra* note 91, at 179.

119. Curasi, *Intergenerational Transfers*, *supra* note 118, at 114-15; Curasi *et al.*, *supra* note 22, at 374-78; Curasi, *supra* note 112, at 127-28; Price *et al.*, *supra* note 91, at 190-93.

120. Curasi, *Intergenerational Transfers*, *supra* note 118, at 117; Curasi, *supra* note 112, at 127-29.

121. Curasi, *supra* note 112, at 129; Price *et al.*, *supra* note 91, at 183; see also Ekerdt *et al.*, *supra* note 105, at 270 (describing narrative accounts of gift-giving).

122. Curasi *et al.*, *supra* note 22, at 380-81.

strategies survivors use to preserve identities of the deceased.¹²³ Recounting to survivors “the ‘stories’ behind an acquired object and the meaning it once had for the deceased,” Unruh concludes, allows the deceased’s identity to pass along with the object itself.¹²⁴ For example, a rocking chair described as “the one my grandmother used for 60 years as she raised her family” will link “the grandmother’s identity of caring mother” to the chair itself.¹²⁵ Recently, Naomi Cahn and Amy Zietlow conducted a series of interviews with people who were involved in probating estates in Baton Rouge, Louisiana, “to develop insight into people’s actual experiences with the transmission of wealth.”¹²⁶ Survivors, describing the gifts they received from deceased loved ones, “thought of inheritance as going beyond financial assets.”¹²⁷ Items like “a work shirt from Sears” and “a teddy bear made out of the shirts of a stepdad” helped make a survivor feel valued.¹²⁸

Not surprisingly, the themes that emerge from these empirical studies echo the themes that resonate in the discussion of narrative theory. Cherished possessions “help narrate a person’s life story”¹²⁹ and communicate who a person is and how she connects to others.¹³⁰ The meaning an owner attributes to a possession is associated with the memories that the possession evokes; conveying that meaning—telling future owners that story—plays a key role in sharing the original owner’s identity and values with her community.¹³¹ In sum, property that may seem insignificant based on economic value alone has tremendous expressive, and in particular narrative, potential. One way to defend the notion that estate planners should deliberately integrate stories into legal

123. Unruh, *supra* note 6, at 340-44.

124. *Id.* at 344.

125. *Id.* Curasi’s research confirmed Unruh’s, although she noted the need for additional research to determine “[u]nder what circumstances are these stories and meanings bundled with the cherished possession most effectively transferred.” Curasi, *supra* note 112, at 131.

126. Cahn & Zietlow, *supra* note 21, at 333 (describing methodology).

127. *Id.* at 341-42.

128. *Id.* at 370.

129. Kleine *et al.*, *supra* note 101, at 341.

130. Richins, *supra* note 78, at 505-07 (describing how empirical studies on possessions’ meaning show value to derive from utilitarian function, communication about social relationships, and owner identity and expression); see also Linda A. Bennett, Steven J. Wolin & Katharine J. McAvity, *Family Identity, Ritual, and Myth: A Cultural Perspective*, in FAMILY TRANSITIONS 211, 218 (Celia Jaes Falicov ed., 1988) (describing how family myths embody rituals but in narrative form and “inform or remind all family members who they are, what they are to believe, and how they are to behave, and . . . promote the continuity of family identity from one generation to another”); Kroger & Adair, *supra* note 78, at 23 (“[O]bjects were concrete, physical reminders of who the participant was, who he or she is now, and how he or she is connected across time and place to present, past, and future generations and eras.”); Price *et al.*, *supra* note 91, at 187-89 (describing how possessions are “narrative mnemonic life tokens” and “emblems of kinship structure” and explaining data that confirms “the social, storied nature of special possession attachments”).

131. See ANGEL, *supra* note 19, at 58-91 (describing conversations with “hundreds of people about their attitudes toward gift giving and family inheritance” in chapters entitled “Money Memories: Narratives of the Meaning of Giving and Receiving” and “Contemporary Values and Beliefs regarding Intergenerational Transfers”).

texts, like wills, is to show how prevalent stories already are in this area of the law, which is both so technical and yet so intimate. Accordingly, before addressing how and why to include property stories in wills, the following Part traces the many ways that narratives, cherished possessions, and inheritance *already* interact and intersect. More particularly, Part II examines fictional and legal inheritance texts to demonstrate the vibrant relationship among stories, transfers at death, systems of values, and principles of conduct.

II. THE PREVALENCE OF INHERITANCE STORIES

That stories are fundamental to legacy may explain the many texts—literary and legal—that struggle with conflicts arising over how property is passed on at death. Because death is a “universal experience” and “perhaps the fact of existence most difficult to come to terms with,”¹³² the act of writing about death, regardless of genre, is simultaneously captivating and excruciating.¹³³ This Part uses a sampling¹³⁴ of texts to examine the ways different genres contain and use narratives about property transfers at death. Section A discusses fictional works, Section B discusses judicial opinions, and Section C discusses wills. All of the genres—literary and legal—support the idea that stories connect property to identity, so that an individual who seeks to create a legacy that will last forever, or at least outlast her corporeal existence, does not simply convey property but rather uses the property to connect what is important in the individual’s life to the beneficiaries’ futures—in essence, to build the “moral communities” about which Rose and Baron (and many of the progressive property advocates) theorize.¹³⁵ These texts not only prove how stories and inheritance are intertwined but also illustrate the moral and social components of inheritance, the impact of inheritance on family and community, and finally the varied but powerful roles played by cherished items of personal property.

A. Fictional Legacy Narratives

Inheritance law frequently purports to be about a property owner’s “personal volition.”¹³⁶ Indeed, a testator’s freedom to dispose of her estate

132. See JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 73 (1973).

133. In a section entitled “A Comparative Anthology on Death,” White juxtaposes legal and non-legal speech about death to highlight how difficult it is to write about this subject without somehow dehumanizing or reducing the subject and object of the writing. *Id.* at 73-79; see also Baron, *supra* note 12, at 676 (describing challenges of interpreting writing about death in shadow of emotions, grief, and loss).

134. Like White, I am overwhelmed with sources “too numerous and varied . . . to be any more than suggestive.” WHITE, *supra* note 132, at 74. I have therefore selected some samples to illustrate the variety of approaches and purposes; one may think of better or more popular examples, but the ones I have chosen resonated with me for the reasons described in the text.

135. See *supra* notes 43-70 and accompanying text.

136. FRANK, *supra* note 13, at 3 (“[T]he will is generally understood . . . to be an expression of

in any manner she desires, whimsical, cruel, grateful, or otherwise is well recognized throughout cases, treatises, and legal scholarship.¹³⁷ For testamentary dispositions to be enforceable, however, they must comport with specific legal requirements, and so often necessitate the law's intervention and interpretation.¹³⁸ There is thus a nexus between individual volition—"will," so to speak—and a system and infrastructure that is needed to effectuate that will, involving not only lawyers, will registries, and sometimes courts but also fiduciaries and beneficiaries. Fictional narratives use wills and other inheritance structures to document individuals' struggles with identity, relationships, and moral obligations in the context of larger societal demands.¹³⁹ These texts highlight not only the personal and emotional components of inheritance law but the social component too.¹⁴⁰ They also document how the characters, who face mortality, deal with the property they leave behind.

Although there are countless works that use legacy as a dramatic device,¹⁴¹ this Article discusses William Shakespeare's *King Lear*,¹⁴² George Eliot's *Middlemarch*,¹⁴³ and Philip Roth's *Everyman*.¹⁴⁴ These fictional narratives, stemming from quite different origins and periods, encapsulate some common themes.¹⁴⁵ Each presents characters who, facing death, struggle with how their property reinforces or undermines their connections to others. The possessions come to symbolize the owners' values, beliefs, and conduct.

the individual's personal volition, an imperative originating with the private property-owner and delivered to future generations via the law.").

137. See Deborah S. Gordon, *Forfeiting Trust*, 57 WILLIAM & MARY L. REV. 1, 3 (2015) (citing sources).

138. FRANK, *supra* note 13, at 3-6.

139. *Id.* at 8-9 (describing rhetorical value of wills in Victorian novels and explaining how the "testamentary novel marks the nexus of the literary and legal concern with identity and inheritance").

140. Not coincidentally, many fictional works about inheritance have been revisited by modern authors who seek to highlight and question assumptions in the original text. See, e.g., JANE SMILEY, *A THOUSAND ACRES* (1991) (revisiting *King Lear*). Exploring the counter-narratives, or plural intertextualities, side-by-side with the original can help a reader understand what is at stake for each of the characters, even those who play supporting roles.

141. See, e.g., Sneddon, *Will as Narrative*, *supra* note 4, at 358 ("Fiction books, including Charles Dickens's *Bleak House*, Robert Louis Stephenson's *Dr. Jekyll and Mr. Hyde*, Jane Austen's *Sense and Sensibility*, George Eliot's *Middlemarch*, Henry James's *Portrait of a Lady*, and Agatha Christie's *Peril At End House*, use wills as plot devices."); Stone, *supra* note 8, at 426 (discussing, among others, Henry James's novels *Portrait of a Lady* and *Washington Square*, George Eliot's novel *Middlemarch*, Marilynne Robinson's novel *Gilead*, and Maria Katzenbach's novel *The Grab*).

142. WILLIAM SHAKESPEARE, *KING LEAR* (Louis B. Wright ed., Folger Library Edition 1957) (First Folio 1623).

143. GEORGE ELIOT, *MIDDLEMARCH* (Signet Classic ed., 1964) (1872).

144. PHILIP ROTH, *EVERYMAN* (2006).

145. Both *Middlemarch* and *Everyman* deal directly with the aging, death, and inheritance of at least one major character. *King Lear* does not deal directly with the transfer of property on death; as Kenji Yoshino explains, however, Shakespearean texts are particularly useful because "our heterogeneous society does not have many shared texts," and Shakespeare's plays are "among the few secular texts that remain common enough and complex enough to sustain" conversations about justice. YOSHINO, *supra* note 15, at xiii.

King Lear, often described as Shakespeare's greatest work,¹⁴⁶ presents two parallel plots involving old men, their communities, and their property.¹⁴⁷ The primary story's essence is familiar, even to those who have never read the play or seen it performed: an aging patriarch who "hungers for assurances of devotion"¹⁴⁸ seeks to finalize the division of his realm among his three daughters at a "love trial"¹⁴⁹ during which each is to attest publicly to her filial piety.¹⁵⁰ The two eldest daughters, Goneril and Regan, deliver fawning speeches that earn each of them a share of the estate.¹⁵¹ Cordelia, youngest, dearest, and most sincere, refuses to participate in the ceremony;¹⁵² her unbending attitude shames the stubborn monarch and, though he loves Cordelia most, Lear disinherits and banishes her.¹⁵³ Lear's property disposition decisions set off a complicated series of duplicitous and cruel acts that end in complete and, at times gratuitous, devastation.

The early scenes of disinheritance in *King Lear* are the play's most memorable not only because "[e]verything in the play hangs" from them but also because they are "ritualistic, mythic, like [a] fairy tale."¹⁵⁴ Legacy, *King Lear* teaches its audience, is built from a lifetime of personal interactions and neither from formal incantations of love nor from fate. In this regard, Lear's words to his children upon seeing how they respond to his "generosity" are revealing. Addressing Cordelia as his "sometime daughter" when she refuses to describe her love for him, Lear "disclaim[s] all [his] paternal care, propinquity, and property of blood," holds this favorite child forever "as a stranger to [his] heart,"¹⁵⁵ and chooses words like "barbarous" and "gorge" to reflect his intensity of dismay.¹⁵⁶ Lear uses similar language when he later curses Goneril, praying that "her womb convey sterility!" or "[i]f she must teem, create her child of spleen" that "stamp[s] wrinkles in her brow of youth" and "[t]urn all her mother's

146. A.C. BRADLEY, SHAKESPEAREAN TRAGEDY 200, 214-29 (Fawcett 2d ed., 1986); see also MARILYN FRENCH, SHAKESPEARE'S DIVISION OF EXPERIENCE 219 (1981).

147. Apart from the central character, the numerous supporting roles are, for the most part, one-dimensional. BRADLEY, *supra* note 146, at 217. Representing "unselfish and devoted love," on the one hand, and "hard self-seeking" on the other, the two groups prompt the reader (and audience) to ponder not only how vastly different natures occur in this world, but also how children of the same parent can be vastly different. *Id.*; see also FRENCH, *supra* note 146, at 239 ("Except for Lear and Gloucester, who err and suffer and grow, who provide the human level of the play, the remaining characters are divided almost instantly into the utterly good and the utterly evil.")

148. BRADLEY, *supra* note 146, at 205.

149. YOSHINO, *supra* note 15, at 110.

150. SHAKESPEARE, *supra* note 142, at act 1, sc. 1, ll. 49-54.

151. *Id.* at act 1, sc. 1, ll. 49-56-87.

152. *Id.* at act 1, sc. 1, ll. 87-110.

153. BRADLEY, *supra* note 146, at 206; see also YOSHINO, *supra* note 15, at 210-19 (describing how Lear used the love trial to alter division of the kingdom according to birth order, hoping to give Cordelia, "last and least," the choicest share; Cordelia's disrespect for the game compelled Lear to disinherit her).

