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# WILLS FOR EVERYONE: HELPING INDIVIDUALS OPT OUT OF INTESTACY

REID KRESS WEISBORD\*

**Abstract:** Testamentary freedom, the guiding principle of American inheritance law, grants individuals broad power to control the disposition of property at death. Most individuals, however, allow testamentary freedom to lapse because they never execute a will. Empirical research reveals that most Americans need and want a will because they cannot identify their intestate heirs, but nevertheless die intestate. The high rate of unintended intestacy is a longstanding, pernicious problem that undermines testamentary freedom, disrupts the expectation of intended beneficiaries, and disproportionately affects nontraditional families and smaller estates. This Article challenges the traditional assumption that most individuals lack a will because they instinctively avoid or postpone decisions regarding death. The widespread use of nontestamentary transfers, such as payable-on-death accounts and life insurance, prove that Americans are willing to plan for the succession of property at death provided the process is sufficiently accessible, simple, and quick. By contrast, most lay individuals likely perceive the formality laden will-making process as obscure, complex, burdensome, and expensive. This Article proposes simplifying the testamentary process by attaching an optional form will to state individual income tax returns. This “testamentary schedule” would improve the will-making process by rendering it simple, widely accessible, easily amendable, and less susceptible to tampering or misplacement.

## INTRODUCTION

The guiding principle of inheritance law is one of testamentary freedom, holding that the owner of property during life has the power to control its disposition at death.<sup>1</sup> The polestar of American inheritance law, testamentary freedom is a right protected by the U.S. Consti-

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\* © 2012 Reid Kress Weisbord, Assistant Professor, Rutgers University School of Law-Newark. Special thanks to Carlos Ball, Gerry Beyer, Thomas Gallanis, Taja-Nia Henderson, Ray Madoff, Bruce Mann, Chrystin Ondersma, George Thomas, Stephen Urice, and Lawrence Waggoner for reading earlier drafts of this paper and to Ryan Ballard for excellent research assistance. The Article benefited greatly from suggestions and comments offered at faculty colloquia at Rutgers University School of Law-Newark and DePaul University College of Law.

<sup>1</sup> See *infra* notes 24–33 and accompanying text.

tution, and once it is exercised, courts go to great lengths to implement the decedent's intent by closely honoring and interpreting testamentary instructions. But exercising testamentary freedom requires an affirmative act during life—the execution of a will—and even though most Americans intend to obtain a will, decades of empirical studies reveal that most individuals do not have one.<sup>2</sup>

For the majority of decedents, property owned at death is governed by default rules of intestacy rather than the decedent's expressed intent. This is problematic because most individuals without a will do not intend to die intestate and do not understand the undesirable consequences of allowing testamentary freedom to lapse.<sup>3</sup> Most Americans cannot correctly identify their intestate heirs,<sup>4</sup> so the absence of a will creates uncertainty and possibly frustrated expectations for intended beneficiaries. Intestacy is structurally unsuitable for the large and growing population of nontraditional families because heirship is limited to individuals related to the decedent by marriage, blood, or legal adoption. Intestacy unnecessarily complicates matters at death when unmarried individuals are survived by minor children.<sup>5</sup>

Widespread, unintended intestacy also contributes to the growing problem of economic unfairness in the United States. Intestacy disrupts intergenerational economic continuity by causing inherited wealth to fractionate, a result that disproportionately affects decedents of middle or lower economic status. For those decedents, the largest asset owned at death is typically the primary residence. Failure to execute a will can therefore lead to devastating consequences for intended beneficiaries living in the decedent's home who are not intestate heirs, or whose intestate share is smaller than the testamentary gift intended by the decedent. By contrast, the exercise of testamentary freedom and expansion of legal protections for dead-hand control benefit the wealthy, thereby leading to concentrations of wealth among those who are already wealthy.<sup>6</sup>

Prior intestacy scholarship has evaluated the fairness, efficiency and social consequences of the current rules of heirship, but implicitly has accepted the high rate of intestacy as a *fait accompli*. This Article rejects the assumption that the high rate of intestacy is insusceptible to legal reform. The high long-term rate of intestacy is jarringly incon-

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<sup>2</sup> See *infra* notes 38–61 and accompanying text.

<sup>3</sup> See *infra* notes 56–61 and accompanying text.

<sup>4</sup> See *infra* notes 56–61 and accompanying text.

<sup>5</sup> See *infra* notes 76–78 and accompanying text.

<sup>6</sup> See *infra* notes 30–33, 80–82 and accompanying text.

gruous with the principle of testamentary freedom. The fact that most individuals who want to obtain a will do not have one suggests a systemic problem and a need for legal reform to promote universal access to the will-making process.

Scholars traditionally have explained the high long-term rate of intestacy as the product of psychological fears regarding mortality and the unwillingness to contemplate matters relating to death.<sup>7</sup> But this explanation seems implausible. Even though humans commonly harbor fears about death, they are psychologically capable of contemplating the succession of property. This is demonstrated by the widespread use of non-testamentary transfers such as life insurance and jointly titled property with survivorship rights. This Article proposes an alternative explanation for testamentary procrastination, ascribing blame to the relative inaccessibility of the will-making process because of its obscurity, complexity, and cost. Unlike other acts of legal significance, such as entering into a marriage or consumer contract, the will-making process is unfamiliar to most individuals and requires legal draftsmanship and compliance with testamentary formalities. Negative public perceptions about the will-making process discourage lay testation, and many individuals are reluctant to deal with a lawyer for reasons of cost or privacy.

Negative perceptions about the testamentary process are accurate because the law of wills is generally hostile toward self-representation and homemade wills.<sup>8</sup> Some courts and scholars have gone so far as to exalt the complexity of the testamentary process as policy designed to deter self-representation. Those commentators believe that homemade wills are unreliable and breed litigation; testators thus should be channeled to competent estate planning lawyers who are most capable of implementing the decedent's intent.<sup>9</sup> But deterring self-representation backfires because most individuals are channeled to intestacy rather than estate planning lawyers. Thus, the complexity of the will-making process deters the exercise of testamentary freedom by imposing substantial transaction costs, including the cost of professional counsel or the investment of time necessary to prepare a proper will without a lawyer, and these transaction costs are not offset by any benefit.

Over the last thirty years, inheritance law reform has improved the testamentary process, but the continued high rate of intestacy demon-

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<sup>7</sup> See *infra* note 91 and accompanying text.

<sup>8</sup> See *infra* notes 114–126 and accompanying text.

<sup>9</sup> See *infra* notes 125–126 and accompanying text.

strates a need for further reform to simplify the will-making process.<sup>10</sup> Two aspects of inheritance reform reflect progress toward universal access to the will-making process. First, increased recognition of curative doctrines, such as the harmless error rule and the doctrine of substantial compliance, has lessened but not eliminated the cost of innocent noncompliance with testamentary formalities.<sup>11</sup> Second, the recognition of statutory form wills in a handful of states represents a positive step toward facilitating lay testation, but existing forms are not effectively channeled, are still somewhat complex, and require compliance with testamentary formalities (including witness attestation, for validity).<sup>12</sup> Prior reform efforts, although well intended, have failed to reduce the high long-term rate of intestacy.

If inheritance law is committed to testamentary freedom, then the will-making process must be rendered universally accessible without the need for legal representation. In particular, transaction costs should be lowered by eliminating the need for legal draftsmanship and witness attestation. Legal draftsmanship could be eliminated by providing a reliable, standardized testamentary form. Witness attestation could be eliminated outright because it deters the execution of wills, frequently frustrates testamentary intent, and only marginally enhances the reliability of wills. The current testamentary process should be supplemented with a dynamic, technology-driven process that interacts with the testator in a question-and-answer format and then generates a draft will based on the testator's responses. The dynamic, technology-driven process should be properly channeled to testators who are most likely to own property.

This Article proposes renewed consideration of statutory form wills with important innovations to simplify and promote lay access to the will-making process.<sup>13</sup> The most notable proposal is the creation of a "testamentary schedule," an optional form will attached to the state individual income tax return that could be filed and updated electronically.<sup>14</sup> By integrating the income tax and estate planning processes, the testamentary schedule would discourage procrastination by interacting with the testator annually at the optimal moment—when preparing legally significant tax documents that in many cases take into account considerations relevant to estate planning (e.g., potential beneficiaries

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<sup>10</sup> See *infra* notes 127–166 and accompanying text.

<sup>11</sup> See *infra* notes 128–156 and accompanying text.

<sup>12</sup> See *infra* notes 157–166 and accompanying text.

<sup>13</sup> See *infra* notes 167–205 and accompanying text.

<sup>14</sup> See *infra* notes 169–212 and accompanying text.

and the nature and extent of property). The substantive design of the testamentary schedule would improve upon existing statutory form wills by simplifying language and providing testators with greater flexibility regarding distribution of their estates.<sup>15</sup> To assist lay testators, the state should provide complimentary software akin to the commercial “TurboTax” program, enabling testators to generate a draft will based upon user responses collected during an electronic interview.

To simplify and standardize the will-making process, the testamentary schedule would be governed by the same execution formalities as the income tax return.<sup>16</sup> In particular, the testamentary schedule would waive the witness attestation requirement, require filing with the state (preferably electronically) for safekeeping, and ensure privacy by prohibiting disclosure during the testator’s life. To protect testators from fraud and undue influence, possession of confidential tax information would serve as a proxy for authenticity, and in cases where that safeguard fails, existing protective doctrines applicable to wills should remain available as a remedy.

This Article proceeds as follows: Part I sets forth the principle of testamentary freedom and examines the frequency of intestacy and the disadvantages of dying intestate.<sup>17</sup> Part II considers the causes of widespread intestacy and argues that the current will-making process deters the exercise of testamentary freedom because of its obscurity, complexity, and cost.<sup>18</sup> Part III surveys prior reform efforts to simplify the will-making process and explains why those reform efforts have failed to reduce the high rate of intestacy.<sup>19</sup> Part IV proposes a testamentary schedule, integrated into the state income tax return, as a dynamic, interactive, and properly channeled platform to promote the exercise of testamentary freedom among lay testators.<sup>20</sup> Part V anticipates and responds to potential criticisms of the proposed reform.<sup>21</sup> The Appendix contains a model testamentary schedule and revocation form.

## I. A PERNICIOUS PROBLEM: THE HIGH LONG-TERM RATE OF INTESTACY

The purpose of this Part is to introduce the primary tension addressed in this Article: a puzzling contrast between the broad scope of

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<sup>15</sup> See *infra* notes 169–177 and accompanying text.

<sup>16</sup> See *infra* notes 206–212 and accompanying text.

<sup>17</sup> See *infra* notes 22–87 and accompanying text.

<sup>18</sup> See *infra* notes 88–127 and accompanying text.

<sup>19</sup> See *infra* notes 127–166 and accompanying text.

<sup>20</sup> See *infra* notes 167–233 and accompanying text.

<sup>21</sup> See *infra* notes 234–248 and accompanying text.

testamentary freedom and the infrequency with which individuals exercise that freedom.

Despite nearly unrestricted power to control the disposition of property at death, surprisingly few individuals exercise testamentary freedom by executing a will.<sup>22</sup> As a result, most individuals allow the default rules of intestacy to govern the disposition of their property at death. The high rate of intestacy has concerned inheritance law scholars for decades, in part because most individuals who do not have a will say they want to obtain one.<sup>23</sup> Intestacy, when unintended, can lead to undesirable consequences for the decedent, the decedent's family, and society.

### A. *Testamentary Freedom: The Polestar of Inheritance Law*

The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.<sup>24</sup> Americans enjoy nearly unbridled testamentary freedom, a right that has been fully engrained in the American psyche.<sup>25</sup> Testamentary freedom is a “sa-

<sup>22</sup> See *infra* notes 45–51 and accompanying text.

<sup>23</sup> See *infra* notes 52–55 and accompanying text.

<sup>24</sup> See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 895 (Ill. 2009) (“The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child born after execution of the will if that is the testator’s desire.”); Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 *CARDOZO L. REV.* 1315, 1317–26 (2011) (surveying the justifications for testamentary freedom, and arguing that testamentary freedom should trump public policy that renders testamentary conditions unenforceable). Although testamentary freedom is the guiding principle of inheritance law, a minority of scholars, including Thomas Jefferson, have argued that dead-hand control and, by extension, certain aspects of testamentary freedom, should be curtailed. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 *THE WORKS OF THOMAS JEFFERSON* 3, 3–4 (Paul Leicester Ford ed., G.P. Putnam’s Sons 1904) (“[T]he earth belongs in usufruct to the living’ . . . . [T]he dead have neither powers nor rights over it.”); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 *U. ILL. L. REV.* 1273, 1301; see also Melanie Leslie, *The Myth of Testamentary Freedom*, 38 *ARIZ. L. REV.* 235, 236 (1996) (arguing that the polestar of testamentary freedom is undermined by judicial application of protective doctrines that effectively construe the donative documents according to social norms rather than the decedent’s intent). The surviving spouse is protected from disinheritance in separate property states by the spousal elective share, but in most states, decedents retain testamentary power over the vast majority of their property. See *WILLS, TRUSTS, AND ESTATES* 268–69 (Jesse Dukeminier et al. eds., 8th ed. 2009).

<sup>25</sup> See, e.g., RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 109 (2004) (noting that the freedom of testation “remains ingrained in the American psyche” and “[t]here is little reason to believe that the notion will change substantially in the near future”); LAWRENCE FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND*

cred privilege” and an important incident of property ownership; scholars argue the freedom is necessary to preserve the social institution of private property and to provide economic leverage to the elderly who might otherwise be deprived of care toward the end of life.<sup>26</sup> In 1987, in *Hodel v. Irving*, the U.S. Supreme Court held that the power to control the disposition of property at death was protected from taking without just compensation by the Fifth Amendment because testamentary freedom is one of the valuable rights of property ownership.<sup>27</sup> Thus, *Hodel* renders “‘dead-hand control’ of property a natural right.”<sup>28</sup> In 1997, in *Babbitt v. Youpee*, the Supreme Court reaffirmed this principle and held that the Constitution protects the power to devise property by will to the natural objects of one’s bounty.<sup>29</sup>

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INHERITANCE LAW 19 (2009) (discussing the declining influence of formal rules in wills and the rise of will substitutes in allowing for the simple passage of wealth from one generation to the next); Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280–81 (2010); see also Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 333 (“Curtailment of testamentary freedom has been unpopular largely because of a belief that beneficial economic and social effects result from a policy of allowing nearly unrestricted transfers of wealth at death. The accumulation of property and control of its transfer at death is thought to breed ingenuity, initiative, creativity, and self-reliance.”). *But see* Leslie, *supra* note 24, at 236 (“Wills that fail to provide for [beneficiaries with a supposedly “superior moral claim” to the decedent’s estate] typically are upheld only if the will’s proponent can convince the fact-finder that the testator’s deviation from normative values is morally justifiable. This unspoken rule, seeping quietly, but fervently from case law, directly conflicts with the oft-repeated axiom that testamentary freedom is the polestar of wills law.”).

<sup>26</sup> LAWRENCE W. DIXON, WILLS, DEATH AND TAXES 3–11 (Rowman & Littlefield 1977) (1968) (describing testamentary freedom as a sacred privilege); JOHN STUART MILL, *Principles of Political Economy: With Some of Their Applications to Social Philosophy*, in 2 COLLECTED WORKS OF JOHN STUART MILL 215, 223 (J.M. Robson ed., 1965) (arguing that testamentary freedom is an extension of property ownership); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1247 (1968) (arguing that testamentary freedom is necessary to preserve the system of private property); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 171 (2008) (“[S]ociety should tolerate freedom of testation because it allows parents to reward children for lifetime services.”). *But see* Thomas P. Gallanis & Josephine Gutler, *Family Caregiving and the Law of Succession*, 45 U. MICH. J.L. REFORM (forthcoming 2012) (proposing an elective share for a family-member caregiver as a better way to recognize and support caregiving within the family).

<sup>27</sup> 481 U.S. 704, 715 (1987) (“There is no question . . . that the right to pass on valuable property to one’s heirs is itself a valuable right.”). The Takings Clause of the Fifth Amendment provides that private property “shall [not] be taken for public use, without just compensation.” U.S. CONST. amend. V.

<sup>28</sup> Ronald Chester, *Inheritance in American Legal Thought*, in INHERITANCE AND WEALTH IN AMERICA 23, 33 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

<sup>29</sup> 519 U.S. 234, 244–45 (1997).

Over the last few decades, American law has dramatically expanded the power of testation by vesting the dead hand with unprecedented control over property once owned by the decedent.<sup>30</sup> Many states have enacted dynasty trust legislation by abrogating the common law rule against perpetuities, which ensured that a trust, and thus its donor-imposed restrictions, would expire within a tolerable period (typically no longer than 100 years).<sup>31</sup> Dynasty trust legislation authorizes trusts up to 1000 years in duration, theoretically allowing the decedent to control property for many generations after death.<sup>32</sup> Simultaneously, Congress has scaled back estate tax rates dramatically and increased the amount of wealth transferable without any transfer tax liability.<sup>33</sup> For the wealthy, those reforms are powerfully complementary—dynasty trust legislation enables enduring control over private property while federal transfer tax reform greatly expands the quantum of property subject to that control. As a result, Americans now have more power to control the disposition of property at death than ever before.

Testamentary freedom, however, must be exercised affirmatively during life by executing a will,<sup>34</sup> and the law strongly favors the affirmative exercise of that freedom by granting special protections for testate estates. For example, under *Hodel*, the Constitution protects testamentary freedom so long as the decedent executes a will, but the Constitution provides no protection if the decedent died intestate because she intentionally relied on the default rules of heirship. Further, although the rules of intestacy generally reflect the probable intent of the typical decedent, under *Hodel*, the Constitution does not require that intestacy statutes distribute property according to principles of probable intent.<sup>35</sup> Likewise, state inheritance law favors the affirmative exercise of testamentary freedom by will through a presumption that avoids partial intestacy; courts “abhor” intestacy and go to great lengths to give effect

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<sup>30</sup> See generally RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD HAND (2010) (explaining the rising influence of dead hand control).

<sup>31</sup> *Id.* at 76–85.

<sup>32</sup> Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 171 (2012).

<sup>33</sup> MADOFF, *supra* note 30, at 63–70.

<sup>34</sup> See, e.g., UNIF. PROBATE CODE § 2-502 (2008) (stating the general rule that a will must be in writing, and signed by the testator and two witnesses).

<sup>35</sup> *Hodel's* dictum suggests that states may alter or abolish the default rules of descent, meaning that the constitutional protection afforded by the Takings Clause favors disposition by will rather than by intestacy. See 481 U.S. at 718 (“It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.”).

to a testamentary document if the alternative is partial intestacy.<sup>36</sup> When individuals exercise the right of testamentary freedom, courts make every effort to adhere to the testator's expressed or construed intent.<sup>37</sup>

### B. Widespread Intestacy: A Pervasive, Unintended Lapse of Testamentary Freedom

Perplexingly, even though American law provides nearly unlimited testamentary freedom, most individuals do not exercise that freedom by executing a will.<sup>38</sup> It is critically important to understand why most people fail to execute a will because, if most decedents intend to die intestate, then widespread application of the default rules of heirship is not necessarily a problem. Testamentary freedom includes the right to opt into the default rules of heirship (in effect at death) by *not* executing a will.

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<sup>36</sup> See, e.g., *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1007 (Fla. Dist. Ct. App. 2005) (applying the presumption that “testacy is preferred by the courts over intestacy”); *In re Estate of Ikuta*, 639 P.2d 400, 406 (Haw. 1981) (“The public policy which does apply is that ‘the law abhors intestacy and presumes against it.’”); *Oliver v. Hays*, 708 A.2d 1140, 1147 (Md. Ct. Spec. App. 1998) (“[T]he law disfavors intestacies and requires that, whenever reasonably possible, wills be construed to avoid that result.”); *Gallaudet Univ. v. Nat’l Soc’y of the Daughters of the Am. Revolution*, 699 A.2d 531, 538 (Md. Ct. Spec. App. 1997) (“Just as nature is said to abhor a vacuum, Maryland courts in addressing these disputes have long abhorred intestacy when an individual sits down to dispose of the rest and residue of his or her estate under a will.”); *In re Estate of Vandergrift*, 177 A.2d 432, 447 (Pa. 1962) (Bell, J., concurring in part, dissenting in part) (“[N]early everyone abhors an intestacy and consciously or unconsciously seeks to avoid it, and this is especially true where as here testator undoubtedly wished to dispose by will of his entire estate.”); *S. Bank & Trust Co. v. Brown*, 246 S.E.2d 598, 601 (S.C. 1978) (“The law abhors intestacy and will indulge every presumption in favor of the validity of the will.”); *Kesler v. Dillon*, 16 Va. Cir. 276, 284 (1989) (“In a cause such as this requiring a choice between attempting to give the will effect and allowing funds to revert to intestacy, Virginia favors the former.”).

<sup>37</sup> See, e.g., *Phillips v. Estate of Holzmann*, 740 So. 2d 1, 2 (Fla. Dist. Ct. App. 1998) (“The polestar in construing any will is to ascertain the intent of the testator.”); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) (“The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor’s intention; and (2) that the donor’s intention is given effect to the maximum extent allowed by law.”).

