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# Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code

Mary Louise Fellows\*

The most fundamental change in American law in this century is the growing reliance on legislation to solve social and economic problems.<sup>1</sup> Not surprisingly, with statutory enactments growing in importance as the source of the law, the legislative process itself has attracted the interest of many scholars.<sup>2</sup> This essay intends to contribute to this growing body of literature by exploring the phenomenon of lawmakers using judicial decision-making techniques when designing statutory enactments. Judges frequently conceal their decisions to move beyond or retreat from existing law by rationalizing their holdings with prior decisions or statutes. Courts feel obligated to bow to precedent and statutory rules because of notions about American democracy and the doctrine of separation of powers, and because of the myth that the role of a judge in the common-law process is that of lawfinder and not of lawmaker.<sup>3</sup> Legislatures' engagement in similar pretexts, however, is not so

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1. See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (tracing the history and role of American statutory law); G. GILMORE, *THE AGES OF AMERICAN LAW* (1977) (discussing the evolution of American law since the early 1800's).

2. See, e.g., S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968); M. JEWELL, *THE STATE LEGISLATURE POLITICS AND PRACTICE* (2d ed. 1969); M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* (3d ed. 1977); J. VAN DER SLIK, *AMERICAN, LEGISLATIVE PROCESSES* (1977); Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965); Elliott, *The Lawyer and Legislation*, 26 ROCKY MOUNT. L. REV. 359 (1954); Krasnow & Kurzman, *Lawyers for the Lawmakers*, 51 A.B.A. J. 1191 (1965); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

3. For an excellent discussion of the legitimacy of courts' lawmaking power, see G. CALABRESI, *supra* note 1, at 91-101.

readily explicable. This essay explores the adoption by statutory drafters of judicial subterfuge techniques that formally retain an existing legal rule while drastically changing its practical effect. The "legislative study" chosen to demonstrate this statutory subterfuge technique is the doctrine of advancements of intestate succession shares. By investigating the development of this area of law, this essay demonstrates the costs and benefits of employing subterfuge techniques in statutory enactments and concludes that such drafting techniques are seldom justifiable.

This essay first sets forth the doctrine of advancements and includes a discussion of its suitability for a study of statutory reform and the purpose and origin of the doctrine. The essay then demonstrates how a presumption against finding an advancement that can be rebutted only by a writing showing a contrary intent operates as a practical repeal of advancements. Next, the essay explores the rationales of the drafters of the Uniform Probate Code (UPC) in repealing the advancements doctrine by subterfuge and analyzes the costs of reform by subterfuge. Finally, the essay recommends an alternative approach to reforming the advancements doctrine, which offers some insights into avoiding statutory subterfuge.

An advancement is a gift made by a decedent during life to a family member that reduces the share of the probate estate that the family member receives under the intestate succession statute upon the decedent's death.<sup>4</sup> For example, the advancements doctrine provides that in the distribution of an estate of a father who dies without a will and who made a prior gift of \$100,000 to one of his three surviving sons, the other two sons receive \$100,000 from their father's estate before the third son receives any further property. This doctrine, codified in UPC section 2-110, has much to recommend it as a proper subject for a study of the legislative process. First, the National Conference of Commissioners on Uniform State Laws scrutinized the doctrine. The American Bar Association established the Conference in 1889<sup>5</sup> as a model for assuring

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4. See *West v. Beck*, 95 Iowa 520, 64 N.W. 599 (1895); *Nobles v. Davenport*, 185 N.C. 162, 116 S.E. 407 (1923), 183 N.C. 207, 111 S.E. 180 (1922); *Cazassa v. Cazassa*, 92 Tenn. 573, 22 S.W. 560 (1893); W. THORNTON, A TREATISE ON THE LAW RELATING TO GIFTS AND ADVANCEMENTS 503-05, 510-11 (1893); Elbert, *Advancements: I*, 51 MICH. L. REV. 665, 665, 675-78 (1953) [hereinafter cited as Elbert, *Advancements: I*]; Elbert, *Advancements: II*, 52 MICH. L. REV. 231 (1953) [hereinafter cited as Elbert, *Advancements: II*]; Elbert, *Advancements: III*, 52 MICH. L. REV. 535 (1954).

5. REPORT OF THE AMERICAN BAR ASS'N, 12TH ANNUAL MEETING 50-51 (1889).

good lawmaking. The promulgation of a uniform law represents the culmination of years of scholarly work. Although interested persons are given a full opportunity to express their views, the drafters act independently of any group. Preliminary drafts of model laws receive careful, critical review, which further increases the likelihood that the final promulgation contains no inconsistencies, ambiguities, or unthoughtful changes.<sup>6</sup> Thus, any criticism of UPC section 2-110 cannot be attributed to the lawmakers' haste, carelessness, or inexpertise that frequently explains troubling statutory provisions.

Second, the advancements doctrine is a good subject for study because it is perfectly innocuous. The goals of legislation in the area of succession are nondebateable—drafters should design legal rules to achieve the donative intent of individual decedents, but not to require litigation for resolving the issue of intent. A rule of law that permits specific factual inquiry into donative intent will necessitate admitting evidence that is particularly susceptible to misinterpretation and fraudulent manufacture. The poor quality of evidence used to prove intent not only increases the likelihood of litigation, but also may undermine the goal of furthering donative intent.<sup>7</sup> In addition to the noncontroversial nature of the goals of advancements legislation, no political group or particular school of legal thought is identified with the various choices for reform in this area. Disputes arise only because of differences of opinion on how to balance these two, sometimes inconsistent, goals. A rule of law that purports to reflect a decedent's probable intent is a welcomed reform, but scholars generally view this type of reform cautiously because of a fear that donative intent is being sacrificed for the sake of administrative convenience. In sum, the UPC treatment of the advancements doctrine is an excellent choice for the study of statutory reform because it provides an opportunity to

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6. See Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401, 424 (1968) (identifying similar criteria to explain the Uniform Commercial Code's success); see also Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC'Y 142, 146-48 (1920) (urging establishment of a group that would have the responsibility of analyzing the laws and proposing reforms).

7. See generally Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941) (describing the various functions served by will formalities); Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (suggesting that the courts' insistence regarding execution of wills should be replaced with a substantial compliance doctrine); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982) (suggesting that courts should admit evidence of the testator's intent and reform wills containing mistakes).

evaluate lawmaking when erratic influences on the process have been minimized and the likelihood for rational results has been enhanced.

An intestate succession statute is a statutory estate plan designed, in a large part, to reflect the probable intent of an individual who dies without leaving a will.<sup>8</sup> Every American intestacy statute contains a distribution pattern that assures equal treatment among the decedent's children.<sup>9</sup> The primary purpose of the advancements doctrine, and the reason for its inclusion in the statutory distribution pattern, is to further this equality principle.<sup>10</sup>

8. Averill, *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169, 176 (1972); Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 OHIO ST. L.J. 114, 116 (1973); Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1047 (1966); Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 301, 306 (1970); O'Connell & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 209 (1972).

Intestate succession statutes also reflect societal interests including the protection of the decedent's financially dependent family, the avoidance of complex property titles and excessive subdivision of property, and the promotion and encouragement of the nuclear family. See 7 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 991-993 (R. Rohan rev. ed. 1982); Cole, *Inheritance*, in 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 35, 36 (1932); Friedman, *The Law of Succession in Social Perspective*, in DEATH, TAXES AND FAMILY PROPERTY ESSAYS AND AMERICAN ASSEMBLY REPORT 14 (E. Halbach, Jr. ed. 1977). To the extent these societal interests conflict with the preferences of individual citizens, the societal interests should prevail. See L. SIMBS, *PUBLIC POLICY AND THE DEAD HAND* 21 (1955); see also Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 355-57. Actually, little, if any, conflict exists between an individual decedent's preferences and societal interests. See generally Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 319.

9. See Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3, 11-12, 23-27, 36-37, for a description of the historical development of the law pertaining to children's shares under the intestate succession statutes.

10. See *Nobles v. Davenport*, 185 N.C. 162, 116 S.E. 407 (1923), 183 N.C. 207, 111 S.E. 180 (1922); *In re Blockley*, 29 Ch. D. 250 (1885); *Boyd v. Boyd*, 4 L.R.-Eq. 305 (1867); *Edwards v. Freeman*, 2 P. Wms. 435, 24 Eng. Rep. 803 (1727); see also W. THORNTON, *supra* note 4, at 508-09.

The model for the American advancements statute was the English Statute of Distribution, 22 & 23 Car. II, ch. 10, § 3 (1670), which limited the doctrine to gifts made by a father to his children. All American statutes have extended the doctrine to mothers, and most have expanded the class of eligible advancees to lineal descendants, see, e.g., CONN. GEN. STAT. § 45-274(a) (1983); MASS. GEN. LAWS ANN. ch. 196, § 3 (West 1958); VA. CODE § 64.1-17 (1980), or to heirs, including decedent's ancestors, collaterals, and spouse, see, e.g., ALA. CODE § 43-8-49 (1975); ARK. STAT. ANN. § 61-153 (1971); MD. EST. & TRUSTS CODE ANN. § 3-106 (1974). Tennessee is the only state that appears to continue to limit the doctrine to children. TENN. CODE ANN. §§ 31-701 to -702 (1977). The language in this statute is ambiguous. In all reported cases, the advancements concerned a transfer from a parent to a child, see, e.g., *Anderson v. Forbes*, 169 Tenn. 223, 84 S.W.2d 104 (1935); *Cawthon v. Coppedge*, 31 Tenn.

By taking into account lifetime parental gifts to children, the advancements doctrine achieves a more equal sharing by the children of their parent's wealth when the parent dies without a will.<sup>11</sup> The

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(1 Swan) 486 (1852); *Thornton v. Thornton*, 39 Tenn. App. 225, 282 S.W.2d 361 (1955), but no reported case specifically held that the advancements doctrine did not apply to gifts between decedent and heirs other than decedent's children. *But see Robinson v. Robinson*, 23 Tenn. (4 Hum.) 392, 393 (1843) (dicta suggesting advancement can be made to a relative).

11. All American jurisdictions except Michigan have statutes providing for advancements. Michigan had an advancements statute until 1979 when the legislature repealed it as part of its general replacement of the probate code. The Michigan legislature failed to enact an advancements statute within its new revised code. Michigan, however, did enact a statute relating to satisfaction. MICH. COMP. LAWS § 700.139 (1979); *see infra* note 40. The action by the Michigan legislature may have been unintentional, but the omission has not yet been corrected. This legislative inaction leaves uncertain the treatment of advancements in Michigan. If Michigan continues to recognize advancements, then that recognition now must come from the common law. Michigan generally recognizes the common law of England as modified by English statutes of general application. *In re Sanderson*, 289 Mich. 165, 286 N.W. 198 (1939). For example, the Michigan courts have recognized the English Habeas Corpus Act of 1679 as part of the Michigan common law. *People v. Den Uyl*, 320 Mich. 447, 31 N.W.2d 699 (1948). Thus, the customs of London and York, which are recognized as the forerunners of advancements in England, as well as the English Statute of Distribution, which was passed before the English Habeas Corpus Act, arguably may serve as the foundation of a Michigan common law of advancements. *See Elbert, Advancements: I, supra* note 4, at 674. *But cf. Putman's Adm'r v. Heirs of Putnam*, 18 Ohio 347 (1849) (holding that the court could not recognize advancements of personalty because the legislature did not authorize this exception to the distribution statute for personalty as it had done for the descent of land).

The following states statutes have adopted UPC § 2-110: ALA. CODE § 43-8-49 (1975); ALASKA STAT. § 13.11.050 (1973); ARIZ. REV. STAT. ANN. § 14-1220 (1975); DEL. CODE ANN. tit. 12, § 509 (1979); HAWAII REV. STAT. § 560:2-110 (1976); MINN. STAT. § 524.2-110 (1982); MO. REV. STAT. § 474.090 (Supp. 1982); MONT. CODE ANN. § 72-2-206 (1983); NEB. REV. STAT. § 30-2310 (1979); N.D. CENT. CODE § 30.1-04-10 (1976). The following states have enacted UPC § 2-110 with minor nonsubstantive changes: FLA. STAT. § 733.806 (1981); IDAHO CODE § 15-2-110 (1979); N.M. STAT. ANN. § 45-2-110 (1978). Other states have adopted the UPC language in large part, but these statutes include some significantly different language: ARK. STAT. ANN. § 61-153 (1971) (writing not expressly required to be executed contemporaneously with the making of the gift; does not expressly provide that declaration or acknowledgement can operate to bind issue of donee); COLO. REV. STAT. § 15-11-110 (1973) (applies to partial intestacy); ME. REV. STAT. ANN. tit. 18-A, § 2-110 (1964) (allows the decedent to establish the value of the property, which is the subject of the advancement, in the contemporaneous writing); N.J. STAT. ANN. § 3B:5-13 (West 1983) (not clear whether statute applies to partial intestacy); OHIO REV. CODE ANN. § 2105.051 (Page 1976) (not clear whether statute applies to partial intestacy); OR. REV. STAT. §§ 112.135, .155 (1981) (writing not expressly required to be executed contemporaneously with the making of the gift; contrary to the UPC, the property advanced shall be taken into account in computing the share going to the advancee's issue if the advancee predeceases the decedent); 20 PA. CONS. STAT. ANN. § 2109.1 (Purdon Supp. 1983) (applies to partial intestacy; writing not expressly required to be executed contemporaneously with the making of the gift); UTAH CODE ANN. § 75-2-110 (1978) (writing not expressly required to be executed contemporaneously with the making of the gift; contrary to the UPC, the property advanced shall be taken into account in computing the share going to the advancee's issue if the advancee

increasing popularity of wills for the wealthy<sup>12</sup> has made the advancements doctrine and the intestacy statute relevant only to estates of less wealthy decedents. The cost of litigating the question of advancements is often no longer worthwhile because of the relatively small sums at stake.<sup>13</sup> Given that this doctrine is most useful in modern American society to heirs of smaller estates, the law re-

predeceases the decedent); WYO. STAT. § 2-4-108 (1980) (not clear whether statute applies to partial intestacy; the property advanced is valued as of the date on which the heir comes into possession or enjoyment and, unlike the UPC, death of the decedent prior to possession or enjoyment is not an alternative valuation date).

For statutes that do not expressly refer to a *contemporaneous* writing, the courts have imposed such a requirement anyway. *See, e.g.*, *Hirning v. Webb*, 91 Idaho 229, 419 P.2d 671 (1966); *Elliott v. Western Coal & Mining Co.*, 243 Ill. 614, 90 N.E. 1104 (1910); *Harness v. Harness*, 49 Ind. 384 (1885); *In re Estate of Hessler*, 79 Neb. 691, 113 N.W. 147 (1907); *Arthur v. Arthur*, 143 Wis. 126, 126 N.W. 550 (1910). *See infra* note 58 and accompanying text for discussion of whether lineal descendants of the advancee are bound by an advancement.