154. FRENCH, *supra* note 146, at 226.

155. SHAKESPEARE, *supra* note 142, at act 1, sc. 1, ll. 120-22.

156. *Id.* at act 1, sc. 1, ll. 123-25.

pains to laughter and contempt.”¹⁵⁷ The monarch’s attitude toward his daughters, the venomous language suggests, impacts how Lear will live out his days and be remembered.¹⁵⁸

And yet, the audience pities and feels for the failing Lear, both as he becomes more human and, even at his advanced age and in a whirling state of madness, he learns and repents. Toward the end of the play, and before the final catastrophes, a diminished Lear and an ever-faithful Cordelia head off to prison together. As they go, the story Lear tells of his dying wishes, and the words he uses to tell it, have changed significantly:

Come, let’s away to prison
 We two alone will sing like birds i’ the cage.
 When thou dost ask me blessing, I’ll kneel down,
 And ask of thee forgiveness. So we’ll live.
 And pray, and sing, and tell old tales, and laugh
 At gilded butterflies . . .¹⁵⁹

Facing mortality, Lear’s words and images have been transformed from majestic and global to trifling and local: birds singing in a cage and telling old tales. Appearance, position, law, politics, and even property have faded, and love has replaced them.¹⁶⁰ Lear, who starts the play as a monarch, ends it as a man.¹⁶¹ The power of this transformation, however, is undercut by Cordelia’s death—so unnecessary and cruel that producers of the play for years imagined a substituted (and happier) ending.¹⁶² But death’s inevitability is one truth that *King Lear* illustrates. Salvation, Shakespeare reminds his audience, comes from the bonds of intimacy we forge during life. While *King Lear* is thus a narrative primarily about aging and dying, it also warns how property—here, a kingdom—can fortify the owner’s community or destroy it. Tragically, the king uses the gift of his realm to assess and control his daughters’ love rather than to transmit some lasting part of himself to them.

In *Middlemarch*, George Eliot deliberately raises questions about the role of legacy when, for example, she depicts her heroine Dorothea Brooke wondering “Was inheritance a question of liking or of responsibility?”¹⁶³ The realism that characterizes nineteenth century novels generally, and *Middlemarch* in particular,¹⁶⁴ allows readers to

157. *Id.* at act 1, sc. 4, ll.276-91.

158. BRADLEY, *supra* note 146, at 234 (“The question is not whether Goneril deserves these appalling imprecations, but what they tell us about Lear. They show that, although he has already recognized his injustice toward Cordelia . . . the disposition from which his first error sprang is still unchanged.”).

159. SHAKESPEARE, *supra* note 142, at act 5, sc. 3, ll. 9-14.

160. YOSHINO, *supra* note 15, at 230-32.

161. See FRENCH, *supra* note 146, at 222; BRADLEY, *supra* note 146, at 234-43.

162. See YOSHINO, *supra* note 15, at 230-31; BRADLEY, *supra* note 146, at 200-01; see also FRENCH, *supra* note 146, at 219 (“Less courageous souls . . . sweeten the play with promises of salvation.”).

163. ELIOT, *supra* note 143, at 362.

164. FRANK, *supra* note 13, at 83 (describing 19th century realist novels and referring to

consider not only “legal commands” but, more importantly, “normative questions of morality in order to create a vantage point” for critique of the law and its impact on the social order.¹⁶⁵ Much of the action in *Middlemarch* centers on the wills of two foolish old men, Edward Casaubon, a feckless scholar, and Peter Featherstone, an indecisive manipulator, who seek to use their property, and specifically their wills, to achieve immortality of a sort. As Frank explains, these characters’ “failures are illustrative of the problems (for the testator, the lawyer, and the novelist alike) of framing intention, securing it through writing, and making it effective in and constitutive of the many communities (familial, municipal, legal, and imagined) to which one belongs.”¹⁶⁶ While the intricate manipulations of both testators are fascinating, the role of the written directive in Casaubon’s will, intended to control the future of Brooke, his young wife, is most relevant here.¹⁶⁷

Casaubon’s “central ambition”¹⁶⁸ is his desire to ensure the completion of his work, titled the “*Key to all Mythologies*,” before he dies.¹⁶⁹ To help with Casaubon’s “life’s labour” was one of the reasons Brooke married the aging scholar, believing the work to be “something greater, which she could serve in devoutly for its own sake.”¹⁷⁰ But the opus, Brooke woefully discovers, turns out to be comprised of “shattered mummies and fragments of a tradition which was itself a mosaic wrought from crushed ruins.”¹⁷¹ Even its author has a “morbid consciousness that others did not give him the place which he had not demonstrably merited”¹⁷² and perceives his wife’s devotion “like a penitential expiation of unbelieving thoughts” and criticisms.¹⁷³ Diagnosed with fatty degeneration of the heart, Casaubon becomes increasingly aware of his mortality¹⁷⁴ and increasingly suspicious and jealous of those around him.¹⁷⁵

Middlemarch as the “quintessential” novel in this genre).

165. *Id.* at 75 (citing ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 3-4 (1993)).

166. *Id.* at 83.

167. Actually, in *Middlemarch* Eliot “explores and develops five different subplots involving inheritance and disinheritance,” but the Brooke plot is “primary.” Stone, *supra* note 8, at 430. Even so, some of the most memorable scenes in the novel involve the hordes of Featherstone’s “blood-relations, who naturally manifested more their sense of the family tie and were more visibly numerous now that he had become bedridden.” ELIOT, *supra* note 143, at 296.

168. ELIOT, *supra* note 143, at 406.

169. *Id.* at 463.

170. *Id.* at 465.

171. *Id.* at 464.

172. *Id.* at 406.

173. *Id.* at 407. Casaubon’s writer’s block “so shames him he cannot admit it even to himself.” Stone, *supra* note 8, at 430.

174. *Id.* at 431 (“Casaubon, now afraid that he would not live to complete his project, is more jealous than ever of youth.”).

175. ELIOT, *supra* note 143, at 413 (“To Mr. Casaubon now, it was as if he suddenly found himself on the dark river-brink and heard the splash of the oncoming oar, not discerning the forms but expecting the summons. In such an hour the mind does not change its lifelong bias, but carries it onward in imagination to the other side of death, gazing backward, perhaps with the divine calm of beneficence, perhaps with the petty anxieties of self-assertion. . . . And Mr. Casaubon’s immediate

Ultimately, there are two “low . . . and shady places” to which Casaubon’s fear of his impending death takes him, both of which Eliot reveals in a chapter titled “The Dead Hand.” First, Casaubon seeks to extract from Brooke a pledge that “in the case of my death, you will carry out my wishes,”¹⁷⁶ without detailing the precise contours of his intentions. Not surprisingly, Brooke resists assenting “to her own doom”¹⁷⁷ but ultimately decides that she “could not smite the stricken soul that entreated hers.”¹⁷⁸ Casaubon, though, dies before Brooke can convey her answer, which plagues her until she learns of Casaubon’s second betrayal.¹⁷⁹ That second “shady place” involves a codicil to Casaubon’s will disinheriting Brooke if she marries Casaubon’s earnest young nephew, Will Ladislav, who also happens to be the rightful owner of at least part of Casaubon’s fortune.¹⁸⁰ Both Brooke and her relatives are repulsed by Casaubon’s slur on his wife’s character, describing the codicil and its author with words like “hidden alienation,” “secrecy and suspicion,” “painful subjection,” “broken,” “cruel,” and “revulsion.”¹⁸¹ The legacy Casaubon leaves—one of suspicion, jealousy, and control—rejects community rather than affirms it; as Frank observes, “[b]y giving free rein to his own interests and suspicions, Casaubon exercises the prerogative of the testator, but by exempting himself from other values and framing his will solely in reference to his personal desire, he also reaches towards . . . vengeful isolationism. . . .”¹⁸² Ultimately, Eliot teaches us, Casaubon’s “dead hand” reaps the same distrust it sows. With perfect irony, the codicil “precipitates the very thing it sought to avoid.”¹⁸³ Eliot’s warning rings clear: using a “dead hand” to manipulate the living is not only futile but also corrodes any fond memories of the decedent that he may have sought to preserve.

Finally, Philip Roth’s 2006 novella *Everyman* opens at the graveside of its unnamed narrator and immediately identifies him as both unique and ordinary: advertising executive and artist; son, grandson, brother, and father; friend, ex-husband, teacher, and lover.¹⁸⁴ As its title implies, the

desire was not for divine communion and light divested of earthly conditions; his passionate longings, poor man, *clung low and mistlike* in very shady places.”) (emphasis added).

176. *Id.* at 463.

177. *Id.* at 465.

178. *Id.* at 467.

179. See FRANK, *supra* note 13, at 88.

180. ELIOT, *supra* note 143, at 472-75.

181. *Id.* at 476-79; see also FRANK, *supra* note 13, at 88 (“As damaging a picture of Dorothea created by his will might be, it is [Casaubon’s] own testamentary character that suffers more. At last Casaubon is taken as a man of his words: like the codicil, ‘there never was a meaner, more ungentlemanly’ man.”).

182. FRANK, *supra* note 13, at 89.

183. ELIOT, *supra* note 143, at 476. Dorothea rejects Casaubon’s property and marries Will Ladislav. Stone, *supra* note 8, at 431. Of course, unlike so many beneficiaries, Dorothea has the freedom to do so because she also has money in her own right.

184. ROTH, *supra* note 144, at 1-2.

book then tells the tale of this man, both any man and every man, as he moves through his life and contemplates his failing body and his body of work.¹⁸⁵ From its opening epitaph “where youth grows pale, and spectre-thin, and dies”¹⁸⁶ to its last lines where Everyman “enter[s] into nowhere without even knowing it,”¹⁸⁷ the book is about death. At age sixty-five, the narrator retires, finalizes a third divorce, goes on Medicare, begins to collect Social Security, and sits “down with his lawyer to write a will”;¹⁸⁸ with no explanation, Everyman describes *this* act as “the best part of aging and probably even dying, the writing and, as time passed, the updating and revising and carefully reconsidered rewriting of one’s will.”¹⁸⁹ How curious! One might speculate that the process is fulfilling because it gives the person confronting death some power; Everyman’s will’s content, however, is never described. Nowhere does he tell the reader how he intends to allocate his worldly goods among his three ex-wives, his three children (two resentful sons from his first unhappy marriage and his beloved daughter Nancy), his twin granddaughters, and his successful, robust, and loving older brother, Howie. The reader is left to wonder what words Everyman sets down and what revisions he decides to make.

In contrast, though, to this lack of information about the decision-making associated with Everyman’s estate, Roth describes in intricate detail two possessions that belonged to Everyman’s father and “were not just his—they were *him*.”¹⁹⁰ The description, which appears in Howie’s eulogy of Everyman, is one of the most memorable and tender parts of the book. The first possession, the father’s jeweler’s loupe and case, were “beautiful, cherished little things he worked with, which he held in his hands and next to his heart” and were buried with their owner.¹⁹¹ The second possession was the father’s wristwatch which, to Howie’s delight, Everyman asked to inherit:

When our father died my brother asked me if I minded if he took our father’s watch. It was a Hamilton, made in Lancaster, P-A, and according to the expert, the boss, the best watch this country ever produced. Whenever he sold one, our father never failed to assure the customer that he’d made no mistake. “See, I wear one myself. A very, very highly respected watch, the Hamilton. To my mind,” he’d say, “the premier American-made watch, bar none. . . .” It *was* a classy watch, my dad did love his, and when my brother said he’d like to own it, I couldn’t have been happier.¹⁹²

185. *Id.* at 1-2.

186. *Id.* at cover page (quoting John Keats’s “Ode to a Nightingale”).

187. *Id.* at 184.

188. *Id.* at 62.

189. *Id.* at 62.

190. *Id.* at 11 (emphasis in original).

191. *Id.* at 10.

192. *Id.* at 11.

Howie explained to his fellow mourners that Everyman wound and set the watch every morning, wore it day and night except when he went swimming, and only took it off for good when he “handed it to the nurse to lock away for safekeeping while he was having the surgery that killed him.”¹⁹³ Along with the item’s obvious symbolism (a wristwatch’s purpose, after all, is to mark the passage of time), this particular cherished possession is important because it took on the essence of its owner: for the father, it symbolized connection to his customers and pride in his work and community; for the son, it symbolized his connection with his family and his past.

These three fictional narratives, stemming from diverse eras and authors, prompt parallel recognitions about death and legacy. Each depicts a character who, facing mortality, struggles with whether and how his property creates ties to others.¹⁹⁴ From Lear and his daughters, to Casaubon and his bride, to Everyman and his father, the characters in these fictional works are motivated and defined by property dispositions. Both Lear and Casaubon fail in their attempts to use their property to manipulate others and thereby defy mortality. *Everyman*’s message is slightly different because the narrator’s property decisions—embodied in his estate plan—are reported to be the most satisfying thing for him about approaching death, though the reader is told nothing about the plan’s content. We do learn, however, that the item of property Everyman inherits from his father becomes a talisman, connecting and grounding him in memories of his family.

Fictional texts help reveal the fundamental bond between stories and inheritance, characterized by a struggle between personal volition and the communities that both sustain and subvert that “will.” Although the fictional texts admittedly provide few answers and no clear roadmaps for conduct, they do highlight how identity is linked to property and, specifically, its transfer from the dead to the living. As the following section demonstrates, legal legacy narratives, or at least those that arise from court proceedings, are characterized by conflicting versions but surprisingly similar stock characters and themes. Here, as in the fictional works, property becomes important not only for its economic value but also for its symbolic role connecting the decedent to survivors.