<sup>38</sup> See *infra* notes 45–51 and accompanying text.

By analogy, the freedom of marriage implies that individuals have a freedom *not* to marry.<sup>39</sup> If demographic data revealed that most individuals who had the right to marry chose to remain single, then such a result might be consistent with the freedom of marriage. Whereas, if most individuals who had the right to marry remained single because they could not navigate the procedures for obtaining a marriage license, or if the procedures for obtaining a marriage license somehow deterred individuals from marrying, then widespread singlehood might expose a regulatory regime inconsistent with the freedom of marriage.

Thus, the collective lapse of testamentary freedom raises many questions: Is the right to dictate the disposition of property at death not sufficiently important to undertake the cost or effort of obtaining a will? Are individuals sufficiently satisfied with the default rules of intestacy and therefore do not need a will? Do individuals understand the default rules of heirship well enough to rely on them? Do the procedural or substantive requirements for obtaining a will deter individuals from exercising testamentary freedom?

Existing empirical research is insufficient to answer these questions definitively,<sup>40</sup> but survey data suggests a disconnect between the desire for testamentary freedom and the wherewithal to exercise it.<sup>41</sup> Most Americans agree with the principle of testamentary *freedom*; but for reasons largely unrelated to testamentary *intent*, they fail to exercise the right. The nonexercise of testamentary freedom is rarely the result of intentional reliance on the default rules of intestacy, which few Americans know about or understand. Most individuals who do not have a will intend to obtain one, but that intent is often never realized.

Opinion surveys, though sparse and slightly stale, reveal that a majority of Americans agree with the general principle of testamentary freedom. For example, a 1977 survey asked participants the following question: "Should the law limit inheritance to either relatives, to friends of long standing or to organizations to which an individual has had a long time connection or should there be *no* restrictions at all on the way a person distributes his property?"<sup>42</sup> An overwhelming majority,

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<sup>39</sup> See Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 223; R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 317 (1999).

<sup>40</sup> See FRIEDMAN, *supra* note 25, at 5–6 (describing the small number of studies on the patterns of testation, but noting that "on the whole, the literature is hardly as rich as one might like").

<sup>41</sup> See *infra* notes 46–51 and accompanying text.

<sup>42</sup> Fellows et al., *supra* note 25, at 335.

eighty-nine percent, responded that the law should place no restriction on the decedent's disposition of property at death.<sup>43</sup> If this view is representative and remains true today, then public opinion is consistent with the current state of the law, which imposes very few restrictions on testamentary freedom.<sup>44</sup>

In stark contrast to that sentiment, decades of empirical studies have repeatedly confirmed that most Americans do not have a will.<sup>45</sup> Although no nationwide study has ever quantified the number of intestate decedents,<sup>46</sup> scholars agree that a high rate of intestacy has persisted throughout most of American history. In the eighteenth and nineteenth centuries, wills were uncommon except among the wealthy.<sup>47</sup> Most recently, a 2009 publication estimated that sixty-five per-

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<sup>43</sup> *Id.* at 335–36. In a separate question, the same respondents were asked whether the law should allow individuals to leave “most of his estate to the care or maintenance of his dog or cat for as long as that animal shall live.” *Id.* at 335. A slim majority of respondents—fifty-four percent—stated that the law should limit that type of bequest. *Id.* at 336.

<sup>44</sup> Most states protect the surviving spouse from outright disinheritance; but even in those states, the spousal protection allows the individual to dictate the disposition of most property owned at death. See WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 476–78.

<sup>45</sup> See *infra* notes 46–51 and accompanying text.

<sup>46</sup> Quantifying a precise national rate of intestacy based on the number of decedents who die without a will is vexingly difficult and has never been done. The data collection necessary to quantify the national intestacy rate by surveying probate records renders the exercise impractical and cost prohibitive, even though probate files are a matter of public record. The law of property succession in the United States is administered by state probate courts staffed by municipal and county officers. Because relatively few jurisdictions provide electronic access to probate records, a comprehensive survey would require a physical visit to more than 3000 probate, surrogate, and orphans' courts; according to the U.S. Census Bureau, there were 3141 counties in the United States as of January 1, 2000. See U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING 141 (2004), available at <http://www.census.gov/prod/cen2000/phc3-us-pt1.pdf>.

Importantly, even if a national survey of probate records were conducted, such a study would substantially undercount the number of intestate decedents because most small estates tend to be intestate and are never probated. Stated alternatively, estates that go through the probate process are larger than the average decedent's estate, and larger estates tend to be testate rather than intestate.

The advantages of surveying living respondents about intestacy by asking them if they currently have a will are threefold: (1) a nationwide study can be conducted by surveying a statistically representative sample, whereas a nationwide study of probate records is impractical; (2) surveying living people permits a qualitative inquiry because respondents can be asked why they do not have a will; and (3) the alternative, a survey of probate records, would distort the intestacy rate downward because larger estates are more likely to be probated, and individuals with large estates are more likely to have a will. The most obvious disadvantage of surveying living respondents is that the data is only predictive of whether a person will die without a will because the status of intestacy can be determined only at death.

<sup>47</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 183 (Touchtone Press 3d ed. 2005) (1973) (“Only the wealthy, by and large, made out wills. Even at the very end of

cent of Americans do not have a will.<sup>48</sup> A 2006 nationwide survey found that sixty-eight percent of respondents lacked a will.<sup>49</sup> Both estimates corroborate older studies reporting similar findings.<sup>50</sup> Scholars believe that most individuals who lack a will never obtain one and die having allowed the right of testamentary freedom to lapse.<sup>51</sup>

The question of why so many Americans do not have a will is difficult to answer, but empirical and anecdotal evidence suggests that procrastination is, by far, the most plausible explanation for intestacy.<sup>52</sup> In

the [eighteenth century], probably less than 5 percent of the persons who died in the typical county, in any one year, left wills that passed through probate.”); *id.* at 319 (“One study of wills compared a sample of wills in Essex County, New Jersey, in 1850, 1875, and 1900. In 1850, less than 5 percent of those who died left wills; only about 8 percent had estates of any sort. By 1900, roughly 14 percent of the dying population left estates that went through probate; 8 percent were testate.”).

<sup>48</sup> Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, EST. PLAN., Apr. 2011, at 27, 27.

<sup>49</sup> Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009).

<sup>50</sup> A 1977 survey of 750 Alabama, California, Massachusetts, Ohio, and Texas residents found that forty-five percent of respondents had a will. Fellows et al., *supra* note 25, at 337. A 1978 survey of Iowa residents revealed that 306 of 600 randomly selected respondents (fifty-one percent) did not have a validly executed will. Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1070 (1978). The rate of intestacy was lower among a separate pool of respondents who received an inheritance through the probate process. *Id.* Also, the rate of intestacy was lower among probated estates. *Id.* A 1998 survey of Minnesota respondents revealed that sixty-six percent of individuals in opposite-sex couples, thirty-seven percent of women in same-sex couples, and forty-four percent of men in same-sex couples did not have wills. Monica K. Johnson & Jennifer Robbenolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 488–89 (1998); see also Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 799 (1993) (“The majority of the fifty-one participants did not have a will. Only three [high school educated participants] and just less than half of [college-educated and current law school student participants] had executed a will. This appears consistent with data from previously reported studies which show that most Americans do not have wills and that those with little education are less likely to have wills.”) (summarizing a survey conducted to study the suitability of form wills, not the rate of intestacy).

<sup>51</sup> See, e.g., MATERIALS ON FAMILY WEALTH MANAGEMENT 91 (William J. Turnier & Grayson M.P. McCouch eds., 2005) (“Studies indicated that a majority of individuals die intestate . . .”); WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 59 (“In spite of the many advantages of a will, roughly half the population dies intestate.”).

<sup>52</sup> A leading estate planning treatise opines,

Inertia may be the cause, or superstition that death will surely come sooner if plans are made. Some folks procrastinate about making that appointment because they cannot bear the notion that they are mortal; ducking the entire subject is a means of avoiding discomfort. Additionally, in lots of cases there will be a general disinclination to become involved with a lawyer. If there is no appointment, there is no fee to pay.

a 1977 intestacy study, 63.6% of respondents who lacked a will cited “laziness” as the reason.<sup>53</sup> In a 1978 survey of randomly selected Iowa citizens, 57% of respondents who lacked a will said they “ha[d] not gotten around to making a will.”<sup>54</sup> The full array of responses from the 1978 survey is reproduced below:<sup>55</sup>

Reason	Percent	Number
Little or no property	16%	47/286
Only insurance and joint property	8%	23/286
Do not like to think about wills	4%	11/286
Have not gotten around to making a will	57%	163/286
Do not trust lawyers	2%	5/286
Wills are too costly	1%	2/286
State will distribute decedents’ assets	3%	7/286
Family will get automatically	10%	28/286

Procrastination, the most frequently cited reason, does not manifest an intent to die intestate. To the contrary, procrastination implies that such individuals want to avoid intestacy and hope to obtain a will. If most individuals who lack a will want to obtain one, then what is preventing them? In both the 1977 and 1978 intestacy studies, procrastination appears to serve as a catchall response, but unfortunately, empirical studies have not inquired further into why so many individuals procrastinate in making a will.

The high rate of intestacy is not the result of widespread agreement with or reliance on the default rules of heirship. Although in theory, agreement with the default rules could reduce the need for a will,<sup>56</sup> both the 1977 and 1978 intestacy studies concluded that individuals lacking a will did not intentionally rely on the default rules.<sup>57</sup> In the 1977 study, *no* respondent cited reliance on or satisfaction with the default rules of intestacy as a reason for not having a will; in fact, a majority of respondents who claimed to understand the default rules

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JEROME A. MANNING ET AL., MANNING ON ESTATE PLANNING § 1:2 (6th ed. 2004).

<sup>53</sup> Fellows et al., *supra* note 25, at 339.

<sup>54</sup> Contemporary Studies Project, *supra* note 50, at 1077.

<sup>55</sup> *Id.*

<sup>56</sup> The existence of default heirship rules can reduce the transaction costs of estate planning in the aggregate if intestacy statutes conform to majoritarian preferences. That is, “If a default rule of intestacy correctly anticipates a benefactor’s distributive preferences, both initially and as her circumstances change, lawmakers save her the expense of executing a will altogether.” Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1039 (2004).

<sup>57</sup> See Fellows et al., *supra* note 25, at 339–40; Contemporary Studies Project, *supra* note 50, at 1077–78.

could not identify their intestate heirs.<sup>58</sup> Researchers asked each respondent two questions:

1. If you died today without a will, do you know who would inherit your property?

2. [If yes] Could you tell me who would receive what proportions of your property if you were survived by your wife/husband, two minor children, and your mother and father, supposing you have all these family members and they are all living?<sup>59</sup>

Seventy percent of respondents answered “Yes” to the first question, but of those respondents, only forty-five percent correctly (or nearly correctly) answered the second question.<sup>60</sup> This finding suggests that most individuals do not understand (or claim to understand) even the most basic consequences of dying intestate. Similarly, in the 1978 study, researchers explained that even though thirteen percent of respondents cited reasons possibly suggesting reliance on default rules (i.e., “state will distribute decedents’ assets” or “family will get automatically”), those responses did not necessarily indicate satisfaction with or comprehension of the default rules, but merely expressed a belief that somehow property would pass at death without a will.<sup>61</sup>

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<sup>58</sup> Fellows et al., *supra* note 25, at 339–40 (noting that “15 percent said they had never thought about it before the interview” and “[a]nother 15 percent said they did not have a will because they did not need one either because they were young and childless or because they had little property”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 340.

<sup>61</sup> The survey notes:

In the [random sample of Iowa citizens], thirteen percent of the interviewees were content to allow the state to distribute their property according to the intestate succession statutes, or believed that their family would take the property automatically at their death. The researchers assumed that those respondents who believed that their family would take their property automatically felt that there was no need for a will because those family members would share in the estate anyway, even though they might not have realized that such a result would be accomplished under state law. It is possible, however, that respondents who believed that their family would receive the property automatically may not agree with the distribution pattern in the state’s statutes of intestate succession, but were merely ignorant about what will happen to their property when they die, or had arranged their affairs so their property would pass to chosen survivors without a will. If ignorance or alternative estate plans explain the ‘family will receive automatically’ response, the number of Iowans who are consciously satisfied with the Iowa statutory distribution for intestate estates may be much lower than the twenty five percent in

Taken together, these studies suggest that Americans value testamentary freedom and want to exercise that right by executing a will, but for various reasons (largely procrastination), they do not. This is troubling because most individuals do not understand even the most basic consequences of dying intestate. The fact that most individuals cannot correctly identify their intestate heirs means that, for many individuals who do not currently have a will, the need to obtain one might be far more important than they realize.

### C. *Disadvantages of Intestacy*

Intestacy statutes govern the disposition of property owned at death and not disposed of by will.<sup>62</sup> In most states, with minor variation, the intestate estate is distributed to heirs in the following order: surviving spouse, descendants, parents, descendants of parents, grandparents, descendants of grandparents, and (in some states) stepchildren and descendants of stepchildren.<sup>63</sup> This priority reflects a legislative presumption that most individuals prefer that property pass to surviving family members, generally defined as the surviving spouse and blood relatives, to the exclusion of friends, cohabitants, favorite charities, or anyone else.<sup>64</sup> Scholars argue that principles of testamentary freedom mandate agreement between heirship rules and probable intent because to do otherwise would create a trap for the uninformed.<sup>65</sup>

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[the sample of Iowa residents who went through the probate process] and thirteen percent in [the random sample of Iowa citizens].

Contemporary Studies Project, *supra* note 50, at 1077–78.

<sup>62</sup> See UNIF. PROBATE CODE § 2-101(a) (2008) (“Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this Code, except as modified by the decedent’s will.”).

<sup>63</sup> See, e.g., N.J. STAT. ANN. § 3B:5-4 (West 2007 & Supp. 2011); UNIF. PROBATE CODE §§ 2-102, 2-103 (2008).

<sup>64</sup> The Chief Reporter of the 1969 Uniform Probate Code, summarized the Code’s drafting principle as guided by probable intent: “The foundation [of the Code] is a pattern of intestate succession that is responsive to the idea that the law’s plan should be in line with what the average person wants.” Richard V. Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP. PROB. & TR. J. 199, 204 (1968); see Fellows et al., *supra* note 25, at 323 (noting that the drafting goal of the 1969 Uniform Probate Code “was to design a statute that reflects the dispositive wishes of persons who die without wills”). The Uniform Probate Code’s intestacy provisions have been adopted or mostly adopted in more than a third of the states. *Uniform Probate Code Locator*, LEGAL INFO. INST., <http://www.law.cornell.edu/uniform/probate.html> (last visited Apr. 19, 2012).

<sup>65</sup> A number of scholars argue that “[t]estamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent’s bounty” so intestacy rules must “conform[] to the likely wishes of a person

Although there are notable exceptions, intestacy statutes tend to reflect the probable intent of most individuals.<sup>66</sup>

But even when intestacy statutes correctly capture majoritarian preferences, dying intestate remains disadvantageous in a significant number of cases. Intestacy is unsuitable for all individuals whose preferences differ from the statutory rules of heirship, but it is acutely unsuitable for a large and growing population of nontraditional families, which include relationships other than those defined by consanguinity, marriage, or legal adoption.<sup>67</sup> Intestacy is structurally unsuitable for

who dies without having executed a valid will [because it would otherwise] create[] a trap for the ignorant or misinformed." Fellows et al., *supra* note 25, at 323–24.

<sup>66</sup> One major exception is the nonrecognition of intestacy inheritance rights for surviving same-sex partners in most jurisdictions. See Thomas P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 91 (2004) (arguing that recognition of intestate inheritance rights for surviving same-sex partners would effectuate the decedent's presumed intent). Another departure from probable intent is the exclusion of other nontraditional families from the rules of intestacy; but for reasons discussed below, the best way to facilitate testamentary intent for such decedents is to promote testacy rather than alter the rules of intestate distribution. See *infra* notes 68–73 and accompanying text.

<sup>67</sup> One scholar explains:

The rules of intestate succession—the default rules that apply in the absence of a will—provide rigidly for inheritance by status. The decedent's closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent. A spouse takes one share, a child another. When no "close" family members survive, the law ignores those in intimate, dependent relationships with the decedent to confer windfalls on distant relatives who may not even have known the decedent. Under this scheme, behavior and need are irrelevant. In most states, the decedent's closest relative inherits even if she abandoned, maltreated, or physically abused the decedent. Short of murdering the decedent, she retains intestate succession rights because her family status makes her by definition a "natural object of the decedent's bounty." In contrast, a blended family member, extended family member, or nonrelative who was the decedent's primary caregiver or long-term dependent generally receives no recognition under intestate succession statutes. She is considered an "unnatural" recipient of the decedent's estate.

Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206–08 (2001). Those decedents should execute a will because intestacy is structurally unsuitable:

An analysis of intestacy law must begin with the recognition that an intestacy statute cannot work equally well for every potential decedent. Indeed, developing an intestacy statute that will meet the needs or wishes of all persons is both unnecessary and impossible. There are too many variations on what decedents want, too many family situations to consider and too many special circumstances surrounding individual decedents. An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will. Any adult with adequate mental capacity can opt out of the intestacy statute either by executing a will or by holding title to property in a manner that provides for the transfer of title at death by means other

nontraditional families because the legislature cannot (or will not) make presumptions about probable intent when the decedent's relationship to intended beneficiaries is not clearly defined by traditionally accepted indicia of familial status.<sup>68</sup>

For example, unmarried cohabitants living in a marriage-like arrangement may intend mutual inheritance rights for each other, but without an outward, objective manifestation regarding the status of their relationship, it is difficult to make legislative presumptions about their probable intent. When unmarried cohabitants have the right to marry but choose not to, cohabitation does not serve as a reliable proxy for testamentary intent.<sup>69</sup> Some cohabitants maintain committed relationships but choose not to marry for financial reasons (such as the potential loss of Social Security benefits) and other cohabitants live together because they are not yet sure if they are ready to marry; many nontraditional families probably fall somewhere in between.<sup>70</sup> Without a factual inquiry, it is impossible to know whether cohabitants live together because their relationship operates like a family or for some other reason, and post-mortem factual inquiries tend to be unreliable because the best evidence, the decedent's testimony, is not available.<sup>71</sup>

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than the probate system. If a person determines that the applicable intestacy statute will not appropriately carry out his or her testamentary wishes, the person has alternatives to subjecting disposition of his or her property to the statutory formula.

Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1–2 (2000).

<sup>68</sup> See Thomas P. Gallanis, *The Flexible Family in Three Dimension*, 28 LAW & INEQ. 291, 298 (2010) (arguing that states should provide recognition for self-defined families in the nonmarital, cohabitation context).

<sup>69</sup> This problem is alleviated in states that recognize common-law marriage, which is formed “without license or ceremony, when two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple.” BLACK’S LAW DICTIONARY 1060 (9th ed. 2009). Nine states—Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, and Texas—and the District of Columbia recognize common-law marriage. See *Common-Law Marriage*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=4265> (last reviewed Apr. 19, 2011). Five states—Georgia, Idaho, Ohio, Oklahoma and Pennsylvania—have abolished common law marriage but recognize marriages formed before the date of abolishment. *Id.*

<sup>70</sup> See BRASHIER, *supra* note 25, at 50–55.

<sup>71</sup> *Id.* at 53 (“[A] default rule giving a surviving cohabitant spouse-like protection could prove unworkable unless tempered by an *objective* means for determining both the existence and the duration of the cohabitation. A marriage certificate provides objective proof of a family relationship and allows us to measure its duration. Without a similar objective criterion for determining a claimant’s status as a surviving cohabitant, probate courts could find themselves sinking into a morass of individualized, subjective inquiries involving both public and private aspects of the cohabitating relationship before them.”);

Intestacy statutes therefore are especially unsuitable for committed same-sex partners because, in most states, they are prohibited from marrying or otherwise legally expressing the status of their relationship; only ten states provide an intestate share for a surviving same-sex spouse or partner.<sup>72</sup> The structural unsuitability of intestacy for nontra-

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NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 134 (2008) (“Since the purpose of [intestacy statutes and default estate rules] is furthering autonomy, the theory for the [heirship] priority is that the person would most likely want the result that the laws provide. After all, it is not feasible to hold a court hearing in every case and ask a judge to rule on whom a dead or incapacitated person would choose to make decisions on her behalf. But the current model fails those who choose important family relationships without marrying and would want such people, not biological relatives, to have rights and decision-making authority.”).