If the language of an advancements statute fails to provide clearly whether the doctrine applies when the decedent dies partially intestate, the courts conflict on the proper interpretation. For cases holding that the advancements statute applies only when the decedent dies wholly, rather than partially, intestate, see *Little v. Ennis*, 207 Ala. 111, 92 So. 167 (1922); *Gilmore v. Jenkins*, 129 Iowa 686, 106 N.W. 193 (1906); *In re Estate of Beier*, 205 Minn. 43, 284 N.W. 833 (1939); *Bowron v. Kent*, 190 N.Y. 422, 83 N.E. 472 (1908); *Jenkins v. Mitchell*, 57 N.C. (4 Jones Eq.) 207 (1858). For cases holding that the advancements statute applies when decedent dies partially intestate, see *Dittoe's Adm'r v. Cluney's Ex'rs*, 22 Ohio St. 436 (1872); *McClure v. Steele*, 14 Rich. Eq. 105 (S.C. 1858).

Many advancements statutes expressly apply only when the decedent dies totally intestate. *See, e.g.*, IND. CODE § 29-1-2-10 (1982); WASH. REV. CODE § 11.04.041 (1983); U.P.C. § 2-110 (1977). Other statutes expressly permit advancements when the decedent dies partially intestate. *See, e.g.*, CAL. PROB. CODE § 1050 (West 1981), *repealed* by Probate Law & Procedure Act, ch. 842, § 44, 1983 Cal. Legis. Serv. 4491 (West) (effective Jan. 1, 1985) (interpreted in *In re Estate of Hayne*, 165 Cal. 568, 133 P. 277 (1913)); CAL. PROB. CODE § 6409(a) (West Supp. 1984) (effective Jan. 1, 1985) expressly applies only when decedent dies totally intestate); KY. REV. STAT. § 391.140 (Bobbs-Merrill Supp. 1982); VA. CODE § 64.1-17 (1980).

12. *See Dunham, The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 244, 248, 249-51 (1963); *Powell & Looker, Decedents' Estate Illumination from Probate and Tax Records*, 30 COLUM. L. REV. 919, 921-27 (1930); *Ward & Beuscher, The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 411-13; *see also Friedman, Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 34-35 (1964).

13. For example, a review of New York cases after 1900 shows that only two cases dealt with advancements. *See Johnson v. Cole*, 178 N.Y. 364, 70 N.E. 873 (1904); *In re Bennington*, 67 Misc. 363, 124 N.Y.S. 829 (Sur. Ct. 1910). Other cases tangentially considering the doctrine concerned a gift prior to execution of a will, *Bowron v. Kent*, 190 N.Y. 422, 83 N.E. 472 (1908), partial intestacy, *In re Farmers' Loan & Trust Co.*, 181 A.D. 642, 168 N.Y.S. 952 (1918), *aff'd*, 225 N.Y. 666, 122 N.E. 880 (1919) (partial intestacy occurring as a result of settlement between intestate heirs and will beneficiaries); *Estate of Finck*, 120 Misc. 428, 198 N.Y.S. 670 (Sur. Ct. 1923); a loan, *In re Robinson*, 45 Misc. 551, 92 N.Y.S. 967 (Sur. Ct. 1904) (intestate estate); or a release, *Estate of Merrihew*, 171 Misc. 541, 14 N.Y.S.2d 360 (Sur. Ct. 1939) (intestate estate).

former's task becomes clear—an advancement statute should reflect the probable intent of less wealthy decedents and be self-implementing so that extensive litigation becomes unnecessary.<sup>14</sup>

The UPC drafters' response to the needs of less wealthy intestate decedents was an advancements statute that recognized a lifetime gift to an heir as an advancement of that heir's inheritance only if the gift was either accompanied by a writing indicating the decedent's intent to make it an advancement or if it was acknowledged in writing by the heir as an advancement.<sup>15</sup> After first dem-

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14. The low number of advancements cases shown, *supra* note 13, might be attributable to decedents' no longer making lifetime gifts for which any evidence suggests that the decedents intended advancements. A review of satisfactions cases, however, suggests that lifetime gifts are still being made, but that parties cannot afford to litigate the question of the testamentary effect of these gifts with respect to small intestate estates. See *infra* notes 40-45 and accompanying text for a definition of the satisfactions doctrine. A satisfaction is a lifetime gift made by a testator to a legatee or devisee with the intent that it be a substitute for a bequest or devise found in the testator's will. Both the satisfactions and advancements doctrines concern lifetime gifts made by the decedents. Thus, satisfaction is the analogue to the doctrine of advancements in the law of wills. A fair inference can be made from a greater number of satisfactions cases, therefore, that more advancements claims would be pursued if intestate decedents had larger estates. In New York the number of satisfactions cases decided after 1900 far outnumbered the number of advancements cases decided during that same period. See *Estate of Snyder*, 78 Misc. 2d 322, 358 N.Y.S.2d 824 (Sur. Ct. 1974); *Estate of McDonnell*, 32 Misc. 2d 471, 222 N.Y.S.2d 454 (Sur. Ct. 1961); *In re Ludwig*, 207 Misc. 860, 140 N.Y.S.2d 742 (Sur. Ct. 1955); *In re Will of Hall*, 120 N.Y.S.2d 188 (Sur. Ct. 1953), *aff'd*, 284 A.D. 1013, 135 N.Y.S.2d 295 (1954); *In re Lutz*, 201 Misc. 539, 107 N.Y.S.2d 388 (Sur. Ct. 1951); *In re Frank*, 195 Misc. 406, 90 N.Y.S.2d 716 (Sur. Ct. 1949); *In re Singer's Estate*, 171 Misc. 509, 13 N.Y.S.2d 37 (Sur. Ct. 1939); *Estate of Bernhardt*, 151 Misc. 480, 273 N.Y.S. 250 (Sur. Ct. 1934); *In re Weiss*, 39 Misc. 71, 78 N.Y.S. 877 (Sur. Ct. 1902); see also *In re Will of Fahnestock*, 273 A.D. 767, 75 N.Y.S.2d 332 (1947), *aff'd*, 298 N.Y. 647, 82 N.E.2d 38 (1948) (ambiguous provision in will as to how to account for previous gift made to devisee); *In re German's Estate*, 107 N.Y.S.2d 411 (Sur. Ct. 1951) (same); *In re Ferge's Will*, 67 N.Y.S.2d 321 (Sur. Ct. 1947) (same); *In re Estate of Willis*, 158 Misc. 534, 287 N.Y.S. 165 (Sur. Ct. 1936) (same). Compare the above cited cases with the advancements cases reported in New York after 1900. See *supra* note 13.

15. The UPC provides:

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgement provides otherwise.

U.P.C. § 2-110 (1977).

The Model Probate Code of 1946 (MPC) proposed to reverse the prevalent, court created presumption in favor of gifts being advancements. The MPC states that "every gratuitous intervivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement." M.P.C. § 29(a) (1946). If one assumes that the problem to be



onstrating that imposing this writing requirement effectively repeals the advancements doctrine by failing to address the needs of intestate decedents, this essay then explores the reasons the drafters concealed the repeal by retaining the formal recognition of the advancements doctrine in the Code.

Intuitively, one suspects that the writing requirement effectively abolishes the advancements doctrine because those persons who are sophisticated enough to make an advancement in writing are more likely to execute a will.<sup>16</sup> A review of the statutory development and litigation of the advancements doctrine during the nineteenth and twentieth centuries bolsters this assumption.<sup>17</sup>

Most jurisdictions modeled their original advancements statutes after the English Statute of Distribution,<sup>18</sup> which provided only the manner for a general accounting for lifetime gifts.<sup>19</sup> These

solved was excessive litigation concerning advancements, reversing the presumption as to the decedent's intent was an insufficient response. As long as the enigmatic question of specific intent of the decedent remained at issue, reversing the presumption would not be a significant deterrent to heirs from pursuing their claim. This MPC provision was adopted in Indiana and Iowa. IND. CODE § 29-1-2-10 (1982); IOWA CODE § 633.224 (1983). Other states that similarly have reversed the common-law presumption by statute are North Carolina, N.C. GEN. STAT. §§ 29-2(1), -24 (1976) (an advancement to decedent's spouse must be accompanied by a contemporaneous writing designating gift as an advancement), Texas, TEX. PROB. CODE ANN. § 44 (Vernon 1980), and Washington, WASH. REV. CODE § 11.04.041 (1983) (Washington previously had required a writing, Act of Mar. 16, 1917, ch. 156, § 33, 1917 Wash. Laws 651).

16. Certainly, attorneys would advise most clients to write a will rather than rely on the advancements statute.

17. The emergence of statutory reform in the nineteenth century, *see infra* notes 28-33 and accompanying text, and the increasing popularity of wills in the twentieth century, *see supra* note 12, explain the focus on this time period.

18. *See, e.g.*, Act of Aug. 12, 1822, § 14, 1822 Fla. Laws 7; Act of Dec. 25, 1821, § 1, 1821 Ga. Laws 52-53; Act of Jan. 25, 1839, § 46, 1839 Iowa Acts 486.

19. The English Statute of Distribution provided:

. . . to and amongst the Children of such persons dyeing intestate, and such persons as legally represent such Children in case any of the said Children be then dead, other than such Childe or Children (not being Heire at Law) who shall have any Estate by the Settlement of the Intestate, or shall be advanced by the Intestate in his Lifetime by portion or portions equal to the share which shall by such distributcon allotted to the other Children, to whom such distributcon is to be made. And in case any Childe, other than the Heire at Law who shall have any Estate by Settlement from the said Intestate, or shall be advanced by the said Intestate in his Lifetime by portion not equal to the share which will be due to the other Children by such distributcon as aforesaid, then soe much of the Surplusage of the Estate of such Intestate to be distributed to such Childe or Children as shall have any Land by Settlement from the Intestate, or were advanced in the Lifetime of the Intestate as shall make the Estate of all the said Children to be equall as neere as can be estimated. But the Heire at Law notwithstanding any Land that he shall have by descent or otherwise from the Intestate is to have an equall part in the distributcon with the rest of the Children without any consideration of the value of the Land which he hath by descent or otherwise from

statutes made no attempt to define an advancement or to provide guidelines on the types of transfers treated as advancements rather than absolute gifts.<sup>20</sup> The American courts generally refused to adopt any objective tests to identify advancements. Instead, they interpreted the advancements statutes as authorizing an inquiry to determine if decedent's specific intent was to make an advancement rather than an absolute gift.<sup>21</sup> Predictably, this judicial inquiry created a significant amount of litigation on an array of legal issues: Must the decedent possess the intent to make an advancement at the time of the gift or may the decedent acquire the requisite intent at any time prior to death?<sup>22</sup> Could a decedent, having the intent to make an advancement, later change that intent and

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the Intestate.

English Statute of Distribution, 22 & 23 Car. II, ch. 10, § 3 (1670). "Heire at Law" refers to the eldest son under the principle of primogeniture. An advancement of land to the eldest son would not decrease his share of the intestate personalty. Further, the common-law rule that the eldest son suffered no abatement of the descended lands because the decedent had made an advancement of personalty continued to apply. The Statute of Distribution, however, was interpreted to require the eldest son to bring any advancements of personalty to the estate if he wanted to share in the intestate personalty. *Pratt v. Pratt*, 284, 94 Eng. Rep. 758 (1731).

20. These early American statutes and the English Statute of Distribution are typical of statutes enacted before the twentieth century. The legislatures expressed their policies only in general terms, leaving the courts to provide specific detail. Some commentators regret that these enactments are no longer the norm. See G. CALABRESI, *supra* note 1, at 5-6; G. GILMORE, *supra* note 1, at 95-96.

21. For examples of cases in which courts have held intent relevant, see *Booth v. Foster*, 111 Ala. 312, 20 So. 356 (1896); *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665 (1920); *Page v. Elwell*, 81 Colo. 73, 253 P. 1059 (1927); *Johnson v. Belden*, 20 Conn. 322 (1850); *Holliday v. Wingfield*, 59 Ga. 206 (1877); *Woolery v. Woolery*, 29 Ind. 249 (1868); *Barber v. Taylor's Heirs*, 39 Ky. (9 Dana) 84 (1839); *Graves v. Spedden*, 46 Md. 527 (1877); *Bulkeley v. Noble*, 19 Mass. (2 Pick.) 337 (1824); *Speer v. Speer*, 14 N.J. Eq. 240 (1862); *Kiger v. Terry*, 119 N.C. 456, 26 S.E. 38 (1896); *Fels v. Fels*, 1 Ohio C.C. 420 (1886). South Carolina is the only state in which the courts have held that the specific intent of the decedent is irrelevant. The objective circumstances surrounding the gift, however, such as the amount or purpose of the gift, are considered to determine if a court should treat a particular gift as an advancement. See *Heyward v. Middleton*, 65 S.C. 493, 43 S.E. 956 (1903); *Rees v. Rees*, 11 Rich. Eq. 86 (S.C. 1859); *M'Caw v. Blewit*, 2 McCord Eq. 90 (S.C. 1827).

22. See, e.g., *Wallace v. Owen*, 71 Ga. 544 (1883) (donor unable to change an executed gift into an advancement without the donee's consent); *Bolin v. Bolin*, 245 Ill. 613, 92 N.E. 530 (1910) (donor unable to change an executed gift into an advancement without the donee's consent); see also *Guardianship of Hudelson*, 18 Cal. 2d 401, 115 P.2d 805 (1941) (transfers made from an incompetent's estate during his life to his daughter could be advancements even though the incompetent was incapable of possessing the requisite intent to make a transfer because the court acted for the incompetent and its order must be taken in lieu of the written expression of the donor's intent); *In re Farmers' Loan & Trust Co.*, 181 A.D. 642, 168 N.Y.S. 952 (1918), *aff'd*, 225 N.Y. 666, 122 N.E. 880 (1919) (although the court held transfers to be absolute gifts, the court indicated that it had the power to make advancements from an incompetent's estate).

make an absolute gift? If so, would the change of intent have to be manifested in any formal manner?<sup>23</sup> Upon proof of what circumstances, if any, should a presumption arise in favor of an advancement?<sup>24</sup> The courts, even after resolving these legal issues, were severely burdened with factual disputes<sup>25</sup> that were exacerbated by the inevitable unreliability of the evidence admitted to show decedent's intent.<sup>26</sup>

#### Disenchantment with the operation of the advancements doc-

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23. See, e.g., *Wallace v. Owen*, 71 Ga. 544 (1883) (evidence that the donor did not want his children to account for the gift and that he would tear up the memorandum changing the gift to his children, which he did, was admissible); *Calhoun v. Taylor*, 178 Iowa 56, 159 N.W. 600 (1916) (decedent by stipulation in a deed advanced \$1000 to a son as his full interest as heir, to which son agreed, and the decedent had not converted the advancement into a gift by making a subsequent gift to his son); *Gunn v. Thruston*, 130 Mo. 339, 32 S.W. 654 (1895) (presumption for advancement may be rebutted by subsequent declarations of the decedent to third persons); *Oller v. Bonebrake*, 65 Pa. 338 (1870) (the finding of "family book" with items of advancement erased held not sufficient to establish a change of intention when the decedent had been mentally incompetent for several years prior to his death because the competency of the decedent at the time of the cancellation was unknowable).