193. *Id.* The watch ultimately ended up with Everyman’s daughter, Nancy, who must punch a new notch in the band to accommodate her smaller wrist.

194. Interestingly, all three texts depict the female characters as objects (or potential objects) of bounty rather than as donors and property owners in their own rights. For a fascinating contrast, see Darach Turley & Stephaine O’Donogue, *The sadness of lives and the comfort of things: Goods as evocative objects in bereavement*, 28 J. MARKETING MGMT. 1331 (2012), which analyzes Joan Didion’s memoir, *The Year of Magical Thinking*, and in particular person-object relations at times of bereavement.

B. Legal Legacy Narratives

Narratives pervade inheritance law in a variety of ways. Judicial opinions, of course, are replete with stories, as “[e]ach case is a drama in human relationships and a cautionary tale.”¹⁹⁵ This idea holds true not only for cases raising the most incendiary claims, like lack of capacity¹⁹⁶ or undue influence,¹⁹⁷ but also for more mundane challenges based on drafting errors,¹⁹⁸ forfeiture clauses,¹⁹⁹ or ambiguous terms.²⁰⁰ Even in these quite ordinary contests, friends, families, fiduciaries, and charities show themselves unable to resolve intimate property disputes without judicial intervention. The briefs in these cases, as with persuasive briefs generally,²⁰¹ contain stories too; indeed, any inheritance matter that ends up in litigation involves not only competing theories about who is entitled to the property at stake but also various counter-narratives, or subtexts, that provide background, meaning, and emotional context to the theories.²⁰² Finally, even legislation about inheritance can have a narrative component.²⁰³

Although there are many ways to document how stories pervade inheritance law, this section uses a 2015 undue influence case, *Cresto v. Cresto*,²⁰⁴ and a 2011 ambiguity case, *In re Gourary*,²⁰⁵ to examine how the themes of mortality, community, and property emerge through narratives.²⁰⁶ In *Cresto*, two of the testator’s genetic children sought a

195. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES xxxv (9th ed. 2013).

196. See, e.g., *In re Strittmater’s Estate*, 53 A.2d 205 (N.J. 1947).

197. See, e.g., *Estate of Morrell*, 853 N.W.2d 525 (Neb. 2014).

198. See, e.g., *Banner v. Vandeford*, 748 S.E.2d 927 (Ga. 2013).

199. See, e.g., *Smithsonian v. Meech*, 18 S. Ct. 396 (1898).

200. See, e.g., *Matter of Estate of Krokowsky*, 896 P.2d 247, 254 (Ariz. 1995) (*en banc*).

201. See LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 271-86 (2012) (describing the role of storytelling in brief writing).

202. See Brooks, *supra* note 59, at 16 (describing prominence of conflicting narratives in the law).

203. Consider, for example, the Uniform Probate Code’s section defining the parent-child relationship for the purposes of intestate distribution. Unif. Probate Code §§ 2-115 through 2-122 (Unif. Law Comm’n 2010). These intricate provisions recognize that, in addition to blood relatives, families may be comprised of genetic, step, and adopted parents and children, §§ 2-115 & 2-119; may or may not involve a marriage, § 2-117; and may involve “third party” donors, gestational carriers, and assisted reproductive technology, § 2-120. Yet functioning as parent means “performing functions that are customarily performed by a parent, including fulfilling parental responsibilities” and “materially participating in the child’s upbringing.” *Id.* §§ 2-115(4). This version of “once upon a time” is significantly different from the more traditional version that the statutes told only a few years ago. Far more mundane statutes tell stories, too. See § 2-502(b) (will is valid if signed “in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction”).

204. 358 P.3d 831 (Kan. 2015).

205. 932 N.Y.S.2d 881 (Surr. Ct. N.Y. Co. 2011), *aff’d*, 943 N.Y.S.2d 80 (2012).

206. It is tempting to try to fashion an objective way to choose legal texts for analysis. I could, for example, look at a slice of cases from a particular jurisdiction and era. I also might select a single property-driven topic and look at all cases dealing with this topic. My point, though, is that any case, from the highest court to the lowest, tells a story about people’s lives and carries with it subtexts and undisclosed stories, fixed at the point in litigation but also quite fluid, both personal and universal. I therefore make no pretense of objectivity and instead have chosen two cases that tell stories that are not unusual but exceedingly interesting.

declaration that their father's 2008 will and *inter vivos* trust resulted from undue influence exerted by their stepmother and her "agent," an estate planning lawyer who happened to have a personal, romantic relationship with a member of the family.²⁰⁷ By way of background, the testator married his first wife, the plaintiffs' mother, in 1952, was divorced from her when the children were young, remarried soon thereafter, and then outlived his second wife who died from cancer in 1992.²⁰⁸ Starting in 1997, the testator executed several iterations of his estate plan, distributing the bulk of his assets among his natural children and the children of his second wife.²⁰⁹ Each version of these documents, which were drafted by a Connecticut estate planning lawyer, referred to various family heirlooms, such as "valuable paintings and clocks," and incorporated a "personal property list" by which the testator used "meticulous descriptions" and "specific instructions" to dispose of those items.²¹⁰

In 2003, the testator met and then married the defendant, Kathleen (the "stepmother"), who was divorced and had seven children from her first marriage.²¹¹ One of the stepmother's daughters was in a "romantic relationship" with, and later married, an Indiana lawyer named Patricia Hackett, and Hackett drafted 2004 amendments to the testator's documents, which the plaintiffs did not challenge, and 2008 estate planning documents, which the plaintiffs sought to invalidate.²¹² The 2008 instruments, in contrast to prior versions, disinherited completely all children from the testator's first two marriages, left the bulk of his estate, including all tangible personal property, to the stepmother, and named the stepmother's seven children, along with several charities, as contingent beneficiaries should the stepmother die first.²¹³ These naked facts, which are consistent with every version of the story, show the many communities involved in this plan, including the multiple layers of marriages and legal representations.

Undue influence claims are one of the most fertile areas for competing narratives because the named beneficiaries often tell a story about the testator's life, competencies, and vulnerabilities which differs significantly from the story told by the will's challengers.²¹⁴ *Cresto* falls squarely within this model. According to the stepmother's appellate briefs, the

207. *Cresto*, 358 P.3d at 837-38.

208. *Id.* at 836.

209. *Id.* at 836-37.

210. *Id.* at 836.

211. *Id.*

212. *Id.* at 837-38.

213. *Id.* Another change was to add in 2004, and then retain in 2008, a forfeiture clause, even though at the time the final documents were drafted the children no longer would forfeit anything by a challenge (because they received nothing from the estate). Local counsel testified that the testator wanted to retain the clause to "let his children know his wishes." *Id.* at 838.

214. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 285 (2010) ("acts in undue influence cases are susceptible to completely valid conflicting readings").

testator, who was “strong-willed,” “organized,” “sharp,” “meticulous,” and “detail oriented,”²¹⁵ met the stepmother at church,²¹⁶ and their relationship “was a great love story.”²¹⁷ She even suggested, and later signed, a prenuptial agreement “so that his children would not think she was after his money.”²¹⁸ In this version of the story, the testator decided in 2008 that his children had enough money of their own, and he was more interested in providing for his wife.²¹⁹ The stepmother’s brief to the Kansas intermediate appellate court characterizes the testator as wanting to go into “simplicity mode” with respect to all of his property,²²⁰ including tangibles, so that he could finalize the documents before commencing treatment for prostate cancer.²²¹ Having discussed his documents with Hackett over the years,²²² the testator asked that she revise the documents in accordance with his wishes; because Hackett was an Indiana attorney, however, she was required to retain Kansas counsel and engaged an estate planning lawyer and former judge to serve in this capacity.²²³ The stepmother’s briefs depict the local attorney as meeting with the testator to conduct a thorough review of the terms and effects of the 2008 estate planning documents before they were executed.²²⁴ In sum, the stepmother’s brief tells a story about a testator who “was a mentally strong, physically vigorous man,” “a kind and loving spouse who had neither the purpose, nor the ability, to dominate, pressure, or coerce [testator] and destroy his free will,” and “natural children who had been raised largely in [testator’s] absence and with whom he did not have a close or warm relationship.”²²⁵

Not surprisingly, the children’s briefs tell a different story.²²⁶ The main characters include a testator who was “disoriented and confused” due to “an advanced case of prostate cancer that required aggressive treatment,”²²⁷ a spouse who meddled in every stage of the testator’s estate

215. Supplemental Brief of Appellant Cresto, Nos.12-108547-A, 12-109059-A, 2014 WL 3882687, *6-7 (Kan. July 21, 2014) [hereinafter Stepmother’s Kansas Brief]; Brief of Defendant/Appellant Cresto, Nos.12-108547-A, 12-109059-A, 2013 WL 788341, *2 (Kan. App. Jan. 22, 2013) [hereinafter Stepmother’s Appellate Brief].

216. Stepmother’s Appellate Brief, *supra* note 215, at *4.

217. *Id.* at *5.

218. *Id.* at *6.

219. *Id.* at *9-10.

220. *Id.* at *11.

221. *Id.*; see also Stepmother’s Kansas Brief, *supra* note 215, at 8-10 (describing testator’s push to get his estate in order before beginning cancer treatment).

222. Stepmother’s Appellate Brief, *supra* note 215, at *6-8.

223. Stepmother’s Kansas Brief, *supra* note 215 at 7-9; Stepmother’s Appellate Brief, *supra* note 215, at *6-8.

224. Stepmother’s Kansas Brief, *supra* note 215, at 9.

225. Stepmother’s Appellate Brief, *supra* note 215, at *25.

226. Supplemental Brief of Plaintiffs/Appellees & Cross-Appellants Cresto & Jones, No.12-108547-AS, 2014 WL 3882688 (Kan. July 21, 2014) [hereinafter Children’s Kansas Brief]; Reply Brief of Cross-Appellants Cresto & Jones, Nos.12-108547-A, 12-109059-A, 2013 WL 2318776 (Kan. App. May 10, 2013) [hereinafter Children’s Appellate Brief].

227. Children’s Appellate Brief, *supra* note 226, at *8.

planning,²²⁸ and a lawyer who was emotionally involved with a member of that spouse's family,²²⁹ a fact that she failed to disclose to local counsel.²³⁰ The children's story speaks of rushed drafting²³¹ which served to alter the documents dramatically and, among other things, deleted any reference to important and meaningful family heirlooms and other tangibles.²³² Finally, in this version local counsel spent a mere thirty minutes meeting with the client to discuss his health and other ancillary matters *and* to execute his documents.²³³ Even had this fiduciary known of Hackett's personal relationship with the stepmother and her daughter, he could not have ensured the documents reflected the testator's will in such a short time, the brief contends.

Equally compelling, these two versions of the story have themes that are familiar in many will contests: the challenges posed by blended families; the complicated roles played by fiduciaries, here lawyers; radically different versions of documents; and questions about the donor's professed intent, especially in light of his age and infirmity. The Kansas Supreme Court's opinion reflects these same themes. The trial court declared the 2008 will and trust void on the grounds of undue influence.²³⁴ Although the intermediate appellate court purported to defer to the trial court's findings of fact,²³⁵ it nevertheless "proceeded to make its own determination" about witness credibility, reversing on the ground that local counsel's testimony established that the testator "was properly counseled on the terms of his estate plans before they were executed in accordance with law."²³⁶ Based on this assessment, the appellate court found "insufficient evidence of suspicious circumstances" and therefore reversed.²³⁷ Ultimately, the Kansas Supreme Court found "substantial competent evidence" to support the trial court's application of the "suspicious circumstances" doctrine to shift onto the stepmother, the will's proponent, the burden to *disprove* undue influence,²³⁸ which she failed to do.²³⁹

Recognizing that many of the "suspicions" upon which the trial court

228. *Id.* at *9.

229. *Id.* at *9.

230. Children's Kansas Brief, *supra* note 226, at *3-5; Children's Appellate Brief, *supra* note 226, at *7-8.

231. Children's Kansas Brief, *supra* note 226, at *9; Children's Appellate Brief, *supra* note 226, at *12.

232. Children's Kansas Brief, *supra* note 226 at *9; Children's Appellate Brief, *supra* note 226, at *12-13.

233. Children's Appellate Brief, *supra* note 226, at *13-15.

234. *Cresto v. Cresto*, 358 P.3d 831, 839 (Kan. 2015).

235. *Id.* 839-40.

236. *Id.* at 840, 847.

237. *Id.* at 840.

238. *Id.* at 840-47. The first prong of this test, confidential relationship, was conceded. *Id.* at 839.