<sup>72</sup> Ten states and the District of Columbia provide an intestate share for a surviving same-sex partner, either by recognition of same-sex marriage or an intestate share for a domestic partner. CAL. PROB. CODE § 6401 (West 2009) (intestate share for domestic partner); CONN. GEN. STAT. § 1-1m (Supp. 2011) (recognition of same-sex marriage); D.C. CODE § 46-401 (2009 & Supp. 2011) (recognition of same-sex marriage); HAW. REV. STAT. § 560:2-102 (2010) (intestate share for reciprocal beneficiary); ME. REV. STAT. tit. 18-A, § 2-102 (1998 & Supp. 2011) (intestate share for same-sex partner); N.H. REV. STAT. ANN. § 457:1-a (2004 & Supp. 2011) (recognition of same-sex marriage); N.J. STAT. ANN. § 3B:5-3 (West 2007) (intestate share for domestic partner); N.Y. DOM. REL. LAW § 10-a (McKinney 2010 & Supp. 2012) (recognition of same-sex marriage); VT. STAT. ANN. tit. 15, § 8 (2002 & Supp. 2010) (recognition of same-sex marriage); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (recognition of same-sex marriage); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (recognition of same-sex marriage).

Laws prohibiting same-sex marriage and intestacy rights for same-sex partners are often based on the putative governmental interest in “steering procreation into marriage”: “By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws ‘encourage procreation to take place within the socially recognized unit that is best situated for raising children.’” *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). But depriving a surviving member of a same-sex partnership is contrary to the goal of giving effect to the decedent’s probable intent. *See Sonia Bychkov Green, Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 63 (2011) (noting that “thirty-nine states have laws that define marriage as between a man and a woman; thirty states have constitutional amendments with the same definition”); *id.* at 108–22 (including appendix of authorities). *See generally* Gallanis, *supra* note 66 (arguing for an extension of inheritance rights to opposite- and same-sex domestic partners).

The 2008 revision to the Uniform Probate Code urges states to clarify intestate succession rights for surviving members of a same-sex partnership:

States that recognize civil unions, domestic partnerships, or similar relationships between unmarried individuals should add appropriate language wherever such references or similar references appear. States that do not recognize such relationships between unmarried individuals, or marriages between same-sex partners, are urged to consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed but who die domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in this state

ditional families is a salient problem because of the growing trend of unmarried cohabitation and same-sex partnerships. In 2010, there were 16.3 million Americans living in unmarried cohabitation households.<sup>73</sup>

In addition to the large and growing number of nontraditional families is a silent, uncountable population of individuals whose intended beneficiaries simply differ from their heirs determined by statute. Because most Americans are unsure of how their property would be distributed by intestacy, the absence of a will creates uncertainty regarding the succession of property at death and can lead to frustrated expectations for the surviving family at a time of grief and emotional turmoil.<sup>74</sup> The unintended descent of property by intestacy can also lead to fractionated interests held as tenants in common by multiple heirs. This is problematic because tenants in common must coordinate and obtain consent from fractional owners before maintaining or selling the property.<sup>75</sup>

Even when intestacy statutes correctly anticipate the decedent's intended beneficiaries, dying intestate can lead to undesirable, costly, and acrimonious guardianship and administration contests, which could otherwise be avoided by executing a will. Guardianship issues are an especially important consideration for individuals with minor children. Absent testamentary appointment of a guardian of the person for minor children with no other natural guardian, a court must appoint a responsible adult to care for the child without express direction from the child's deceased parent. If an unmarried single parent dies intestate, all or most of the estate passes to the decedent's children,<sup>76</sup> but a court proceeding may be necessary to appoint a guardian or conserva-

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but simply allowing those who move to and die in this state to retain the rights they previously acquired elsewhere.

UNIF. PROBATE CODE art. II, legislative note (2008).

<sup>73</sup> Rose M. Kreider, *Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS)* 13 (Housing & Household Econ. Statistics Div. Working Paper 2000), available at <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf> (noting that household data from 2010 indicate 7,529,000 opposite-sex couples and 620,000 same-sex couples living in cohabitation); see also Gallanis, *supra* note 66, at 57 (noting that "unmarried same-sex and opposite-sex couples, including some with children, are increasingly prevalent").

<sup>74</sup> See MATERIALS ON FAMILY WEALTH MANAGEMENT, *supra* note 51, at 91–92; Fellows et al., *supra* note 25, at 339–40.

<sup>75</sup> See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 495 (2010) ("[B]y virtue of the substantive law of how ownership interests pass to descendants—by representation in one form or another—division of ownership is given precedence over consolidation and alienability.").

<sup>76</sup> See UNIF. PROBATE CODE § 2-103 (2008).

tor of the child's property.<sup>77</sup> The same concerns are present if both parents (whether married or unmarried) of a minor child die simultaneously. Guardianship concerns are most prescient for the large and growing population of unmarried parents in the United States; the 2010 Census reported slightly over twenty million households with children under the age of eighteen but no spouse living with the householder.<sup>78</sup>

All individuals should be concerned about conflicts regarding the selection of a personal representative to administer their estates. Absent testamentary appointment of an executor, a court must appoint a personal representative without express direction from the decedent. The personal representative plays a critical role in the estate administration process because she is typically given authority and discretion to decide whether and how to liquidate property in the estate to satisfy creditor claims and general bequests. Disagreement among beneficiaries regarding selection of the personal representative can lead to expensive and contentious proceedings that dissipate the decedent's estate.<sup>79</sup> The testator can resolve such disagreements in advance by designating an executor in the will.

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<sup>77</sup> Under the Uniform Probate Code, the court may appoint a conservator to protect the property of a minor child "if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money." *Id.* § 5-401(1) (2008). When property is conveyed to a minor child in trust, however, the trustee holds legal title and bears the responsibility for protecting the trust corpus. *See* Fellows et al., *supra* note 25, at 325 (noting that "attorneys frequently caution against bequeathing property directly to a minor child, because such a bequest requires appointment of a guardian to the estate of the child").

<sup>78</sup> *See Profile of General Population and Housing Characteristics*, AM. FACTFINDER, <http://factfinder2.census.gov/> (type "Profile of General Population and Housing Characteristics" into the "topic or table name" search box, click "go," and click on the first table entitled "Profile of General Population and Housing Characteristics: 2010") (last visited Apr. 20, 2012). These data do not mean that every included householder is unmarried, only that no spouse is present in the household, but many if not most of the single-parent householders are likely to be unmarried. *See id.* Data from the 2010 Census also show that a quarter of same-sex couples are raising children. *See* Susan Donaldson James, *Census 2010: One-Quarter of Gay Couples Raising Children*, ABC NEWS (June 23, 2011), <http://abcnews.go.com/Health/sex-couples-census-data-trickles-quarter-raising-children/story?id=13850332>. The law of many states is unsettled on whether unmarried couples may jointly adopt. *See* Deidre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 5-6 (2008).

<sup>79</sup> *See, e.g., In re Estate of Dennis*, O.C. No. 1589 DE of 2008, 2010 Phila. Ct. Com. Pl. LEXIS 243, at \*2 (July 2, 2010) (stating that in a small estate, litigation over the appointment of a personal representative required both sides to retain counsel).

The high rate of intestacy also raises serious questions of fairness. Demographic analyses reveal that individuals are more likely to have a will if they are white, male, married or formerly married, educated, older, and wealthy; this demographic pattern has endured over time.<sup>80</sup> As a result, the benefits of expanding testamentary freedom (i.e., legal protections for testate estates, dynasty trust legislation, and transfer tax reform) disproportionately flow to those with great wealth, thereby contributing to the growing economic inequality in the United States.<sup>81</sup> For the very wealthy, testamentary freedom and dead-hand control allow for great concentrations of wealth, but for the rest of society, great accumulations of wealth contribute to economic inequality and other social ills.<sup>82</sup>

Unlike the exercise of testamentary freedom, which allows for great concentrations of wealth, intestacy (when unintended) has precisely the opposite effect: wealth is disbursed among multiple heirs rather than concentrated. Economists have shown that the unintended fractionation of wealth in small estates creates the “anticommons problem,” which impairs the economic value of fractionated wealth co-owned by multiple parties.<sup>83</sup> This effect compounds the problem of economic inequality because intestate decedents disproportionately belong to the lower and middle economic classes. For decedents with modest estates, the transmission of assets at death permits economic continuity from one generation to the next, but when modest estates are divided among many intestate heirs, economic intergenerational continuity is destroyed. When intended beneficiaries are financially dependent on the succession of property from the decedent, the failure to inherit can be economically devastating. The cost of losing an anticipated inheritance is more economically harmful for those intended beneficiaries than the benefit of a modest windfall inheritance is economically helpful for unintended heirs.

Economic disruption is particularly acute in modest estates because the largest asset is almost always the decedent’s personal resi-

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<sup>80</sup> DiRusso, *supra* note 49, at 44–51; Fellows et al., *supra* note 25, at 324–25; Strand, *supra* note 75, at 492.

<sup>81</sup> Strand, *supra* note 75, at 459–60 (noting the rise in wealth inequality in the United States).

<sup>82</sup> See generally MADOFF, *supra* note 30 (outlining the implementation of dynasty trusts to maintain wealth within a family).

<sup>83</sup> See B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 929 (2007).

dence.<sup>84</sup> When real property descends to multiple heirs as tenants in common, the fractionation of interests makes an already modest inheritance even less valuable because problems of coordination and collective action render maintenance and alienation of the property difficult, slow, and expensive.<sup>85</sup> If the intended beneficiaries are living in the decedent's primary residence, unintended intestacy can render those closest to the decedent homeless. The problem of fractionation can be prevented by executing a will that identifies a single or small number of beneficiaries rather than allowing property to descend by default to intestate heirs, who can be numerous, remote, and unwilling to cooperate.

Given the demography of intestate decedents, some argue that the widespread nonexercise of testamentary freedom perpetuates social stigmas of inferiority and powerlessness among family members survived by intestate decedents.<sup>86</sup> Drawing on critical race and feminist theory scholarship, one scholar argues that a disproportionate number of intestate decedents belong to historically disadvantaged groups, such as nonwhites and women, and that that imbalance allows pre-existing symbols of social inferiority and disempowerment to endure from one generation to the next.<sup>87</sup>

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<sup>84</sup> See Strand, *supra* note 75, at 460 (“[F]or the three middle quintiles of Americans—those who lie between the top 20% and the bottom 20% in wealth—the principal residence is between one-half and two-thirds of total net worth.”); see also, e.g., *Hodel*, 481 U.S. at 707.

<sup>85</sup> See *Hodel*, 481 U.S. at 707; Strand, *supra* note 75, at 493–94.

<sup>86</sup> See DiRusso, *supra* note 49, at 62–77; Mary Louise Fellows et al., *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 433–34 (2010).

<sup>87</sup> DiRusso, *supra* note 49, at 62–77. One scholar explains:

Testate and intestate status can also be compared upon dimensions of empowerment and disempowerment. The law seeks to empower the testator. The law of wills is a set of rules established to facilitate and execute the will of the testator. The law functions as tools intended to empower the testate in his role as leader and decision-maker with respect to his property. The law of wills aims to grant power and control to the individual, with solicitude toward idiosyncratic and individualistic desires and goals. It uses the force of the legal system to support and enact the decisions made by the testator. Intestacy, conversely, is powerlessness. The rules of intestacy are imposed upon the assets of the intestate, regardless of whether there is clear evidence of what the intestate would have wanted. The focus of the law of intestacy is social structure and not the individual.

## II. THE CURRENT TESTAMENTARY PROCESS DETERS THE EXERCISE OF TESTAMENTARY FREEDOM

This Part examines the potential cause of widespread intestacy and, given the absence of empirical evidence, presents a hypothesis that the testamentary process itself deters most individuals from obtaining a will.<sup>88</sup>

Prior scholarship, largely based on anecdotal evidence, argues that a major reason for testamentary procrastination is a psychological fear of or aversion toward dealing with matters pertaining to death.<sup>89</sup> The argument that human instinct deters individuals from making a will would imply that the high rate of intestacy is not susceptible to legal reform. Instinctive behavior is difficult to alter, so the intestacy rate would remain high notwithstanding improvements to the testamentary process. But there is substantial evidence that humans *are* capable of and willing to deal with the succession of property at death. Non-testamentary transfers, which provide for the disposition of property at death outside the probate system, are commonplace and widely used in the United States. If Americans are willing to contemplate the succession of property when effecting non-testamentary transfers, then perhaps intestacy is caused by aversion toward the will-making process itself rather than by the universal fear of death.

The following Sections propose this alternative explanation for testamentary procrastination.<sup>90</sup> That is, most individuals procrastinate because they perceive the will-making process as unfamiliar, highly technical, burdensome, and expensive. Such perceptions are accurate because the current will-making process *is* complex and different from other acts of legal significance, such as entering into a consumer contract or marriage. If the complexity of the will-making process constrains the exercise of testamentary freedom, then the will-making process should be reformed to abolish aspects that deter testation.

### A. *Prior Assumptions About Testamentary Procrastination*

Scholars often explain testamentary procrastination as the product of fear relating to death. According to this view, those who are unwilling to confront the consequences of their own mortality are unlikely to make a will.<sup>91</sup> It is undoubtedly true that humans do not like thinking

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<sup>88</sup> See *infra* notes 88–126 and accompanying text.

<sup>89</sup> See *infra* note 91 and accompanying text.

<sup>90</sup> See *infra* notes 91–126 and accompanying text.

<sup>91</sup> One scholar describes the cognitive psychology theory of “terror management”:

about or dealing with matters relating to death, but no published empirical finding has established a causal link between such fears and the high rate of intestacy.

Opinion surveys suggest that fear of death does not play a major role. For example, in the 1978 Iowa intestacy study, only four percent of respondents said they did not have a will because they “do not like to think about wills”—possibly an implicit reference to contemplating death—and ninety-six percent of respondents cited reasons completely unrelated to the psychology of death.<sup>92</sup> Opinion surveys, however, may fail to capture behavioral phenomena accurately: subjective explanations for one’s own behavior tend to be unreliable because humans often do not understand why they engage in certain behavior.<sup>93</sup>

Observation of *actual* behavior points to the conclusion that fear of death, though undoubtedly widespread, is probably not the leading cause of testamentary procrastination. Humans surely harbor fears about their own mortality, but they are nevertheless willing to make plans for the succession of property at death when the process is sufficiently simple, quick, and accessible. In the United States, most transfers of property at death occur outside the probate system through “will substitutes,” such as jointly titled property with rights of survivorship,

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Because human beings uniquely possess the capacity to appreciate the inevitability of their deaths and yet, like all organisms, are genetically adapted for self-preservation, the thought of death inspires terror. Studies demonstrate that humans alleviate this terror in a variety of ways, such as by overestimating their longevity, underestimating their vulnerability to life-threatening illness, and by maneuvering to avoid situations that would bring thoughts about mortality consciously to mind. Estate planners’ anecdotal observations about self-deceptive foot-dragging and their uphill struggle to get clients actually to present themselves in a law office—where, of course, they would directly confront their mortality—fits neatly with the psychologists’ findings in other settings.

Hirsch, *supra* note 56, at 1049; see also Thomas L. Shaffer, *The “Estate Planning” Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969) (“The testamentary experience is death-confronting, novel, and taboo-defying. For that reason it is probably much more vivid in the mind and heart of the client than lawyers who go through the experience every day suppose it to be. Taboo-defying experiences usually tend to be vivid. People going through them tend to be upset. People who are able to go through their upsetting experiences in the company of a competent, comfortable, accepting professional, however, come out more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop.”).

<sup>92</sup> See Contemporary Studies Project, *supra* note 50, at 1077.

<sup>93</sup> See generally Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (commenting on a lack of self-awareness of what causes a particular person to act in a certain way).

life insurance, and retirement plans that contain a death benefit provision.<sup>94</sup> Will substitutes are popular in part because they avoid the delay and cost of probate, but more importantly, because they are simple to understand, widely available, and quickly executed on standardized forms without the need for legal draftsmanship or witness attestation.<sup>95</sup>

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<sup>94</sup> John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (“The law of wills and the rules of descent no longer govern succession to most of the property of most decedents.”); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1(a) (2003) (“A will substitute is an arrangement respecting property or contractual rights that is established during the donor’s life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.”). The *Restatement* drafters explain:

The traditional explanation for why a will substitute is not a will is that a will substitute transfers ownership during life—it effects a present transfer of a non-possessory future interest or contract right, the time of possession or enjoyment being postponed until the donor’s death. Anglo-American law recognizes that a nonpossessory future interest is an ownership interest even though it is subject to a power or other conditions that might not be permanently resolved until the interest takes effect in possession or enjoyment. Likewise, a contract right can be conferred on another even though the contract right is a right to possession or enjoyment of money or other property some time in the future and is subject to a power or other conditions that might not be permanently resolved until the contract right becomes enforceable.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 cmt. a (2003). The Uniform Probate Code designates the following nonprobate transfers as nontestamentary will substitutes: “[A]n insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature.” UNIF. PROBATE CODE § 6-101 (2008).

<sup>95</sup> See, e.g., MARY RANDOLPH, EIGHT WAYS TO AVOID PROBATE 18 (8th ed. 2010) (stating that nonprobate devices, like a payable-on-death bank account for example, can be as simple to execute as filling out a document designating a beneficiary); Langbein, *supra* note 94, at 1108 (noting that assets can be distributed simply and effectively to beneficiaries through life insurance, pension accounts, joint accounts, and revocable trusts, which rely on financial intermediaries who use standard form documents with fill-in-the-blank beneficiary designations); David Major, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California’s Trusts and Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 305 (2009) (arguing that simplicity of execution is the primary advantage of nonprobate real estate transfers); John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 52 (2009) (claiming that life insurance policies, annuities, and retirement plans are effective will substitutes because they are as simple as naming a beneficiary on a form); Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1194 (1993) (arguing that people use will substitutes extensively because they are simple, routine, and easy to understand; but also claiming that because will substitutes have fewer safeguards to implementation, the Uniform Probate Code needs to have a

For example, seventy-eight percent of Americans own life insurance, and the majority of contracts in force are individual life insurance policies purchased by the policyholder.<sup>96</sup> Life insurance is so simple to understand and obtain that many individuals purchase their policies directly from insurance carriers over the Internet without a broker or agent.<sup>97</sup> The fact that life insurance is so widely purchased, and other forms of non-testamentary transfers are so commonplace, suggests that fear of death is not the primary cause of testamentary procrastination.

Some scholars attribute testamentary interference to the business practices of estate planning attorneys who have done a poor job of marketing wills to prospective clients.<sup>98</sup> In particular, attorneys have failed to promote the value proposition of estate planning, and have failed to distribute promotional materials in which the price of their services is made transparent.<sup>99</sup> These observations may understate the problem because many attorneys maintain a customary practice of withholding their billable rate and fee structure until a prospective client visits for a consultation.<sup>100</sup> The unwillingness of attorneys to disclose fee information when requested in advance may deter potential

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mechanism added to protect beneficiary and creditor rights while retaining the simplicity of effecting will substitutes).

<sup>96</sup> AM. COUNCIL OF LIFE INSURERS, ACLI LIFE INSURERS FACT BOOK 2010, at 63–73, available at <http://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/1853bfc4e61e486e8449afad8e10136fFB07010LifeInsurance1.pdf>.

<sup>97</sup> See *Life Insurance Purchasing Habits Changing as One in Four Consumers Now Prefer to Buy Direct*, LIFE & HEALTH INS. FOUND. FOR EDUC. (July 27, 2011), <http://www.lifehappens.org/life-insurance-purchasing-habits-changing-as-one-in-four-consumers-now-prefer-to-buy-direct>.

<sup>98</sup> See Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008).

<sup>99</sup> *Id.* at 54.

<sup>100</sup> In March 2011, a research assistant with a background in journalism contacted by telephone ten randomly selected New Jersey attorneys who practice inheritance law. The research assistant identified himself as a Rutgers Law School student, briefly explained the nature of this research project, and stated that all responses would remain anonymous. Telephone Interviews with New Jersey lawyers (Mar. 2011) (notes on file with author). The research assistant asked how each attorney would respond if a prospective client requested information about the billing rate—not overall cost—for the preparation of a will. Seven of the ten practitioners stated they would not disclose their billing rate over the telephone, instead requiring prospective clients to participate in some form of prescreening process, such as a formal consultation or the completion of a questionnaire. Two attorneys stated that disclosure of a billing rate over the telephone would constitute legal malpractice or a violation of the code of professional conduct, but neither cited legal authority for their assertions. The attorney who claimed that disclosure of a billing rate over the telephone would violate the code of professional conduct stated that his belief was based on information provided at a recent program on ethics. Of course, disclosure of a billing rate is neither legal malpractice nor an ethical violation (and hopefully, such explanations do not reach the ears of clients).

testators from obtaining professional advice; in turn, many of those individuals may never obtain a will. Such practices surely contribute to testamentary procrastination, but only for the small subset of individuals who contact lawyers. As scholars have explained, most individuals do not even reach the point of interacting with a lawyer.<sup>101</sup>

As explained later in this Part, the more likely cause of testamentary procrastination is the complexity and unique burdens imposed by the testamentary process itself.<sup>102</sup> Most individuals are unfamiliar with the will-making process, and as a result, they hesitate rather than perform the testamentary act. Such behavior is consistent with psychological research on the behavioral phenomenon of procrastination.