24. Most courts created a presumption in favor of an advancement upon proof of a gift of a substantial value. See, e.g., *Autrey v. Autrey's Adm'r*, 37 Ala. 614 (1861); *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665 (1920); *Holliday v. Wingfield*, 59 Ga. 206 (1877); *Maxwell v. Maxwell*, 109 Ill. 588 (1884); *McCaw v. Burk*, 31 Ind. 56 (1869); *Burton v. Baldwin*, 61 Iowa 283, 16 N.W. 110 (1883); *Cecil v. Cecil*, 19 Md. 72 (1862); *Whitfield v. Whitfield*, 40 Miss. 352 (1866); *Harper v. Harper*, 92 N.C. 300 (1885); *Sayles v. Baker*, 5 R.I. 457 (1858). See generally T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 129, at 719-22 (2d ed. 1953) (discussing advancements).

25. See, e.g., *Dillman v. Cox*, 23 Ind. 440 (1864); *Stewart v. Pattison*, 8 Gill 46 (Md. 1849); *Osgood v. Heirs of Breed*, 17 Mass. 356 (1821); *Wanmaker v. Van Buskirk*, 1 N.J. Eq. 685 (1832); *In re Will of Morgan*, 104 N.Y. 74, 9 N.E. 861 (1887); *Nobles v. Davenport*, 185 N.C. 162, 116 S.E. 407 (1923), 183 N.C. 162, 111 S.E. 180 (1922); *Law v. Smith*, 2 R.I. 244 (1852); *White v. White*, 72 W. Va. 144, 77 S.E. 911 (1913).

26. See, e.g., *Rumbly v. Stinton*, 24 Ala. 712 (1854) (subsequent declarations of the donor, unless made in the presence of the donee and sanctioned by him, are not admissible); *Distributees of Mitchell v. Mitchell's Adm'r*, 8 Ala. 414 (1845) (decedent's oral declarations admitted); *Johnson v. Belden*, 20 Conn. 322 (1850) (subsequent declarations by decedent were admissible); *Phillips v. Chappell*, 16 Ga. 16 (1854) (decedent's oral declarations admitted); *Chne v. Jones*, 111 Ill. 563 (1884) (declarations that decedent had given all his children equal amounts of property admitted); *Woolery v. Woolery*, 29 Ind. 249 (1868) (declarations of decedent immediately before and after a gift admissible to rebut presumption of advancement); *West v. Beck*, 95 Iowa 520, 64 N.W. 599 (1895) (evidence of contemporaneous declaration of decedent admissible); *Parks v. Parks*, 19 Md. 323 (1863) (the rule that parol evidence is inadmissible to vary a written instrument cannot be invoked to exclude such evidence when offered to show no advancement when the instrument is silent on this issue); *In re Estate of Martinez*, 20 N.M. St. B. Bull. 1070, 633 P.2d 727 (Ct. App. 1981) (court held evidence of decedent's conversations on his intent to make an advancement many years after the gift was insufficient to support finding of an advancement); *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S.E. 523 (1918) (when intent of father and child do not appear from any writing executed by them, it may be deduced from their prior, contemporaneous, or subsequent declarations, their subsequent conduct as to property, and the father's evident intent to make distributions before his death).

trine developed quickly.<sup>27</sup> A forerunner to UPC section 2-110 can be found as early as 1784 in Massachusetts,<sup>28</sup> which enacted a statute that did not require a writing in all cases, but included in the definition of an advancement a gift charged in writing or accompa-

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27. Chancellor Kent, a leading nineteenth century jurist in the area of wills and trusts, identifies the states that required a writing, but he neither suggests the reasons for the deviation from the Statute of Distribution nor comments on the advisability of imposing a writing requirement. 4 J. KENT, COMMENTARIES ON AMERICAN LAW 444 (9th ed. 1888).

The only persuasive explanation for these state statutes is that legislatures enacted them in an effort to reduce the amount of difficult litigation concerning advancements. The statutes requiring advancements in writing became popular in some of the Western and Midwestern states, such as Arizona and the Dakota Territories, where the legislatures were required to enact quickly an entire body of law. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 340-58 (1973). That situation alone does not explain adequately the use of the writing requirement, however, because other jurisdictions such as Florida and Iowa also were required to enact quickly a body of law. These states chose to continue the English Statute of Distribution language and not to limit expressly the quality of evidence to prove an advancement. See *supra* note 18. An examination of other parts of the succession law likewise cannot explain satisfactorily these early writing statutes. Conceivably, the rejection of other doctrines vital to the English law of descent relating to lineal descendants, such as primogeniture, see Page, *supra* note 9, at 11-14, might have made these lawmakers suspect the advancements doctrine, which was based on the assumption of equality among children. Since such changes were not unique to states imposing a writing requirement for proving advancements, *id.* at 22-27, however, such an explanation seems tenuous. Alternatively, the writing requirement may have represented only a part of a general pattern in these jurisdictions' succession laws for imposing formalities on testamentary acts and strictly limiting extrinsic evidence to show the decedent's testamentary intent. The existence in several of these jurisdictions of liberal rules with respect to the doctrine of satisfactions, however, suggests that this explanation is also unsatisfactory. See *infra* notes 40-45 and accompanying text.

A commentary accompanying a writing requirement provision in the 1865 version of the proposed New York Civil Code is the best available evidence that the drafters primarily sought to reduce litigation through these enactments. A commission appointed by the State of New York, which included David Dudley Field as its foremost member, published a general civil code as an alternative to the common law. See L. FRIEDMAN, *supra*, at 340-58; Atkinson, *Codification of Probate Law*, in DAVID DUDLEY FIELD CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 177-203 (A. Reppy ed. 1949). (This provision was adopted by the Dakota Territory. See *infra* note 33.). The Commission's motivating factor—the reduction of litigation—was stated as follows:

Questions of considerable embarrassment, which frequently arise in determining what is to be deemed an advancement, and what is to be taken as its value, have led the commissioners to insert the provision, that in order to constitute a settlement an advancement, within these provisions, its purpose and value must be expressed in the instrument.

REPORT OF THE COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 654, Comments, at 190 (1865)[hereinafter cited as FIELD'S CIVIL CODE].

28. See W. NELSON, AMERICANIZATION OF THE COMMON LAW—THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 91-92 (1975) (describing the emergence of the Massachusetts legislature's willingness to exercise sovereign power and change the common law).

nied by a memorandum.<sup>29</sup> In 1806, Massachusetts amended the statute to restrict advancements to gifts for which the intent to make an advancement is expressed in writing.<sup>30</sup> During the mid-1800's, when codification of the common law gained popularity, especially in the West,<sup>31</sup> the 1806 Massachusetts advancements statute became a model<sup>32</sup> for more than a dozen jurisdictions.<sup>33</sup> These

29. The statute, in pertinent part, reads:

That any deed of lands or tenements made for love and affection, or where any personal estate delivered a child shall be charged in writing by the Intestate, or by his order, or a memorandum made thereof, or delivered expressly for that purpose, before two witnesses who were bid to take notice thereof, the same shall be deemed and taken an advancement to such child or children to the value of such lands, tenements or personal estate, within the intent of this act.

Act of Mar. 9, 1784, ch. 36, 1782-83 Mass. Laws 582. Similar language is found in a 1789 New Hampshire statute. Act of Feb. 3, 1789, *reprinted in* 5 N.H. LAWS, FIRST CONSTITUTIONAL PERIOD 1784-1792, at 386 (H. Metcalf ed. 1916). This statute remains in force today. N.H. REV. STAT. ANN. §§ 561:15-:16 (1974). Rhode Island and Vermont also adopted this statutory language in the 1820's. R.I. Laws § 4, at 226 (1822), *approved*, Jan. 2, 1822; Act of Nov. 15, 1821, § 76, 1821 Vt. Laws 58. Both these states have retained the statute with only slight modification. R.I. GEN. LAWS § 33-1-11 (1969); VT. STAT ANN. tit. 14, § 1723 (1974). This statute also was adopted briefly in the early 1800's by territories in the Midwest. Michigan enacted the 1784 Massachusetts statute. Act of July 27, 1818, §§ 7, 18, *reprinted in* 1 Mich. Terr. Laws 359, 366 (1871). When Wisconsin became a separate territory from Michigan in 1836, the 1784 statute became a part of its law. Wis. Organic Act, § 12, *approved*, Apr. 20, 1836, *found in* 5 Stat. 15 (1846); *see also* Act of Dec. 9, 1836, § 1, 1836 Wis. Terr. Laws 110-11 (reaffirming that Michigan Territorial law applied). Wisconsin reenacted this same statutory provision in 1839. Act of July 4, 1839, § 41, 1839 Wis. Terr. Laws 305. The 1784 Massachusetts statute became part of Minnesota law when Minnesota became a separate territory on March 3, 1849, and its Organic Act adopted the laws of Wisconsin in force as of that date. Minn. Organic Act § 12, *approved*, Mar. 3, 1849, *found in* 9 Stat. 407 (1851). Michigan, Minnesota, and Wisconsin later adopted the more restrictive 1806 Massachusetts advancements statute. *See infra* note 33.

30. The Massachusetts statute of 1806 provides:

That all gifts or grants made by the Intestate to any child or grand child of any estate real or personal, in advancement of the portion of such child or grand child, and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing or acknowledged in writing by the child or grand child as made for such advancement, such estate, real and personal, shall be taken and estimated in the distribution and partition of the intestates real & personal estate as part of the same;

Act of Mar. 12, 1806, ch. 90, § 3, 1804-05 Mass. Laws 508-09. The statutory language is ambiguous as to whether a writing was the exclusive means of proving an advancement. The Massachusetts courts interpreted the statute restrictively and made clear that a writing was the exclusive means of proving an advancement. *See* Barton v. Rice, 39 Mass. (22 Pick.) 508 (1839); Bullard v. Bullard, 22 Mass. (5 Pick.) 527 (1827); Ashley, Appellant, 21 Mass. (4 Pick.) 21 (1826). *But see* Bransford v. Crawford, 51 Ga. 20 (1874) (interpreting similar language, a court held that the statute did not preclude proof of decedent's intent to make an advancement by other types of evidence). *See generally infra* notes 72-73 and accompanying text.

31. *See* L. FRIEDMAN, *supra* note 27, at 351-55.

32. For discussions of drafters' propensity to borrow statutes from other states, see Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41 (1937); Riesenfeld, *Law-Mak-*

early enactments, which required written proof of the decedent's

*ing and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 141-43 (1949) (describing in general terms the reliance of these midwestern and western territories on Massachusetts law).

33. The most prevalent statutory language found in these earlier enactments was: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." HOWELL CODE, ch. 26, § 9, at 184. This provision was adopted in the following jurisdictions: ME. CONST. art. X, § 3 (continuing in force the laws of Massachusetts; Maine had been part of Massachusetts until June 19, 1819, at which time Massachusetts passed the Act of Separation, Act of June 19, 1819, ch. 161, 1818-22 Mass. Laws 248-60; the Massachusetts law as of 1820, when Maine became a state, included statutory language only slightly different than that shown above, *see* MASS. GEN. LAWS ch. 90, § 3 (1823); statutory language can be found in ME. LAWS tit. 51, § 40 (1821)); Howell Code, *supra*, adopted, 1864 Ariz. Terr. Laws 71 (in ARIZ. REV. STAT. § 1465 (1887), *approved*, Mar. 8, 1887, the writing requirement was eliminated; upon passage of the Uniform Probate Act it was reinstated, Act of Apr. 24, 1973, ch. 75, § 4, at § 14-2110, 1973 Ariz. Sess. Laws 366); Act of Apr. 13, 1850, ch. 96, § 7, 1849-50 Cal. Laws 221; GA. CODE § 2538 (1861), *adopted*, Act of Dec. 19, 1860, § 1, 1860 Ga. Laws 24; Act of Feb. 1, 1864, ch. 3, § 321, 1864 Idaho Terr. Laws 390; Act of Apr. 9, 1872, § 7, 1871-72 Ill. Laws 354; MICH. REV. STAT. ch. 67, § 9 (1846), *adopted*, Act of May 18, 1846, No. 150, § 1, 1846 Mich. Laws 272 (revisors cited in margin Bullard v. Bullard, 22 Mass. (5 Pick.) 526 (1827); Ashley, Appellant, 21 Mass. (4 Pick.) 21 (1826)); MINN. TERR. REV. STAT. ch. 50, § 8 (1851), *approved*, Mar. 31, 1851; Probate Practice Act, § 546, 1877 Mont. Terr. Laws 368; NEB. TERR. REV. STAT. ch. 14, § 37 (1866), *approved*, Feb. 12, 1866; Act of Nov. 29, 1861, § 320, 1861 Nev. Terr. Laws 240; OKLA. TERR. STAT. § 6905 (1890), *approved*, Dec. 24, 1890; OR. GEN. LAWS ch. 10, § 10, at 677 (M. Deady ed. 1845-64) (original session laws unavailable; enacted Oct. 24, 1864); Act of Mar. 13, 1884, ch. 44, tit. 2, § 14, 1864 Utah Terr. Laws 76; Act of Apr. 27, 1854, § 239, 1854 Wash. Terr. Laws 307; WIS. REV. STAT. ch. 63, § 8 (1849), *approved*, Jan. 10, 1849 (effective Jan. 1, 1850, WIS. REV. STAT. ch. 157, § 1 (1849)).

Another variation of the writing requirement, taken from FIELD'S CIVIL CODE, *supra* note 27, § 654, at 190, was enacted in the Dakota Territory in the 1860's as follows:

When any real or personal property, or both, whether within or without this Territory, of a person who dies intestate as to all his property, has been advanced by such intestate, directly, or by virtue of a beneficial power, or of a power in trust with a right of selection, to a person entitled to succeed to his property, and with a view to a portion or settlement in life, and so expressed in the instrument establishing the settlement or portion, the value thereof as expressed in the instrument must be reckoned, for the purposes of this section only, as part of the property of such intestate which his successors are to receive; and if such advancement equals or exceeds the share which such relative would be entitled to receive, of the property so reckoned, then such relative and his successors have no share in the property of the intestate. But if the advancement is less than such share, he and his successors are to have so much only of the property as is sufficient to make it equal to such share.

Act to Establish a Civil Code, § 654, 1865-66 Dak. Terr. Laws 118-19. By 1877 the Dakota Territory had enacted the more prevalent language from the 1806 Massachusetts statute. *See* DAK. TERR. REV. CODE § 790 (1877).

At the time the UPC promulgated its advancements statute, the following states had taken the Massachusetts lead and adopted statutes requiring a writing to prove an advancement: CAL. PROB. CODE § 1050 (West 1981), *repealed* by Probate Law & Procedure Act, ch. 842, § 44, 1983 Cal. Legis. Serv. 4491 (West) (effective Jan. 1, 1985); IDAHO CODE § 14-109 (1948), *repealed* by Uniform Probate Code Act, ch. 111, § 3, 1971 Idaho Sess. Laws 374; Ill. Rev. Stat. ch. 110-1/2, § 2-5(a) (1983); Me. Rev. Stat. Ann. tit. 18, § 1151 (1964), *repealed* by

intent to make an advancement, provide an opportunity to evaluate the impact of a writing requirement on the doctrine of advancements. In addition, the experience in these jurisdictions with such statutes provides evidence as to what results the UPC drafters reasonably could have expected from a statute that required written proof of the decedent's intent to make an advancement.