239. *Id.* at 847-49.

relied actually cut both ways,²⁴⁰ the *Cresto* court nevertheless found two of the “suspicions” credible. First, the “abrupt” and “complete disinheritance” of the testator’s children, after a lifetime pattern of adding “new family” members to the plan without replacing “old family” members, was difficult to explain and therefore concerning.²⁴¹ Second, Hackett’s involvement with, and potential benefit from, the stepmother’s family and her corresponding failure to share with local counsel information about that personal relationship supported the burden shift.²⁴² Not surprisingly, “family heirlooms,” described as paintings and clocks, also featured prominently. For example, the trial court observed that the testator had “religiously maintained and updated the separate list of personal property that was bequeathed to various persons, including the children,” and so found “suspicious” the absence of a voided or canceled list.²⁴³ The Kansas Supreme Court disagreed, finding that a detail-oriented person was just as likely to destroy a list that no longer applied as to mark it void.²⁴⁴ But “abandoning the effort to keep family heirlooms in the family” was far more suspicious.²⁴⁵ This change in pattern, the *Cresto* court held, “was inconsistent with [the testator’s] character.”²⁴⁶

Thus, *Cresto*, on its surface, depicts the types of competing stories found in many will contests, and yet a discussion of the narratives would not be complete without at least recognizing the characters, symbols, and themes that “lie just behind the express texts.”²⁴⁷ These “subtexts” often reveal, strengthen, undermine, and enhance what the texts themselves say.²⁴⁸ So, for example, *Cresto* is a story about how archetypal power

240. *Id.* at 843-46.

241. *Id.* at 843-44.

242. *Id.* at 844-45 (“If Hackett truly expected [local counsel] to independently ascertain whether the testamentary documents she had drafted were a product of the Decedent’s free will, it is suspicious that she failed to disclose that she had a close personal relationship with the family that would be taking the children’s share of the estate under the new estate plan.”).

243. *Id.* at 845.

244. *Id.*

245. *Id.* at 844.

246. *Id.*

247. Rose, *Fifth Panel*, *supra* note 33, at 12 (defining subtexts).

248. See *id.*; see also Jerome Bruner, *Life as Narrative*, 71 SOC. RES. 691, 709 (2004) (“any story one may tell about anything is better understood by considering other possible ways in which it can be told”). Carla Spivack’s use of *In re Estate of Mahoney*, 220 A.2d 475 (Vt. 1966), provides a powerful example of why subtexts matter in an area of the law that often is portrayed as morally unambiguous. See Carla Spivack, *Killers Shouldn’t Inherit from Their Victims—or Should They?*, 48 GA. L. REV. 145, 147-48 (2013). *Mahoney* involves Slayer Rules, which bar killers from inheriting from their victims. Spivack observes that the case, used in many a trusts & estates class to introduce this topic of barriers to inheritance, says little about the killing at issue other than that the husband died intestate “of gunshot wounds,” that his wife “was tried for the murder . . . and was convicted by jury of the crime of manslaughter,” and that the wife was “serving a sentence of not less than 12 nor more than 15 years.” Spivack, *supra*, at 166 (citing *Mahoney*, 220 A.2d at 476). Suspecting that Charlotte Mahoney’s killing of her husband “might have been related to spousal abuse,” Spivack dug into the case archives to discover significant facts indicating abuse, including the telltale threat that “if she ever tried to leave him, he would kill her.” Spivack, *supra*, at 167. This subtext helps reveal a moral ambiguity absent in the primary text and an important reason to seek reform. *Id.* at 215-25.

dynamics impede donative intent.²⁴⁹ Like many an inheritance dispute, *Cresto* features a “stepmother” figure²⁵⁰ who epitomizes the struggles between family related by blood and family related by marriage and thus raises concerns about illegitimate claims on affection; interestingly, it is difficult to find cases in which a stepfather figures as prominently. The case also features a second archetype, the sage advisor, a figure the audience yearns to trust and whose betrayal, or at least dishonesty, undermines the community’s confidence. In *Cresto*, one such example is the local counsel, a former federal judge, whose testimony the trial court rejected, but who is so inherently worthy of belief that the intermediate appellate court struggles with its own obligations and the standard of review in order to validate the fiduciary’s credibility.²⁵¹ The second is Hackett, an estate planning lawyer but also the stepmother’s lesbian daughter-in-law, who supplants “a long-time, trusted legal adviser”;²⁵² it is difficult not to speculate about whether Hackett’s gender and sexuality played any role in the story, if not by the court then perhaps by the litigants.²⁵³

Finally, there is the troubling subtext of the disappearing “family heirlooms,” which included paintings, clocks, and other items meticulously listed by the owner, but otherwise unidentified in the judicial opinions and briefs. These items once featured prominently in the plan and then evaporated. The court equates the treatment of tangibles with the decedent’s character, finding this deviation in the plans to be evidence of the undue influence. While this tangible property appeared to have had real economic value in *Cresto*, disputes over the ownership of cherished possessions, valuable or not, are often unsettling because of the intimate nature of this type of property.²⁵⁴ Just think of recent press discussing battles over Robin Williams’s tuxedo, Martin Luther King, Jr.’s bible, and Audrey Hepburn’s costumes and clothes.²⁵⁵

The narratives that are both express and implicit in *Cresto* are not

249. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996). This story appears throughout inheritance law and is not unique to undue influence claims.

250. For a discussion of the wicked stepmother and the awesome and frightening powers of this female archetype, see SANDRA GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC* 28-43 (1979).

251. See *Cresto*, 358 P.3d at 849 (“While one can understand the Court of Appeals panel’s disbelief that an esteemed retired federal Court of Appeals judge would provide incredible testimony, that was simply not its call.”).

252. *Id.* at 845.

253. Indeed, the undue influence doctrine has been criticized repeatedly for its malleability, especially when issues of gender and sex are involved. See Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576-77 (1997); Veena K. Murthy, Note, *Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?*, 4 CARDOZO WOMEN’S L.J. 015, 106 (1997); Spivack, *supra* note 214, at 280-84.

254. Cahn & Zeittlow, *supra* note 21, at 327 (“[T]he nuts and bolts of the inheritance process for many Americans takes place in a . . . universe . . . where the black-letter law is only a shadow, keepsakes and heirlooms assume outsized importance, and family dynamics drive outcomes.”).

255. See *infra* note 304.

unique to the case or to its subject matter. *Gourary*, another legal inheritance text, provides a useful comparison, because the case presented an ambiguity rather than an undue influence question, but it too involved personal property owned by an elderly male testator, a blended marriage, and a dubious estate planning lawyer.²⁵⁶ The dispute in *Gourary* was whether the testator's bequest to his wife of "household furniture and furnishings, books, pictures, jewelry and other articles of personal or household use"²⁵⁷ included a rare book and manuscript collection that the testator had spent "much of his life—often with [his wife's] loving assistance" creating and displaying.²⁵⁸ The wife was named executor, and she filed an account showing the collection passing entirely to her under a broad tangibles clause in her late husband's will. The testator's son from his first marriage challenged his stepmother's decision, arguing that the collection should be shared by the two of them in the same proportions as the residuary estate.²⁵⁹

The trial court, finding a latent ambiguity in the will, held a hearing.²⁶⁰ The collection was valued at \$5.2 million, but testimony "put to rest any notion that decedent 'was collecting for investment purposes.'"²⁶¹ Rather, the testator wanted to create something "that was of scholarly, historical, bibliographical and aesthetic value considered as a whole."²⁶² Notwithstanding the collection's importance to the testator, however, his will made no specific reference to those possessions apart from the general language about tangibles quoted above. Although the *Gourary* court paid scant attention to the estate planning lawyer who drafted the will, any knowledgeable reader wonders why the lawyer prepared a two-page instrument²⁶³ to dispose of a \$17 million estate.²⁶⁴

Bemoaning both the absence of a clear burden of proof in cases of ambiguity and the lack of any other specific guidance,²⁶⁵ the Surrogate analogized the situation to "determining the 'best interests of the child' in initial custody and visitation proceedings between parents."²⁶⁶ Given the testator's devotion to "making something of continuing growth" and

256. *In re Gourary*, 932 N.Y.S.2d 881, 882 (Sur. Ct. N.Y. Co. 2011) *aff'd sub nom.* *Gourary v. Gourary*, 943 N.Y.S.2d 80 (App. Div.3d 2012).

257. 932 N.Y.S.2d at 882-83.

258. *Id.* at 887-88.

259. *Id.* at 883.

260. *See id.* at 882 (describing "the difficulty of determining close cases in the absence of a clearly enunciated burden of proof").

261. *Id.* at 885.

262. *Id.* at 888; *see also id.* at 885 (expert testified that collectors seek to "discover something about these books that wasn't known before or that allows scholars and collectors to look at these books in a new way")(internal citations omitted).

263. *Id.* at 883.

264. Because the drafting lawyer was deceased when the will was probated, the court upheld a double-hearsay objection to testimony from that lawyer's colleague about the testator's intent with respect to the collection. *Id.* at 884 & n.5.

265. *Id.* at 885-87.

266. *Id.* at 887.

diverse values, the court found it “difficult to believe” that the testator “intended to include this, his life’s avocation, in the pedestrian phrases ‘books, pictures . . . and other items of personal use.’”²⁶⁷ The *Gourary* court therefore sided with the son, awarding him a share of the collection’s value; in other words, the court decided on joint custody (or, some might say, it split the baby). The story ends with the Surrogate applying the general residue clause, instead of the tangibles clause, so that the items were shared between the son and stepmother, a decision that was affirmed on review.²⁶⁸ Once again, the stepmother lost, the advisor appeared less than exemplary, and the property itself, by which I also mean the property’s original owner, ultimately was silent.

While both cases illustrate how legal texts contain narratives, more importantly both courts recognized the symbolic quality of property. The *Cresto* court equated heirlooms with character. The *Gourary* court equated the testator’s collection with children. But this symbolic—and indeed transcendent—potential may not be realized. Indeed, one moral of these cases is that where property has a special significance, there are valid reasons to acknowledge that meaning in text. The next section examines examples of testamentary documents that try to accomplish this goal.

C. Testamentary Narratives

It is not just judicial opinions that tell complicated legal inheritance stories. Wills too often have narratives buried within them.²⁶⁹ Sometimes the narratives are quite vibrant and easy to decipher, as exemplified by Benjamin Franklin’s will, which leaves his daughter, “The king of France’s picture, set with four hundred and eight diamonds,” with the request that “she would not form any of those diamonds into ornaments, either for herself or her daughters, and thereby introduce or countenance the expensive, vain, and useless pastime of wearing jewels in this country.”²⁷⁰ Sometimes the narratives are more difficult to discern and interpret, as exemplified by the will of another wordsmith, William Shakespeare, who quite famously left his estranged wife his “second best bed” with no further explanation.²⁷¹ In fact, gifts of possessions often

267. *Id.* at 888. The appellate division found “no reason to disturb that determination.”

268. 943 N.Y.S. 2d at 81.

269. See *supra* notes 61-77 and accompanying text. There are many sources for these documents, including will vaults, public databases like Ancestry.com, MegaDox.com, and NationalArchives.gov.uk, media reports about testation, and empirical studies. See Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 1 J. EMPIRICAL LEGAL STUD. 322 (2010) (providing an overview of empirical scholarship on wills).

270. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 182 (2005) (citing VIRGIL M. HARRIS, *ANCIENT, CURIOUS, AND FAMOUS WILLS* 370, 414 (1911)). A copy of the full will is available at <http://www.constitution.org/primarysources/lastwill.html>. Franklin also left his son land in Nova Scotia, books, papers, and the debts owed to him, explaining that the son’s “part he acted against [Franklin] in the late war . . . will account for my leaving him no more of an estate he endeavoured to deprive me of.”

271. See Shakespeare’s Last Will and Testament (1616) available at <http://www.shakespeare->

provoke wonder and speculation, especially when the items themselves are unique. Relating results from their study of wills from the antebellum South, for example, Alfred Brophy and Stephen Duane Davis describe as “particularly evocative” a will that bequeaths to two of the testator’s daughters an interest in a pianoforte with no further detail.²⁷² The scholars bemoan that “[w]hat story might be buried in that bequest has been lost to time” but recognize that the bequest itself “evokes suggestions of a family’s time spent together and a connection between the past and the present.”²⁷³ Another such example is found in the will of Margaret Rowan, who died in Philadelphia, Pennsylvania in 1770, and as she was “considering the uncertainty of human life,” directed her executor to give her “gold watch and buckles” to her daughter and ordered that same executor to purchase “a good silver watch” for her son, John.²⁷⁴

Other qualitative empirical studies of wills show that, as a general rule, testators are “much less frank and revealing” than they might be.²⁷⁵ In the early 1990s, for example, sociologist T.P. Schwartz studied all wills filed in the Providence, Rhode Island Probate Court in a one-year period to test theories about what motivates testamentary behavior. Schwartz found that a majority of the 319 wills he read were “relatively standard” which means that they “manifested almost no individuality beyond the names of the persons identified in the will.”²⁷⁶ But 42 percent had some “personalized” attributes, defined by Schwartz to mean “unusual features that can be attributed to the testator rather than to attorneys, family members or other entities.”²⁷⁷ One testator, for example, “not only distributes her personal property to ten friends but she explains why she makes each of the choices,”²⁷⁸ including for example, a cash gift to her “very dear friend . . . in consideration of the many kindnesses that she has extended to me.”²⁷⁹

online.com/biography/shakespearewill.html.

272. Stephen Duane Davis II & Alfred L. Brophy, *The Most Solemn Act of My Life: Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757, 782 (2011).

273. *Id.*

274. Will of Margaret Rowan (on file with author).

275. T.P. Schwartz, *Testamentary Behavior: Issues and Evidence about Individuality, Altruism and Social Influences*, 34 SOCIOLOGICAL Q., 337, 350 (May 1993); see also Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 966-73 (2010) (analyzing 323 Israeli wills and finding most to be “short, formal, standardized, and dull . . . with very few indications as to the unique personal circumstances behind it”).