### B. *The Psychology of Procrastination: Unpleasant Tasks Are Most Likely to Be Delayed*

Psychologists describe procrastination as the act of “voluntarily delay[ing] an intended course of action despite expecting to be worse off for the delay.”<sup>103</sup> Voluntary delay is often a function of the perceived character of the intended task. When the task relates to an event in the distant future, nonperformance has a lesser immediate impact and is therefore more susceptible to delay:<sup>104</sup> “This occurs because people value enjoying a small, certain, and immediate reward more highly than avoiding a larger, but uncertain and long-delayed, penalty. The immediacy and certainty of the gratification associated with the smaller

<sup>101</sup> McCunney & DiRusso, *supra* note 98, at 54.

<sup>102</sup> See *infra* notes 115–126 and accompanying text.

<sup>103</sup> Piers Steel, *The Nature of Procrastination: A Meta-Analytic and Theoretical Review of Quintessential Self-Regulatory Failure*, 133 *PSYCHOL. BULL.* 65, 66 (2007).

<sup>104</sup> *Id.* at 68.

It has long been observed that the further away an event is temporally, the less impact it has upon people’s decisions . . . .

In his essay on procrastination, Samuel Johnson (1751) posited temporal proximity as a cause in that it is natural “to be most solicitous for that which is by its nearness enabled to make the strongest impressions.” More recently, this preference for the present has been resurrected by O’Donoghue and Rabin (1999), who used the economic discounted utility model to describe various forms of human procrastination, such as our tendency to save inadequately for retirement.

*Id.* (quoting SAMUEL JOHNSON, *The Rambler No. 134* (June 29, 1751), reprinted in 1 *THE WORKS OF SAMUEL JOHNSON*, L.L.D. 208 (Collins, Keese & Co. 1844)) (citing Ted O’Donoghue & Matthew Rabin, *Incentives for Procrastinators*, 114 *Q.J. ECONOMICS* 769 (1999)).

reward overwhelms the deeply discounted value of the larger uncertain and deferred penalty.”<sup>105</sup>

This is especially true in the testamentary context because the cost of delay is entirely borne by third parties after the decedent’s death. Although the right of testamentary freedom belongs to the testator, intended beneficiaries suffer the consequences of allowing the right to lapse. Given the inherent externalization of costs arising from the lapse of testamentary freedom, perhaps inheritance law should force individuals to internalize the cost of the lapse, which would otherwise be borne entirely by intended beneficiaries. Forcing individuals to internalize the cost of the lapse of testamentary freedom would encourage testation, but would be inconsistent with the principle of testamentary freedom, which includes the right not to make a will. Although potentially effective, it would be unpalatable and impractical to impose a deadline before which individuals must make a will and after which the individual would lose the power to control property at death.

Rather than imposing sanctions for delay, reform that would reduce the complexity of the testamentary process might provide an effective remedy for procrastination. Most individuals avoid the task of making a will because they are intimidated by a process they perceive as formality-laden and complex.<sup>106</sup> “Consistently and strongly, the more people dislike a task, the more they consider it effortful or anxiety producing, the more they procrastinate.”<sup>107</sup> Tasks can be unpleasant for a variety of reasons. When a task involves making a difficult decision, delay is often preferable to action. According to the famous thought experiment, Buridan’s ass starved to death because he could not choose

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<sup>105</sup> Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 629–30 (2008) (footnotes omitted).

<sup>106</sup> See Chrisoula Andreou, *Environmental Preservation and Second-Order Procrastination*, 35 PHIL. & PUB. AFF. 233, 244 (2007) (“Empirical research confirms the intuitively compelling hypothesis that we are prone to defer difficult decisions. Indeed, studies confirm that ‘there are situations in which people prefer each of the available alternatives over the status quo but do not have a compelling reason for choosing among the alternatives and, as a result, defer the decision, perhaps indefinitely.’” (quoting Eldar Shafir et al., *Reason-Based Choice*, in REASONING AND DECISION MAKING 11, 21 (P.N. Johnson Laird & Eldar Shafir eds., 1993))); Steel, *supra* note 103, at 68 (“Task aversiveness is almost a self-explanatory term. Also known as dysphoric affect or task appeal, it refers to actions that one finds unpleasant. Its relationship is predictable. By definition, one seeks to avoid aversive stimuli, and consequently, the more aversive the situation, the more likely one is to avoid it (e.g., procrastinate). Although the extent to which people dislike a task may be influenced by a variety of personal characteristics (e.g., boredom proneness, intrinsic motivation), if people do find a task unpleasant, research has indicated that they are indeed more likely to put it off.” (internal citations omitted)).

<sup>107</sup> Steel, *supra* note 103, at 75.

between two equidistant bales of hay.<sup>108</sup> Psychologists use this thought experiment to analyze ways of minimizing procrastination caused by difficult decision making. For example, increasing the immediate cost of inaction is one way to discourage delay because the failure to make a decision has near-term, concrete consequences.<sup>109</sup> So, in Buridan's thought experiment, setting fire to both bales of hay might prompt the animal to decide which bale to eat before nothing edible remained. But another way of discouraging delay is to lessen the difficulty associated with the decision. In Buridan's thought experiment, procrastination could be discouraged by reducing the cost of choosing between the two bales of hay. If both haystacks were placed closer to the ass, then the cost of choosing incorrectly would only require a short walk to the better bale.

Procrastination is often triggered by the unpleasantness of the task. For many individuals, a task is unpleasant when it involves complex and unfamiliar processes. Scholars refer to this behavior as "second-order procrastination," which occurs when an individual postpones "planning about how to proceed with a task, thus delaying even starting on the task, and compounding delay in task completion."<sup>110</sup> For example, plaintiffs often wait until the statutory deadline to file a lawsuit because they are intimidated by the complexity, expense, unfamiliarity, and unpleasantness of the civil litigation process.<sup>111</sup> The current testamentary process, like civil litigation, is intimidating to lay individuals because legal sophistication is necessary to navigate the statutory formalities and complexity of drafting language of testamentary conveyance.

Lay individuals are understandably wary of attempting the task on their own and are discouraged from doing so by estate planning professionals.<sup>112</sup> Unlike other acts of legal significance, such as entering into a

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<sup>108</sup> See OXFORD DICTIONARY OF PHRASE AND FABLE 162 (15th ed. 1995).

<sup>109</sup> Andreou, *supra* note 106, at 246.

<sup>110</sup> Wistrich, *supra* note 105, at 631 n.105 (citing Andreou, *supra* note 106, at 243–44).

<sup>111</sup> See *id.* at 631 ("The task of filing a lawsuit—or even simply hiring a lawyer—is one that many people probably would find unpleasant. It is unfamiliar and intimidating, and it might require either the immediate expenditure of money or making an immediate commitment to pay money in the future. Thus, we can expect that it would be a task that many plaintiffs would be inclined to put off." (footnotes omitted)).

<sup>112</sup> Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 179–80 (2008) ("The public in general perceives the will as a document that is formally technical enough that many people, if not most, seek the services of a lawyer in having one drawn up. This is desirable because, frankly, the disposition of an estate is a complicated business."); see also Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES.COM (Sept. 7, 2010), <http://www.forbes.com/2010/09/07/>

consumer contract or marriage, obtaining a will generally requires legal draftsmanship and compliance with testamentary formalities. By contrast, consumers enter into countless contracts, many of which are unwritten; even written contracts consumers typically accept without reading (let alone drafting), without the advice of professional counsel, and without witness attestation. By comparison, the testamentary process is obscure, unfamiliar, and complex.

The decisions required to formulate a testamentary plan are difficult, so the testamentary process should be designed to alleviate that difficulty rather than exacerbate it. Making a will is difficult, in part, because individuals believe that executing a will involves making final decisions. But wills are freely revocable, so the testamentary process should contain a default advisory that informs the testator that an executed will need not be permanent. The testamentary process should also provide an accessible, transparent medium for revocation. By emphasizing and facilitating the revocability of testamentary documents, the law could reduce the perceived difficulty of decisions involved in planning for the disposition of property at death.

For most individuals with simple estates, drafting an elaborate formal will from scratch is not necessary to memorialize testamentary intent.<sup>113</sup> Most individuals have simple estates and would be satisfied with a basic testamentary instrument that avoids intestacy and could be quickly understood and executed. If the will-making process were more akin to non-testamentary transfers, such as life insurance and pension plan death beneficiary forms, lay individuals would be more likely to handle their own estates and overcome the interference that prevents them from obtaining a will. Better yet, if a testamentary form were an integrated optional component of the compulsory income tax process, individuals who are required to file an income tax return may be less likely to procrastinate in making a will. In short, simplifying the will-making process would likely reduce testamentary procrastination.

### C. *The Current Testamentary Process Is Hostile Toward Lay Testators*

The current will-making process is unfamiliar, complex, and intimidating to lay individuals, and as a result, most individuals avoid the will-making process altogether.<sup>114</sup> Two aspects of the will-making proc-

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do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html (discouraging lay testators from preparing their own wills).

<sup>113</sup> See *infra* notes 178–205 and accompanying text.

<sup>114</sup> See *infra* notes 115–126 and accompanying text.

ess are primarily responsible for constraining testamentary freedom: (1) the witness attestation requirement, and (2) the need for legal draftsmanship.

The witness attestation requirement distinguishes the will-making process from other acts of legal significance, such as entering into a contract or marriage. Although the requirement may seem simple on its face, the process is unfamiliar to most lay testators, and as explained below, the case law is replete with examples of will contests in which the testator failed to comply with the witness attestation requirement.

The need for legal draftsmanship deters the exercise of testamentary freedom because lay individuals are unaccustomed to drafting legal language of conveyance. Unlike consumer contracts, most of which are unwritten (and those which are in writing are rarely drafted by the consumer), the current will-making process in most states lacks a reliable medium for lay testators to adopt a customizable estate plan without engaging in legal draftsmanship.

The main problem is that the current testamentary process is the product of a long tradition of rote adherence to formality and procedure in the law of wills. For most of the twentieth century, courts revered statutory formalities governing will execution as gospel, elevating the formalities of making a will over the goal of distributing property according to the decedent's intent.<sup>115</sup> Courts routinely denied probate absent strict compliance with testamentary formalities even when presented with evidence that a technically noncompliant will was a reliable statement of the testator's intent.<sup>116</sup> Thus, even though the law theoretically conferred the power to control the disposition of property at death, in practice individuals who were insufficiently apprised of the procedural requirements were prevented from exercising testamentary freedom.

The doctrine of strict compliance was especially harsh on lay testators, with some courts construing the legislature's imposition of complex testamentary requirements as policy designed to discourage self-representation and homemade wills. For example, in a 1953 case from the New Jersey Superior Court Probate Division, *In re Taylor's Estate*, the

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<sup>115</sup> See *infra* notes 116–127 and accompanying text.

<sup>116</sup> See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 3–4 (1987); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994) (“Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator.”).

contestant challenged a homemade, handwritten will for failing to comply with a requirement that the testator sign or acknowledge the will before two attesting witnesses.<sup>117</sup> On appeal, the New Jersey Superior Court Appellate Division held that when a testator's signature is not written in the presence of attesting witnesses, the testator must subsequently acknowledge the will before attesting witnesses and, importantly, the testator's signature must be visible to attesting witnesses at the time of acknowledgment.<sup>118</sup> Mr. Taylor, the decedent, signed his will without witnesses present and subsequently located two witnesses for acknowledgment.<sup>119</sup> "Both witnesses testified that the testator in effect declared that the instrument was his will and wanted them to 'sign' it."<sup>120</sup> But Taylor's signature was not visible because the will was folded over to prevent the attesting witnesses from viewing the dispositive provisions.<sup>121</sup> As a result, the appellate court found the will legally defective and denied probate.<sup>122</sup> Chiding the informal nature of Mr. Taylor's homemade will, the court explained that the legislature enacted complex testamentary formalities to deter the execution of wills without professional legal advice:

Proponents say, too, that though the statute regulating the formalities for the making of a will has a salutary purpose, yet it should not be so read as to frustrate the desires of those not advised as to the law. Indeed one not so advised may easily trip in the execution of those formalities, and it would rather seem that the Legislature may have intended him therefore to look to counsel for assistance. The Legislature may have deemed—and with reason—that the interposition of a person schooled in those formalities and draftsmanship would serve, in part, to prevent mistakes in drafting the will. More than that, the presence, at the very moment of execution, of this third person of professional standing, may add to the safe-

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<sup>117</sup> *In re Taylor's Estate (Taylor I)*, 95 A.2d 503, 504 (N.J. Super. Ct. Prob. Div. 1953), *aff'd*, 100 A.2d 346 (N.J. Super. Ct. App. Div. 1953).

<sup>118</sup> *In re Taylor's Estate (Taylor II)*, 100 A.2d 346, 347–48 (N.J. Super. Ct. App. Div. 1953) ("[T]he mere declaration by the testator that the instrument was his will cannot be held to be an acknowledgment of the signature.").

<sup>119</sup> *Id.* at 347.

<sup>120</sup> *Id.*

<sup>121</sup> *Taylor I*, 95 A.2d at 503–04 ("He thereupon laid the paper on a table folded up so that the witnesses could see nothing but the portion where they were to sign."). Under New Jersey law, it is unnecessary for a witness to view the dispositive provisions of a will. *See* N.J. STAT. ANN. § 3B3-2 (West 2007).

<sup>122</sup> *Taylor II*, 100 A.2d at 348–49.

guards which the statute has so rigorously thrown about the testamentary act in order to forestall frauds by the living upon the dead. At all events these considerations may lend significance to what is looked upon by some as an almost ritualistic complexity in the formalities.<sup>123</sup>

Construing the attorney's role as inseparable from the will-making process, *Taylor* suggests two additional testamentary formalities not required by statute: that attorneys both draft and supervise the execution of wills.

*Taylor* represents an antiquated view about the purpose of testamentary formalities—that is, formalities should deter self-representation because, without professional help, testators will muck up their own estates and wrongdoers will perpetrate fraud. But because there was absolutely no indication that Mr. Taylor's will was mistaken or fraudulent,<sup>124</sup> the court's generalized concern falls flat. By attempting to prevent testator mistakes and “forestall frauds by the living upon the dead,” the court set aside a will that was, in all likelihood, perfectly reliable.

*Taylor* was decided in 1953, and even though most scholars today would disagree with *Taylor*'s holding as overly formalistic, some scholars (and many practitioners) maintain that estate planning is so inherently complicated that testators should be channeled to lawyers with estate planning expertise. According to this view, if individuals perceive the testamentary process as sufficiently complicated, then they will not attempt to draft a will without professional advice. For example, one scholar argues:

The public in general perceives the will as a document that is formally technical enough that many people, if not most, seek the services of a lawyer in having one drawn up. This is desirable because, frankly, the disposition of an estate is a complicated business. This is true even for modest estates. By channeling the testator to a will, we also usually channel the testator to a lawyer, and hopefully to a lawyer who has the general competence and specific expertise to draft a will that carries out the testator's wishes. Most laypeople, and even many lawyers, simply do not have the expertise to draft unambiguous will provisions. Even if the will is unambiguously

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 346 (“The single question dealt with here is whether the signature of Mr. Taylor, affixed out of the witnesses' presence, was duly acknowledged.”).

drafted, very few laypeople have a grasp of all of the laws that can affect how property might be distributed under the will. Despite what the will may say, a testator's marital status, exposure to tax liability, and obligations to creditors can affect property distributions. Further, many testators have their final will drafted—the only one that really counts—when they are quite elderly. Though a testator in this position may be quite competent to express the testator's wishes to a lawyer, the testator can often not then, if the testator ever could, articulate those wishes in a properly-drawn will.

....

... A competent estate-planning lawyer is a decedent's best chance for an accurate expression of the decedent's wishes, while also exposing the decedent to advice on other laws that may affect the transfer of the decedent's property.<sup>125</sup>

A complex will-making process certainly deters self-representation and raises transaction costs, but the result of that deterrence in most cases is intestacy, not increased reliance on attorneys. Professional estate planning advice may indeed be beneficial, but the will-making process should not be intentionally rendered complex for the purpose of channeling individuals to lawyers. By deterring self-representation, the current will-making process also deters the exercise of testamentary freedom. If the goal of inheritance law is to facilitate donative intent rather than to regulate it,<sup>126</sup> then the will-making process should be universally accessible without the need for professional representation.

### III. PRIOR REFORMS FAILED TO SIMPLIFY THE TESTAMENTARY PROCESS

This Part examines prior reform efforts to simplify the law of wills and concludes that reform efforts have not gone far enough toward

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<sup>125</sup> Schenkel, *supra* note 112, at 179–80, 183 (footnotes omitted).

<sup>126</sup> The *Restatement* explains,

American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention.

addressing the high rate of unintended intestacy.<sup>127</sup> In particular, two reform efforts—the trend toward informalism in the execution of wills and the increased recognition of homemade wills—improved the will-making process but failed to facilitate universal access to testamentary freedom.

### A. Informalism

Over the last forty years, longstanding adherence to formality and ceremonial tradition—exemplified in the 1953 case from the New Jersey Superior Court Appellate Division *In re Taylor's Estate*—were relaxed in favor of more informal rules governing the execution of wills.<sup>128</sup> For example, the publication requirement and simultaneous presence rule for witness attestation, which led to many harmless execution errors, were abandoned in the 1969 Uniform Probate Code.<sup>129</sup> In addition to scaling back some of the testamentary formalities, the *Taylor* court's view of strict compliance<sup>130</sup> and the role of attorneys has fallen out of fashion. Courts and legislatures now recognize that the purpose of testamentary formalities is to ensure the reliability of wills, not to discourage self-representation or homemade wills.<sup>131</sup> Courts today would reject the rule applied in *Taylor* because the elevation of form over function comes at the high cost of frustrating testamentary intent.<sup>132</sup> The posi-

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<sup>127</sup> See *infra* notes 128–166 and accompanying text.

<sup>128</sup> *In re Taylor's Estate (Taylor II)*, 100 A.2d 346, 348–49 (N.J. Super. Ct. App. Div. 1953). For a penetrating discussion of formalism, and the distinction between formalism and the imposition of formalities, see Mann, *supra* note 116, at 1042.

<sup>129</sup> See Langbein, *supra* note 116, at 5.

<sup>130</sup> *Taylor II*, 100 A.2d at 348–49.

<sup>131</sup> See, e.g., FRIEDMAN, *supra* note 25, at 64 (“The modern trend is to relax some of these requirements, and courts today might well reach different results in some of these cases. There has been a definite movement away from ‘formalism.’”); Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1059–64 (2006) (describing a forty-year trend of reform toward informality in the law of wills). Another example of the trend toward informality is the adoption of holographic wills, which are written in the testator’s own handwriting without witness attestation and are often prepared without the aid of professional counsel. Authorization of holographic wills is laudable in theory because it allows everyone to write a valid homemade will; but in practice, holographic wills are fairly uncommon. See FRIEDMAN, *supra* note 25, at 65 (“The formal law has become more and more favorable to holographs. The rather slight evidence we have suggests that they are not used very much, however.”); WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 268–69 (noting that as of 2008, slightly more than half the states authorize holographic wills).

<sup>132</sup> If *Taylor* were litigated in New Jersey today, the result would differ because of statutory reform governing holographic (handwritten) wills. See N.J. STAT. ANN. § 3B:3-2(b) (West 2007) (stating that a will is valid without witness attestation “if the signature and

tive trend toward informalism also implies a robust role for self-representation in the law of wills. Informalism promotes accessibility and self-representation, which in turn enables and encourages the exercise of testamentary freedom.

The modern trend of inheritance law liberalizes formalities and supplies doctrines to cure execution defects when there is sufficient evidence that a will reliably states the testator's intent. This trend helps ensure the testator's wishes are granted rather than frustrated. In New Jersey, for example, the state supreme court has adopted a broad doctrine of substantial compliance—a doctrine explicitly rejected in *Taylor*<sup>133</sup>—which saves a defective will from automatic invalidity. Rather than denying probate as a matter of course, the court must consider whether “the noncomplying document express[es] the decedent's testamentary intent, and [whether] its form sufficiently approximate[s] Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act . . . .”<sup>134</sup> The New Jersey legislature has further liberalized the law regarding testamentary formalities by adopting the Uniform Probate Code's harmless error rule, which directs courts to treat a defective will as compliant if the proponent adduces clear and convincing evidence that the decedent intended the document to be a will.<sup>135</sup> A growing number of states and U.S. territories have adopted both the doctrine of substantial compliance and the harmless error rule, and both would have saved Mr. Taylor's will from automatic invalidity.<sup>136</sup> The trend toward informalism increases public access to the

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material portions of the document are in the testator's handwriting”); *Taylor II*, 100 A.2d at 348–49.

<sup>133</sup> 100 A.2d at 348–49.

<sup>134</sup> *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975)).

<sup>135</sup> N.J. STAT. ANN. § 3B:3-3 (West 2007) (“Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.”).

<sup>136</sup> A number of jurisdictions have enacted the harmless error rule by statute, using the language from section 2-502 of the Uniform Probate Code. HAW. REV. STAT. § 560:2-503 (2010); MICH. COMP. LAWS § 700.2503 (2002); MONT. CODE ANN. § 72-2-523 (2011); N.J. STAT. ANN. § 3B:3-3; S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (LexisNexis 1993 & Supp. 2011); V.I. CODE ANN. tit. 15, § 2-503 (Supp. 2011). Other jurisdictions have enacted variations on the harmless error rule. CAL. PROB. CODE § 6110

will-making process by excusing or forgiving procedural mistakes by lay testators who may be unaware of the technical statutory requirements.