As explained earlier,<sup>34</sup> advancements litigation decreased after 1900 as the popularity of testacy increased—especially for those decedents dying with substantial estates for which the expense of litigation would be warranted. Not unexpectedly, jurisdictions that require written proof of the decedent's intent to make an advancement have experienced a greater decline in advancements litigation than those states without a writing requirement.<sup>35</sup> Although this

Probate Code Act, ch. 540, § 24-C, 1976 Me. Laws 1113; MASS. GEN. LAWS ANN. ch. 196, § 5 (West 1958); MICH. COMP. LAWS § 702.90 (1970), *repealed by* Revised Probate Code Act, No. 642, § 993, 1978 Mich. Pub. Acts 2585; Minn. Stat. § 525.53 (1974), *repealed by* Act of June 5, 1975, ch. 347, § 144, 1975 Minn. Laws 1104; MONT. CODE ANN. § 91-414 (1947), *repealed by* Uniform Probate Code Act, ch. 365, 1974 Mont. Laws 1378; NEB. REV. STAT. § 30-115 (1964), *repealed by* Probate Code Act, Leg. Bill 354, § 315(5), 1974 Neb. Laws 263-64; Nev. Rev. Stat. § 151.120 (1983); N.H. REV. STAT. ANN. § 561:15-:16 (1974) (as an alternative to a writing for an advancement of personal property, the statute provides that an advancement be delivered "in the presence of two witnesses who were requested to take notice thereof"; additionally, an advancement of real property can be proved if made for love or affection, *see supra* note 29); N.Y. EST. POWERS & TRUSTS LAW § 2-1.5(b) (McKinney 1981); N.D. CENT. CODE § 30-21-14 (1960), *repealed by* Uniform Probate Code Act, ch. 257, § 82, 1973 N.D. Sess. Laws 777; OKLA. STAT. tit. 84, § 225 (1981); OR. REV. STAT. § 111.120 (1963), *repealed by* Act of June 16, 1969, ch. 591, § 305(1), 1969 Or. Laws 1221-22; R.I. GEN. LAWS § 33-1-11 (1969) (similar to New Hampshire statute); S.D. CODIFIED LAWS ANN. § 29-1-18 (1976); UTAH CODE ANN. § 74-4-20 (1953), *repealed by* Uniform Probate Code, ch. 150, § 1, 1975 Utah Laws 580; VT. STAT. ANN. tit. 14, § 1723 (1974) (similar to New Hampshire statute); WIS. STAT. § 852.11 (1981-82).

34. *See supra* notes 12-13 and accompanying text.

35. Evidence to show that the writing requirement reduces the amount of advancements litigation comes from a comparison of advancements cases reported after 1900 in Minnesota, which imposed a writing requirement, *see supra* notes 29 and 33, and cases reported after 1900 in Iowa, which did not impose a writing requirement, *see supra* notes 15 and 18. In Minnesota, only two cases were reported raising the issue of advancements with respect to estates of intestate decedents. *See Bruski v. Bruski*, 148 Minn. 458, 182 N.W. 620 (1921) (relief was requested to amend the final decree distributing father's intestate estate on basis that decree was procured by fraud or mistake by fact that two of his children failed to admit advancements for which they had signed written acknowledgements; court held that one acknowledgement was procured by undue influence of the father against his daughter and that the other acknowledgement was not signed by the son); *Gilman v. Maxwell*, 79 Minn. 377, 82 N.W. 669 (1900) (without describing the factual basis for its decision, the court upheld a lower court finding against the administrator that an advancement had not been made to decedent's daughter). Other cases raised advancements as an issue, but they either concerned testate estates, *see In re Estate of Staples*, 214 Minn. 337, 8 N.W.2d 45 (1943); *In re Estate of Beier*, 205 Minn. 43, 284 N.W. 833 (1939) (partially testate); *Kuhne v. Gau*, 138 Minn. 34, 163 N.W. 982 (1917); *Kragnes v. Kragnes*, 125 Minn. 115, 145 N.W.

decline indicates that the imposition of the writing requirement relieved the administrative burden on the courts, this trend suggests nothing about the reason advancements litigation is not being pursued in jurisdictions requiring a writing.

Litigation may have declined in jurisdictions that imposed a writing requirement because people do not intend lifetime gifts to be considered upon distribution of their estates. By imposing the writing requirement, the legislatures gave the decedent control over the evidence that could be introduced with respect to a lifetime gift and protected the decedent's estate against claims based on false or easily misinterpreted evidence. The problem with this explanation for the decline in litigation is that it is essentially an argument for repeal of the advancements doctrine rather than an argument for the writing requirement. The decedent always has had control over the effect of any lifetime gifts, because the decedent always has had the power to execute a will. By enacting a statute that permitted the introduction of a less formal instrument to vary the operation of the intestate succession statute, the legislature lessened, rather than eliminated, the risk that false claims that the decedent intended to make an advancement would be made against the decedent's estate.<sup>36</sup>

An alternative explanation for the decline in litigation is that although decedents are making lifetime gifts with the intention that they be taken into account in the distribution of the probate

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785 (1914), or the transferor of the advancement was still alive, see *Holste v. Baker*, 223 Minn. 321, 26 N.W.2d 473 (1947); *Leach v. Leach*, 162 Minn. 159, 202 N.W. 448 (1925). In comparison, Iowa reported 19 cases in which the question whether the decedent intended to make an advancement was a central issue in the decision. The court held that the decedent had made an advancement in the following cases: *Murphy v. Callan*, 199 Iowa 216, 199 N.W. 981 (1924); *In re Estate of Sells*, 197 Iowa 696, 197 N.W. 922 (1924); *Woods v. Knotts*, 196 Iowa 544, 194 N.W. 953 (1923) (alternative holding); *Calhoun v. Taylor*, 178 Iowa 56, 159 N.W. 600 (1916); *McGinnis v. McGinnis*, 159 Iowa 394, 139 N.W. 466 (1913) (court held that transfer was a completed gift in the form of an advancement rather than a constructive trust); *Mossesstad v. Gunderson*, 140 Iowa 290, 118 N.W. 374 (1908); *Hickey v. Davidson*, 129 Iowa 384, 105 N.W. 678 (1906) (facts also could support a release); *Eastwood v. Crane*, 125 Iowa 707, 101 N.W. 481 (1904); *Ellis v. Newell*, 120 Iowa 71, 94 N.W. 463 (1903). The court held that the decedent did not make an advancement in the following cases: *In re Estate of Miller*, 248 Iowa 19, 79 N.W.2d 315 (1956); *In re Estate of Wiese*, 222 Iowa 935, 270 N.W. 380 (1936); *In re Manatt Trust*, 214 Iowa 432, 239 N.W. 524 (1931); *Rollins v. Jarrett*, 207 Iowa 183, 222 N.W. 365 (1928) (grantor still alive); *In re Estate of O'Hara*, 204 Iowa 1331, 217 N.W. 245 (1928); *Fell v. Bradshaw*, 205 Iowa 100, 215 N.W. 595 (1927); *Young v. Young*, 198 Iowa 789, 200 N.W. 181 (1924); *Bash v. Bash*, 182 Iowa 55, 165 N.W. 399 (1917); *Bissell v. Bissell*, 120 Iowa 127, 94 N.W. 465 (1903); *Russell v. Smith*, 115 Iowa 261, 88 N.W. 361 (1901).

36. See *infra* notes 83-85 and accompanying text.



estate, a writing is not accompanying these gifts. Thus, the disappointed heirs have no basis for a claim that the decedent made an advancement. If this explanation is correct, then the writing requirement eliminated an administrative burden on the courts at the cost of frustrating donative intent.

A third explanation for the decline in litigation concerning advancements in jurisdictions requiring a writing is that unambiguous writings accompany most lifetime gifts intended to be advancements, eliminating any need for litigation.<sup>37</sup> This is the only explanation that justifies the writing requirement solution.

Support for either of the last two possible explanations for the decline in litigation in writing jurisdictions is difficult because reported cases are the only easily accessible source of data. A showing that cases frequently concern the question of whether a proffered ambiguous writing was sufficient under the statute to prove an advancement would support the explanation that writings commonly accompany most gifts. That few of these cases exist,<sup>38</sup> however, does not justify an inference that writings are uncommon, because the infrequency of litigation may be attributed to the relatively high cost of litigating the issue.<sup>39</sup>

Reported cases concerning the satisfactions doctrine indirectly provide insight into the operation of the advancements statutes. A satisfaction is a lifetime gift made by the testator with the intention that it satisfy, in whole or in part, a bequest or devise.<sup>40</sup> The satisfactions doctrine essentially provides for the situation in which the testator decides to change the timing of a gift to permit the beneficiary to enjoy the gift before the testator's death.<sup>41</sup> As

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37. One purpose of a statutory formality is to serve a channeling function, which assures the transferor predictable results if certain rules are followed. See Gulliver & Tilson, *supra* note 7.

38. Interestingly, one of the two reported cases on advancements in Minnesota disputed the validity of a writing. See *Bruski v. Bruski*, 148 Minn. 458, 182 N.W. 620 (1921).

39. See *supra* notes 12-13 and accompanying text (discussing the increasing popularity of testacy, especially for decedents dying with large estates and the economic constraints of litigating issues for small intestate estates).

40. See, e.g., *In re Hall's Will*, 120 N.Y.S.2d 188 (Sur. Ct. 1953), *aff'd*, 284 A.D. 1013, 135 N.Y.S.2d 295 (1954); *Moore v. Hilton*, 39 Va. (12 Leigh) 1 (1841). To avoid cumbersome language, hereinafter the term "devise" will be used to refer to testamentary gifts of both personal property and real property.

41. The nature of the lifetime gift can differ significantly from the nature of the devise. A gift of property that differs substantially from that devised to the donee under the will, however, may raise a presumption that the testator did not intend to make a satisfaction. See, e.g., *Dugan v. Hollins*, 4 Md. Ch. 139 (1853); *Scholze v. Scholze*, 2 Tenn. App. 80 (1925); *In re Jacques*, [1903] 1 Ch. 267; *Holmes v. Hohnes*, 1 Bro. C.C. 555, 28 Eng. Rep. 1295 (1783). This presumption is not as strong in the United States as it is in England. See

with advancements, the courts treat a gift as a satisfaction of a devise only if the testator intended at the time of the gift that it be taken into account when the estate is distributed under the will.<sup>42</sup> In the nineteenth century, a handful of states adopted a writing requirement to prove a satisfaction.<sup>43</sup> For testate estates, which are

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Louisville Trust Co. v. Southern Baptist Theological Seminary, 148 Ky. 711, 147 S.W. 431 (1912); *In re Vincent's Estate*, 241 Mich. 329, 217 N.W. 65 (1928); *Carmichael v. Lathrop*, 108 Mich. 473, 66 N.W. 350 (1896); *Alexander's Estate*, 83 Pa. Super. 210 (1924) (pecuniary legacy satisfied with gift of stock because evidence showed testator regarded stock as the equivalent of money); *Harrison's Ex'r v. Harrison's Adm'r*, 171 Va. 224, 198 S.E. 902 (1938).

42. See, e.g., *Kramer v. Kramer*, 201 F. 248 (5th Cir. 1912); *Cowles v. Cowles*, 56 Conn. 240, 13 A. 414 (1888); *Roberts v. Wilson*, 200 Ga. 201, 36 S.E.2d 758 (1946); *Richardson v. Eveland*, 126 Ill. 37, 18 N.E. 308 (1888); *Rodgers v. Reinking*, 205 Iowa 1311, 217 N.W. 441 (1928); *Traubber v. King*, 235 Ky. 658, 32 S.W.2d 8 (1930); *Richards v. Humphreys*, 32 Mass. (15 Pick.) 133 (1833); *Domzalski v. Domzalski*, 303 Mich. 103, 5 N.W.2d 672 (1942); *In re Estate of Wantz*, 137 Neb. 307, 289 N.W. 363 (1939); *Van Houten v. Post*, 32 N.J. Eq. 709 (1880); *In re Will of Williams*, 71 N.M. 39, 376 P.2d 3 (1962); *Degraaf v. Teerpenning*, 52 How. Pr. 313 (N.Y. 1876); *Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1911); *Ellard v. Ferris*, 91 Ohio St. 339, 110 N.E. 476 (1915); *Jones v. Mason*, 26 Va. (5 Rand.) 577 (1827). *But see Wickliffe v. Wickliffe*, 206 Mo. App. 42, 226 S.W. 1035 (1920) (holding that satisfaction requires consent of donee).

43. Field's Civil Code contained the following provision precluding recognition of a satisfaction of a general legacy unless proof of testator's intent was expressed in writing: "Advancements or gifts are not to be taken as adoptions of general legacies, unless such intention is express by the testator in writing." FIELD'S CIVIL CODE, *supra* note 27, § 613, at 178. This same nineteenth century statutory language can be found in CAL. PROB. CODE § 1050 (West 1981), *repealed by Probate Law & Procedure Act*, ch. 842, § 44, 1983 Cal. Legis. Serv. 4491 (West) (effective Jan. 1, 1985), *replaced by CAL. PROB. CODE § 6174* (West Supp. 1984) (effective Jan. 1, 1985) (amended extensively from its original enactment in 1872); OKLA. STAT. tit. 84, § 185 (1981) (originally enacted as OKLA. TERR. STAT. § 6869 (1890), *approved*, Dec. 24, 1890); S.D. CODIFIED LAWS ANN. § 29-6-14 (1976) (originally enacted as Act to Establish a Civil Code, § 613, 1865-66 Dak. Terr. Laws 110). The language found in the South Dakota statute was contained in the laws of Montana, North Dakota, and Utah before these states adopted the UPC. MONT. CODE ANN. § 91-235 (1947) (originally enacted as Probate Practice Act, ch. 17, § 508, 1877 Mont. Terr. Laws 360), *repealed by Uniform Probate Code Act*, ch. 365, 1974 Mont. Laws 1378; N.D. CENT. CODE § 56-05-35 (1960) (originally enacted as Act to Establish a Civil Code, § 613, 1865-66 Dak. Terr. Laws 110), *repealed by Uniform Probate Code Act*, ch. 257, § 82, 1973 N.D. Sess. Laws 777; UTAH CODE ANN. § 74-2-35 (1953) (originally enacted as Act of Mar. 13, 1884, ch. 44, tit. 1, ch. 2, § 35, 1884 Utah Terr. Laws 69), *repealed by Uniform Probate Code Act*, ch. 150, § 1, 1975 Utah Laws 580.

In contrast to the doctrine of advancements, the doctrine of satisfactions is court made and was not the subject of widespread statutory enactment. Besides the statutes described above, only a few other states have addressed the satisfaction doctrine in their statutes.

A statute that apparently does no more than recognize the doctrine can also be traced to FIELD'S CIVIL CODE, *supra* note 27, § 624, at 182, which states that "[a] legacy, or a gift in contemplation, fear or peril of death may be satisfied." This statutory language still can be found in OKLA. STAT. tit. 84, § 11 (1981) and S.D. CODIFIED LAWS ANN. § 29-6-21 (1976).