276. Schwartz, *supra* note 275, at 343, 349.

277. *Id.* at 349. Of these, approximately nine percent contained “testamentary material,” which he defined as language “in which the testator testifies or bears witness to something or another that might be of relatively minor significance to probate court” but “expresses their individuality.” *Id.* at 347. Other ways that wills “manifested higher levels of individuality” were “altruism, disinheritance, use of . . . testamentary material, and the overall language, syntax and grammatical style of the will.” *Id.* at 343.

278. *Id.* at 348.

279. *Id.* at 348-50 (describing will of Annibel N. Marston which consisted of more than six pages of personalized language); see also Hacker, *supra* note 275, at 969-71 (describing wills that contain detailed lists of personal possessions and describing how the items reveal characteristics of their owners).

Contrast these results with the more elaborate narrative found in the following will supplied by a Colorado estate planning lawyer who advocates including personal values in estate planning documents:

In 1853, my great, great grandfather, Bob Jones, left the love and security of his family and home in Baltimore, Maryland. Taking his new bride, Sue, with him, they traveled west, seeking a new future in ranching. After many months of difficult and dangerous travel, Sue found herself with child (my great grandmother, Jane) and the young couple decided to settle in Denver to raise the new family. The ranch my brothers and I inherited from my grandparents, Dick and Mary Brown, was the result of the pioneering spirit and lifelong work of Bob and Sue Jones. I want my descendants to always know the character of their ancestors and the sacrifices made for their benefit.²⁸⁰

Here, the story about how the ranch came to derive its meaning is expressly connected to the property, thereby linking the generations.²⁸¹

Case law is another source of wills that contain narratives. In general, where cases discuss these wills, the documents themselves are not suspect²⁸² so long as the narratives are neither sloppy nor erroneous.²⁸³ To the contrary, where the text of a testamentary document contains an express narrative, the issues before the court appear to be more crystalized.²⁸⁴ Consider, for example, the testamentary trust of publisher Joseph Pulitzer²⁸⁵ authorizing his fiduciaries to sell any estate stock²⁸⁶ except as follows:

This power of sale . . . shall not be taken to authorize or empower the sale or disposition under any circumstances whatever, by the Trustees of any stock of the Press Publishing Company, publisher of 'The World' newspaper. I particularly enjoin upon my sons and my descendants the duty of preserving, perfecting and perpetuating 'The World' newspaper (to the maintenance and upbuilding of which I have sacrificed my health and strength) in the same spirit

280. Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 COLO. LAWYER 73, 78 (December 2003).

281. *But see* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 43 (2008) (describing "light-hearted moments" in holographic wills as "offer[ing] a rare glimpse of the largely anonymous human relationships that undergird the law" but "[u]nfortunately . . . damage[ing] the reputation of the do-it-yourself willmakers").

282. *See, e.g.*, *Williams v. Estate of Williams*, 865 S.W.2d 3, 5-7 (Tenn. 1993).

283. *See* *Lipper v. Westlow*, 369 S.W.2d 698 (Tex. App. 1963) (finding no undue influence, even though testator explained disinheritance decisions in will by telling tales that turned out to be partially wrong); *see also* Deborah S. Gordon, *Reflecting on the Language of Death*, 34 Seattle U. L. Rev. 379, 418- 21 (2011) (discussing undue influence case law).

284. *See infra* notes 340-47 and accompanying text.

285. *In re Matter of Pulitzer*, 249 N.Y.S.87 (Sur. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932).

286. *Id.* at 92.

in which I have striven to create and conduct it as a public institution, from motives higher than mere gain, it having been my desire that it should be at all times conducted in a spirit of independence and with a view to inculcating high standards and public spirit among the people and their official representatives, and it is my earnest wish that said newspaper shall hereafter be conducted upon the same principles.²⁸⁷

When the value of the publishing stock deteriorated, the *Pulitzer* court quite famously exercised its equitable power “to protect the beneficiaries of a trust from serious loss, or a total destruction of a substantial asset of the corpus.”²⁸⁸ The court observed that a person of the testator’s “sagacity and business ability could not have intended that from mere vanity, the publication of the newspapers with which his name and efforts had been associated” should be continued until the trust “was destroyed or wrecked.”²⁸⁹ The testator expected that his paper would flourish; “[d]espite his optimism, he must have contemplated that they might become entirely unprofitable and their disposal would be required to avert a complete loss,” the court reasoned.²⁹⁰ For this reason, the court authorized sale of the newspaper stock.²⁹¹ The *Pulitzer* case has sparked voluminous commentary about the type of “dead hand” control a property owner should retain.²⁹² For the purposes of this Article, though, the court appears to understand the testator’s story, which identifies the man with his life’s work; based on the identity this story establishes for Pulitzer, the court refuses to allow the trust’s value to deteriorate. Had the gift contained a statement about the importance of the newspapers to the testator without a restriction on the fiduciaries’ discretion, the results would likely have been the same (absent, perhaps, the litigation and its associated costs).

Coming full circle, George Eliot’s 1880 will, marked as “Probate of a Married Woman’s Will” and bearing the name “Mary Ann Cross,” not surprisingly tells the story of being female, in a society and at a time when women, including and especially married women, were significantly limited in their rights to deal with property.²⁹³ Eliot describes first how, through “two several indentures,” her property, both real and personal, had

287. *Id.*

288. *Id.* at 93.

289. *Id.* at 95.

290. *Id.*

291. *Id.*

292. See, e.g., Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1213 & n.230 (2008); Jeffrey A. Cooper, *Shades of Gray: Applying the Benefit-the-Beneficiaries Rule to Trust Investment Directives*, 90 B.U. L. REV. 2383, 2383-84 (2010); Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 223-25 (2011); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1118 (2004); John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 B.U. L. REV. 375 (2010).

293. FRANK, *supra* note 13, at 58.

been “settled ‘in trust for myself for my separate use for life and after my death in trust as I should by my last will and testament appoint,’” including any property arising from the “exercise of my literary skills.”²⁹⁴ She then grants several “substantial annuities to women, again being careful to specify that they shall be ‘for the sole and separate use of the respective annuitants free from the control, debts, or engagements of any husband and without power of alienation during any coverture.’”²⁹⁵ Quite appropriately, Eliot’s last will continues her life’s dominant narrative.

All of the texts discussed above, both fictional and legal, resonate with stories that show how property connects what was important in an owner’s life—her identity and values—to the future in which her loved ones reside.²⁹⁶ The purpose of this Part II is to parse sample “death texts” to document the range and diversity of stories about property owners, the property itself, and the communities involved in and linked by the gratuitous transfers and, in so doing, show how narratives already permeate inheritance law. The texts affirm the social science research discussed in Part I by illustrating the important role cherished possessions play in these stories. The following Part argues that making deliberate use of narratives—and specifically, when drafting testamentary documents—has legitimate benefits for property owners and survivors, especially when directed toward personal property dispositions whose potential is often overlooked or underestimated.

III. TELLING THE TALES OF THINGS

Without dispute, inheritance law and estate planning are primarily about property and, more specifically, about the gratuitous transfer of that property from a deceased owner to a living owner.²⁹⁷ After all, burying a decedent with her worldly goods²⁹⁸ or confiscating those possessions to benefit the general populace²⁹⁹ are not really popular options in modern society. The language of disposition surely should be crisp, clear, and unambiguous, as testamentary documents are meant to provide closure during an emotionally charged, psychologically demanding, and complicated time.³⁰⁰ In other words, wills are not novels, so ambiguity

294. *Id.*

295. *Id.*

296. See ANGEL, *supra* note 19, at 80-81 (“An inheritance is a fundamental tie between generations, and it solidifies, in a final act, a person’s place in the giver’s life and emotions.”).

297. Cahn & Zeittlow, *supra* note 21, at 369.

298. See Heinrich Härke, *Grave goods in early medieval burials: messages and meanings*, 19 MORTALITY 41, 44-52 (2014) (describing history of burying bodies with possessions, called “grave goods,” and discussing meanings archeologists have offered for such burial practices).

299. See DUKEMINIER & SITKOFF, *supra* note 195, at 19-20.

300. See Roth, *supra* note 4, at 245; see also STEPHAN R. LEIMBERG ET AL., THE TOOLS AND TECHNIQUES OF ESTATE PLANNING 69-80 (17th ed. 2015) (describing the emotions that arise during estate planning counseling); THOMAS L. SHAFFER, CAROL ANN MOONEY & AMY JO BOETTCHER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 13-15 (5th ed., Found. Press 2007) (same).

serves no purpose. At the same time, if “humankind is unable to get on without stories,”³⁰¹ and if death is a primary force in our lives,³⁰² and if stories are how we make sense of the world and relate to and understand others,³⁰³ it seems worthwhile to consider integrating this essential form of communication into the primary legal documents that deal with death. Stories about cherished possessions provide a unique opportunity for testators to connect with their survivors and infuse testation with meaning.

Although disputes about cherished possessions can spark epic battles,³⁰⁴ bequests of specific items of personal property are often viewed as trivial by estate planning lawyers and others professionally engaged in the inheritance system.³⁰⁵ A study of 800 wills dated between 1959 and 1989 found that they rarely refer to particular items of personal property, although a significant number had general bequests of personalty.³⁰⁶ Acknowledging that more comprehensive bequests “make[] interesting reading,” the authors of the study explained that it was “relatively rare for someone to go into . . . detail about their personal property or indeed to bequeath such apparently mundane items of property as pink carpets and electric fires.”³⁰⁷ One reason, the authors noted, is that professionals discourage this type of detail and suggest that gifts of tangibles be included in a non-binding side letter of instructions.³⁰⁸ Sneddon has

301. AMSTERDAM & BRUNER, *supra* note 51, at 114.

302. *See supra* notes 3-6 and accompanying text.

303. WHITE, *supra* note 59, at 242-45; Curasi *et al.*, *supra* note 22, at 374-76.

304. Joseph M. Scheuner & Olen M. Bailey, Jr., *A Legal and Practical Guide to the Disposition of Tangible Personal Property at Death*, 20 PROB. & PROP. 66, 66 (2006) (“Things have histories, stories, mythical values, family connections, and emotional attachments. These must be addressed and addressed correctly. If not, feelings become hurt, siblings become rivals, and families become divided.”). Recent celebrity deaths have made this attachment abundantly clear. *See* David Beasley, *Dispute over Martin Luther King Jr.’s Bible, Nobel medal heads for mediation*, REUTERS, May 27, 2015, available at <http://www.reuters.com/article/2015/05/27/us-usa-court-mlk-idUSKBN00C2BO20150527>; Derek Bryson Taylor, *Audrey Hepburn’s kids still fighting over her stuff*, NEW YORK POST, May 27, 2015, available at <http://pagesix.com/2015/05/27/audrey-hepburns-kids-still-fighting-over-her-stuff/>; Sudhin Thanawala, *Robin Williams’ widow seeks his wedding tux*, ASSOCIATED PRESS, Mar. 30, 2015, available at <http://www.usatoday.com/story/life/movies/2015/03/30/robin-williams-widow-seeks-his-wedding-tux/70677536/>; *see also* Ray and Dana Brandon, *Heirloom Jewelry and Your Heirs*, THE DAILY NEWS, May 28, 2015, available at <http://www.memphisdailynews.com/news/2015/may/28/heirloom-jewelry-and-your-heirs> (“Talking with your heirs to determine who should receive each piece, and why they want that particular piece, can avoid a lot of heartache, squabbling and an outright break between family members.”); Jim Flynn, *Money & The Law: Don’t forget about personal property in estate planning*, GAZETTE, June 9, 2015 available at <http://gazette.com/money-the-law-dont-forget-personal-property-in-estate-planning/article/1553440#VXm14cgKis.email> (“[R]esearch concerning property distributions at death has shown that the distribution of personal effects is responsible for more family acrimony than just about anything else . . .”).

305. *See* John T. Berteau, *Steps to Avoid Beneficiary Conflicts Over Bequests of Tangible Personal Property*, 12 EST. PLAN. 356, 357-58 (1985); *see also* Curasi *et al.*, *supra* note 22, at 371 (“The bequeathing of possessions has received little attention from either academics interested in inheritance or from practitioners working in related fields.”). Some states even define as “not subject to probate” any items of tangible property under a set monetary value. *See, e.g.*, Fla. Stat. §§ 732.4015, 732.402 (1983).

306. JANET FINCH ET AL., WILLS, INHERITANCE, AND FAMILIES 86-88 (1996).

307. *Id.* at 86-88.

308. *Id.* at 88; *see also* Scheuner & Bailey, *supra* note 304, at 67 (“Instruction letters have proven

observed that specific bequests tend to be associated more frequently with the wills of female testators.³⁰⁹

But dispositions of personal possessions have a special part to play in estate planning because of the associations so many owners have with this type of property and because of surviving loved ones' corresponding attachments to those cherished items. On the one hand, not every "thing" has a meaningful history, tale, or value associated with it—and indeed a will telling a story about every knickknack or heirloom would be cumbersome, to say the least.³¹⁰ On the other hand, however, nearly every person owns at least one item that the owner associates with her history, identity, values, or relationships. The story explaining that symbolic connection between that cherished item and its owner often embodies some quality of the owner, some value she holds dear, some "life-transcending project."³¹¹ Section A describes how narratives about such cherished possessions can easily be integrated into an individual's will. The remaining sections in this Part describe the substantive arguments for (and against) using wills to transfer not only cherished possessions but stories too. Section B addresses how this approach impacts testators, Section C addresses survivors, and Section D addresses the inheritance system more generally.