But the trend toward informality has not gone far enough because, in all states except for Pennsylvania, witness attestation or notarization (a less onerous form of witness attestation) remains a testamentary requirement.<sup>137</sup> The witness attestation requirement is often justified on grounds that the presence of witnesses at the time of execution reduces the likelihood of fraud, duress, or undue influence exerted upon the testator.<sup>138</sup> But decades of experience with the witness attestation requirement demonstrate that the formality is unnecessarily burdensome and ultimately creates more problems than it solves.

The purpose of witness attestation, like all testamentary formalities, is to increase the reliability of wills, but such requirements should only be imposed if they enhance reliability at an acceptable cost.<sup>139</sup> Professor James Lindgren argues that a principle of parsimony should determine which testamentary formalities reflect the proper balancing of costs and benefits: “[S]tates should impose the least restrictive requirements that serve the purposes of formalities without seriously undercutting the policy of free testation. The law should set requirements at a level that tends to enforce the testator’s intent, not frustrate it.”<sup>140</sup> Some formalities, such as the requirement that a will be in writing and signed by the testator, satisfy the parsimony test because they increase the reliability of wills by preserving good evidence of the testator’s intent without imposing substantial administrative costs.<sup>141</sup> Other formalities, such as witness attestation, fail the parsimony test:

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(West 2009); COLO. REV. STAT. § 15-11-503 (2011); OHIO REV. CODE ANN. § 2107.24 (West Supp. 2011); VA. CODE ANN. § 64.1-49.1 (2007).

<sup>137</sup> Some states recognize, however, an exception to the witness attestation requirement when the material provisions of the will are written in the testator’s handwriting. Holographic wills, valid in twenty-six states, are exempt from the witness attestation requirement, but they are uncommon. See *infra* notes 157–158 and accompanying text; see also Lawrence Waggoner, *The UPC Authorizes Notarized Wills*, 34 AM. C. TR. & EST. COUNS. J. 83, 85 (2008) (discussing the Uniform Probate Code’s authorization of notarized wills, and stating that because notarization serves all functions of will execution formalities, the Code regards the notary public as serving the same purpose as two attesting witnesses).

<sup>138</sup> See Mann, *supra* note 116, at 1042.

<sup>139</sup> James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 544 (1990) (arguing that testamentary formalities are only justified if they help “effectuat[e] the intent of the testator at an acceptable administrative cost”).

<sup>140</sup> *Id.* at 546 (“Too many required formalities frustrate the wishes of testators who fail to meet them. Too few formalities do not give us reliable enough evidence of what the testator wanted.”).

<sup>141</sup> *Id.* at 542 (“Writing makes an estate plan concrete. Signature indicates a decision, final unless later revoked, and supplies evidence of genuineness.”).

Attestation by witnesses is a poor means to an end. It's supposed to protect testators from the imposition of others, but it's mainly a trap for the unwary. Wills lacking attestation are not usually tainted by fraud or undue influence. And wills with attestation are not necessarily freely made.<sup>142</sup>

Witness attestation was first enacted as part of the 1677 English Statute of Frauds when the system of title conveyance was in a state of crisis.<sup>143</sup> The attestation requirement was intended to deter fraud perpetrated against feeble testators executing deathbed wills and to stop the proliferation of forged deeds, both common occurrences in the seventeenth century.<sup>144</sup> Today, however, deathbed wills and deed forgeries are uncommon, so protection against those types of fraud is no longer necessary.<sup>145</sup> As Lindgren explains:

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<sup>142</sup> *Id.* at 572.

<sup>143</sup> Professor Lindgren explains:

As [the Statute of Fraud's] name implies, fraud was rampant. One contemporary described it as "epidemic" and estimated that two-thirds of all real estate litigation in Westminster Hall involved concealed prior encumbrances. Land was often sold by people who did not own it. And those who did own it often sold it more than once. There was little way for a buyer to know whether he was purchasing enforceable title. As Professor Hamburger explains, "Since the effect and even existence of wills were fruitful sources of dispute, recently inherited land often was of uncertain ownership, and its purchasers were vulnerable to fraud." The Statute was proposed in an atmosphere of crisis: the Fire of London in 1666 had destroyed land records, forced rebuilding, created many confused estates, and fostered land disputes. In addition, the Plague had generated many more than the usual number of corpses whose estates needed to be sorted out. By imposing writing requirements on real estate transactions and writing and witnessing requirements on wills, the Statute made it easier to determine who actually owned property. In addition, the Statute was designed to induce the voluntary recording of real estate deeds by making recording a practical prerequisite to enforceability. By all accounts, within a few decades the Statute accomplished its purpose. Fraudulent real estate transactions became rare, the recording of deeds became commonplace, and court cases for fraudulent conveyancing almost disappeared.

*Id.* at 550–51 (quoting Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 366 (1983)).

<sup>144</sup> *Id.*

<sup>145</sup> Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 10 (1941). Agreeing with this critique of using formalities as a way to protect the testator, Professor John Langbein explains:

(1) The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in preventing the many cases of fraud and undue influence which are proved each year. (2) Protective formalities do more harm than good, voiding homemade wills for harmless violations. (3) Protective formalities are not needed. Since fraud or

If one judges simply from the cases where wills are denied probate because attestation is botched or absent, extremely few involve the kind of fraud that the Statute of Frauds was designed to prevent. Almost all are defective because of ignorance or mistake. With the current system for conveyancing and for registering deeds operating smoothly, abolishing the attestation requirement for wills would not return us to the chaos of the 1660s and 1670s.<sup>146</sup>

Witness attestation imposes unacceptable costs because the requirement is easy to botch and failure to comply is often exploited by disappointed heirs to invalidate wills notwithstanding strong evidence of authenticity.<sup>147</sup> The famous textbook case of *In re Groffman* presents the classic example.<sup>148</sup> There, the testator acknowledged his will in the presence of two witnesses who each signed the will, but contrary to the “simultaneous presence” requirement in effect at the time, the witnesses were not in the presence of each other at the time of acknowledgement. The court denied probate even though the judge was “satisfied that the document . . . represent[ed] the testamentary intentions of the deceased.”<sup>149</sup> Judicial insistence upon literal compliance with the

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undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.

Langbein, *supra* note 134, at 496 (citing Gulliver & Tilson, *supra*, at 9–13).

<sup>146</sup> Lindgren, *supra* note 139, at 551. The evidentiary function of witness attestation is also of questionable value. In theory, the evidentiary purpose of attestation serves to secure testimonial evidence concerning the facts of execution. But in practice, attesting witnesses may not survive the testator or otherwise be available at the time of administration. Gulliver & Tilson, *supra* note 145, at 8. As Lindgren explains, “[W]itnesses to a will are not necessarily witnesses in court, and witnesses in court are not necessarily witnesses to a will.” Lindgren, *supra* note 139, at 570; *see also* Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 40 (1985) (“A procedure that contemplates producing witnesses to answer questions about acts that may have occurred years or even decades earlier is obviously burdensome, inefficient, and unreliable.”). Thus, testimony from attesting witnesses is often obviated by the execution of a self-proving will, which contains an affidavit sworn by the witness at the time of execution to be used in place of testimony in probate court. *See* UNIF. PROBATE CODE § 2-504 (2008).

<sup>147</sup> *See* Mann, *supra* note 116, at 1042 (“Attestation is the formal requirement that distinguishes wills from all other documents that transfer property—trusts, deeds, contracts, checks, insurance, pensions, and the like. It is also the formal requirement that is most complex, least intuitively obvious, and, consequently, easiest to violate. Not surprisingly, more wills are tossed from probate for defective attestation than for any other reason. Yet, by any functional analysis, attestation contributes little to the overall objective of assuring that the document represents the testator’s intent.”).

<sup>148</sup> *In re Groffman*, [1969] 1 W.L.R. 733, 739 (Eng.); *see* WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 228; *see also supra* notes 117–124 (discussing *Taylor*).

<sup>149</sup> *Groffman*, 1 W.L.R. at 737.

attestation requirement thus tends to frustrate the decedent's intent rather than facilitate it.<sup>150</sup>

Matthew Hale, drafter of the Statute of Frauds, believed the best way to deter fraudulent wills was to require probate administration, thereby ensuring supervision of transfer by a court official.<sup>151</sup> In 1677, there was no system of probate for land in England, and Hale thought it would be too burdensome for the courts to create one.<sup>152</sup> Instead of requiring probate administration for the devise of land, Hale included witness attestation in the Statute of Frauds as an additional means of deterring wrongful conduct. Today, by contrast, probate administration is available in all American jurisdictions and is necessary to transfer title when the decedent's estate includes real property. Thus, even the drafter of the Statute of Frauds would likely agree that witness attestation is no longer necessary given the creation of competent probate courts.

Lindgren's arguments for abolishing the attestation requirement are persuasive, and anecdotal evidence suggests his conclusions are correct.<sup>153</sup> Pennsylvania does not require witness attestation, and the

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<sup>150</sup> In a detailed study of Texas will contests litigated on grounds that the testator failed to comply with execution formalities (and, in particular, when the testator mistook the self-proving affidavit for the requirement that attesting witnesses sign the will itself), one scholar criticized the requirement of literal compliance: "Courts . . . routinely invalidate wills on formal grounds despite ample evidence that the document offered for probate accurately represents the testator's intent." Mann, *supra* note 146, at 60; *see also* Stevens v. Casdorff, 508 S.E.2d 610, 613 (W. Va. 1998) (finding that a will was not validly executed when neither witness literally saw the testator sign the will despite both witnesses being asked to sign shortly after the testator himself had signed).

<sup>151</sup> Lindgren, *supra* note 139, at 552.

<sup>152</sup> *Id.*

<sup>153</sup> Langbein agrees that witness attestation is the least necessary of testamentary formalities:

Implicitly, this case law has produced a ranking of the Wills Act formalities. Of the three main formalities—writing, signature, and attestation—writing turns out to be indispensable. Because section 12(2) requires a "document," nobody has tried to use the dispensing power to enforce an oral will. Failure to give permanence to the terms of your will is not harmless. Signature ranks next in importance. If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument. An unsigned will is presumptively only a draft, as the landmark decision in *Baumanis v. Prauln* insisted, but that presumption is rightly overcome in compelling circumstances such as in the switched-wills cases. By contrast, attestation makes a more modest contribution, primarily of a protective character, to the Wills Act policies. But the truth is that most people do not need protecting, and there is usually strong evidence that want of attestation did not result in imposition.

Langbein, *supra* note 116, at 52.

state has not become a breeding ground for fraudulent wills.<sup>154</sup> Will substitutes, which are not subject to the attestation requirement, allow property to pass at death outside the probate system, and the success of financial intermediaries that provide will substitutes shows that such transfers are rarely tainted by fraud.<sup>155</sup> The benefits of witness attestation are dubious at best and certainly outweighed by the costs arising from noncompliance, which are disproportionately borne by lay testators who are not advised about the requirement.<sup>156</sup>

Thus, the trend toward informality has at least one more step before it is complete. Witness attestation should be abolished as a requirement for a valid will.

### B. Increased Recognition of Homemade Wills

Another positive area of inheritance law reform promotes public access to the will-making process by recognizing certain types of homemade wills. In particular, the recognition of holographic (handwritten) and statutory form wills promotes lay access to the will-making process, but for reasons explained below, those reform measures have not been sufficient to ensure universal access.

Holographic wills are testamentary documents written in the testator's own handwriting; they provide a simple way for lay testators to

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<sup>154</sup> *In re Estate of Sidlow*, 543 A.2d 1143, 1145 (Pa. Super. Ct. 1988) (“[T]he law of Pennsylvania does not require subscribing witnesses to a will . . . .”); see 20 PA. CONS. STAT. § 2502 (2005) (requiring witness attestation only for wills signed with a mark rather than the testator's signature); *Keiper's Estate* (No. 2), 20 Pa. D. & C. 2d 521, 521 (Ct. Com. Pl. 1960) (admitting a will without witness attestation to probate); see also WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 264 (“Since the 1700s, Pennsylvania has not required attestation for formal wills, yet there is no evidence that fraud has run wild in Pennsylvania.”). In 2001, Nevada enacted an electronic will statute that did not require witness attestation, NEV. REV. STAT. § 132.119 (2001), but it was never implemented because of technical infeasibilities. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 887 (2007).

<sup>155</sup> Lindgren explains,

The main purpose of the attestation requirement is to protect the testator against fraud, duress, and undue influence. Yet we know from experience with will substitutes that witnessing isn't necessary to prevent these harms. If these evils were common and if witnessing could effectively prevent them, insurance companies and banks would probably insist on witnessing—both to make their financial products more attractive and to reduce their litigation costs. Thus, among the ways of passing property at death, wills are exceptional in that they require attestation by two or three witnesses.

Lindgren, *supra* note 139, at 557.

<sup>156</sup> The most common mistakes made by lay testators relate to will execution formalities, namely the requirement of witness attestation. See Goffe & Haller, *supra* note 48, at 28.

make a homemade will. They are valid in twenty-six states (and under the Uniform Probate Code) without witness attestation because the handwriting sample serves as a proxy for authenticity.<sup>157</sup> Although recognition of holographic wills is a positive step toward liberalizing testamentary formalities, in practice, holographic wills are relatively uncommon.<sup>158</sup> Drafting any will from scratch, whether handwritten or typed, requires legal draftsmanship, and lay testators are understandably wary of attempting that task on their own. As a result, recognition of holographic wills has not meaningfully affected the high rate of intestacy.

Form wills are testamentary documents based on templates that allow testators to “fill in the blanks,” thereby eliminating the need for legal draftsmanship, but not witness attestation. Commercial form wills have been available for decades, and their continued popularity among lay testators demonstrates demand for reform promoting standardization and simplification.<sup>159</sup> Courts, however, have criticized commercial forms as unreliable and potentially confusing to lay testators.<sup>160</sup>

In 1984, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Statutory Will Act “to simplify and modernize laws dealing with probate” by creating a “simple will” form for adoption by state legislatures.<sup>161</sup> The statutory form will was intended to serve as an accessible alternative to intestacy without the need for professional counsel.<sup>162</sup> Further, it was supposed to resolve

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<sup>157</sup> UNIF. PROBATE CODE § 2-502(b) (2008); WILLS, TRUSTS, AND ESTATES, *supra* note 24, at 269 (listing states that recognize holographic wills); see Waggoner, *supra* note 137, at 83 (“One of the reasons for validating a holographic will is that the larger handwriting sample yields greater assurance of the identity of the maker of the document than a mere signature.”).

<sup>158</sup> FRIEDMAN, *supra* note 25, at 65.

<sup>159</sup> Lay testators have used commercial form wills for decades, and the market for commercial forms remains strong today. LegalZoom, a leading provider of commercial forms, offers a simple three-step process that makes it fast, easy, and affordable to create a comprehensive will, complete with advanced provisions. See *Making a Will*, LEGALZOOM, <http://www.legalzoom.com/legal-wills/wills-overview.html> (last visited Apr. 21, 2012). LegalZoom raised \$100 million in capital investments and is preparing an initial public offering. Debra Cassens Weiss, *LegalZoom Readies for IPO After Raising \$66M in New Capital*, A.B.A. J., July 25, 2011, at 32, available at [http://www.abajournal.com/news/article/legal\\_zoom\\_readies\\_for\\_ipo\\_after\\_raising\\_66m\\_in\\_new\\_capital](http://www.abajournal.com/news/article/legal_zoom_readies_for_ipo_after_raising_66m_in_new_capital).

<sup>160</sup> See, e.g., *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 164 (Tex. App. 1992) (finding that a commercial will-making kit “contains fill-in-the-blank forms that can easily confuse nonlawyers”).

<sup>161</sup> UNIF. STATUTORY WILL ACT prefatory note (1984).

<sup>162</sup> The Prefatory Note to the Uniform Statutory Will Act states,

concerns about reliability and usability because it would be designed by state legislatures and, unlike commercial products, would be presumptively valid and enforceable.

The statutory form will was excellent in concept because it eliminated the need for legal draftsmanship, one of the primary deterrents to lay testation. But the Uniform Statutory Will Act's model form failed to gain acceptance, with only a small handful of states enacting the model legislation.<sup>163</sup> One of the Uniform Statutory Will Act's flaws was its reliance on the doctrine of incorporation by reference, which undermined the goal of simplicity by assuming the average testator could understand such a technical legal doctrine.<sup>164</sup> Another problem was the public's lack of awareness of statutory form wills. Yet another problem was the requirement of witness attestation for validity. As a result, in 1996, the Uniform Statutory Will Act was "withdrawn from recommen-

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Because of the efficiency offered and the ease of adopting the testamentary scheme of the Uniform Statutory Will Act, it is anticipated that many persons, who might otherwise die intestate, will find it desirable and convenient to use the testamentary scheme provided in this Act as an alternative to intestacy. While it is recognized that this Act may be used most often by persons with small to medium-sized estates, the statutory-will scheme is not limited to estates with any particular cap in size. If the testator's estate at death should be substantially larger than the testator perhaps anticipated when the will was executed, some estate planning concepts are provided in this statutory-will scheme that will reduce the detrimental tax effects that might result in intestacy. The comprehensive nature of the statutory will and the efficiency in adopting the statutory-will plan may recommend its use in larger estates, particularly as a kind of residuary disposition after providing for some specific devises. Testators adopting a statutory will in whole or in part should keep in mind that like any will it should be reviewed periodically and especially whenever there is a substantial change in the testator's personal circumstances or in tax or other laws.

*Id.*

<sup>163</sup> Six states have enacted statutory form wills. CAL. PROB. CODE §§ 6220–6227 (West 2009); ME. REV. STAT. tit. 18, § 2-514 (1998); MASS. GEN. LAWS ch. 191B, § 2 (2011); MICH. COMP. LAWS § 700.2519 (2002 & Supp. 2011); N.M. STAT. ANN. § 45-2A-3 (2011); WIS. STAT. § 853.55 (2002).

<sup>164</sup> UNIF. STATUTORY WILL ACT prefatory note (1984) ("This Act contemplates that a testator will adopt the statutory will through incorporation by reference in a 'simple will.' . . . A testator can adopt the statutory-will scheme merely by executing a will stating the testator's intent to adopt the statutory-will scheme through a reference to the statute in an instrument executed according to the statutory requirements for a valid will."). Under the doctrine of incorporation by reference, "A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." UNIF. PROBATE CODE § 2-510 (2008).

dition for enactment by the National Conference of Commissioners on Uniform State Laws . . . due to it being obsolete.”<sup>165</sup>

The Uniform Statutory Will Act was not successful, but the concept of a statutory form will remains sound. Indeed, some states rejected the model legislation but embraced the underlying concept by enacting a modified statutory form will.<sup>166</sup> Inheritance law should embrace renewed consideration of statutory form wills because they eliminate the need for legal draftsmanship and encourage the exercise of testamentary freedom.

#### IV. A PROPOSAL FOR STATUTORY REFORM: A “TESTAMENTARY SCHEDULE” ON THE STATE INDIVIDUAL INCOME TAX RETURN

This Part proposes renewed consideration of statutory form wills as a way of promoting lay testation, but with several notable innovations.<sup>167</sup> Most importantly, the statutory form will recommended in this Article would be attached to the state income tax return as an optional schedule called a “Testamentary Schedule—Last Will and Testament.”<sup>168</sup> The testamentary schedule would be governed by the substantive law of wills

<sup>165</sup> UNIF. STATUTORY WILL ACT, 8B U.L.A. 174 (Supp. 2011).

<sup>166</sup> See, e.g., CAL. PROB. CODE § 6240 (West 2011) (providing a form will that does not require statutory language to be incorporated by reference).

<sup>167</sup> See *infra* notes 168–233 and accompanying text.