In the nineteenth and early twentieth centuries, another type of satisfactions statute found its way into laws of the District of Columbia, Kentucky, Virginia, and West Virginia and remains in force today. W. VA. CONST. art. XI, § 8 (adopted laws of Virginia in force as

more likely to involve substantial wealth and, therefore, warrant

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of June 10, 1863; first codification of provision found in W. VA. CODE ch. 77, § 11 (1868)); Act of Mar. 3, 1901, ch. 854, § 1630, 31 Stat. 1434 (1901); Act of Mar. 24, 1851, ch. 617, ch. 3, § 17, 1851 Ky. Acts 229; VA. CODE ch. 122, § 12 (1849), *adopted*, Act of Aug. 15, 1849, ch. 2, § 1, 1849-50 Va. Acts 255. This satisfactions statute provides:

A provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person contained in a previous will, if it would be so deemed in case the devisee or legatee were the child of the testator; and whether he is a child or not, it shall be so deemed in all cases in which it appears from parol or other evidence to have been so intended.

D.C. CODE ANN. § 18-307 (1981) (language modified); KY. REV. STAT. § 394.370 (Bobbs-Merrill 1972); VA. CODE § 64.1-63 (1980); W. VA. CODE § 41-3-2 (1982). The meaning or purpose of this statute is not obvious as demonstrated by the diverse interpretations given to it by the courts of Kentucky and Virginia. In *Duncan's Trustee v. Clay*, 76 Ky. (13 Bush) 48 (1877), the court held:

The first clause of this section was intended to place devisees or legatees, to whom the testator does not stand in the relation of a parent, upon the same footing with children or grandchildren, and to change the common-law rule to that extent. [A presumption in favor of satisfaction arose upon a gift by the testator to a child or to a person to which the testator stands in *loco parentis*. *E.g.*, *Roberts v. Weatherford*, 10 Ala. 72 (1846); *Rodgers v. Reinking*, 205 Iowa 1311, 217 N.W. 441 (1928).] The latter clause further changes the common law so as to apply certain gifts to the satisfaction of devises or legacies, whether specific or general, and whether for a fixed or an uncertain sum. But this provision does not control unless it can be made to appear, from parol or other evidence, that the testator intended, at the time it was made, it should be deemed a satisfaction, partial or entire, of the devise or bequest contained in the previous will.

*Id.* at 51-52; *accord Swinebroad v. Bright*, 110 Ky. 616, 119 Ky. 684, 62 S.W. 484 (1901); *see also Traugher v. King*, 235 Ky. 658, 32 S.W.2d 8 (1930); *Stiff's Ex'r v. Stiff*, 217 Ky. 716, 290 S.W. 718 (1927).

In contrast, the Virginia court in *Harrison's Ex'r v. Harrison's Adm'r*, 171 Va. 224, 198 S.E. 902 (1938), held that, despite the Kentucky holdings to the contrary, it was compelled on the basis of the legislative history of the Virginia statute to raise a presumption in favor of satisfaction for both devisees who were children of the testator and for other devisees and that the reference to parol evidence in the statute merely authorized the court to admit evidence showing testator's intent. *See also In re Estate of Groves*, 120 W. Va. 373, 198 S.E. 142 (1938).

Analogous to its position on advancements, the UPC adopts a writing requirement for satisfactions:

Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

U.P.C. § 2-612 (1977).

The following state statutes currently require a writing to prove a satisfaction: ALA. CODE §§ 43-8-231 (1975); ALASKA STAT. § 13.11.275 (1973); ARIZ. REV. STAT. ANN. § 14-2612 (1975); CAL. PROB. CODE § 1050 (West 1981), *repealed* by Probate Law & Procedure Act, ch. 842, § 44, 1983 Cal. Legis. Serv. 4491 (West) (effective Jan. 1, 1985), *replaced* by CAL. PROB. CODE § 6174 (West Supp. 1984) (effective Jan. 1, 1985); COLO. REV. STAT. § 15-11-612 (1973); FLA. STAT. § 732.609 (1981); HAWAII REV. STAT. § 560:2-612 (1976); IDAHO CODE § 15-2-612

litigation, relatively few cases concerning writings exist—suggesting by inference, that testators do not commonly execute these writings.<sup>44</sup> Furthermore, a greater number of satisfaction cases arises in states in which written proof of an intent to make a satisfaction is not required.<sup>45</sup> If decedents who are sophisti-

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(1979); ME. REV. STAT. ANN. tit. 18-A, § 2-612 (1964); MASS. GEN. LAWS ANN. ch. 197, § 25A (West Supp. 1984-85); MINN. STAT. § 524.2-612 (1982); MO. REV. STAT. § 474.425 (Supp. 1982); MONT. CODE ANN. § 72-2-515 (1983); NEB. REV. STAT. § 30-2350 (1979); N.J. STAT. ANN. § 3B:3-46 (West 1983); N.M. STAT. ANN. § 45-2-612 (1978); N.Y. EST. POWERS & TRUSTS LAW § 2-1.5 (McKinney 1981); N.D. CENT. CODE § 30.1-09-12 (1976); OKLA. STAT. tit. 84, § 185 (1981); S.D. CODIFIED LAWS ANN. § 29-6-14 (1976); UTAH CODE ANN. § 75-2-612 (1978); WIS. STAT. § 853.19 (1981-82). Of these states, the following have adopted the language found in UPC § 2-612: Alabama, Alaska, Arizona, California (most recent enactment; varying from UPC by providing that value expressed in the required writing is conclusive), Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts (more limited than UPC by applying only to a pecuniary legacy), Minnesota, Missouri, Montana, Nebraska (varying from UPC by requiring a devisee's written acknowledgement to be contemporaneous with the gift), New Jersey, New Mexico, North Dakota, and Utah. New York and Wisconsin enacted statutes that were substantially different than UPC § 2-612, but undoubtedly were influenced by the UPC drafts published during the 1960's that imposed a writing requirement. Act of Aug. 2, 1966, ch. 952, § 2-1.5, 1966 N.Y. Laws 2766; Act of Jan. 29, 1970, ch. 339, § 26, 1969 Wis. Laws 1116-17. Michigan enacted a new statute in 1979, the meaning of which is not entirely clear: "Property which a testator gave in his lifetime to a devisee shall be treated as a satisfaction of the devisee in whole or in part, if the will provides for deduction of the lifetime gift." MICH. COMP. LAWS § 700.139 (1979), enacted by Revised Probate Code Act, No. 642, § 139, 1978 Mich. Pub. Acts 2470. This language could be interpreted as requiring an express provision in the will to account for lifetime gifts before a gift could be treated as a satisfaction. If so interpreted, this provision is the most restrictive of any found in the United States. (Michigan has no advancements statute. See *supra* note 11.)

Interestingly, in jurisdictions that do not require a writing for satisfaction but do for advancements, courts have referred to the writing requirement imposed in the advancements statute as evidence of the state's policy not to find a satisfaction without convincing evidence. See, e.g., *In re Estate of Pridmore*, 187 Ill. App. 301 (1914); see also *Domzalski v. Domzalski*, 303 Mich. 103, 5 N.W.2d 672 (1942).

44. The following satisfaction cases decided in California concern the nature of the writing: *In re Estate of Crane*, 6 Cal. 2d 218, 57 P.2d 476 (1936) (property settlement upon separation of parties did not qualify as a sufficient writing for purposes of statute; spouse allowed to take devise made to her under will); *In re Estate of Baker*, 168 Cal. 766, 145 P. 1005 (1914); *Estate of Lackey*, 17 Cal. App. 3d 247, 94 Cal. Rptr. 524 (1971).

45. The following satisfaction cases were decided in California after 1900: *In re Estate of Crane*, 6 Cal. 2d 218, 57 P.2d 476 (1936); *In re Estate of Baker*, 168 Cal. 766, 145 P. 1005 (1914); *Estate of Lackey*, 17 Cal. App. 3d 247, 94 Cal. Rptr. 524 (1971). See also *Estate of Neathery*, 142 Cal. App. 2d 769, 299 P.2d 292 (1956) (one of several reasons why the court determined deeds given to devisee were not a satisfaction of a devise was that no writing existed showing testator's intent to make a satisfaction). Other cases in California related to the satisfaction doctrine concerned decedent's gifts to a pretermitted heir. See *In re Estate of Kretschmer*, 232 Cal. App. 2d 789, 43 Cal. Rptr. 121 (1965); *In re Estate of Rawnsley*, 94 Cal. App. 2d 384, 210 P.2d 888 (1949). Other cases concerned ambiguous provisions in the will directing that subsequent gifts or loans be taken into account upon distribution of the estate. See *Estate of Nielsen*, 169 Cal. App. 2d 297, 337 P.2d 87 (1959); *In re Estate of Brown*, 22 Cal. App. 2d 480, 71 P.2d 345 (1937); *In re Estate of Dodge*, 9 Cal. App. 2d 650,

cated enough to execute wills are unaware of the satisfaction writing requirement, then the assumption that a decedent who did not execute a will would execute an advancements writing is hardly reasonable.

Thus, only two satisfactory explanations for the reduced litigation in jurisdictions requiring a writing remain: either decedents no longer intend lifetime gifts to be considered upon distribution of their estates, or decedents are making lifetime gifts, but without an accompanying writing. If the former hypothesis is correct, the doctrine is no longer relevant to the distribution of intestate estates and should be repealed. If the latter hypothesis is correct, the writing requirement eliminates any effect the advancements doctrine may have on the distribution of intestate estates by repealing the doctrine for all practical purposes.

Many reasons support the actions of the nineteenth century lawmakers in adopting the writing requirement as a device to control litigation concerning the advancements doctrine. During the nineteenth century intestacy was much more common and litigation concerning advancements much more burdensome. Legislatures might have hoped that a writing accompanying an advancement would become general practice. They might have believed that a sufficient number of decedents would execute a writing to justify continuing the advancements doctrine in this restricted form so as to further these decedents' intentions. The modern legislatures in these states, however, can be criticized for not reconsidering the wisdom of retaining the advancements doctrine in this restricted form. Their inaction can be attributed to a fact of legislative life during the last century in this country—"getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions."<sup>46</sup> Also contributing to the present day inaction is the imprimatur received by these statutes from the National Commissioners when they promulgated UPC section 2-110 in 1969.<sup>47</sup> Now that the writing requirement is the preferred and modern resolution of the advancements doctrine problem, state legislatures are hardly likely to recognize that their advancements statutes have become outmoded.

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50 P.2d 839 (1935). Compare the above cited cases with the large number of satisfactions cases reported in New York after 1900. *See supra* note 14.

46. G. GILMORE, *supra* note 1, at 95.

47. *See* 1969 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNITED STATE LAWS 101-06.

Unlike the drafters of the nineteenth century advancements statutes, the UPC drafters had considerable evidence at the time they adopted the writing requirement for advancements showing that advancements litigation was no longer burdensome on the courts and that the imposition of a writing requirement for advancements was likely to have the practical effect of abolishing the doctrine. Thus, the critical question is why the drafters retained formal recognition of the doctrine of advancements in the Code, while adopting a procedural rule that effectively repealed that doctrine.<sup>48</sup> If they believed, as stated in their commentary,<sup>49</sup> that decedents no longer make advancements, then the drafters should have abolished the doctrine along with the other anachronisms that they found in the law of succession, such as the unequal treatment of halfbloods.<sup>50</sup>

A simple and attractive explanation for the sleight of hand treatment of advancements in the Code is that the advancements issue was of minor importance compared to the other matters the drafters addressed in Article II. These matters included a new intestate succession statute,<sup>51</sup> a new will execution procedure,<sup>52</sup> and greater protection for the spouse in common-law states against disinheritance accomplished through lifetime transfers.<sup>53</sup> The explanation that the drafters did little more than select among existing statutory enactments and borrow a provision they considered satisfactory is contradicted, however, by the carefully deliberated terms of UPC section 2-110. Among the improvements made by the drafters was the elimination of an ambiguity found in many existing statutes<sup>54</sup> under which an advancement could be shown if "expressed in [such] gift or grant" or if "charged in writing by the intestate."<sup>55</sup> Unlike many existing statutes,<sup>56</sup> the UPC expanded

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48. The same question can be asked of the drafters of the New York statutory provision. The commentary to N.Y. EST. POWERS & TRUSTS LAW § 2-1.5 (McKinney 1981) cites difficulties of litigation as the reason the drafters imposed the writing requirement. By 1966, however, when this statutory provision was enacted, advancements litigation no longer appeared to be a problem. See *supra* notes 13, 33; Act of Aug. 2, 1966, ch. 952, § 2-1.5, 1966 N.Y. Laws 2766.

49. U.P.C. § 2-110 Comment (1977).

50. *Id.* § 2-107.

51. *Id.* § 2-101 to -114.

52. *Id.* § 2-501 to -513.

53. *Id.* § 2-201 to -207.

54. This ambiguity can be traced to the Massachusetts statute of 1806. See *supra* note 30.

55. *Id.*

56. See *supra* note 10.

the class of persons eligible to receive advancements from children or lineal descendants of the decedent to all the decedent's heirs.<sup>57</sup> The drafters also clearly stated that an advancement does not bind the lineal descendants of a recipient of an advancement who predeceased the decedent. Frequently, existing statutes either left this issue unaddressed or legislatures adopted a contrary rule.<sup>58</sup> In sum,

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57. Presumably, the drafters did this because the evidence showing an intent to make an advancement was made more stringent by the writing requirement.

58. The following jurisdictions do not address by statute the question of whether lineal descendants of the advancee are bound by an advancement: D.C. CODE ANN. § 19-319 (1981); MISS. CODE ANN. § 91-1-17 (1972); R.I. GEN. LAWS § 33-1-11 (1969); TENN. CODE ANN. § 31-702 (1977); *see also* VA. CODE § 64.1-17 (1980); W. VA. CODE § 42-4-1 (1982) (both providing that the advancee "or any descendant of his" shall be bound). When the statute does not speak to the representation issue, the courts have based their decisions on a technical analysis. According to the courts, whether the advancement continues to be taken into account in the distribution of the probate estate depends upon how the shares passing to the substitute takers for the advancee are determined under the intestate succession statute and the representational system adopted by the state. If the substitute taker's share of the estate is the share, or a portion of the share, that would have otherwise passed to the predeceased advancee, then the substitute taker will be required to account for the advancement. *E.g.*, *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176 (1850); *Towles v. Roundtree*, 10 Fla. 299 (1863-1864); *Nelson's Heirs v. Bush's Adm'r*, 39 Ky. (9 Dana) 104 (1839); *Dilley v. Love*, 61 Md. 603 (1884); *Estate of Williams*, 62 Mo. App. 339 (1895); *Park's Estate*, 4 Pa. C. 560 (1887); *Eshleman's Appeal*, 74 Pa. 42 (1873); *Hughes's Appeal*, 57 Pa. 179 (1868); *McClure v. Steel*, 14 Rich. Eq. 105 (S.C. 1868); *Flesher v. Mitchell*, 5 W. Va. 59 (1871); *see also Simpson v. Simpson*, 114 Ill. 603, 4 N.E. 137, 7 N.E. 287 (1885) (statute expressly provided for this result); *McRae v. McRae*, 3 Bradf. 199 (N.Y. Sur. Ct. 1855) (statute expressly provided for this result); *cf. Beebe v. Estabrook*, 79 N.Y. 246 (1879) (court held that a grandchild could claim benefit of advancements when the decedent was survived by sons and a grandchild, who was the child of a predeceased daughter). The substitute taker is said to be sharing in the probate estate by "representation" of the advancee and, therefore, bound by the advancement made to the advancee rather than receiving a share of the estate "directly" from the decedent. The following cases hold that persons taking directly from the decedent are not bound by advancements made to their ancestors: *Brown v. Taylor*, 62 Ind. 295 (1878); *Skinner v. Wynne*, 55 N.C. (2 Jones Eq.) 41 (1854); *Person's Appeal*, 74 Pa. 121 (1873).