A. Drafting the Stories

Accepting that stories about death and property are everywhere, it is not a vast leap to claim that testators should take control of their life stories and explicitly include them in their testamentary documents. Assuming for a moment the substantive merit to this proposal, this section suggests a process for drafting such a provision. Even where researchers recognize value in passing stories on with possessions, those researchers have not suggested a way to go about linking the two.³¹² Stories are *sui generis*, difficult to compose, and thus arguably far too personal for lawyers to

popular in the states where they are authorized."); James G. Dickinson, *Avoiding Conflicts Among Beneficiaries Over Bequests of Personal Property*, 17 EST. PLAN. 216, 221 (1990) (describing process for using separate memorandum). Cases often refer to these lists. See, e.g., *Acklin v. Riddell*, 856 S.W.2d 322, 323 (Ark. Ct. App. 1993) ("[D]ecedent completed seven (7) separate hand-written lists which directed the disposition of items of personal property, 'auto parts and tools,' which he owned, in accordance with the provisions of his will."). Although they can be easily changed, however, the lists also can be ignored. FREDERICK K. HOOPS, FREDERICK H. HOOPS III & DANIEL S. HOOPS, 1 FAMILY ESTATE PLANNING GUIDE § 17:11 (4th ed. 2015). The Uniform Probate Code, and many state probate codes, specifically allow individuals to deal with personal property through a separate memorandum that is subject to fewer formalities than the will and therefore more easily updated. See Unif. Prob. Code § 2-513 (2010); see also, e.g., Colo. Rev. Stat. § 15-11-513 (West 2015); 12 Del. C. § 212 (2009); Fla. Stat. § 732.515 (2002).

309. Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1569-72 (2015).

310. See Hacker, *supra* note 275, at 969-71 (describing "somewhat confused testaments" containing detailed itemizations of property); Schwartz, *supra* note 275, at 348-50 (same).

311. Alexander, *Intergenerational Communities*, *supra* note 45, at 34-35.

312. See Unruh, *supra* note 6, at 343-44.

draft and include in legal documents. How would a legal professional go about drafting such a provision?³¹³ What would such a narrative look like? And would a story be so unique that drafting it would require special attention each time, making the provisions cost prohibitive for all but the wealthiest property owners and thus discouraging any drafter who lacks a talent in creative writing? These questions go to the heart of the estate planning process and the relationship between client and counselor.³¹⁴

As powerful as stories can be for “laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future,”³¹⁵ they are often built from stock or common narratives, with similar arcs, characters, and morals.³¹⁶ Indeed, it is this familiar “schema” that allows audiences to connect with the storyteller.³¹⁷ Accordingly, stories are not so different than any other plain vanilla provision a draftsperson might include in a document, because stories have a general structure though they may vary in specific context and details.³¹⁸ Narrative experts Anthony Amsterdam and Jerome Bruner provide an “austere” definition of narrative as an account of events, real or imagined, that has characters and plot; the plot, they explain, generally involves a steady state, some disruption, resolution or transformation, and a lesson.³¹⁹ They go on to describe this form of writing as follows:

Narrative defines its cast of characters as agents or victims, gives their aspirations legitimacy (or not), looks at them in the light of a culture’s time-tested scripts—scripts that set forth and exemplify

313. See FINCH ET AL., *supra* note 306, at 176; Hacker, *supra* note 275, at 975-76.

314. See LEIMBERG ET AL., *supra* note 300, at 69-80; SHAFFER ET AL., *supra* note 300, at 3-26.

315. Bruner, *supra* note 248, at 708.

316. PHILIP N. MEYER, STORYTELLING FOR LAWYERS 18 (2014) (describing narrative expectations and plot models); Edwards, *supra* note 50, at 886-88 (describing common narrative patterns); see also Berger, *supra* note 19, at 281 (“[S]tories are entangled in culture, resulting in common archetypes, myths, and master stories that help construct social and cultural norms by shaping them directly and by supporting particular ways of interpreting experiences.”); Note, *Originality*, 115 HARV. L. REV. 1988, 1990 (2002) (“all writing is, in some sense, rewriting”).

317. See Jennifer Sheppard, *Once Upon A Time, Happily Ever After, and in A Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 257-61 (2009); see also Berger, *supra* note 19, at 278 (“if the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener’s mind”); Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos As Relationship*, 9 LEGAL COMM. & RHETORIC 229, 253 (2012) (“[W]hen an advocate uses a narrative organizational feature such as a stock structure, she does so to establish a connection with the reader and to capitalize on the persuasive value of that shared experience. The organizational framework is a scaffold, and the subtle prompts offered by the framework rely on relationship to provide the full breadth of the story and, importantly, its conclusion or resolution.”); Rideout, *supra* note 58, at 59 (“[N]arrative theorists agree that narrative forms are not only immediately recognizable, but that they allow us to assign meaning to events through ‘pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning.’”) (quoting Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1628-29 (2001)).

318. See SHAFFER ET AL., *supra* note 300, at 215-25, 267-300 (providing annotated forms of estate planning documents).

319. AMSTERDAM & BRUNER, *supra* note 51, at 113-14; see also *id.* at 120-42 (fleshing out the austere definition).

the expectable order of things—and thus connects the happening of events over time into *patterns* that enact the culture’s normative understanding of its people’s straits and destinies.³²⁰

In other words, telling future owners the story of an item of property—with characters, disarray, resolution, and a moral built in—can be far simpler (and therefore cost-effective) to draft than many provisions that currently appear in wills.³²¹ All that is needed is a beginning, middle, and end.³²²

In drafting a provision to transfer a cherished item, the estate planning lawyer might ask questions to elicit the meaning of the item to its owner. These questions, which would not differ markedly from the personal and financial queries that often appear in planning questionnaires,³²³ might include:

1. Do you own any special items that you wish to single out because of the item’s personal, symbolic, or sentimental value? Describe any such items and their meaning to you.
2. To whom do you wish to leave this item or items and why?

From these simple questions, a narrative about the cherished possession might be drafted in the following format:

To [beneficiary/character 1], I [aka character 2] leave my [character 3’s] [item] because [plot] [moral].

Or, as completed based on responses to the questions on the estate planning questionnaire, the provision might read:

To my daughter Deborah, I leave the gold earrings that belonged to my great-grandmother, who wore them when she escaped from Nigeria during a time of war and later refused to sell the earrings even when she had to work multiple jobs in order to make ends meet.

To my brother Norman, I leave my stamp collection because this collection records many of the places I have visited or wished to visit during the course of my life.

To my niece Julie, I leave my guitar, which belonged to my sister, because whenever we would argue, she would reunite us by

320. *Id.* at 123.

321. And not many words are needed to tell a compelling tale, as Ernest Hemingway’s famous six-word story illustrates: “For Sale: baby shoes, never worn.” *Six-Word Memoirs: Life Stories Distilled*, NPR BOOKS, June 17, 2011, available at <http://www.npr.org/templates/story/story.php?storyId=18768430>; *Six Word Stories*, <http://www.sixwordstories.net/> (last visited Jan. 29, 2016).

322. Brooks, *supra* note 59, at 17 (“Early in the history of literary theory, Aristotle told us the obvious but important fact that stories must have beginnings, middles, and ends and to be so constructed that the mind of the listener, viewer, or reader could take in the relation of beginning, middle, and end.”).

323. See LEIMBERG ET AL., *supra* note 300, at 41-67 (describing data gathering).

playing music on this instrument.

The permutations are endless,³²⁴ but the idea is that the item's value and meaning is conveyed along with the possession. This seemingly trivial change is easy from a process perspective and so would be unlikely to add to the financial burden of estate planning. But why bother with this change? The next three sections address this question from the diverse and sometimes conflicting perspectives of the decedent property owner, the survivors, and the inheritance system more generally.

B. Benefits to Decedents from the Stories: Meaning and Legacy

A narrative approach to personal property dispositions will benefit *testators* by providing a mechanism for allowing them to achieve some degree of immortality. As the empirical data discussed in Part I makes clear, possessions matter to their owners but also to the owners' loved ones.³²⁵ A property owner's cherished possessions and the stories that "endow" them can live on long after the original owner's death.³²⁶ For property owners who have already chosen to participate in the estate planning process, explaining why certain cherished items are special allows them to convey that ubiquity, that personhood and identity, to their chosen beneficiaries.³²⁷ When a testator tells a possession's story, the testator passes on part of herself with the possession.³²⁸ This means of achieving immortality—of creating a legacy—is far less destructive than imposing conditions on inheritance that seek to control assets from beyond the grave, yet it accomplishes the same psychological, moral, and social goals.³²⁹ For those individuals who are reluctant to engage in estate planning because they see no role for themselves in the process, this opportunity to include a personal possession narrative is a way to encourage their participation.³³⁰

324. The types of property for which this approach would work are unlimited. Although personal items tend to be closely associated with their owners, it is easy to imagine how businesses, homes, and even money acquired as the result of personal investment strategies or stock in a company for which the testator had worked would have stories to tell; just think of Joseph Pulitzer's newspaper business, *supra* note 285, or the Kodak stock in the Janes case. See *Matter of Estate of Janes*, 681 N.E.2d 332 (N.Y. 1997).

325. See *supra* notes 78-131 and accompanying text.

326. Curasi, *supra* note 112, at 131 (explaining how intergenerational gifting of cherished possessions may achieve "symbolic immortality similar to the desire of many wealthy to attain a type of secular immortality through their philanthropic gifts to their communities and country").

327. See, e.g., Shaffer, *supra* note 6, at 363-64 (observing how attitudes towards personal property—coin collections and jewelry for example—were not economic but rather symbolic; owners saw their prized possessions as "bits of personality" which they wanted "to be expressions of love in a way that seemed to transcend, to be entirely other, than simple inheritance and any idea of support").

328. Curasi *et al.*, *supra* note 22, at 380-81; Price *et al.*, *supra* note 91, at 183; see also Curasi, *supra* note 112, at 129; Ekerdt *et al.*, *supra* note 105, at 270; Unruh, *supra* note 6, at 344.

329. See Fox *et al.*, *supra* note 5, at 160-72 (describing psychological literature of the "legacy motive"); Shaffer, *supra* note 6, at 364 ("Clients come more readily to the vague idea of surviving death when they approach it through the relationship they have with their property."); see also *supra* notes 230-36 and accompanying text (discussing *Pulitzer*).

330. See *infra* notes 379-89 and accompanying text.

The practicing bar, together with scholars and others involved in the inheritance system, are likely to resist the idea of incorporating narratives, even simple ones about personal property, into wills for fear that extra language will muddle otherwise clear directives.³³¹ In other words, the argument would go, even recognizing the importance, relevance, and power of narratives, there is little to be gained by including them in formal documents.³³² Tell them instead, either orally or in writing, but in a way that does not interfere with the legal business of death.

By all means, stories (about personal property or otherwise) should be shared in many different ways, not reserved solely for wills. This past November, at Thanksgiving, we eagerly listened to my father, in the midst of chemotherapy, tell stories about his grandfather's argyle socks, of volunteering to paint a bird eagle on the jeep of his commanding officer, of hiding an undercooked potato in the drawer of the family dining table, and of fighting with a blind jogger while circling the Central Park reservoir in New York City. We have laughed over these stories more times than I can count, and my children see themselves in the colorful characters who populate our family history. But because death is a time of upheaval and change, it is crucial to be able to remember and recognize the decedent *and* to move forward. A significant part of what we, as estates lawyers, do is to facilitate that transition for the property owner and her family.³³³ Our tools are the documents by which such property is transferred. Including stories about cherished items is a means to hone these tools.

Moreover, while an informal format for these stories may be preferable to silence, it is not a perfect substitute. Prior to the 1837 adoption of the Wills Act, which set forth the formalities required to produce a valid will, English wills often related family stories of all types, and the public widely discussed and devoured popular writings about actual wills for the details they recounted.³³⁴ After enactment, however, as more lawyers became involved in the estate planning process, wills, in turn, became far more standard and, some might argue, less interesting.³³⁵ It is not that people never include expressions of individuality in their wills; in fact,

331. See Schwartz, *supra* note 275, at 347 ("Attorneys frequently counsel clients to leave testamentary statements with their loved ones, out of the will, so as not to clutter the will with unnecessary features.").

332. I have argued elsewhere that there is a place for non-binding letters of wishes to accompany formal documents and provide guidance as to the settlor's purpose. See Gordon, *supra* note 9, at 589-91. Here, though, there is value to the community in publicizing the story rather than burying it. See Gordon, *supra* note 283, at 424-27 (discussing how non-binding side letters may be ignored or devalued).