<sup>168</sup> This could be enacted in the forty-three states that impose an individual income tax. See CAL. CONST. art. 13, § 26; ALA. CODE § 40-18-2 (2011); ARIZ. REV. STAT. ANN. § 43-102 (2006); ARK. CODE ANN. § 26-51-201 (1997); COLO. REV. STAT. § 39-22-104 (2011); CONN. GEN. STAT. § 12-700 (2008 & Supp. 2011); DEL. CODE ANN. tit. 30, § 1102 (2009); GA. CODE ANN. § 48-7-20 (2009); HAW. REV. STAT. ANN. § 235-51 (LexisNexis 2011); IDAHO CODE ANN. § 63-3002 (2007); 35 ILL. COMP. STAT. ANN. 5/201 (West 2005 & Supp. 2011); IND. CODE 6-3-2-1 (LexisNexis 2007 & Supp. 2011); IOWA CODE ANN. § 422.5 (West 2011); KAN. STAT. ANN. § 79-32, 110 (1997 & Supp. 2010); KY. REV. STAT. § 141.020 (2001 & Supp. 2009); LA. REV. STAT. ANN. § 47:31 (2001); ME. REV. STAT. tit. 36, § 5111 (2010 & Supp. 2011); MD. CODE ANN., TAX-GEN. § 10-102 (LexisNexis 2010); MASS. GEN. LAWS ch. 62, § 4 (2010); MICH. COMP. LAWS § 206.51 (2003); MINN. STAT. § 290.03 (2010); MISS. CODE ANN. § 27-7-5 (2010); MO. REV. STAT. § 143.011 (West 2006); MONT. CODE ANN. § 15-30-2103 (West 2011); NEB. REV. ST. ANN. § 77-2715 (LexisNexis 2010); N.H. REV. STAT. ANN. § 77:4 (2003 & Supp. 2011) (income tax only on dividends and interest income); N.J. STAT. ANN. 54A:2-1 (West 2002 & Supp. 2011); N.M. STAT. ANN. § 7-2-3 (2010); N.Y. TAX LAW § 601 (McKinney 2006 & Supp. 2012); N.C. GEN. STAT. § 105-134.2 (2011); N.D. CENT. CODE § 57-38-30.3 (2011); OHIO REV. CODE ANN. § 5747.02 (West 2007); OKLA. STAT. ANN. tit. 68, § 2355 (West 2008); OR. REV. STAT. § 316.007 (2011); 72 PA. CONS. STAT. § 7302 (West 2000 & Supp. 2011); R.I. GEN. LAWS § 44-30-1 (2005); S.C. CODE ANN. § 12-6-510 (2000 & Supp. 2011); TENN. CODE ANN. § 67-2-102 (2011) (income tax only on dividends and interest income); UTAH CODE ANN. § 59-10-104 (LexisNexis 2011); VT. STAT. ANN. tit. 32, § 5822 (2008 & Supp. 2011); VA. CODE ANN. § 58.1-320 (2009); W. VA. CODE § 11-21-3 (2010); WIS. STAT. § 71.02 (2009–2010).

and could be revoked, amended, or superseded by the execution of another testamentary schedule, revocation form, or formal will or codicil. This testamentary schedule would drastically reduce transaction costs by eliminating the need for legal draftsmanship and by simplifying execution procedures.

A. *Integration of Taxes and Testation: Promoting Efficient Public Access to the Testamentary Process*

The testamentary schedule is a novel innovation because it designates the state income tax return as the point of governmental intervention to promote testacy.<sup>169</sup> Integrating the income tax and testamentary processes would promote testacy by efficiently combining complementary tasks that often involve overlapping considerations. In particular, the will-making process requires that the testator be capable of understanding the natural objects of her bounty (i.e., potential beneficiaries) and the nature and extent of her property.<sup>170</sup> In many cases, the income tax process requires similar considerations because taxpayers must identify financial dependents and review income-producing property to report income, deductions, and exemptions properly.<sup>171</sup>

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<sup>169</sup> A search of state statutes and state legislative history revealed no legislation or legislative proposal to integrate the process of testation with the income tax return.

<sup>170</sup> A testator must be mentally competent to make a will, which is demonstrated by the ability to understand the natural objects of her bounty and the nature and extent of her property. *See, e.g., In re Bosley*, 26 A.3d 1104, 1111–12 (Pa. Super. Ct. 2011) (“Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his bounty, the general composition of his estate, and what he wants done with it, even if his memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs.”).

<sup>171</sup> The factual relationship between estate planning and the income tax return is substantial. For example, consider the information the New Jersey state income tax return requires. The taxpayer must:

- (1) enter a filing status (i.e., single, married/civil union couple (filing jointly), married/civil union couple (filing separately), head of household, or qualifying widow or widower);
- (2) identify dependents (defined as “a spouse or child, or a domestic partner . . . , or any individual related to the taxpayer and who is a dependent pursuant to the provisions of the Internal Revenue Code during a taxable year,” N.J. STAT. ANN. § 54A:1-2(e) (West 2002 & Supp. 2011)); and
- (3) disclose income from various sources, including salary, taxable interest, tax-exempt interest, net profits from business, income from the disposition of property, withdrawals from pensions, annuities, and IRAs, partnership income, S Corporation income, and income from rents, royalties, patents, and copyrights. *State of New Jersey Income Tax-Resident Return*, STATE OF N.J. (2010), [http://www.state.nj.us/treasury/taxation/pdf/other\\_forms/tgi-ee/2010/10\\_1040.pdf](http://www.state.nj.us/treasury/taxation/pdf/other_forms/tgi-ee/2010/10_1040.pdf).

Because of the strong factual overlap between taxes and testation, the testamentary schedule's attachment to the income tax return would render the will-making process less onerous than drafting a stand-alone testamentary instrument. The income tax return prompts the testator to consider most of the relevant estate planning factors, and the testamentary schedule simplifies the will-making process by allowing the testator to record her estate plan in a fill-in-the-blank format.

Integrating the income tax and testamentary processes would yield several advantageous synergies. First, the testator would confront the testamentary schedule at the best possible moment—the time of year when she is already required to contemplate matters of money, income, property, and financial dependents. Second, the testamentary schedule would target individuals most likely to own property at death, such as those who earn income and are therefore required to file an income tax return. Third, the testamentary schedule would alleviate the problem of “stale wills” because the testamentary schedule's placement on the income tax return would prompt an annual testamentary review.<sup>172</sup> Fourth, the testamentary schedule would alleviate the problem of lost wills because all filed testamentary schedules would be retained by the state until the time of probate. Fifth, the testamentary schedule would harness the care, seriousness, and high rate of compliance with which Americans regard the income tax process. Sixth, individuals who retain skilled professionals to prepare their income tax returns may be encouraged to seek professional estate planning advice at the same time. Seventh, legal advice for individuals who seek assistance in completing the testamentary schedule will cost less than a formal will drafted from scratch. Eighth, individuals eventually will grow accustomed to dealing with estate planning as an integrated part of the compulsory income

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The act of listing and collecting information required by the income tax return is a natural first step in the estate planning process. The same individuals identified as a spouse or dependent are likely to be among the testator's testamentary beneficiaries. For individuals whose closest relations are not identified on the income tax return, the absence of those individuals from the tax form should be conspicuous, thereby prompting the testator to consider the execution of a will to provide for those beneficiaries. Collection of information regarding income-producing property requires the filer to review the nature and extent of her property, thereby encouraging consideration of how assets (including non-income-producing property) might be disposed of at death.

<sup>172</sup> See generally Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH U. L. REV. 609 (2009) (providing an overview of state wills; and arguing that stale wills should be interpreted dynamically when incapacity has disabled the decedent from revising a will, but not necessarily when a competent testator has simply failed to amend a stale will).

tax process, thereby overcoming interference such as procrastination and avoidance.

Other areas of the law already combine widely used administrative processes to promote public awareness of and optional participation in beneficial but obscure government programs. For example, individuals who apply for a state driver's license are asked whether they would like to register as an organ or tissue donor.<sup>173</sup> Although organ donor registration is administratively distinct from the licensing of motor vehicle operators, they are related because transplanted organs are often harvested from individuals who die in motor vehicle accidents.<sup>174</sup> By combining the driver's licensure process (which is frequently used and universally familiar) with organ donor registration (which is relatively obscure), the law encourages individuals who would otherwise be unaware of the organ donor registration program or registration process to complete the administrative process of becoming an organ donor.<sup>175</sup>

States already use income tax forms to promote obscure government programs with little or no relevance to the income tax itself. For example, the New York State Income Tax Return allows taxpayers to contribute to charitable funds promoted by the State, including the Return a Gift to Wildlife Fund; Missing and Exploited Children Clearinghouse Fund; Breast Cancer Research and Education Fund; Prostate Cancer Research, Detection, and Education Fund; Alzheimer's Disease Fund; United States Olympic Committee/Lake Placid Olympic Training Center; National September 11 Memorial and Museum at the World Trade Center; and Volunteer Firefighting and Volunteer Emergency Services Recruitment and Retention Fund.<sup>176</sup> A fortiori, the state income tax return could be used even more effectively to promote testation which *is* related to the income tax process.

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<sup>173</sup> See, e.g., NEB. REV. STAT. § 60-484 (2006) (requiring that prospective licensees be asked whether they would like to be an organ and tissue donor).

<sup>174</sup> Brian C. Sirois et al., *Do New Drivers Equal New Donors? An Examination of Factors Influencing Organ Donation Attitudes and Behaviors in Adolescents*, 28 J. BEHAV. MED. 201, 201 (2004) ("New adolescent drivers may comprise the largest potential pool of organ donors as this group is most likely to experience accidental death through motor vehicle accidents.").

<sup>175</sup> *Id.* at 202 ("[A]ll 50 states have some method for stating donation intentions on the driver license. Thus, obtaining a driver license may be the first and only time that an individual is faced with making a decision about becoming an organ donor.").

<sup>176</sup> See *Combined Instructions for Forms IT-150 and IT-201*, N.Y. STATE DEPARTMENT OF TAXATION & FIN., 24, [http://tax.ny.gov/pdf/2010/inc/it150\\_201i\\_2010.pdf](http://tax.ny.gov/pdf/2010/inc/it150_201i_2010.pdf) (last visited Apr. 22, 2012); *Resident Income Tax Return*, N.Y. STATE DEPARTMENT OF TAXATION & FIN., [http://tax.ny.gov/pdf/current\\_forms/it/it201\\_fill\\_in.pdf](http://tax.ny.gov/pdf/current_forms/it/it201_fill_in.pdf) (last visited Apr. 22, 2012).

Seven states do not impose an individual income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.<sup>177</sup> Those states could adopt the testamentary schedule as an independent form and allow testators to file completed testamentary schedules electronically with the state; but of course, those states would lose the benefit of coupling the estate planning and income tax processes. In states that do impose an income tax, the form should also be offered as a stand-alone instrument for individuals not required to file a tax return.

The state income tax return would serve as the point of intervention rather than the federal income tax return because wills are governed by state law, and once executed, the testator would file the will in her state of domicile for safekeeping and ease of probate administration.

### B. *Designing the Testamentary Schedule*

Proper design of the testamentary schedule is critical to its success. The testamentary schedule must include all essential elements of a basic will, which is defined as a donative instrument that: (1) “transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession”;<sup>178</sup> (2) complies with testamentary formalities;<sup>179</sup> and (3) is given legal effect when offered for probate.<sup>180</sup> For simple estates, the most important functions of a will include the transfer of property, revocation of prior wills, appointment of an executor, and nomination of a guardian for minor children. The testamentary schedule would serve those basic functions by improving upon existing statutory form wills.

In 1993, Professor Gerry Beyer performed a comprehensive empirical study to assess the design and usability of statutory form wills.<sup>181</sup>

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<sup>177</sup> See *supra* note 168.

<sup>178</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1, cmt. a (2003).

<sup>179</sup> *Id.* § 3.1.

<sup>180</sup> See, e.g., UNIF. PROBATE CODE § 3-102 (2008) (“[T]o be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court . . .”).

<sup>181</sup> Beyer, *supra* note 50, at 798–99. Before conducting his empirical study, Beyer identified several putative advantages and disadvantages of statutory form wills. “Ostensible benefits” included “increased use of estate planning techniques to effectuate demonstrated intent,” “lowering of estate planning costs,” “reduction in time and effort needed

Beyer's study remains the only such empirical inquiry. In the first phase of the study, participants were presented with statutory form wills enacted in California, Maine, Michigan, and Wisconsin, and asked to choose the form they liked the best.<sup>182</sup> In the second phase, participants completed the form they selected as a mock will. In the third phase, each participant was interviewed to evaluate their understanding of how their mock will would distribute property at death.

The study results varied according to participants' level of education. Participants with no education above the high school level had the most difficulty, but many of their errors were minor, "such as including gifts of personal property under the section for real property or placing cash gifts to family members in the section for cash gifts to charities."<sup>183</sup> Those errors were minor because the document as a whole contained sufficient expression of the testator's intent to permit probate administration. But other errors, such as misunderstanding the residuary clause, were more serious.<sup>184</sup> Participants with college degrees and students currently enrolled in law school fared much better and were generally able to use and understand the forms.<sup>185</sup>

Even though some participants had trouble completing the forms, the vast majority said they welcomed the enactment of statutory form wills.<sup>186</sup> Many participants said the availability of a statutory form would serve as an impetus to obtain a will.<sup>187</sup> Beyer concluded that the advan-

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to create and update an estate plan," "greater awareness of an ability to plan an estate and its importance," "improved emotional and psychological condition," prevention of family inheritance disputes, increased public awareness of the benefits of dying testate, "expanded access to the legal system," "decreased reliance on commercialized self-help estate planning publications," and conservation of judicial resources. *Id.* at 774–82. "Ostensible disadvantages" included the potential for user error caused by form alteration, failure to observe testamentary formalities, and "failure to comprehend the form and its effect"; facilitation of undue influence, fraud, and duress; the potential "lack of [a] comprehensive estate plan . . . for death, disability, and related matters"; and a potential decrease in the quality of legal services. *Id.* at 782–89.

<sup>182</sup> *Id.* at 799. Participants preferred the Maine and Michigan forms over the California and Wisconsin forms, but "[a]fter the study was completed, California amended its statutory will form. The California legislature made significant changes to the format of the statutory will, such as presenting information and instructions in a question and answer format and giving the user many more choices and opportunities to customize the distribution scheme." *Id.*

<sup>183</sup> *Id.* at 808.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 808–09.

<sup>186</sup> *Id.* at 804, 807.

<sup>187</sup> Beyer, *supra* note 50, at 804 ("Participants overwhelmingly approved of the concept of statutory will forms. Over 80% of all participants stated that they liked the idea.").

tages of statutory wills strongly outweighed the disadvantages,<sup>188</sup> and that the most common errors could be prevented by improving the forms:

When legislatures amend and draft will forms, they should: (1) provide greater opportunity for individualization; (2) write in plain language; (3) provide detailed instructions, warnings, and explanations which are effectively presented (i.e., in a question and answer format and located on the form where the information is needed); (4) create an effective format; and (5) have straightforward execution procedures.<sup>189</sup>

Beyer's endorsement of statutory form wills is persuasive. Although the task of completing a statutory form undoubtedly requires care and attention, it is reasonable to assume that most individuals could complete a testamentary form, given that ninety-nine percent of Americans can read and write.<sup>190</sup> Indeed, statutory form wills are far less complicated and assume less knowledge than most state income tax return instructions.<sup>191</sup> A thoughtfully designed form would be universally usable regardless of educational background.

This Article proposes a testamentary schedule form that adopts Beyer's recommendations; a sample will and revocation form appear in the Appendix.<sup>192</sup> The proposed form incorporates aspects of the California and Michigan statutory form wills, but provides several innova-

<sup>188</sup> As Beyer explained:

Statutory will forms offer considerable benefits to the non-legal and legal communities by lowering estate planning costs and reducing the time and effort needed to create and update wills. The publicity surrounding the forms increases the number of individuals aware of the importance of dying testate. The forms also expand the public's access to the legal system and decrease reliance on commercialized self-help estate planning publications. Statutory forms may enhance the image of the legal profession, improve the quality of legal services, decrease the probability of attorney malpractice, and abate court congestion. Given the number of benefits that statutory will forms provide, it is unlikely that the policies underlying their enactment may be questioned seriously.

*Id.* at 835.

<sup>189</sup> *Id.* at 836.

<sup>190</sup> See *United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (click on "People and Society:: United States" to find the literacy rates) (last updated Mar. 27, 2012) (reporting a literacy rate of ninety-nine percent).

<sup>191</sup> Cf. Beyer, *supra* note 50, at 841 ("A nation which bases its financial support on the average person's ability to complete fill-in-the-blank income tax returns certainly can trust its citizens to prepare will forms for simple and modest estates.").

<sup>192</sup> See *infra* App.

tions, including: (1) relocation of the residuary clause to the beginning of the will under the heading, Primary Beneficiaries; (2) enhanced flexibility for customized estate planning; (3) reliance on information from the testator's most recent state income tax return as a proxy for authenticity; (4) abolishment of witness attestation; (5) inclusion of a simple revocation form; and (6) optional provisions for the testator to record preferences regarding organ donation and disposition of final remains.<sup>193</sup>

Perhaps the most notable feature of the proposed testamentary schedule is the relocation and renaming of the residuary clause. In most wills, specific bequests and cash gifts are recited at the beginning; the residuary clause, which disposes of the balance of the estate, appears at the end. The residuary clause, however, is often the most important provision of the will because it typically distributes the bulk of the estate. In Beyer's study, the residuary clause generated the greatest amount of confusion,<sup>194</sup> which is understandable because first-time testators are unlikely to understand the term "residue" or its critical function in a formal will. To reduce confusion and emphasize its importance, the proposed form in the Appendix relocates the residuary clause to the beginning of the form and describes the provision without using the terms "residue" or "residuary clause." Instead, the provision is simply called "Primary Beneficiaries" and appears with the following instructions:

This section identifies the Primary Beneficiaries of your estate. Primary Beneficiaries will receive all your property unless you choose different beneficiaries for your personal residence, specific tangible items, or cash gifts (see Sections 2.b, 2.c, or 2.d).

Thus, the "Primary Beneficiaries" clause serves all functions of the traditional residuary clause without using terminology that most lay testators find confusing.

Existing statutory form wills severely restrict the number of beneficiaries and specific gifts for the sake of simplicity, and some testators react to those restrictions by altering or abandoning the form.<sup>195</sup>

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<sup>193</sup> *California Statutory Will*, CA.GOV, <http://www.calbar.ca.gov/Portals/0/documents/publications/Will-Form.pdf> (last visited May 4, 2012); *Michigan Statutory Will Notice*, MICHIGAN.GOV, [http://www.michigan.gov/documents/statwill\\_11444\\_7.pdf](http://www.michigan.gov/documents/statwill_11444_7.pdf) (last visited May 4, 2012).

<sup>194</sup> Beyer, *supra* note 50, at 808.

<sup>195</sup> *See id.* at 783.

Therefore, the testamentary schedule should provide greater flexibility for estate customization by providing space for at least ten primary beneficiaries, ten personal residence beneficiaries, twenty beneficiaries of specific gifts of tangible personal property, and ten cash gift beneficiaries. Although the proposed form in the Appendix provides space for fewer beneficiaries because of publication formatting constraints, a full-size version of the form would provide space for the recommended number of beneficiaries and a computerized version of the form would avoid spatial limitations on the number of beneficiaries altogether.

The proposed testamentary schedule includes an optional provision for the testator to record preferences regarding organ donation and the disposition of final remains. Professionally drafted wills often include the testator's preferences regarding the disposition of final remains, but statutory form wills do not.<sup>196</sup> The proposed form includes an organ donor provision because of its direct relevance to the disposition of final remains. This provision should supplement rather than replace existing state programs that allow residents to record their organ donor status.

Additionally, because the testamentary schedule is intended for lay usage, states should strongly consider providing free, computer-guided assistance akin to the TurboTax software popular in the income tax return context.<sup>197</sup> The software should guide the testator through each part of the testamentary schedule using a question-and-answer interview format and generate a draft will based on the testator's responses.<sup>198</sup> The software should also include error-checking features to

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<sup>196</sup> See, e.g., Last Will and Testament of Leona M. Helmsley, available at [http://www.nytimes.com/packages/pdf/nyregion/city\\_room/20070829\\_helmsleywill.pdf](http://www.nytimes.com/packages/pdf/nyregion/city_room/20070829_helmsleywill.pdf) ("I direct that I be interred wearing my gold wedding band (which is never to be removed from my finger) and that my remains be interred next to my beloved husband, Harry B. Helmsley, and next to my beloved son, Jay Panzirer, at the Helmsley Mausoleum at Woodlawn Cemetery, Bronx, New York. If the remains of my husband Harry B. Helmsley and my son Jay Panzirer are relocated to another mausoleum in another cemetery, then I direct that my remains be interred next to them, in any such other mausoleum in such other cemetery. I further direct that permission be granted as the need arises for the interment in the Helmsley Mausoleum of the remains of my brother, Alvin Rosenthal, if he wishes, and my brother's wife, Susan Rosenthal, if she wishes, but for no other person."); *Michigan Statutory Will Notice*, *supra* note 193 (no provision for disposition of final remains).

<sup>197</sup> Beyer, *supra* note 50, at 838–39 (proposing the use of computerized software to improve delivery of statutory form wills to lay testators).

<sup>198</sup> In Beyer's empirical study of statutory wills, he concluded that a question-and-answer format was an ideal method of eliciting accurate information from lay testators. See *id.* at 831–32 ("[A] question and answer format to convey the preliminary information, instructions, and warnings could be used instead of a mere listing of the items at the beginning of the form. This format would be easier to read because the questions can be

prevent submission of incomplete forms and errant responses. For example, if the testator opts to assign percentage shares to multiple primary beneficiaries, then the software should ensure that the percentage shares add up to one hundred percent.