MPC section 29(c) requires the advancement to be taken into account by the persons who take from the decedent and who were also heirs of the advancee. That these persons do not take by representation through the advancee is irrelevant.

*Death of Advancee before intestate.* If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

M.P.C. § 29(c) (1946). Although this statutory provision contains ambiguities, the comments to the section clarify the drafters' intent to have the advancee's lineal descendants account for the advancement even though they took directly from the decedent rather than by representation through the advancee. (The term "lineal heirs" is not defined in the MPC. Pre-

UPC section 2-110 is a unique advancements statute that demonstrates a thoughtful consideration of advancement problems and, hence, makes any "short shrift" explanation untenable.

A more likely explanation for the UPC's retention of the doctrinal cloak of advancements is the common-law tradition—a tradition that provides lawyers the sense of security and certainty of the past and, at the same time, promises reform that will provide an adequate response to changing circumstances. The drafters did not seize the opportunity to overthrow the existing doctrine simply because such action is unfamiliar and uncomfortable to the common-law lawyer. This common-law tradition also helps explain the drafters' reliance on statutory precedent when promulgating their own reform.<sup>59</sup> Thus, habit of thinking led the drafters to conceal, in the common-law tradition, their repeal of the advancements doctrine.

The legislative transplantation of common-law decisionmaking devices to statutory drafting results, in part, from law school

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sumably the drafters were referring to the advancee's lineal descendants.) *Accord* CAL. PROB. CODE § 1053 (West 1981), *repealed by* Probate Law & Procedure Act, ch. 842, § 47, 1983 Cal. Legis. Serv. 4491 (West) (effective Jan. 1, 1985) (CAL. PROB. CODE § 6409(d) (West Supp. 1984) (effective Jan. 1, 1985) follows the UPC); IND. CODE § 29-1-2-10(c) (1982); IOWA CODE § 633.226 (1983); KAN. STAT. ANN. § 59-510 (1983); MD. EST. & TRUSTS CODE ANN. § 3-105(c) (1974) (language could be judicially interpreted to adopt case law rationale of representation: "If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the share of the issue of the recipient."); NEV. REV. STAT. § 151.150 (1983); N.C. GEN. STAT. § 29-27 (1976); OKLA. STAT. tit. 84, § 227 (1981); OR. REV. STAT. §§ 112.155 (1981) (Oregon has the clearest statutory language of any existing statute: "If the recipient of the property advanced fails to survive the decedent, the amount of the advancement shall be taken into account in computing the share of the issue of the recipient, whether or not the issue take by representation."); S.D. CODIFIED LAWS ANN. § 29-1-21 (1976); TEX. PROB. CODE ANN. § 44 (Vernon 1980); WASH. REV. CODE § 11.04.041 (1983); WIS. STAT. § 852.11(2) (1981-82).

Other states have codified the case law in their advancements statutes and require the advancement to be taken into account by the persons taking as representatives of the advancee. *See* CONN. GEN. STAT. § 45-274(a) (1983); GA. CODE § 53-4-51(a) (1981); ILL. REV. STAT. ch. 110½, § 2-5(a) (1983); KY. REV. STAT. § 391.140(1) (Bobbs-Merrill Supp. 1982); LA. CIV. CODE ANN. art. 1240 (West 1952); N.H. REV. STAT. ANN. § 561:13 (1974); N.Y. EST. POWERS & TRUSTS LAW § 2-1.5(c) (McKinney 1981); S.C. CODE ANN. § 21-3-60 (Law. Co-op. 1976); UTAH CODE ANN. § 75-2-110 (1978); VT. STAT. ANN. tit. 14, § 1726 (1974). The following language of the Massachusetts statute, though ambiguous, appears to adopt the representation analysis:

If a child or other lineal descendant who has received an advancement dies before the intestate, leaving issue, the advancement shall be considered as part of the intestate's estate in the division and distribution of such estate, and the value thereof *shall be taken by the representative of the heir to whom the advancement was made toward his share of the estate, as if the advancement had been made directly to him.* MASS. GEN. LAWS ANN. ch. 196, § 7 (West 1958) (emphasis added).

59. *See* Horack, *supra* note 32; Riesenfeld, *supra* note 32.



teaching methods based on the Langdellian tradition of case analysis.<sup>60</sup> The finest legal scholars and lawyers, who have become leading law reformers, receive better training to become appellate judges than to become statutory drafters because of the continuing emphasis in our law schools on analyzing legal opinions rather than legislative materials. Critics see the problem in the law schools as broader than merely the emphasis on court-made law. Professor Rodell would attribute the use of subterfuge techniques in statutory drafting to legal training emphasizing linguistic manipulation.<sup>61</sup> After acquiring the jargon and the mental agility, law students are no longer able to think about a problem in a direct way—instead, they think in terms of “complicated intellectual riddles.”<sup>62</sup>

Another reason the common-law technique of concealing change is attractive is that this technique provides lawmakers with the sense that they are not making a rash or major deviation from existing laws.<sup>63</sup> As for all aspects of human conduct, fear of innova-

60. Christopher Columbus Langdell, the first dean of Harvard Law School, is generally credited for establishing the “science of law.” See A. SUTHERLAND, *THE LAW AT HARVARD* ch. 6 (1967).

61. F. RODELL, *WOE UNTO YOU, LAWYERS!* 14-15, 138-50 (2d ed. 1957). But see Page, *Statutes as Common Law Principles*, 1944 *Wis. L. Rev.* 175, 175-76.

62. There is no more pointed demonstration of the chasm between ordinary human thinking and the mental processes of the lawyer than in the almost universal reaction of law students when they first encounter The Law. They come to law school—a normally intelligent, normally curious, normally receptive group. Day in and day out they are subjected to the legal lingo of judges, textbook writers, professors—those learned in The Law. But for months none of it clicks; there seems to be nothing to take hold of.

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Eventually their confusion, founded though it is in stubborn and healthy skepticism, is worn down. Eventually they succumb to the barrage of principles and concepts and all the metaphysical refinements that go with them. And once they have learned to talk the jargon, once they have forgotten their recent insistence on matter-of-factness, once they have begun to glory in their own agility at that mental hocus-pocus that had them befuddled a short while ago, then they have become, in the most important sense, lawyers. Now they, too, have joined the select circle of those who can weave a complicated intellectual riddle out of something so mundane as a strike or an automobile accident. Now it will be hard if not impossible ever to bring them back to that disarmingly direct way of thinking about the problems of people and society which they used to share with the average man before they fell in with the lawyers and swallowed The Law.

F. RODELL, *supra* note 61, at 14-15.

63. The largest changes have never been deliberate. Even when large consequences follow from a legislative act, one can be sure that they were not intended. The legislator addresses a problem small enough to be identified: what may happen is that the current of events catches on his remedy and produces a larger diversion. The current may catch on anything. Its force is that of clients coming to lawyers with what seems to common sense like a case, although the law is against them. All the lawyer can do for one hit by a rule is to look for a way round it, make a distinction, bring some new idea

tion and a natural conservative bias is prominent in law reform. Even law reformers who are receptive to innovation nevertheless may draft legislation in a manner that makes changes from existing law appear less dramatic in an effort to alleviate these concerns for other persons participating in the legislative process. This attitude is certainly in the American law tradition,<sup>64</sup> in which public expectations require the law, whether judicially or legislatively created, not to change quickly or abruptly.<sup>65</sup> Understanding the political constraints on law reform provides further insight into the lawmakers' use of language to make changes appear minor and well

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to bear. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be used by others, the result may be reversed, but the rule remains. Even when it is abolished or forgotten, its shape will be seen in the twisting route by which it was circumvented. And the ideas he has imported will prove their own strength. The first resort to them may have been artificial; but their natural properties will assert themselves, and consequences may follow as far-reaching as the ecological disturbances produced by alien animals or plants.

S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 6 (2d ed. 1981).

64. Law, by and large, evolves; it changes in piecemeal fashion. Revolutions in essential structure are few and far between. That at least is the Anglo-American experience. Some of the old is preserved among the mass of the new.

But what is kept of old law is highly selective. Society in change may be slow, but it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive when they still have a purpose—or, at least, when they do not interfere with the demands of current life.

L. FRIEDMAN, *supra* note 27, at 14.

An equally universal characteristic of the rational judicial process is that its rules must be given to it or be found by rational derivation from other rules. This is not, as was once thought, a simple deductive process from a set of rules given once and for all by statute, precedents of ultimately unknown origin, or natural law, or any combination of these. Rather there is creative evolution of rules, but like biological creation, the new rules must have parents and ancestors and survive only if viable in the environment for which they are proposed or are applied. In this respect the legislative process has broader sources, for while it too must generate its products on a rational basis, it is not confined internally within the system of rules already extant in the legislative system, although it is most likely to build on what already exists there.

Breitel, *supra* note 2, at 773.

65. The legislative process by its own internal traditions, as well as its external political necessities, is also controlled by precedents, traditions and rationalistic considerations. This is true in the area of public law. It is dramatically true in the area of private law.

A legislature, adopting a new lien law, a uniform commercial code, or a statute qualifying the automatic renewal clause in real estate leases, will look, to much the same extent as the courts, to the body of the law, decisional and statutory, for precedents, consistency, the effect on policy factors, and the satisfaction of the reasonable expectations of the community. It does so in a different way, no doubt. But the fact that it does respond to these influences shows how much a continuum the lawmaking process is, regardless of the political organ that undertakes the task. It is only true in theory that a legislature may enact any law it wishes, subject alone to the Constitution.

Breitel, *supra* note 2, at 760.

within legal precedent.<sup>66</sup>

Benefits can be derived from the common-law tradition in which law reformers purport to retain old legal institutions. First, in some rare cases, the drafters can better achieve the desired result by indirection. Professor Calabresi explains this linguistic phenomenon best through an example. He argues that if we forthrightly admit that the state can regulate religion, psychologically, we are more likely to allow such regulation than if we say that regulation of religion cannot exist and then periodically define behavior by some cults as not religious and hence subject to regulation.<sup>67</sup> In particular, Professor Calabresi points to the refusal to permit polygamy among Mormons in the nineteenth century.<sup>68</sup> He states that this refusal "was certainly regulation of religion, but the denial that it was such regulation may have lessened the impact of the decision and led to less regulation of religion than would have followed from an 'honest' admission that some religious beliefs *are* in practice subject to state prohibition."<sup>69</sup> Unless conflicting fundamental rights are at stake, use of subterfuge and imprecise language seldom can be justified.

A second benefit of indirect statutory change is that a court always will be able to revert to the prior law if presented with a particularly egregious case. Thus, the change only takes place after "court-testing" of the reform against factual disputes.<sup>70</sup> When drafters import common-law subterfuge techniques into a statute, judicial activism is encouraged because courts are given the opportunity to restrict, or even to reject, the change.<sup>71</sup> In *Bransford v.*

66. That is not to say, however, that the perceived necessity to travel a serpentine route at a snail's pace is not frustrating to a law reformer.

The Law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been. And certainly The Law, when it moves at all, does so by flapping clumsily and uncertainly along, with its eye unswervingly glued on what lies behind. . . . Only The Law, inexorably devoted to all its most ancient principles and precedents, makes a vice of innovation and a virtue of hoariness. Only The Law resists and resents the notion that it should ever change its antiquated ways to meet the challenge of a changing world.

F. RODELL, *supra* note 61, at 20; see also S. MILSOM, *supra* note 63, at 6-7.

67. G. CALABRESI, *supra* note 1, at 173.

68. *Id.*

69. *Id.*

70. *Cf. id.* at 178. ("The pressure to use subterfuges . . . can also come from a desire in situations of uncertainty to slow down change until we are sure we want it.")

71. The judicial activism suggested here is consistent with a restrictive view of the judicial function in construing statutes.

Whether a judge does violence to language in its total context is not always free from

*Crawford*,<sup>72</sup> a good example of this court-testing, the Georgia Supreme Court rejected the writing requirement reform for advancements. In *Bransford* a granddaughter of the decedent claimed her right to share in the estate along with the other lineal descendants of the decedent. The lower state court refused to admit testimony concerning conversations taking place years after a transfer in which the decedent indicated that money lent to the granddaughter's father, who had since died, was intended to be an advancement on his inheritance. The granddaughter's share of the estate would have been reduced if the administrator of the estate proved that the money lent was an advancement.<sup>73</sup> The Georgia Supreme Court refused to interpret the applicable statute as precluding proof of the decedent's intent to make an advancement if such proof was not in writing.<sup>74</sup> Despite the weak evidence showing the decedent's intention to make an advancement and the statutory preference for a writing, the court was unwilling to exclude the evidence and take the advancement question of fact away from the jury when the possible result would be unequal treatment of lineal descendants.<sup>75</sup>

A final benefit of continuing the doctrinal cloak to conceal legislative reform is that the analogy to similar doctrines remains obvious; therefore, courts are more likely to extend the adopted reform to these other doctrines. For example, a court, referring to a jurisdiction's advancements statute that requires a writing, might require a writing to prove a contract for the release of inheritance rights between an heir and the decedent,<sup>76</sup> or, alternatively, might

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doubt. Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints. Even for a judge most sensitive to the traditional limitation of his function, this is a matter for judgment not always easy of answer. But a line does exist between omission and what Holmes called "misprision or abbreviation that does not conceal the purpose." Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947) (footnote omitted).

72. 51 Ga. 20 (1874).

73. See *supra* note 58 and accompanying text.

74. 51 Ga. at 22 ("As to section 2580, Code, prescribing that a certain act . . . 'shall be evidence of the fact of an advancement,' . . . it cannot, of course, be claimed that it was intended to declare that to be the only way in which it could be proved.").

75. *Id.*

76. The UPC drafters considered a provision on release, but decided that no provision

require clear and convincing proof of the contract.<sup>77</sup> A court would reason that unless the degree of proof for release is raised, transfers that fail as advancements for lack of a writing would remain effective under the release doctrine and the statute would not have accomplished its intended result.<sup>78</sup> This judicial merging of a statutory solution into other common-law areas reflects the interrelationships between statutes and the common law.<sup>79</sup> By purporting to retain a legal rule, doctrine, or institution in the statute, a legislature further nurtures and facilitates "conglomerate mergers of judicial rules and statutes."<sup>80</sup>

For whatever purpose or benefits law reformers conceal their reforms by purporting to continue doctrines that they are in fact rejecting, the cost of this drafting technique is high. First, this technique can contribute to self-deception. Despite their assertions

was necessary.

*Release.* A section following this section in the 1967 Summer Draft (Second Working Draft) dealt with the subject of release. After further discussion the Reporters decided that no reference in the Code to releases was necessary. A release in favor of a third person which is executed for consideration should be effective as a contract for the benefit of a third person. A written release to the decedent for consideration can be effectuated, at least to some extent, as an advancement. In other situations it seems preferable to compel the decedent to state his intention concerning the effect to be given to a release in a duly executed will. Renunciation by an heir is dealt with in section 2-801.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, SECOND TENTATIVE DRAFT (Fourth Working Draft) OF UNIFORM PROBATE CODE, § 2-113, Comments, at 29 (1968).