333. See sources in note 300 *supra*.

334. FRANK, *supra* note 13, at 21-26.

335. *Id.* at 31-32; see also *id.* at 55-57 (giving examples); LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 63 (2009); FRIEDMAN, *supra* note 270, at 182 ("One finds in [wills] an occasional flash of humanity, an insight into the era, or a fact of rare beauty, trapped in county archives as if in amber.").

there is an active movement to make estate planning more “therapeutic” and “purposeful.”³³⁶ Advisors for the ultra-wealthy³³⁷ and for everyone else too³³⁸ have been writing persuasively on how to infuse values and purposes into planning. But many recommenders advocate using an informal method to transmit values,³³⁹ which may work well if a property owner already has an estate plan but will not draw reluctant participants into the inheritance system. Informal, non-testamentary documents also do not speak as loudly, widely, or authoritatively as their legal counterparts which are, at once, “peculiarly both public and intimately private.”³⁴⁰

Nor is the fear of including stories about personal possessions in wills supported by case law. First, although reported cases do discuss testamentary instruments that contain narratives describing the property being bequeathed,³⁴¹ those cases are relatively rare; in other words, where such language does exist, the estates appear to be probated without challenge.³⁴² Second, contests that contain some allegation of ambiguity, inconsistency, or confusion in language and seek interpretation or construction of testamentary documents³⁴³ generally involve an imprecise use of language, especially technical terms like “per stirpes” and “survive.”³⁴⁴ When courts do refer to wills that contain explanatory phrases, the “extra” language, especially when it tells a story, appears to clarify rather than confuse the disposition.³⁴⁵ In fact, when extended fights

336. See, e.g., Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012); Hacker, *supra* note 275, at 980-81.

337. See generally Merrill Lynch Private Banking & Investment Group, *How Much Should I Give to My Family? On the Risks and Rewards of Giving* (2015).

338. See Paul Sullivan, *Focusing on the Human Element of Estate Planning*, N.Y. TIMES (Nov. 7, 2014), <http://www.nytimes.com/2014/11/08/your-money/estate-planning-with-the-human-element.html>.

339. See, e.g., Gerry W. Beyer, *Avoiding the Estate Planning “Blue Screen of Death”—Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 61, 88 (2008).

340. FINCH ET AL., *supra* note 306, at 177; see also Schwartz, *supra* note 275, at 347 (“[T]estators sometimes are inclined to include testamentary material in order to be certain that their personal ideas and opinions are made public.”).

341. See *supra* notes 282-92 and accompanying text.

342. Gordon, *supra* note 283, at 417-18; see also Clowney *supra* note 281, at 32, 44 (“Contrary to popular belief, the data show that holographic wills generate very few courtroom battles” even though “the proliferation of stories has damaged the reputation of do-it-yourself willmakers.”). *But see* Hacker, *supra* note 275, at 973 (positing that contested wills are likely to have more personal reflections).

343. See Matter of Estate of Lohr, 497 N.W.2d 730, 735 (Wis. Ct. App. 1993) (“Ambiguity exists where the will’s language is subject to two or more reasonable interpretations, either on its face or as applied to the extrinsic facts to which it refers.”); Matter of Will of Shehan, 157 Misc. 2d 904, 907, 597 N.Y.S.2d 1017, 1019 (Sur. 1993) (“A construction presupposes some ambiguity, lack of clarity, or vagueness in the language of the instrument that gives rise to uncertainty about the testator’s wishes.”).

344. See, e.g., Hollowell v. Hollowell, 430 S.E.2d 235, 236-37 (N.C. 1993); Wright v. Brandon, 863 S.W.2d 400, 402 (Tenn. 1993).

345. See, e.g., Succession of Diaz, 617 So. 2d 34, 35 (La. Ct. App. 1993); Matter of Estate of Flowers, 848 P.2d 1146, 1154 (OK 1993); Williams v. Estate of Williams, 865 S.W.2d 3, 5 (Tenn. 1993); see also Gordon, *supra* note 238, at 384 (“Contrary to expectations, the case law supports the idea that directly infusing wills with individualized, expressive, and what some might call ‘extra’ language better insulates them against challenges.”). *But see In re Bloch*, 625 A.2d 57, 62 (Pa. Super. Ct. 1993) (language used by scrivener to explain gift to non-relatives causes ambiguity as to testator’s

over personal items arise, a background narrative to accompany and explain the meaning of the gift might have proven useful to help delineate, for example, the specific property being conveyed.³⁴⁶ This point is reinforced by a case like *Gourary*, discussed in Part II; had the testator included the collection's story, it likely would have been easier to discern the testator's intentions for that property, making for a far smoother probate of the will.³⁴⁷ Finally, "[u]nder the polar star rule, the court must determine the testator's intent from what she said—not from what she might have said,"³⁴⁸ so it is curious to resist telling the tale of an item or describing the reasoning for a gift, unless the proposed language is sloppy or inaccurate.³⁴⁹ In short, while numerous wills are challenged because they are poorly drafted, stories about personal items do not prompt these concerns. At the very least, the suggestion poses no less risk of faulty drafting than any other will provision.

There are two final issues worth noting, although admittedly neither is easily resolved. First, an issue posed by any specific gift is that, unlike a financial (or other fungible) asset, a cherished possession cannot be divided, so deciding "to whom a singular cherished possession is given is often fraught with tension and anxiety."³⁵⁰ There is a possibility, however, that attaching stories, and thus explicit meaning, to this type of unique gift might help an owner address that anxiety by focusing on the moral component of the gift, which she could then apply to other cherished items too.³⁵¹

Second, critics will caution that this approach might encourage negative stories or stories that will alienate survivors. Indeed, one type of story that

intent).

346. See, e.g., *Smith v. Smith*, 143 So. 3d 805, 808 (Ala. Civ. App. 2013) (construing will that devised decedent's "dwelling house and the one acre of land" on which it was situated to surviving spouse, together with "her pick of my horses [and] the tack for same" to determine whether "acre" included barn and whether "tack" included various equipment related to horses); *Banner v. Vandeford*, 748 S.E.2d 927, 928 (Ga. 2013) (construing will that left token bequest to two daughters with whom testator was "disappointed" but, because will lacked residue clause, allowed those daughters to share remainder as intestate distributees); *Langille v. Norton*, 628 A.2d 669, 671 (Me. 1993) (construing will with two inconsistent devises of real and personal property: the first a fee simple absolute to decedent's brother and the second a conditional gift of the same property to decedent's brother's children); cf. *Halstead v. Plymale*, 750 S.E.2d 894, 898 (N.C. Ct. App. 2013) (for will disinheriting estranged spouse, explanation facilitated court's construction of patent ambiguity in residuary clause).

347. With respect to *Cresto*, I have previously argued that undue influence cases seem the *best* suited to expressive language to anticipate and forestall challenges. See Gordon, *supra* note 283, at 413-15.

348. *Strunk v. Lawson*, 447 S.W.3d 641, 645-46 (Ky. Ct. App. 2013), *reh'g denied* (Dec. 2, 2013); see also *Grant v. Bessemer Trust Co. of Fla.* ex rel. Grant, 117 So. 3d 830, 836 (Fla. Dist. Ct. App. 2013) ("The law of wills is calculated to avoid speculation as to the testator's intent and to concentrate upon what he said rather than what he might, or should, have wanted to say.") (quotations omitted).

349. See note 283 *supra* (citing case where will explained reason for disinheritance but included erroneous facts)

350. Curasi, *supra* note 112, at 125.

351. *But see* Dickinson, *supra* note 308, at 219 ("The directed sale of all tangible personal property may in many circumstances be the only method of avoiding conflicts. The net cash realized from the sale can go a long way toward healing any hurt feelings.")

appears regularly in wills is the disinheritance narrative, perhaps told by a vindictive or spiteful testator or, more commonly, just reflecting the circumstances of a family that has been “fractured.”³⁵² On the one hand, suggesting that narratives appear in testamentary documents may be seen as encouraging this negative form of expression, especially because cherished possessions invoke such strong emotions for donor and recipient. On the other hand, it is important not to lose sight of how the stories link to the property itself; focusing a testator on explaining how her cherished items represent an important aspect of her identity—one that she hopes will survive her—might in fact counterbalance an urge to punish survivors and punctuate death.³⁵³

In sum, while most of a testator’s tangibles can be dealt with through a residue clause or a more general disposition, relegating all personal property dispositions to this type of second class status is a lost opportunity because of cherished items’ symbolic importance to the owner. But this narrative approach has an even greater role to play where survivors are concerned. As the following section discusses, narratives can console the bereaved, fortify group identity and connectedness, and provide an important source of resilience. Indeed, because a narrative approach to estate planning values the memories and myths with the items, a beneficiary might even dispose of the property that is left behind without losing any of the benefits of the narrative attached to that property.

C. Benefits to Survivors from the Stories: Grief, Resilience, and Connectedness

Along with helping a testator face her own mortality, stories about cherished possessions also can benefit survivors.³⁵⁴ We each experience death—our own or that of a loved one—in different and indescribable ways, so much so that the language of grief can be inadequate, trite, or hackneyed. Stories, however, are a mechanism to share intensely unique experiences about death and to find common ground with others.³⁵⁵ In that

352. See Cahn & Zeittlow, *supra* note 21, at 369-70 (“Certainly, expressive wills will not serve the interest of all decedents.”); Hacker, *supra* note 275, at 967-68 (discussing disinheritance language).

353. See Unruh, *supra* note 6, at 340 (“Dying people hope they will be remembered as good fathers, competent women, successful businessmen, creative artists, or peacemakers.”); Kimberly A. Wade-Benzoni, Leigh Plunkett Tost, Morela Hernandez & Richard P. Larrick, *It’s Only a Matter of Time: Death, Legacies, and Intergenerational Decisions*, 23 *PSYCHOLOGICAL SCI.* 704, 704 (2012) (“[W]hen people are primed with thoughts of death, their inherent desires to generate a positive legacy can transform the expected barriers to intergenerational beneficence (i.e., social and temporal distance) into conditions that promote beneficent allocations to other people in the future.”); see also Claire Routley & Adrian Sargeant, *Leaving a Bequest: Living on Through Charitable Gifts*, 44 *NONPROFIT & VOLUNTARY SECTOR Q.* 869, 874 (2015) (describing research supporting decedents’ focus on property as an extension of self and its intergenerational transfer as important to preserving identity and family relations).

354. Turley & O’Donogue, *supra* note 194, at 1332 (“So, if things matter, and some things matter a lot, they are likely to do so at particular times in a consumer’s life. Bereavement suggests itself as one such time.”).

355. Robinson & Hawpe, *supra* note 52, at 122 (“It is one of the virtues of narrative that it can

way, they can aid in a survivor's grieving process. Sociologist Tony Walter describes the conventional model for dealing with grief at the death of a loved one as being designed for the primary purpose of allowing the survivor to move on, to recover her autonomy so that she can "leave the deceased behind and form new attachments."³⁵⁶ The traditional process for achieving this result is to work through emotions so that the bereaved can detach from the decedent.³⁵⁷ Drawing on non-Western traditions and a qualitative study of his own grief, Walters disputes both bereavement's traditional purpose and its process, arguing that the purpose is for the bereaved to integrate the decedent's presence—to allow the decedent to live through us; the process, suggests Walter, is recounting the deceased's biography.³⁵⁸ In other words, a surviving loved one grieves by telling stories about the deceased's life, reconstructing her biography, and thus finding "permission to retain the dead person."³⁵⁹ In addition to preserving the memories of the deceased, these stories create communities among the living. Whether accurate or idealized, positive or negative, stories can help with the mourning process.

Psychologists who study intergenerational continuity also have documented the value of family stories and myths in creating healthy identities and even in building resilience in survivors.³⁶⁰ For example, a group of psychology professors at Emory University has shown that children who are familiar with their "family history narratives" tend to have a higher level of well-being and to cope better with challenges.³⁶¹ In a study of approximately forty middle class, two-parent families with at least one preadolescent child, these psychologists asked children a series of "do you know" questions, observed family dinner conversations, and administered a battery of personality tests.³⁶² The results revealed that the

convey information indirectly which would not be understood, or not be accepted if conveyed directly in literal and explicit terms.").

356. Tony Walter, *A New Model of Grief: Bereavement and Biography*, 1 MORTALITY 7, 7 (1996); see also Turley & O'Donogue, *supra* note 194, at 1334-36 (describing bereavement literature).

357. Walter, *supra* note 356, at 7-8.

358. *Id.* at 11-15.

359. *Id.* at 23; see also Turley & O'Donogue, *supra* note 194, at 1337 ("Telling the dead person's story tells the story maker who the deceased was, and by extension who the story maker is . . . , and it is this fused biographical/ autobiographical imperative that underpins much of what occupies the time and thinking of bereaved people."); Unruh, *supra* note 6, at 344-49 (describing survivor strategies to deal with grief).

360. See Bennett *et al.*, *supra* note 130, at 218; Robyn Fivush, Jennifer G. Bohanek & Widaad Zaman, *Personal and Intergenerational Narratives in Relation to Adolescents' Well-Being*, in THE DEVELOPMENT OF AUTOBIOGRAPHICAL REASONING IN ADOLESCENCE AND BEYOND 45, 53 (T. Habermas ed., 2010) [hereinafter Fivush *et al.*, *Personal Narratives*]; Robyn Fivush, Jennifer G. Bohanek & Marshall Duke, *The Self in Time: Subjective Perspective and Intergenerational History*, in CONTINUITY AND SELF 131, 131-32 (F. Sani, ed. 2008) [hereinafter Fivush *et al.*, *Self in Time*].