Introducing this type of technology would be consistent with the current trend promoting public access to the law by helping individuals represent themselves.<sup>199</sup> Courts have long assisted pro se litigants in representing themselves by relaxing the formalities associated with civil litigation.<sup>200</sup> Recently, courts have expanded those efforts by providing technology to help self-represented individuals prepare their own pleadings and litigation forms,<sup>201</sup> and legal academics have developed a software platform called A2J Author, which is available to courts for free.<sup>202</sup> A2J contains an electronic interface that conducts automated

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phrased to pique the reader's interest and the answers can supply the necessary information in a concise and organized manner. The question and answer format is already used in the California statutory will form and in brochures distributed by a Michigan congressman to publicize the statutory form.”).

<sup>199</sup> Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J.L. & SOC. CHANGE 265, 267 (2010) (“Self-help programs provide assistance to pro se litigants by helping them understand the law, the filing process, the court procedures and other aspects of how cases proceed.”); see also Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1643 (1987) (proposing that legal services programs endeavor to provide education to pro se litigants on the judicial system rather than provide direct attorney representation).

<sup>200</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (holding that pro se filings are held to “less stringent standards than formal pleadings drafted by lawyers”); see *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 858 (7th Cir. 2011) (“This solicitude is particularly appropriate when, as here, a court is asked to construe a pro se litigant’s filing in such a manner as to deny that litigant the opportunity to present a jurisdictional defense.”); *Ricketts v. Midwest Nat’l Bank*, 874 F.2d 1177, 1183 (7th Cir. 1989); *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982) (“This heightened judicial solicitude is justified in light of the difficulties of the pro se litigant in mastering the procedural and substantive requirements of the legal structure.”).

<sup>201</sup> In some jurisdictions, pro se litigants are required to use specially designed forms that minimize user error. For example, the Rule 17.1 of the Iowa Rules of Civil Procedure requires unrepresented individuals in Family Court to use special forms which are accompanied by a nineteen-page plain English “Guide to Representing Yourself in an Iowa Divorce Case.” *Family Law Forms*, IOWA JUDICIAL BRANCH, [http://www.iowacourts.gov/Court\\_Rules\\_and\\_Forms/Family\\_Law\\_Forms](http://www.iowacourts.gov/Court_Rules_and_Forms/Family_Law_Forms) (last visited Apr. 23, 2012) (providing the forms for pro se litigants).

<sup>202</sup> One scholar explains:

In 2004, Chicago-Kent College of Law joined with the Center for Computer-Assisted Legal Instruction to build Access to Justice Author (A2J Author), which was designed as a “tool to build tools.” This technology uses HotDocs Online software to guide self-represented litigants through a web-mediated process designed to assess eligibility, gather pertinent information needed to prepare a set of simple court forms, and then deliver those forms, ready to be

interviews with pro se litigants and generates personalized forms and pleadings appropriate for filing with the court based on user responses.<sup>203</sup> A2J is currently used by multiple courts across the country,<sup>204</sup> and the technology has been adapted for transactional use to generate documents such as living wills.<sup>205</sup> States that adopt the proposed testamentary schedule should consider adapting A2J for use by lay testators.

### C. Procedures Governing the Testamentary Schedule

Execution and submission of the testamentary schedule would be governed by many of the same procedural requirements as the state income tax return. The following specific requirements are recommended:

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signed and filed. A2J Author is equipped with “just in time” help tools, including the ability to speak each word of the interview to the user in English or Spanish. The program can also direct the user to outside websites in order to obtain explanations of technical terms. Several legal aid programs, including Iowa Legal Aid and Legal Aid of Western Ohio, are pioneering the use of A2J Guided Interviews as a means of directly supplying potential clients with access to their case management system over the web. This will allow a potential client to interview him or herself, determine financial eligibility, provide preliminary information to locate the client problem within the service coverage of the agency, and deliver it all at any time of the night or day.

Houseman, *supra* note 199, at 269.

<sup>203</sup> A2J’s creators emphasize the importance of using simple terminology and providing clear instructions to lay users, who “need to be guided through processes that are foreign to them. The simple act of filling out forms raises unique challenges that the many self-represented litigants have trouble overcoming. Without a very simple front end, a user unfamiliar with web conventions would be unable to use online form systems. To be effective, guided interviews for self-represented litigants must be very simple.” *A2J Author*, IIT CHI.-KENT C. OF LAW, <http://www.kentlaw.edu/cajt/A2JAuthor.html> (last visited Apr. 23, 2012).

<sup>204</sup> John A. Dooley, III et al., *E-Filing Is Coming*, VT. BUS. J., Summer 2010, at 22, 23. (“A2J programs are already used in several court systems throughout the nation; the program allows lawyers and self-represented litigants to complete court filings online, in a manner much like what TurboTax uses to help individuals file their tax returns. Initial reviews of the A2J software have been very positive.”); *see also Meeting the Needs of Self-Represented Litigants*, IIT CHI.-KENT C. OF LAW, 5, <http://www.kentlaw.edu/cajt/SJI-A2JAuthorExecutiveSummary.pdf> (last visited Apr. 23, 2012) (summarizing the adoption of A2J by various courts around the country). Bankruptcy courts have also made considerable efforts to assist pro se bankruptcy petitioners by adopting similar technology. *See Filing for Bankruptcy Without an Attorney*, U.S. FED. CTS., <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/FilingBankruptcyWithoutAttorney.aspx> (last visited Apr. 23, 2012).

<sup>205</sup> *See Living Will Declaration*, LEGAL AID, [http://illinoislegalaid.org/index.cfm?fuseaction=home.dsp\\_content&contentID=4726](http://illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=4726) (last visited Apr. 23, 2012).

- The testamentary schedule should be completed electronically, but the state should provide a paper version of the form as well.<sup>206</sup>
- For authentication purposes, the testamentary schedule should require information from the testator's most recently filed income tax return (e.g., gross income, total deductions, or adjusted gross income).
- The testamentary schedule should be executed by the testator. For electronic forms, the testator should provide an electronic signature.<sup>207</sup> For handwritten forms, the testator should provide a manual signature.
- The testator should be required to file the executed testamentary schedule with the state for safekeeping. Electronic filing should be encouraged.<sup>208</sup>
- All testamentary schedules on file with the state should be treated with at least the same degree of privacy as personal taxpayer in-

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<sup>206</sup> In 2010, sixty-nine percent of individual federal income tax returns were filed electronically. IRS, 2010 ENFORCEMENT RESULTS 8 (2010), *available at* [http://www.irs.gov/pub/irs-utl/2010\\_enforcement\\_results.pdf](http://www.irs.gov/pub/irs-utl/2010_enforcement_results.pdf).

<sup>207</sup> For electronically filed returns, the electronic signature requirement for the income tax return would also apply to the testamentary schedule. This would be consistent with the Uniform Electronic Transactions Act, adopted in forty-seven states, which recognizes electronic signatures that demonstrate signatory intent:

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

UNIF. ELEC. TRANSACTIONS ACT § 9 (1999).

<sup>208</sup> The filing of wills is a service already provided in at least one jurisdiction by the Register of Wills. *See, e.g.*, DEL. CODE ANN. tit. 12, § 2513(a) (2005) ("An original will may be deposited by any testator, testatrix, attorney-in-fact or attorney-at-law for safekeeping in the office of the Register of Wills for New Castle County upon payment of a fee of \$5.").

The state's storage of completed testamentary schedules filed in electronic format would not implicate the technological problems some scholars have associated with digital wills. For example, two scholars argue that digital wills are problematic because the long passage of time between execution and probate may cause the original electronic storage format to become obsolete; as a result, the will would be inaccessible at the time of administration. Beyer & Hargrove, *supra* note 154, at 893–94. By contrast, the state would act as custodian of completed electronically filed testamentary schedules and maintain the data in an accessible format, just as it does for electronically filed tax data.

formation.<sup>209</sup> Privacy rules should prohibit the state from disclosing filed testamentary schedules to third parties during the testator's life. Upon the testator's death, the state should provide the most recently filed testamentary schedule to parties entitled to file for probate and provide all testamentary schedules filed by the decedent upon request by parties litigating a will contest.<sup>210</sup>

- The testamentary schedule should be attached to the state individual income tax return as an optional schedule and be available as a stand-alone form as well.<sup>211</sup>
- Joint testamentary schedules, wherein two spouses attempt to complete a single testamentary schedule as a reciprocal joint will, should be prohibited to avoid the ambiguities associated with joint wills.<sup>212</sup> Married individuals filing a joint tax return should be required to complete separate testamentary schedules.

#### D. *History and Reprisal of Self-Representation*

The existing will-making process is largely based on the assumption that testators will seek professional counsel when making a will. In contrast, the testamentary schedule relies on a model of self-representation.

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<sup>209</sup> See, e.g., N.J. STAT. ANN. § 54:50-8 (West 2002 & Supp. 2011) (prohibiting disclosure of taxpayer information). For an overview of taxpayer privacy policy and an argument supporting confidentiality of taxpayer records, see generally Joshua D. Blank, *In Defense of Tax Privacy*, 61 EMORY L.J. 265 (2011).

<sup>210</sup> For example, a Delaware statute provides:

Upon receipt of notice of the death of the testator or testatrix or by order of the court, the Register shall open the will and place the will in its pending file to await probate. While awaiting probate the will may be reviewed by any person entitled to offer it for probate, authorized by court order or named in the will as a beneficiary, trustee or guardian. Copies of the will shall be given to the executor, executrix, beneficiary, trustee, guardian, at their request or upon court order. The person or party making the request shall be responsible for reasonable copying charges. Except as provided herein, no other person is permitted to receive a copy of a will.

DEL. CODE ANN. tit. 12, § 2513(d) (2007).

<sup>211</sup> A stand-alone form would accommodate testators who are not required to file an income tax return or reside in a state that does not impose an income tax. A stand-alone form would also accommodate testators who wish to revoke or amend a filed testamentary schedule between annual income tax return filings.

<sup>212</sup> Joint wills can breed litigation by creating ambiguity regarding the testators' intent to enter into a contract not to revoke the joint will. See, e.g., *Garret v. Read*, 102 P.3d 436, 440–41 (Kan. 2004); *Collins v. Estate of Collins*, 619 S.E.2d 531, 533 (N.C. Ct. App. 2005). When a marital couple executes reciprocal wills by completing two separate testamentary schedules, the substantive law of wills would determine whether such an arrangement implies a contract not to revoke. N.J. STAT. ANN. § 3B:1-4 (West 2007).

Self-representation traces its long historical roots to the American colonial era when civil court proceedings were informal and parties routinely represented themselves without counsel. Writing from Pennsylvania in 1776, Thomas Paine argued that self-representation was a natural right, and that representation by counsel—or, as Paine described it, “pleading by proxy”—was derivative of the natural right of self-representation.<sup>213</sup> Historical records suggest that American colonists preferred self-representation because of widespread distrust of lawyers, colonial laws prohibiting payment of fees for legal representation in court, the staffing of courts with lay judges, religious tenets espousing self-reliance, high literacy rates, and the relative simplicity of legal procedure in that era.<sup>214</sup>

In the post-Revolutionary period, civil proceedings remained informal and individuals without legal training were capable of handling most civil litigation without an attorney. The Judiciary Act of 1789 codified the right of self-representation by authorizing lay persons to plead their own cases in federal court,<sup>215</sup> and the Act eased the burden of self-

<sup>213</sup> THOMAS PAINE, *Candid and Critical Remarks on a Letter Signed Ludlow*, in THE COMPLETE WRITINGS OF THOMAS PAINE 272, 275 (Philip S. Foner ed., 1945) (“Either party . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation] . . .”); see *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975). In 1670, before settling his colony in the New World, William Penn was indicted for disturbing the peace in England; though admittedly “unacquainted with the formality of the law,” he represented himself and obtained acquittal by jury. See *Faretta*, 422 U.S. at 830 n.37. Penn’s experience as a pro se litigant likely led to the inclusion of the right of self-representation “in all courts” in the 1682 Pennsylvania Frame of Government. See *id.* As a parallel to the tradition of self-representation, records show that early Pennsylvania Quakers avoided the use of professional counsel by resorting to non-litigation forms of dispute resolution. DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 197 (1958) (“In Pennsylvania, the Quakers tried to avoid legal process altogether by using laymen as ‘common peacemakers.’”).

<sup>214</sup> See *Faretta*, 422 U.S. at 826 (noting that colonial law in Massachusetts, Virginia, Connecticut, and the Carolinas prohibited “pleading for hire”); *Iannaccone v. Callahan*, 142 F.3d 553, 557 (2d Cir. 1998). According to the influential Wickersham Commission Report, “Colonial tribunals were largely manned by laymen and lay judges . . . well into the nineteenth century. There was no substantial difference in training, competence, experience, or intelligence between judge and jury.” NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 27 (1931). Historian Daniel Boorstin explains, “Where laymen were judges, there was little incentive for advocates to be learned lawyers. In fact, technical legal learning might have been a disadvantage, for an advocate could hardly show his learning without revealing the ignorance of the judge and arousing the suspicion of the jury.” BOORSTIN, *supra* note 213, at 200.

<sup>215</sup> The Judiciary Act of 1789 provides, “[I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.” Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

representation by prohibiting the dismissal of civil actions for technical defects and by authorizing courts to amend defective pleadings *sua sponte*.<sup>216</sup> Indeed, although the right to self-representation in a criminal proceeding is recognized in the Constitution, the same right in civil litigation has a longer history in American jurisprudence.<sup>217</sup> Some courts not only permitted self-representation and informality, but insisted upon it. Judge John Dudley, a late-eighteenth-century farmer and trader by training, once charged a jury, “It is our business to do justice between the parties not by any quirks of the law out of Coke or Blackstone—books that I never read and never will—but by common sense

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<sup>216</sup> The Judiciary Act of 1789 provides:

And be it further enacted, That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially sit down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants for form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion, and by their rules prescribe.

*Id.* § 32, 1 Stat. at 92.

<sup>217</sup> Self-representation in civil litigation preceded the more familiar right of criminal defendants to represent themselves. Although the Sixth Amendment was ratified in 1791, the Supreme Court did not recognize the Sixth Amendment right to self-representation in criminal proceedings until the twentieth century. One day after President Washington signed the Judiciary Act of 1789, which provided a right of self-representation in civil litigation in section 35, Congress considered legislation that would later be ratified as the Sixth Amendment to the Constitution. *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964). Under the Sixth Amendment, a criminal defendant has the right to present a pro se defense: “Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Faretta*, 422 U.S. at 819–20; *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (explaining the necessity of assistance of counsel in order to adequately present a defense).

Although criminal defendants had the right to represent themselves under colonial law, there is evidence to suggest that self-representation was far less frequent in criminal proceedings than in civil proceedings. *See* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 687 (2005) (noting that a sample of criminal cases in colonial New Jersey showed that only twenty-two of forty-eight defendants appeared without counsel).

as between man and man.”<sup>218</sup> Remarking almost romantically about the prevalence of pro se civil litigants,<sup>219</sup> a 1972 federal appellate court attributed self-representation in the post-Revolutionary period to the “pioneer modes of thought emphasizing the virtues of common sense and self-reliance.”<sup>220</sup> In that period, inheritance law was administered with the same degree of informality as civil litigation.<sup>221</sup> By the twentieth century, however, the rising sophistication of the American economy and complex nature of modern social problems required correspondingly sophisticated legal and regulatory solutions; lawyers per capita increased and self-representation became far less common for individuals who could afford professional counsel.<sup>222</sup>

Despite the modern prevalence of trained attorneys, recent data on civil litigation show that litigants are increasingly resorting to self-representation for uncomplicated disputes in family law cases and controversies involving small damage amounts.<sup>223</sup> Though perhaps not as common as in the post-Revolutionary period, self-representation is once again becoming a popular option in civil matters. States should endeavor to facilitate self-representation where possible because it enables individuals who might otherwise be excluded from the legal system to exercise their rights without the government incurring the costs associated with appointed counsel.

Just as Judge Dudley dispensed justice without consulting Coke or Blackstone, lay testators should be able to make a simple will without consulting Bogert, Page, or Dukeminier. Inheritance law should embrace reform that assists self-represented individuals who want to execute a will, but do not have the wherewithal to draft a testamentary document from scratch. Requiring an attorney to serve as an “interposition” between the testator and the distribution of his estate severely

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<sup>218</sup> BOORSTIN, *supra* note 213, at 201.

<sup>219</sup> A pro se litigant is one who represents himself without a lawyer. BLACK'S LAW DICTIONARY 1341 (9th ed. 2009).

<sup>220</sup> United States v. Dougherty, 473 F.2d 1113, 1122–23 (D.C. Cir. 1972) (“The right of pro se representation is expressly recognized in organic law of 38 states.”).

<sup>221</sup> See, e.g., FRIEDMAN, *supra* note 47, at 183 (“In the early colonial period, probate was cheap, accessible, and relatively informal.”).

<sup>222</sup> See, e.g., *id.* at 483, 504, 538–39 (describing the increasing complexity of the American legal system and the corresponding rise of the legal profession).

<sup>223</sup> See *Federal Court Pro Se Statistics*, NAT'L CENTER FOR STATE CTS., <http://www.ncsc.org/wc/publications/memos/prosestatsmemo.htm#federal> (last visited Apr. 24, 2012) (collecting pro se litigation statistics). In Utah, for example, forty-nine percent of petitioners and eighty-one percent of respondents in divorces cases were self-represented; ninety-nine percent of petitioners and ninety-nine percent of respondents are self-represented in small-claims cases. *Id.*

constrains testamentary freedom by excluding individuals who cannot afford an attorney or are unwilling to tolerate disclosure of highly private information to a professional third party. Programs that assist lay testators reduce transaction costs and encourage the exercise of testamentary freedom.<sup>224</sup>

### E. Adequacy of Self-Representation

Historically, the most challenging aspect of estate planning for lay testators involved the sophisticated planning necessary to minimize federal gift and estate tax liability. Until recently, federal gift and estate tax exemption amounts were low enough to impose wealth transfer taxation on relatively small estates.<sup>225</sup> In 1976, for example, the federal estate tax exemption amount was \$60,000, so for many (although not most) decedents, tax considerations were a relevant concern.<sup>226</sup> Over the last thirty years, however, Congress has gradually and substantially increased the federal wealth transfer tax exemption amounts. Now, as a result, the federal gift and estate tax only affects a small population of wealthy taxpayers. In 2009, the federal estate tax exemption amount was \$3.5 million,<sup>227</sup> and the Internal Revenue Service received only 14,713 estate tax returns reporting estate tax liability.<sup>228</sup> That year, there

<sup>224</sup> Indeed, one commentator even suggests that probate courts should return to the colonial practice of employing lay judges. James Findley, *The Debate over Nonlawyer Probate Judges: A Historical Perspective*, 61 ALA. L. REV. 1143, 1160 (2010) (“[T]here is much merit in maintaining amateur minds in at least some strategic judicial posts, and those offices overseeing matters of testamentary dispositions are among the most appropriate.”).

<sup>225</sup> The federal government imposes transfer taxes on the privilege of transferring wealth. 26 U.S.C. §§ 2501 (gift tax), 2601 (generation-skipping transfer tax) (2006); 26 U.S.C. § 2001 (Supp. IV 2010) (estate tax). Fourteen states and the District of Columbia impose an estate tax, six states impose an inheritance tax, and two states impose both an inheritance and an estate tax. See *McGuireWoods LLP State Death Tax Chart*, MCGUIREWOODS (Mar. 26, 2012), [http://www.mcguirewoods.com/news-resources/publications/taxation/state\\_death\\_tax\\_chart.pdf](http://www.mcguirewoods.com/news-resources/publications/taxation/state_death_tax_chart.pdf).

<sup>226</sup> See Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS, 122, <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf> (last visited Apr. 24, 2012).

<sup>227</sup> 26 U.S.C. § 2010(c) (Supp. IV 2010).

<sup>228</sup> See below for a break down of this figure by estate size:

Size of Taxable Estate	Number of Filed Returns (2009)
Under \$2.0 million	555
\$2.0 million < \$3.5 million	6,999
\$3.5 million < \$5.0 million	2,862
\$5.0 million < \$10.0 million	2,643
\$10.0 million < \$20.0 million	1,016
\$20.0 million or more	637
<i>All Taxable Returns</i>	<i>14,713</i>

were approximately 2.4 million deaths in the United States,<sup>229</sup> so roughly 0.6% of decedents reported an estate tax liability. In 2010, the estate tax was repealed altogether.<sup>230</sup> In 2011, Congress reinstated the estate tax with an exemption amount of five million dollars.<sup>231</sup> In 2011, state estate tax exemption amounts were also high; among states that impose an estate tax, the average exemption amount was \$1.8 million and the median amount, \$1 million.<sup>232</sup> Thus, for the vast majority of Americans, death taxes are no longer a relevant estate planning consideration.<sup>233</sup> The need for professional estate planning advice has drastically declined, and with it, the potential for lay testators to jeopardize their own interests by handling their own estates.

Self-representation may not be appropriate for wealthy individuals who expect to make transfers exceeding the gift and estate tax exemption amounts. But wealthy individuals are likely to obtain professional

*Estate Tax Returns Filed in 2009*, IRS (Dec. 2010), <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=210646,00.html>. For returns reporting estate tax liability with a taxable estate of less than \$3.5 million, the decedent presumably exhausted the cumulative gift and estate tax exemption by making substantial inter vivos gifts.