77. *Cf., e.g., In re Estate of Pridmore*, 187 Ill. App. 301 (1914) (writing requirement in advancements statuta influenced court to require clear and convincing evidence of testator's intent to make a satisfaction); *Domzalski v. Domzalski*, 303 Mich. 103, 5 N.W.2d 672 (1942).

78. See Traynor, *supra* note 6, at 416-19, for examples of instances in which the court has looked to a statutory solution in a related area as the basis for developing a common law remedy.

79.

A statute may be a fat code or a thin paragraph or a starveling sentence. It may cast a heavy shadow on the common law or a light one, or it may idly plane until some incident sends it careening into action. The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.

Sometimes a statute examined close to the weathered textures of the common law reveals so marked a kinship to existing or readily foreseeable judicial rules as to facilitate its recognition as a source of common law. Sometimes a statute serves to reveal a gap or aberration in the common law even though it does not itself provide a remedy, and thus affords a basis for judicial correction within the common law. One way or another, the rising lines of statutes and of judicial precedents are likely at times to converge. It is not realistic, if it ever was, to view them as parallel lines.

*Id.* at 402. See generally Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 117 (1921) (The author hews for legislation that sets judges free to develop and expand the law by "analogy and custom and utility and justice.").

80. Traynor, *supra* note 6, at 403.

to the contrary,<sup>81</sup> the UPC drafters may have believed that decedents make lifetime gifts intending that they be taken into account in the distribution of the intestate estate. Nevertheless, the policy favoring advancements presented difficult evidentiary questions and forced the drafters to adopt and justify the writing requirement. In other words, UPC section 2-110 may reflect accurately the drafters' ambivalence. If the drafters, however, had understood clearly that they were abolishing the advancements doctrine with this statutory reform, they may have searched for alternative solutions.<sup>82</sup>

A second related cost is that the subterfuge techniques may also deceive supporters of the legislation. Drafters who initiate a change, but conceal its impact in legal jargon, can make a proposed reform look modest and unimportant as well as contribute to misunderstandings about its effect. Undoubtedly, the drafters of the UPC constantly were balancing the advantages of a proposed innovation against the possibility that their work would be viewed as too radical. A statute considered radical would fail to obtain the necessary support of the National Commissioners, the legislatures, and the bar and bench in general. A proposal that theoretically may be sound but that is rejected as too radical is far less beneficial than a more modest reform that enjoys widespread enactment. Nevertheless, the misconceptions created by subterfuge techniques are difficult to justify as a necessary part of the political process, especially in such a noncontroversial area.

A third cost of retaining formal recognition of a doctrine otherwise being rejected is that the statutory language inevitably will be broad enough to be the basis for claims that the lawmakers presumably had intended to eliminate. Assuming that the drafters believed the doctrine of advancements to be an anachronism, consider the following hypothetical: A court is presented with an informal letter by a parent to a child accompanying a gift of money that discusses the child's forthcoming marriage or career move without specifically indicating the parent's desire to treat the gift as an advance on the child's inheritance. Other children of the decedent claim that the letter satisfies the writing requirement. A sympathetic court, relying on the maxim that statutes in derogation of the common law should be interpreted strictly,<sup>83</sup> easily

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81. U.P.C. § 2-110 Comments (1977).

82. See *infra* notes 101-09 and accompanying text.

83. See, e.g., *Springfield Fire & Marine Ins. Co. v. Fields*, 185 Ind. 230, 233, 113 N.E. 756, 757 (1916) (refusing to interpret a statute as changing the common law's refusal to

could agree that the writing requirement was satisfied. Disappointed heirs have yet to present this type of case to the courts.<sup>84</sup> Nevertheless, the potential for such litigation exists, especially in light of the increased popularity of will substitutes. Will substitutes, broadly defined, are those transfer devices that permit a person significant control over the property during life while providing for the disposition of the property when the owner dies.<sup>85</sup> The popularity of will substitutes increases the incentive for estate holders to make lifetime transfers. Thus, the popularity of will substitutes coupled with ambiguous advancements statutes enhances the likelihood of litigation with respect to these types of transfers.

A fourth cost of the formal retention of outmoded doctrines is the transformation of the law into a labyrinth of confusing and complex rules that only those persons well-trained in the "science" of law can solve. Legislative retention of old rules, even if only in form, tends to minimize the amount of retraining necessary for the present generation of lawyers. This perceived benefit, unfortu-

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award attorney's fees to insureds); *Lichtman v. Nadler*, 74 A.D.2d 66, 69, 426 N.Y.S.2d 628, 631 (1980) (refusing to interpret a statute as creating a cause of action for private nuisance when none exists at common law).

84. See *supra* notes 12-14 and accompanying text.

85. See *infra* note 100, which discusses the popularity of various types of will substitutes. Examples of will substitutes include life insurance policies, joint tenancy deeds, payable-on-death accounts, joint bank accounts, and Totten trusts.

The applicability of the doctrine of advancements to will substitutes is unsettled. The primary issue presented to the courts is whether will substitute transfers can be the subject of advancements. Some courts have held that an advancement can only exist if decedent has made an unconditional gift to the advancee. *E.g.*, *Albers v. Young*, 119 Colo. 37, 41, 199 P.2d 890, 892 (1948) (joint bank account); *Berry v. Berry*, 208 Ga. 285, 290, 66 S.E.2d 336, 340 (1951) (U.S. Savings bonds held in co-ownership with right of survivorship); *Thornton v. Thornton*, 39 Tenn. App. 225, 237, 282 S.W.2d 361, 367 (1955) (transfer to wife for life, then to decedent if decedent still alive, but if not to child). This "unconditional gift" test for an advancement should be rejected. Other courts have applied the doctrine of advancements to will substitutes. See, *e.g.*, *Brodrick v. Moore*, 226 F.2d 105, 108 (10th Cir. 1955) (U.S. Savings bonds held in co-ownership with right of survivorship); *Culberhouse v. Culberhouse*, 68 Ark. 405, 408, 59 S.W. 38, 39 (1900) (life insurance); *In re Estate of Lee*, 170 Colo. 419, 424, 462 P.2d 492, 494 (1969) (joint tenancy with right of survivorship); *Popplewell v. Flanagan*, 244 S.W.2d 445, 450 (Ky. 1951) (retained life estate for benefit of decedent); *Thompson v. Latimer*, 209 Ky. 491, 495, 273 S.W. 65, 66 (1925) (life insurance); *Vinson v. Vinson*, 105 La. 30, 33, 29 So. 701, 702 (1901) (life insurance); *Parrish v. Adams*, 10 N.C. App. 700, 702, 179 S.E.2d 880 (1971) (retained life estate for benefit of decedent and his wife); *Houston Estate*, 383 Pa. 466, 469, 119 A.2d 304, 306 (1956) (retained life estate for benefit of decedent); *Rickenbacker v. Zimmerman*, 10 S.C. 110 (1877) (life insurance). Property transferred by a will substitute is not part of the probate estate and not subject to the intestate succession statute. If the transfer is not treated as an advancement, then the transferee will receive an intestate share undiminished by the value of the property received through a will substitute that will be equal to or in the same proportion to the other intestate succession takers: this is the very result the doctrine was designed to avoid.

nately, often prevails over the costs to society of unnecessary intricacies.<sup>86</sup> A goal of codification should be to demystify the law so that it may better serve the citizenry.<sup>87</sup> If repeal of the advancements doctrine was its purpose, UPC section 2-110 failed, by its indirection, to clarify the law.<sup>88</sup>

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86. Of course, we can never eliminate ambiguities in legislation, but statutes can be upgraded with improvements in the legislative process.

Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. With one of his flashes of insight, Mr. Justice Johnson called the science of government "the science of experiment." The phrase, uttered a hundred and twenty-five years ago, has a very modern ring, for time has only served to emphasize its accuracy. To be sure, laws can measurably be improved with improvement in the mechanics of legislation, and the need for interpretation is usually in inverse ratio to the care and imagination of draftsmen. The area for judicial construction may be contracted. A large area is bound to remain.

Frankfurter, *supra* note 71, at 528 (footnote omitted).

87. F. RODELL, *supra* note 61, at 8. "[W]e cannot die and leave our property to our children without calling on the lawyers to guide us. To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created." *Id.*

Then, too, in the older cities of the State, among the old men, the oldest and best lawyers, who were worked gray in the profession, there was a strong cleaving to the friendly old forms in the use of which they did, or were supposed to excel. It was hard for such men to forego a superiority, well and laboriously earned, and to be compelled to begin again by the side of the youth just immerging into the legal arena, with whose sweat, and blood, and scars, these veterans were so gallantly mantled. For these men had not learned then, what they have since—that the new system was the old system shorn only of its nonsense, and that no lesson learned in the logic or philosophy of the old, but applied as well to the new.

REPORT OF THE CODE COMMISSIONERS TO THE EIGHTH GENERAL ASSEMBLY OF THE STATE OF IOWA 191 (1859).

88. The indirection inherent in UPC section 2-110 may be characteristic of the statutory indirection criticized by Professor Rodell:

[A] statute which reads like a stone wall to the layman becomes, for the corporation lawyer, a triumphal arch. It is, in short, a language that nobody but a lawyer understands.

....

... It is this fact more than any other—the fact that lawyers can't or won't tell what they are about in ordinary English—that is responsible for the hopelessness of the non-lawyer in trying to cope with or understand the so-called science of law. For the lawyers' trade is a trade built entirely on words. And so long as the lawyers carefully keep to themselves the key to what those words mean, the only way the average



A final cost of retaining formal recognition of an obsolete doctrine is that the lawmakers are more likely to fail to create a coherent and logical statutory framework to provide adequate guidelines to the courts for deciding new, and as yet unforeseeable, issues.<sup>89</sup> Consider how the advancements statute, UPC section 2-110, relates to the UPC in general. The UPC mandates that statutes should be interpreted in a manner consistent with the Code's underlying policies.<sup>90</sup> The advancements statute, however, makes these policies ambiguous. The Code, for example, contains a statute detailing the formalities necessary for execution of a valid will<sup>91</sup> and a statutory estate plan in the absence of the proper execution of a will.<sup>92</sup> The advancements statute, however, permits an informal writing to vary the statutory estate plan. A court might excuse this inconsistency as idiosyncratic. When comparing the historical rules relating to the advancements doctrine and the statute, a court would understand the advancements statute to be a "tightening" rather than a "loosening" of requirements to vary the statutory estate plan.<sup>93</sup> Nevertheless, by its terms, the advancements statute remains a crack in the formalities armor of the law of succession and permits a sympathetic court, assisted by an aggressive litigator, to admit extrinsic evidence to reform will provisions, to move toward merely substantial compliance with will execution formalities, and to promote a greater leniency in recognizing informal lifetime arrangements as valid despite their testamentary character. Ironically, but in a sense predictably, an anchor in the common-law doctrines could become the basis for dramatic change.

The costs of concealing reform in the common-law tradition are significant. The risks of self-deception, misconception, failure to accomplish statutory purpose, increased complexity of the law, and failure to provide coherent guidelines to courts for deciding unforeseen issues almost always outweigh the benefits of subter-

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man can find out what is going on is to become a lawyer, or at least to study law, himself. All of which makes it very nice—and very secure—for the lawyers.

F. RODELL, *supra* note 61, at 11-12.

89. See G. GILMORE, *supra* note 1, at 41-67. Professor Gilmore describes and critiques the attempts of Blackstone, Langdell, and their followers to unify areas of the law through broad doctrines and, thereby, create the "true" body of law that would lead to predictability and certainty where chaos had otherwise prevailed. *Id.*

90. See U.P.C. § 1-102 (1977).

91. *Id.* §§ 2-502 to -503.

92. *Id.* §§ 2-102 to -103.

93. See *supra* notes 18-26 and accompanying text.

fuge.<sup>94</sup> The burden to show the converse must be placed on those who argue for misdirection.

The foregoing analysis does not intend to suggest that old institutions, rules, or doctrines should not remain an integral part of new statutory provisions. On the contrary, as Dean Pound, former dean of Harvard Law School, articulated in an address to the American Bar Association, only a genuine anachronism that is not actually or potentially a useful legal institution, rule, or doctrine should be eliminated.<sup>95</sup> Pound warned against viewing the law as a science based on deduction "from the dogma which the legal system takes for its foundation,"<sup>96</sup> but at the same time he urged critics not to be too quick to conclude that a law is anachronistic.<sup>97</sup>

Pound's cautionary message is particularly relevant to the advancements doctrine. As explained before, the intestacy scheme is designed to accomplish a distribution of the probate estate that reflects the probable dispositive intent of most intestate decedents.<sup>98</sup> The advancements doctrine, which extends the distributional scheme of the intestacy statute beyond the probate estate to encompass lifetime transfers of wealth, assumes that intestate decedents did not intend by lifetime transfers to reject the distribu-

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94.

Without honesty and candor we cannot even know where we are. If we do not speak precisely and describe as openly as we can what we are trying to do in all those cases where basic conflicts are not at stake, then even the statement of ideals in categorical terms in those basic conflicts will sound hollow and false. We will have made the language of fiction and aspirations our common currency, and we will not be able to reserve it for those few situations where it, and it alone, can slow us down and help us preserve our conflicting ideals.

G. CALABRESI, *supra* note 1, at 180.

95. Dean Pound explained the doctrine of anachronisms: "Looked at historically, the reasons which gave it birth may have wholly disappeared. Looked at analytically, it may not fit nicely into the logical scheme of the time. Looked at functionally, however, it does not always follow that we have an anachronism." Pound, *supra* note 6, at 142.

96. *Id.* at 143.

In the past this needless forcing of justice into crooked and narrow paths was often justified as a scientific process. But there is nothing scientific in such a proceeding. The science that calls therefore, is a false science. For legal science must be the science of achieving the ends of law through law. In the modern state law takes on a scientific character in order to accomplish its ends fully, equally and exactly. It is not scientific for the sake of science. The jurist of today must judge it by the results it achieves, not by the niceties of its internal structure. He must value its institutions, rules and doctrines by the extent to which they serve the ends of law, not by the beauty of the logical processes by which they are deduced or the strictness with which they follow from the dogma which the legal system takes for its foundation.

*Id.* at 143; see also *id.* at 145.

97. *Id.* at 142, 146-48.

98. See *supra* note 8 and accompanying text.

tional scheme of the intestacy statute. Repeal of the advancements statutes requires a legislative judgment that an intestate decedent who makes lifetime gifts to presumptive takers intends to adjust the distributional scheme of the intestacy statute. More particularly, it requires a legislative judgment that an intestate decedent who makes a lifetime gift to a child intends to permit that child to receive a greater portion of the decedent's wealth than any other children. Given the strength of the empirical data supporting the distributional schemes found in the majority of intestate succession statutes, especially with respect to children and lineal descendants,<sup>99</sup> a decision to repeal the advancements doctrine seems counterintuitive. Even if a legislature were convinced that by making a lifetime gift the decedent intended to reject the intestacy scheme, it should nevertheless continue the advancements doctrine for lifetime gifts for which the decedent retains significant rights and interests. For these types of transfers, will substitutes, in which the decedent essentially retains ownership until death, the decedent is not likely to comprehend the difference between probate and nonprobate transfers or that both types of transfers would not be considered when distributing the property among the heirs. Will substitutes are not only a reason for not repealing existing advancements statutes, their growing popularity among persons of modest wealth provides a reason for reforming these statutes.<sup>100</sup>

The UPC statute fails because the drafters turned a viable doctrine into an anachronism by adopting a nineteenth century model without evaluating that model in terms of social and economic developments. The question that remains outstanding is whether a statute can be designed that reflects the probable intent of decedents to make advancements and yet does not require heirs to engage in extensive litigation to enforce their rights.