361. See Fivush *et al.*, *Personal Narratives*, *supra* note 360, at 49-50; Fivush *et al.*, *Self in Time*, *supra* note 360, at 136; see also Bruce Feiler, *The Stories that Bind Us*, N.Y. TIMES (March 17, 2013) available at http://www.nytimes.com/2013/03/17/fashion/the-family-stories-that-bind-us-this-life.html?_r=0; Sue Shellenbarger, *The Power of Myth: The Benefits of Sharing Family Stories of Hard Times*, WALL STREET J. (December 22, 2005).

362. Jennifer G. Bohanek, Kelly A. Marin, Robyn Fivush & Marshall P. Duke, *Family Narrative*

more the children knew about their family's personal history, "the stronger [was the children's] sense of control over their lives, the higher their self-esteem and the more successfully they believed their families functioned."³⁶³ The narratives, which included both shared experiences as well as "stories outside of the children's experience" having no particular structure, provided a context for children, the researchers concluded, "informing [the children] of how they fit into a larger life framework."³⁶⁴ Of particular value in allowing the children to develop strong "intergenerational selves" were what the psychologists called "oscillating narratives," which discussed how a family had experienced both successes and failures and had stuck together.³⁶⁵

These conclusions about the value of family stories are consistent with similar work documenting how family rituals, such as celebrations and traditions, can help with life cycle transitions.³⁶⁶ Ritual behavior, which is patterned, ordered, and predictable, helps organize a family and signal that "this is the way we do [things]."³⁶⁷ "Whereas ritual transmits family identity via behavior, myth conveys it in narrative form."³⁶⁸ Both rituals and myths remind members of this community who they are, what they believe, and how they behave "to promote the continuity of family identity from one generation to another."³⁶⁹ This idea that transition necessitates both stability and flexibility, both "embeddedness" and "transcendence," is found in Radin's second article revisiting the idea of personhood and property.³⁷⁰ Relying on the work of philosopher Martha Nussbaum, Radin explains that living a good life requires connectedness.³⁷¹ But an individual's identity is grounded both in a strong attachment to a specific context—to others or property—and the ability to detach from that context.³⁷² This dialectic, as she puts it, also shows how theory alone, without a pragmatic anchor, has the potential to become distorted. Sharing stories of how a cherished possession came to take on significance contributes to this idea of context and connection, embeddedness and

Interaction and Children's Sense of Self, 45 *FAM. PROCESS* 39, 49-50 (2006); Fivush *et al.*, *Personal Narratives*, *supra* note 360, at 47-50; Fivush *et al.*, *Self in Time*, *supra* note 360, at 136-37.

363. Feiler, *supra* note 361, at 2; *see also* Fivush *et al.*, *Self in Time*, *supra* note 360, at 136 ("Children who know their family history, who have shared in these stories, develop a sense of self embedded in a larger familial and intergenerational context, and this sense of self provides strength and security.").

364. Fivush *et al.*, *Self in Time*, *supra* note 360, at 135.

365. Feiler, *supra* note 361, at 3. These findings were reinforced by data collected just a few months later, but following the September 11th terrorist attacks. In the face of this national tragedy, children who were the most familiar with their family's narrative were also the most adept at moderating the effects of stress. *See id.* at 3-4.

366. Bennett *et al.*, *supra* note 130, at 211.

367. *Id.* at 215-17.

368. *Id.* at 218.

369. *Id.* at 218.

370. Radin, *Reconsidering*, *supra* note 41, at 431.

371. *Id.* at 441.

372. *Id.* at 430-31.

transcendence.

Moreover, to the extent that we believe that there are communities that establish obligations between ancestors and descendants, a beneficiary who becomes the caretaker of a cherished object satisfies a moral obligation to members of her intergenerational community. As Gregory Alexander discusses, many property owners are involved in “life-transcending projects,” which might be as grand as creating a charitable foundation or as modest as having a hobby or collection.³⁷³ Such a project, regardless of scope, is transcendent because it allows the creator “in important ways to flourish” and is passed on “in the hope that future owners will recognize the project’s significance.”³⁷⁴ It is well established that a “dead hand” problem can arise when a decedent imposes explicit obligations on the future owner,³⁷⁵ as the *Pulitzer* case discussed above illustrates. More interestingly, though, when no explicit restrictions are imposed, Alexander queries whether a future owner can refuse to accept the project or, if that future owner accepts it, whether she “should be free to possess, use, or enjoy that project in whatever way she sees fit.”³⁷⁶ Making a “reasonable effort” to carry out an ancestor’s life-transcending project is, Alexander argues, a moral duty; what is *reasonable*, however, depends on the burden imposed on the recipient and the benefit to the former owner.³⁷⁷

It is not uncommon that property owners retain items that have meaning for them because getting rid of those items would be like throwing away their lives and memories. Related to this hoarding tendency, however, is the fact that some property that was meaningful to the owner may appear to a recipient as worthless junk, especially if it lies unattended in a decedent’s home.³⁷⁸ Because narratives help share the property’s significance, they can help both owner and recipient distinguish what is a “treasure” from what is not.³⁷⁹ On the one hand, because a narrative has a life, a value, and a power of its own, a recipient might reap the benefits of an item’s story even though she also might choose to divest herself of the property to which that story is attached. On the other hand, when owners share what is important about the property, there is a real possibility that the narrative will build a community with the recipient and encourage her

373. Alexander, *Intergenerational Communities*, *supra* note 45, at 24; *see also* Routley & Sargeant, *supra* note 353, at 877-81 (describing how charitable giving preserves the donor’s identity after death); Wade-Benzoni & Tost, *supra* note 6, at 182-83 (discussing different expressions of intergenerational “generativity,” defined as the “desire to invest one’s substance in forms of life and work that will outlive the self”).

374. Alexander, *Intergenerational Communities*, *supra* note 45, at 35-36.

375. *Id.*

376. *Id.* at 41.

377. *Id.* at 40-41.

378. *See* ANGEL, *supra* note 19, at 85 (“What is valuable to one generation may not be to the next.”); *see also* Belk, *Sense of Past*, *supra* note 81, at 119-20 (describing boxes of memorabilia).

379. *See* Unruh, *supra* note 6, at 343-44.

to become the property's caretaker and guardian.³⁸⁰ In this way, transfers may end up being more thoughtful and less burdensome.

D. Benefits to the Inheritance System from the Stories: Participation and Inclusivity

Finally, the inheritance system too will benefit from this strategy of telling personal property stories because the approach may encourage more robust participation in the estate planning process by a broader segment of the population. People care about their possessions, regardless of the items' value, so assurance that specific gifts are a noteworthy part of wills is likely to draw people who, to date, have not seen the estate planning process as designed for them. This increased participation is valuable for a variety of reasons. First, as others have discussed, the default rules that intestacy laws provide frequently fail to serve property owner goals, especially for people with non-traditional life styles.³⁸¹ For that reason, the will still has an important role to play as an opt-out to the default rules.³⁸² Second, there is some evidence that testate, as opposed to intestate, estates can be administered more easily.³⁸³ Third, without a will or other governing document, survivors are left frustrated and therefore more inclined to fight.³⁸⁴ Encouraging estate planning means that survivors will receive guidance; according to Cahn and Zeittlow, survivors who disagreed with a proposed disposition of property nevertheless appreciated direction provided by the decedent because it "provided important literal guidance and emotional understanding of the next steps."³⁸⁵

380. See *id.*; see also Curasi, *supra* note 112, at 127-29 (describing owners' concerns that recipients continue to care for cherished possessions); Kroger & Adair, *supra* note 78, at 22 (same).

381. DiRusso, *supra* note 28, at 55-59; Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 892-95 (2012); see also Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 645-46 (2014) (describing how evolving social norms and medical advances make it more difficult to predict and track the intent of a "typical" intestate decedent); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (discussing destructive effect of facially neutral intestacy rules on homosexuals); Strand, *supra* note 21, at 494-99 (discussing destructive effects of facially neutral intestacy rules on lower income, predominantly Black families); cf. Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1419 (2014) (describing how intestacy statutes and even individual intestate estates could be more personalized through "big data" information about decedents' preferences).

382. Cahn & Zeittlow, *supra* note 21, at 364.

383. David Horton, *Probate on the Ground*, 62 U.C.L.A. L. REV. 1094, 1123 (empirical study revealed minor administrative downsides to intestacy); Weisbord, *supra* note 381, at 896 (intestacy requires court to appoint fiduciary, which can cause delays and lead to litigation).

384. Cahn & Zeittlow, *supra* note 21, at 360-62; see also ANGEL, *supra* note 19, at 21-22 ("family harmony is one of the most commonly overlooked aspects of inheritance planning"); SHAFFER ET AL., *supra* note 300, at 20 ("One reason a person makes a will is in order to prevent fights—because his survivors will not resist what he wants done as much as they will resist what someone else, someone who lacks the dead person's identification with the property, wants.").

385. Cahn & Zeittlow, *supra* note 21, at 339 ("Even when they disagreed with the proposed outcome, [survivors] acknowledged that formal planning, whether it affected disposition of bodily remains or money, provided important literal guidance and emotional understanding of the next

But there also are more fundamental reasons to encourage broader participation in the estate planning process that relate to the integrity of the inheritance system. In an empirical study gathering information about estate planning by individuals across the country, Alyssa DiRusso documented a lack of participation by younger, more diverse, and less wealthy individuals.³⁸⁶ From this data, DiRusso observes that a “two-track” inheritance system has arisen where those who have historically been disenfranchised—women and non-whites—have tended to take more passive roles.³⁸⁷ Concern is warranted, and change necessary, when a significant “overlap [exists] between historically disempowered groups and the supplicant legal position of intestacy.”³⁸⁸ A strategy that makes estate planning more meaningful, and thus more accessible, will help dismantle or at least disrupt hierarchies of social power and legal status.³⁸⁹

Finally, when only certain groups of people opt to take control of their legacies, the language, and in particular the narratives, that characterize inheritance law are distorted. Although legal texts—most notably opinions, but also testamentary documents—are permeated by stories, the main characters are individuals who choose to participate in estate planning or are objects, rather than actors, dragged into the system by powerful others.³⁹⁰ Offering a version of planning that resonates with a broader population, where the archetypes reflect society’s members, will

steps.”); *id.* at 349 (“In . . . families, when there was an absence of planning, children expressed their powerlessness.”).

386. See DiRusso, *supra* note 28, at 60-77 (describing how intestacy demonstrates passivity, disempowerment, and silence); see also Davis & Brophy, *supra* note 272, at 775 (describing gender imbalances in various historical studies of testation). *But see* Hacker, *supra* note 269, at 350 (observing that “Western and Israeli women enjoy privilege, power, and control” over inheritance and estate planning). For a discussion of trusts and estates scholarship that addresses historically disempowered groups—including people of color, women, lesbian, gay, bisexual, and transgender individuals, low-income and poor individuals, the disabled, and non-traditional families—and suggesting additional avenues of inquiry, see Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317 (2014).

387. DiRusso, *supra* note 28, at 76-79; see also Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 807 (2014) (describing how “testators of lesser means . . . are more apt to be deterred by, or to fall prey to, punctilious formalities” and observing that “We can question the equity of a system of succession that discriminates along socioeconomic lines, defeating the intent of the poor while giving free rein to the preferences of well-heeled testators.”); Strand, *supra* note 21, at 464-68 (stating that even though inheritance rules purport to apply equally to all, inheritance law has contributed to racial wealth disparities by replicating patterns of giving and social structures).

388. DiRusso, *supra* note 28, at 62; see also Spitko, *supra* note 381, at 1100 (“Those who experience the law operating upon them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages. In this way, intestacy law not only reflects society’s familial norms but also helps to shape and maintain them.”).

389. See DiRusso, *supra* note 28, at 77-78 (arguing “that active manipulation of the legal system to empower one’s individual plan is importantly distinguishable from a final encounter with the legal system that disregards a person’s individual existence” even if the end results are identical); Gordon, *supra* note 283, at 427-29 (arguing that expressive language encourages purposeful planning for broader segment of population).

390. See *supra* notes 195-296 and accompanying text; see also Strand, *supra* note 21, at 487 (discussing how changing inheritance taxation system would also begin to change the story of inheritance).

help ensure that the stories of the currently marginalized, available only in subtexts, get told.³⁹¹ Those narratives are essential to uniting author and audience and to building communities between property owners and property recipients; without the stories, the transfers have less resonance and meaning.

CONCLUSION: SHARDS OF MEMORY, TALISMANS OF IDENTITY

Circling back to the Kafka quotation that began this Article, the human desire to create a legacy—something that survives after we die—is quite powerful.³⁹² One way to connect the lives we live to the people we leave behind is through our testamentary writings.³⁹³ By drafting a will to include the story along with the gift, the owner’s legacy—both moral and material—survives with the recipient. Even where a simple item is just one tiny part of an overall estate, its symbolic value makes recognition of the item’s transfer important; after all, “however grand and majestic is the law in general, *law must also be in the small*.”³⁹⁴ And because it does so in a legal document that, by definition, is accorded weight and power, its meaning is public and amplified for both writer and audience.

391. See Farber & Sherry, *supra* note 50, at 828-30 (describing how case law content, including its narratives, can be a potential source of bias).

392. See *supra* note 3.

393. FINCH ET AL., *supra* note 306, at 177.

394. AMSTERDAM & BRUNER, *supra* note 51, at 140.