An advancements statute could be designed to require that the distribution of a decedent's estate take into account all gifts to lineal descendants of substantial sums not given for maintenance or education of the donee. The decedent's heirs who are not lineal descendants should not be subject to this proposed advancements statute because the decedent's intent regarding lifetime gifts to these heirs is less certain. Upon proof to the probate court of a

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99. See Fellows, Simon, & Rau, *supra* note 8, at 368-84.

100. The following table demonstrates the growing popularity of two of the most frequently used will substitutes, life insurance and jointly owned property with right of survivorship, for those persons dying with relatively small estates.

significant lifetime gift, the court could make adjustments in the shares of the estate going to each lineal descendant without further inquiry into the decedent's intent.<sup>101</sup> This proposal reflects the English courts' apparent interpretation of the Statute of Distribution,<sup>102</sup> which treated all gifts made during the life of the decedent as advancements except gifts of small sums or gifts made for the purpose of maintenance or in satisfaction of the decedent's support obligation. Proof of whether a gift fell within one of the exceptions to the rule rested on objective evidence of the nature or purpose of the gift.<sup>103</sup> This proposal also corresponds to the rule adopted in

Life Insurance and Jointly Owned Property With  
Right of Survivorship as a Percentage of the  
Decedent's Gross Estate

Size of Gross Estate	Estate Tax Returns Filed in			
	1973		1977	
	Life Insurance	Jointly Owned Property	Life Insurance	Jointly Owned Property
\$ 60,000 under \$ 70,000	7.3	27.6	7.8	29.1
\$ 70,000 under \$ 80,000	8.2	28.9	8.1	30.1
\$ 80,000 under \$ 90,000	8.5	31.3	8.8	32.6
\$ 90,000 under \$100,000	8.3	29.8	9.4	31.9
\$100,000 under \$120,000	9.2	30.3	9.4	34.0
\$120,000 under \$150,000	9.1	29.1	9.1	31.5
\$150,000 under \$200,000	8.1	24.9	8.3	29.0
\$200,000 under \$300,000	7.1	20.0	7.2	24.3
All estates	5.5	16.5	5.6	18.7

See STATISTICS OF INCOME—1972, ESTATE TAX RETURNS 12, 13, 15 (1974); STATISTICS OF INCOME—1976, ESTATE TAX RETURNS 15, 16, 19 (1979); see also Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 599 (1974).

101. An exception to this proposed rule could be allowed if clear and convincing evidence demonstrates decedent's intent not to make an advancement. The exception could be limited to written evidence. Admittedly, this type of exception would not be consistent with the normal operation of the intestate succession statute, see *supra* notes 88-92 and accompanying text, but it is attractive, nevertheless, because it provides further opportunities for the decedent to establish donative intent.

A legislature would be justified in restricting the application of the proposed advancements rule to lifetime transfers made by will substitutes. See *supra* note 85 and accompanying text.

102. English Statute of Distribution, 22 & 23 Car. II, ch. 10, § 3 (1670), quoted *supra* note 19.

103. In *Boyd v. Boyd*, 4 L.R.-Eq. 305 (1867), the court stated:

[W]herever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing—the Court does not look to the application.

South Carolina in the nineteenth century.<sup>104</sup>

This proposal serves two principal functions. First, it assures administrative efficiency and fairness without burdening heirs with the costs of litigation or unfamiliar formalities. Second, it brings the advancements doctrine into conformity with the general law of succession.<sup>105</sup> A court's inquiry into a decedent's actual intent with

*Id.* at 308-09; *see also In re Blockley*, 29 Ch. D. 250, 253 (1885) (finding an advancement by the father to the son of a certain amount of money); Elbert, *Advancements: II, supra* note 4, at 232-33 (examining old English cases that regarded the intent of the advancer as immaterial). Despite the strong language of *Boyd*, the purpose of the gift seems to have been relevant to the court in deciding whether the decedent had made an advancement. Perhaps the best articulation of the "no specific intent" interpretation of the English advancements statute is found in the following excerpt from Sir Jessels' opinion in *Taylor v. Taylor*, 20 L.R.-Eq. 155, 157-58 (1875):

I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock-in-trade; all these things I understand to be portions or provisions. Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to shew the purpose. But I do not think that these words "by portion" are to be disregarded, nor is the word "advancement" to be disregarded. It is not every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shewn to be that which every one would recognize as being for establishing the child or making a provision for the child.

*Id.*; *see also Kircudbright v. Kircudbright*, 8 Ves. Jun. 51, 32 Eng. Rep. 269 (1802).

104. *See supra* note 21; *see also* KY. REV. STAT. ANN. § 391.140(1) (Bobbs-Merrill 1972). The Kentucky statute provides:

Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undevise estate of the parent or grandparent. . . . The maintaining or educating or the giving of money, to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement.

*Id.*

When the proviso relating to maintenance, education, and gifts of money is inapplicable, the Kentucky courts have held that the statute requires the decedent's intent to be ignored. *Thomas v. Thomas*, 398 S.W.2d 231 (Ky. 1965); *Remmele v. Kinstler*, 298 S.W.2d 680 (Ky. 1957); *Gossage v. Gossage's Adm'r*, 281 Ky. 575, 136 S.W.2d 775 (1940); *Ecton v. Flynn*, 229 Ky. 476, 17 S.W.2d 407 (1929); *Isgrigg v. Isgrigg*, 179 Ky. 260, 200 S.W. 478 (1918); *Boblett v. Barlow*, 26 Ky. L. Rep. 1076, 83 S.W. 145 (1904); *Bowles v. Winchester*, 76 Ky. (13 Bush) 1 (1877). If the proviso applies, the statute expressly provides intent is relevant. *Popplewell v. Flanagan*, 244 S.W.2d 445 (Ky. 1951); *Chism v. Chism*, 296 Ky. 73, 176 S.W.2d 101 (1943); *Crain v. Mallone*, 130 Ky. 125, 113 S.W. 67 (1908); *Hill's Guardian v. Hill*, 122 Ky. 681, 92 S.W. 924 (1906).

respect to a gift, even if the evidence is restricted to writings, is inappropriate. The intestacy statute creates rules of law, designed to reflect the decedent's probable intent, that are independent of an individual's peculiar circumstances. The advancements doctrine, as part of that statutory estate plan, should be merely an extension of the principle underlying that statutory plan—the furtherance of the decedent's probable intent to treat children or their families equally. The risk that some gifts could be treated as advancements contrary to the decedent's actual intention is similar to other risks of not accomplishing a particular decedent's actual wishes through the statutory scheme. The inflexibility of the intestate succession statute is a matter open to debate.<sup>106</sup> England and some Commonwealth nations<sup>107</sup> have introduced court discretion and flexibility into their intestate succession statutes, but the United States generally has rejected this type of statutory scheme because of a fear of increased administrative difficulties and probate expenses.<sup>108</sup> The general rule adopted throughout the United States is that the decedent should be able to vary the intestate

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It may be argued that the recognition of an advancement is illogical in that we ordinarily require the formalities of a will to accomplish a variation in the course of intestate succession, because of the danger of fraud and misunderstanding. Yet in the case of the advancement such a variation may be accomplished orally. Doubtless, the justification for a doctrine of advancements is that people will attempt such transactions whether the statutes provide for them or not, and if no provision for them is made, the intent of donors will often be frustrated. Moreover, the overt act of transferring title by way of advancement is somewhat less likely to be susceptible to fraud or misunderstanding than the execution of an oral will.

M.P.C. § 29, Comment (1946). Conceivably, this apparent inconsistency could be rationalized on the basis that lifetime gifts are so ambiguous that inquiry into intent on a case by case basis is necessary. The difficulty with this argument is that other intestate succession issues are equally as ambiguous, which is why the trend toward flexibility in the Commonwealth nations developed. See *infra* notes 106-07 and accompanying text.

106. See Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 557-60 (1977); see also Friedman, *supra* note 8, at 9, 20.

107. E.g., England's Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63; Family Protection Act 1955, 2 N.Z. REPR. STAT. 449-60.

108. But see LA. CIV. CODE ANN. arts. 2432, 2434-35, 2437 (West Supp. 1984) (if either spouse dies "rich" leaving the surviving spouse in "necessitous circumstances," the latter has the right to one-fourth of the decedent's estate if no children survive, but if one, two, or three children survive, the spouse has the right to one-fourth in usufruct only, and if more than three children survive, the spouse shall receive only a child's share in usufruct); VT. STAT. ANN. tit. 14, § 401 (1958) (the surviving spouse of a decedent shall receive from an intestate decedent's estate that part of the personalty owned by the decedent that the probate court assigns according to the surviving spouse's circumstances and the "estate and degree" of the decedent; but the share of personalty shall not be less than one-third after payment of claims against the estate). Of course, the advancements statutes themselves are another counter-example of the American exclusion of discretion and flexibility in rule-making.

succession statute only by executing a valid will. Analogously, to avoid having the law treat a gift as an advancement, the decedent should have to execute a will and not merely declare orally or by a nontestamentary writing that the gift was not intended as an advancement.<sup>109</sup>

The proposed statutory reform for advancements developed from two research paths. First, a review of current case law de-

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109. This proposal should not be extended to satisfactions. Using a subjective standard of intent rather than adopting an objective test is not theoretically unsound for satisfactions because the evidence is used to vary language in a will rather than an intestate succession statute. The law of wills contains many doctrines which authorize courts to admit extrinsic evidence to discover and give effect to the testator's intent. The ambiguity doctrine authorizes the admission of extrinsic evidence to clarify the testator's intended meaning and to disregard parts of a will in order to accomplish the testator's intent. *See, e.g.*, *Patchl v. White*, 117 U.S. 210 (1886); *see also Langbein & Waggoner, supra note 7, at 529-35.* In the "slam will" cases courts have admitted testator's declarations to prove that the testator did not intend to execute a will that otherwise appears valid in its execution. *See, e.g.*, *Fleming v. Morrison*, 187 Mass. 120, 72 N.E. 499 (1904); *see also Langbein & Waggoner, supra note 7, at 541-43.* The doctrine of dependent relative revocation permits courts to rely on extrinsic evidence to imply a condition that defeats the testator's unequivocal revocation. *See, e.g.*, *Estate of Callahan*, 251 Wis. 247, 29 N.W.2d 352 (1947); *see also Langbein & Waggoner, supra note 7, at 543-45.* These doctrines, along with other similar doctrines, indicate that the will execution statute has not significantly impaired a court's ability to implement the testator's intent when proved clearly and convincingly. So long as lawyers can articulate a doctrine to indicate technical adherence to the will execution statute, the courts are prepared to admit extrinsic evidence and provide a remedy. In sum, inquiry into the specific intent of the testator is standard procedure for courts asked to give effect to a will because they recognize that the basic goal of the law of wills is to achieve the testator's intent. *See generally Langbein & Waggoner, supra note 7.* The satisfactions doctrine is one of many theories adopted by courts to reconcile their inquiry into testators' intent with the will execution statutes, which seemingly require the impossible—that all expressions of a testator's intent be executed with the requisite will formalities. The courts' reliance on a number of technical doctrines rather than a general rule providing that language in a will can be ignored or changed in order to accomplish a testator's intent that is proved clearly and convincingly by extrinsic evidence exemplifies the deceptive reasoning that lawyers frequently find in case opinions when courts try to achieve fair and just results while paying homage to precedents and statutes.

Despite theoretical basis in the law, the courts' inquiry into the testator's intent with respect to lifetime gifts has resulted in satisfactions litigation involving difficult factual disputes. *See, e.g.*, *Kapiolani Maternity & Gynecological Hosp. v. Wodehouse*, 70 F.2d 793 (9th Cir. 1934); *Kramer v. Kramer*, 201 F. 248 (5th Cir. 1912); *Hart v. Johnson*, 81 Ga. 734, 8 S.E. 73 (1888); *Cull v. Cull*, 42 Ga. App. 626, 157 S.E. 124 (1931); *Threw v. Threw*, 410 Ill. 107, 101 N.E.2d 515 (1951); *In re Estate of Pridmore*, 187 Ill. App. 301 (1914); *State v. Crossley*, 69 Ind. 203 (1879); *In re Estate of Smith*, 210 Iowa 563, 231 N.W. 468 (1930); *Duncan's Trustee v. Clay*, 76 Ky. (13 Bush) 48 (1877); *Richards v. Humphreys*, 32 Mass. (15 Pick.) 133 (1833); *In re Vincent's Estate*, 241 Mich. 329, 217 N.W. 65 (1928); *Lake v. Harrington*, 210 Miss. 74, 48 So.2d 845 (1950); *Degraaf v. Teerpenning*, 52 How. Pr. 313 (N.Y. 1876); *Grogan v. Ashe*, 156 N.C. 286, 72 S.E. 372 (1911); *Gibson v. Buis*, 142 Tenn. 133, 218 S.W. 220 (1919); *Harrison's Ex'r v. Harrison's Adm'r*, 171 Va. 224, 198 S.E. 902 (1938); *Jones v. Mason*, 26 Va. (5 Rand.) 577 (1827); *In re Estate of Groves*, 120 W. Va. 373, 198 S.E. 142 (1938); *Will of Cramer*, 183 Wis. 525, 198 N.W. 386 (1924).

cided under various types of advancements and satisfactions statutes suggested the nature of the problem.<sup>110</sup> Second, review of early English and American case law offered the solution.<sup>111</sup> The proposal's development, however, indicates the complexity of the law reformers' task to avoid falling victim to the common-law tradition of following convoluted paths to achieve legal change. Professor Rodell ridicules legal thinking by comparing the lawyer to a killy-loo bird who flies backward.<sup>112</sup> The answer, contrary to what Professor Rodell may be suggesting, however, is not to avoid looking back. The key to eliminating needless complexity in the law caused by deceptive linguistic techniques is for lawmakers to identify societal changes and other legal developments that may make old rules unacceptable or nonresponsive. The UPC drafters certainly were not incorrect in searching for a model for their advancements statute in nineteenth century reforms. Perhaps their error was the failure to inquire further into the cases decided under these nineteenth century statutes to evaluate the potential effect on the advancements doctrine of requiring proof of intent to make an advancement to be in writing. No easy tests or foolproof techniques are readily identifiable for drafters of legislation to avoid being caught by their own legal linguistic traps. Perpetuation of old rules, doctrines, and institutions with slight modification may lead, in many cases, to constructive reform. The critical problem for lawmakers is to predict when a proposed modification so substantially changes the old rule that the law would be improved by abandoning the familiar language of the old rule to signify the legislature's adoption of a new direction in the law.

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110. See *supra* notes 13-14, 45 and accompanying text.

111. See *supra* notes 21, 103-04 and accompanying text.

112. See *supra* note 66.