<sup>229</sup> The most recent data from the U.S. Census Bureau reported 2,424,000 deaths in 2007. *Deaths and Death Rates by Sex, Race, and Hispanic Origin: 1970 to 2007*, CENSUS BUREAU (May 2010), <http://www.census.gov/compendia/statab/2011/tables//11s0107.pdf>. Death rates in the United States have remained fairly constant in recent years, so for purposes of this Article, a rough estimate of 2.4 million decedents for 2009 is sufficiently illustrative.

<sup>230</sup> 26 U.S.C. § 2210 (2006) (repealed 2010).

<sup>231</sup> 26 U.S.C. § 2010(c) (Supp. IV 2010). Subsection (c)(4) also provides for “credit portability,” which allows both members of a marital couple full use of the unified credit amount available to both spouses regardless of who dies first without a credit shelter bypass trust. *Id.* § 2010(c)(4) (surviving spouse’s estate may apply the unused amount of the decedent spouse’s unified credit). Thus, a marital couple can transfer \$10 million without estate tax liability.

<sup>232</sup> The state estate tax exemption amounts are as follows: Connecticut: \$2 million; Delaware: \$5,120,000; District of Columbia: \$1 million; Hawaii: \$3.5 million; Illinois: \$3.5 million; Maine: \$1 million; Maryland: \$1 million; Massachusetts: \$1 million; Minnesota: \$1 million; New Jersey: \$675,000; New York: \$1 million; North Carolina: \$5,120,000; Ohio: \$338,333; Oregon: \$1 million; Rhode Island: \$892,865; Vermont: \$2.75 million; Washington: \$2 million. See *McGuireWoods LLP State Death Tax Chart*, MCGUIREWOODS (Mar. 26, 2012), [http://www.mcguirewoods.com/news-resources/publications/taxation/state\\_death\\_tax\\_chart.pdf](http://www.mcguirewoods.com/news-resources/publications/taxation/state_death_tax_chart.pdf).

<sup>233</sup> David J. Zumpano, “Irrevocable Pure Grantor Trusts”: *The Estate Planning Landscape Has Changed*, 61 SYRACUSE L. REV. 119, 125–26 (2010) (“Estate tax planning for individuals with estates of \$3.5 million or more, accounts for only three in one thousand American taxpayers, less than one third of one percent. The number of individuals subject to estate tax only creeps up slightly less than eighteen in one thousand or 1.76% of American taxpayers if the estate tax exemption is reduced to a \$1 million dollars. Even with the current estate tax laws in transition, the number of Americans needing estate tax planning is insignificant . . .”).

estate planning advice regardless of whether the state provides a statutory form will designed for lay usage. As a precaution, the testamentary schedule should advise users to consult a tax attorney if they expect to leave a large estate.

## V. POTENTIAL CRITICISM

The following Sections identify and respond to potential criticism of the testamentary schedule.

### A. *Potential for Fraud*

The testamentary schedule's self-representation model and lack of witness attestation would enable testators to execute and file a will without encountering any third-party intermediaries. There are significant advantages to this model as explained above, but it also raises the concern that someone, perhaps even a member of the testator's family, could file an unauthorized testamentary schedule for the purpose of defrauding the estate. The law of wills, however, contains sophisticated, well-developed rules for preventing inheritance fraud. Those rules should be sufficient to avert fraudulent use of the testamentary schedule.

First, the intentional unauthorized filing of a testamentary schedule would be prohibited by criminal statute and, like most fraudulent acts, punishable by incarceration. The proposed form in the Appendix includes a warning against fraud in the form's general instructions. Criminal sanctions are a strong deterrent, particularly when the fraud requires filing a falsified tax document with the government and defending the fraudulent act in a contested probate court proceeding before reaping the fruits of the crime.<sup>234</sup> Testamentary fraud is highly susceptible to detection because beneficiaries who would inherit if not for the fraud have a strong incentive to contest the will, thereby subjecting the wrongdoer's conduct to scrutiny in court. The procedures recommended in Part IV would preserve all filed testamentary schedules,

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<sup>234</sup> For example, in the prominent criminal case involving the estate of Brooke Astor, the decedent's son was convicted of fraudulently procuring codicils to his mother's will. See John Eligon, *Brooke Astor's Son Guilty in Scheme to Defraud Her*, N.Y. TIMES, Oct. 8, 2009, at A1. The decedent's son did not inherit from the fraudulent instruments and received a prison sentence of one to three years. See James Barron, *Brooke Astor's Son Is Sentenced to Prison*, N.Y. TIMES, Dec. 21, 2009, at A31.

thus providing a reliable evidentiary record of all changes to the decedent's will.<sup>235</sup>

Second, the testamentary schedule should require confidential information from the testator's most recent state income tax return (e.g., gross income, total deductions, or tax liability) as a proxy for authenticity. The testator's possession of highly confidential personal tax information would provide good (although not conclusive) circumstantial evidence of genuineness. Upon filing, the testator would also receive a notification of receipt to notify the testator in the event of an unauthorized filing.

Third, in the event that fraud, duress, or undue influence does occur, existing protective doctrines would provide an adequate recourse. Wills procured by fraud, duress, or undue influence may be contested in a proceeding governed by evidentiary rules that account for the fact that the best evidence of wrongdoing—the decedent's testimony—is not available.<sup>236</sup> For example, a contestant challenging a testamentary schedule on grounds of undue influence would have to establish an inference of undue influence by proving a confidential relationship and suspicious circumstances,<sup>237</sup> but upon doing so, would

<sup>235</sup> See *supra* notes 167–233 and accompanying text.

<sup>236</sup> The *Restatement (Third) of Property: Wills and Other Donative Transfers* summarizes the three protective doctrines:

- (a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.
- (b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.
- (c) A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.
- (d) A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (2003).

<sup>237</sup> The *Restatement* explains:

The doctrine of undue influence protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor's age, inexperience, dependence, physical or mental weakness, or other factor. A donative transfer is procured by undue influence if the influence exerted over the donor overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made. The alleged wrongdoer need not be

be aided by a presumption that shifts the burden of proof from the contestant to the proponent.<sup>238</sup> Once an inference of undue influence or fraud is proved, the proponent bears the burden of rebutting that inference by proving good faith and showing that the will was not procured by wrongful conduct.

### B. *Loss of Testamentary Privacy*

A testator may execute a valid will without disclosing its contents to others, including beneficiaries and heirs apparent. Indeed, testamentary privacy is often important to the testator and can be necessary to preserve amicable family relations. Once probated, the will becomes a matter of public record, but such disclosure does not occur until after the testator's death.

Because the testamentary schedule would be filed with the state for preservation and safekeeping, testators might worry about public discourse. Under the system proposed in Part IV, however, filed testamentary schedules would be subject to the same privacy and nondisclosure rules as filed income tax returns.<sup>239</sup>

present when the donative document was executed in order to exert undue influence. Direct evidence of the wrongdoer's conduct and the donor's subservience is rarely available to establish the actual exertion of undue influence. The contestant's case must usually be based on circumstantial evidence, and in certain cases, is aided by a presumption of undue influence. See Comment *f*.

In the absence of direct evidence of undue influence, circumstantial evidence is sufficient to raise an inference of undue influence if the contestant proves that (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.

*Id.* § 8.3 cmt. e.

<sup>238</sup> The *Restatement* states:

A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

*Id.* § 8.3 cmt. f.

<sup>239</sup> See *supra* notes 167–233 and accompanying text.

Testamentary privacy concerns may be most acute in testamentary schedules filed with a joint income tax return. Married testators who file a joint income tax return will likely have to share the contents of the testamentary schedule with each other. Thus, a married testator who wants to disinherit a spouse without being detected during life will not find the testamentary schedule suitable for that purpose. But married testators who file a joint income tax return must disclose information regarding income and assets with each other when they complete the income tax return itself. Thus, married individuals who hide assets from each other or otherwise treat property as separately owned may not choose to file a joint return in the first place.

### C. *Distortion of Testamentary Intent*

The testamentary schedule must be simple in its design if lay testators are expected to use it, but simplifying the design necessarily reduces the number of options for disposing of the estate and the testator's ability to customize an estate plan. As a result, testators may alter their estate plan to conform to the testamentary schedule, causing a distortion of testamentary intent. This is, indeed, a significant drawback, but the cost of potential distortion is outweighed by the benefit of facilitating at least some statement of testamentary intent because the alternative is often intestacy.

In the parlance of inheritance law, the testamentary schedule would serve a channeling function that encourages "uniformity in the organization, language, and content" of wills to reduce the burden of drafting and interpreting testamentary instruments.<sup>240</sup> Standardization enables courts to interpret wills without puzzling over testamentary language and allows a testator to rely on accepted language of conveyance rather than "devise for himself a mode of communicating his testamentary wishes to the court, and . . . worry whether it will be effective."<sup>241</sup> Uniformity and simplicity promote efficiency in the law of wills,

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<sup>240</sup> Langbein, *supra* note 134, at 493–94. Quoting Professor Lon Fuller, Langbein explained the role of language in accurately effectuating a conveyance: "One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels." *Id.* (quoting Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 802 (1941)).

<sup>241</sup> Langbein has cited the success achieved by standardization of tax forms in enabling the IRS to process millions of annual income tax returns in short order. *Id.* at 494 ("Citizen compliance with the usual forms has, therefore, the same order of channeling importance for the probate courts that it has, for example, for the Internal Revenue Service. Under the principle of free testation, the substance of wills (what they actually say) cannot be standardized. It may be all the more important that the documents be standardized in

but one of the unavoidable drawbacks of standardization is the loss of opportunity to customize the form to suit a diverse range of individual preferences. The testamentary schedule favors simplicity at the cost of limiting customization because facilitating some expression of testamentary intent, even if imperfect, is superior to unintended intestacy and testators would always retain the right to draft a will without using the testamentary schedule.

#### D. *Failure to Appreciate the Significance of the Testamentary Act*

One of the functions of testamentary formalities is to impress upon the testator the legal significance of executing a will; rituals surrounding the execution of a will serve as a substitute for experiencing the “wrench of delivery” when parting with property during life.<sup>242</sup> By cautioning the testator and demonstrating to the court that the testator was cautioned, the observance of testamentary formalities can reduce the incidence of false positive errors—that is, giving legal effect to a document which the decedent did not intend as her will. A will execution ceremony in which the testator signs the will in the presence of attesting witnesses serves the cautionary function by creating a social context that connotes legal significance.<sup>243</sup> But an execution ceremony is not the only way to caution the testator about the legal significance of

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form.”); see also Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 468 (2002) (“The channeling function of will formalities provides [coordination and simplifies decision-making]. A set of established formalities coordinates the actions of testators, lawyers, and judges: judges immediately recognize the significance of the expression, and testators and their lawyers know that judges will accept what they have done as a testamentary transaction. Established formalities also can save testators time and expense in determining how to express their intent.”).

<sup>242</sup> Langbein, *supra* note 134, at 494–95 (noting that it would be “difficult [for the testator] to complete the ceremony and remain ignorant that one is making a will”).

<sup>243</sup> *Id.* at 495. The testator’s voluntary participation in this ritual suggests that the testator thought about the purpose and effect of the testamentary document before executing it and “precludes the possibility that the testator was acting in a casual or haphazard fashion.” Gulliver & Tilson, *supra* note 145, at 5. Gulliver and Tilson explain:

The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative. This purpose of the requirements of transfer may conveniently be termed their ritual function.

*Id.* at 4.

executing a will. The cautionary function can be served by any process that forces the testator to devote a high level of care and attention.

The testamentary schedule would serve the cautionary function by substituting the ritual of will execution ceremonies for another ritual—preparation of the annual income tax return. As a general rule, Americans exert great diligence and care in preparing and filing their annual income tax returns.<sup>244</sup> The tax system relies on voluntary compliance, and Americans, by and large, voluntarily comply.<sup>245</sup> The overall tax compliance rate of eighty-four percent demonstrates that the tax collection system functions well and that Americans regard the income tax process with a high degree of seriousness and care.<sup>246</sup> In fact, economists are intrigued by the willingness of Americans to act against their own self-interest by voluntarily paying taxes even when tax liability exceeds the expected cost of sanctions for noncompliance; such behavior reflects a deep social commitment to tax compliance.<sup>247</sup> Even tax evaders who file a return but underreport income are likely to devote extreme care and attention to their tax returns; tax evasion requires a competent understanding of the tax system and sufficient attention to detail to avoid detection. Tax evaders with hidden assets would not be deterred from using the testamentary schedule because the form does not require the identification of assets.

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<sup>244</sup> See *IRS Updates Tax Gap Estimates*, IRS (Feb. 14, 2006), <http://www.irs.gov/newsroom/article/0,,id=154496,00.html> (noting that the vast majority of Americans pay their taxes).

<sup>245</sup> Michael Hatfield, *Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation*, 10 FLA. TAX REV. 841, 845–46 (2011) (“It is commonly understood that our federal income tax system is one of voluntary self-assessment, which simply refers to the requirement that each of us assess his or her own tax liability each year, submitting a check to the IRS on or before April 15. What may be less well understood is that Americans do so with a remarkable reliability: well over 80% of American taxpayers voluntarily pay the (right amount of) taxes owed. This is one of the highest voluntary compliance rates in the world. And it applies to ‘over 138 million taxpayers filing over 235 million returns annually.’” (citing *Internal Revenue Service Data Book 2007*, IRS, 5 (Mar. 2008), <http://www.irs.gov/pub/irs-soi/07databkrevised.pdf>)); see, e.g., *United States v. Geneves*, 405 U.S. 93, 104 (1972) (“[The] tax system . . . is . . . largely dependent on voluntary compliance.”).

<sup>246</sup> *Update on Reducing the Federal Tax Gap*, IRS, 2 (July 8, 2009), [http://www.irs.gov/pub/newsroom/tax\\_gap\\_report\\_final\\_version.pdf](http://www.irs.gov/pub/newsroom/tax_gap_report_final_version.pdf).

<sup>247</sup> See generally Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1520 (2002) (discussing the fact that telling Americans that compliance with tax laws is high is more effective in getting compliance than raising penalties for noncompliance); Dan M. Kahan, *Trust, Collective Action and Law*, 81 B.U. L. REV. 333, 341 (2001) (pointing to studies that show that when people learn that their neighbors have positive feelings towards tax policy they are more likely to comply with tax law); Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000) (exploring the hypothesis that a social norm explains why Americans are compliant with tax laws).

The testamentary schedule would serve the cautionary function by interacting with the testator at a time when she is in a high state of conscientious thoughtfulness. As an attachment to the state income tax return, the testamentary schedule would harness the seriousness, care, and attention that Americans devote to the reporting of taxable income. Thus, the income tax process is an ideal context in which to caution the testator about the legal significance of executing a will.

#### E. *Storage and Administrative Costs*

The government's processing and storage of testamentary schedules is extremely important because it fulfills an evidentiary function that ensures reliability and availability of testamentary schedules at death. The evidentiary function of testamentary formalities is necessary because the decedent's testimony is unavailable at the time of probate and testimony by other witnesses is likely to be compromised by bias or faded memory.<sup>248</sup> To serve the evidentiary function, the testamentary schedule would be filed with the state for safekeeping, but subject to taxpayer privacy rules to ensure confidentiality. Filing with the state would eliminate the problem of lost wills and prevent wrongdoers from altering the will without authorization. All filed testamentary schedules would be retained for evidentiary purposes, but only the last filed schedule would be probated.

State governments would have to absorb the cost of processing and storing completed testamentary schedules. It is unclear whether this cost would impose a major burden on state governments, but this consideration might necessitate charging a nominal fee (perhaps five dollars) for the service.

#### CONCLUSION

Testamentary freedom is the guiding principle of inheritance law, but for most Americans, exercising that freedom proves elusive. The fact that most individuals who want to obtain a will die without one is inconsistent with the freedom of testation because most Americans do not understand the rules of intestacy or the negative consequences of dying intestate. When unintended, intestacy can wreak economic devastation and social disruption upon the decedent's intended beneficiar-

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<sup>248</sup> Formalities requiring that the document be in writing serve to preserve the language of the testator, and formalities requiring that the document be signed by the testator offer proof of the author's identity.

ies, and in the aggregate, widespread intestacy contributes to the growing problem of economic inequality in the United States.

Many scholars explain the high rate of intestacy as the product of human fears regarding death and mortality, but in the absence of direct empirical evidence supporting that hypothesis, this Article proposes an alternative explanation for the widespread lapse of testamentary freedom: the obscurity, complexity, and expense of the will-making process itself.

The testamentary process should be simplified and channeled to lay testators to ensure universal access to the will-making process. In particular, the will-making process must eliminate the need for legal draftsmanship and the witness attestation requirement. This Article proposes reform that would (1) authorize a simplified statutory form will governed by the same execution formalities as the income tax return, (2) attach the statutory form will to the state individual income tax return as an optional testamentary schedule, (3) assist lay testators in completing the form by providing computerized software similar to the commercial “Turbo Tax” program, and (4) permit electronic filing and storage of completed testamentary schedules.

The testamentary schedule would be governed by the substantive law of wills, but execution formalities would be subject to the procedural rules applicable to the income tax return, including electronic filing procedures, rather than by formalities required under the Wills Act. By integrating two complementary tasks—the income tax and estate planning processes—the testator would encounter the will-making process at the optimal moment and, by creating an annual testamentary routine, reduce the incidence of stale wills. As an empirical matter, adoption of the testamentary schedule would permit a rigorous analysis of whether the current testamentary process deters the exercise of testamentary freedom; if properly implemented, the number of individuals without a will could be compared before and after introduction of the testamentary schedule. The testamentary schedule would render the will-making process universally accessible, promote the careful exercise of testamentary freedom, and increase the likelihood that the decedent’s intent will be expressed and, as a result, implemented.

APPENDIX  
TESTAMENTARY SCHEDULE—LAST WILL AND TESTAMENT

**DESCRIPTION.**

1. This form will serve as your Will. Use this document to identify the beneficiaries who will receive your property at death, appoint a guardian and custodian for minor children, appoint an executor to handle your estate, and declare your preferences regarding organ donation and the disposition of final remains. If you do not understand this form, consult an attorney for assistance.
2. This form has no effect on jointly held assets, retirement plan benefits or life insurance policies.
3. If you expect your estate to exceed [\$5 million, or the state's inheritance tax exemption] or if you have made substantial lifetime gifts, then you should consult an attorney for tax planning advice first.
4. You may revoke this form at any time by executing the attached Revocation form, a new Testamentary Schedule, or a new Will.
5. You may not submit this form on someone else's behalf without consent. Submission of an unauthorized form is a crime punishable by imprisonment.

**GENERAL INSTRUCTIONS.**

1. Complete the form by filling in the blanks. If an item does not apply, leave it blank.
2. Sign and date the form. If you complete this form electronically, you may use an electronic signature. No witnesses are required.
3. File this form with the State Department of {\_\_}. You may do so with your state income tax return. This form will be treated as private and confidential, just like your income tax return.

**1. WILL.** This is my Will. I revoke all prior Wills and Codicils.

a. FULL NAME

WILL OF \_\_\_\_\_

*Full Name (First, Middle, Last)*

b. AUTHENTICATION

*To authenticate yourself, enter the following information from your current state income tax return:*

[Tax Return Item 1]: \_\_\_\_\_

[Tax Return Item 2]: \_\_\_\_\_

**2. BEQUESTS.**

**a. PRIMARY BENEFICIARIES**

*This section identifies the Primary Beneficiaries of your estate. Primary Beneficiaries will receive all your property unless you choose different beneficiaries for your personal residence, specific tangible items, or cash gifts (see Sections 2.b, 2.c, or 2.d). Indicate Primary Beneficiaries below by placing your initials next to the desired selection and, if applicable, identify the beneficiaries by name.*

- 1. \_\_\_ My spouse if s/he survives me. If my spouse dies before me, then my descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me.
- 2. \_\_\_ My descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me. (I leave nothing to my spouse.\*)
- 3. \_\_\_ The following person, charity, organization, or trust:

Beneficiary: \_\_\_\_\_

You may select alternate beneficiaries to inherit if the person listed above dies before you:

Alternate 1: \_\_\_\_\_

Alternate 2: \_\_\_\_\_

Alternate 3: \_\_\_\_\_

- 4. \_\_\_ The following persons, charities, organization, or trusts in the following shares: [Percentage shares must add up to 100%.]

Name:	Percent Share:
Beneficiary 1: _____	_____ %
Beneficiary 2: _____	_____ %
Beneficiary 3: _____	_____ %
Beneficiary 4: _____	_____ %
Beneficiary 5: _____	_____ %
Beneficiary 6: _____	_____ %

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\* [For states with an elective share statute] State law protects your surviving spouse or domestic partner from outright disinheritance. If you are married or partnered at death and select this option, your surviving spouse or domestic partner may file a petition in court to obtain a spousal elective share. This will reduce the amount passing to your selected beneficiaries.

**2. BEQUESTS (continued)**

**b. SPECIFIC GIFT OF PERSONAL RESIDENCE—OPTIONAL.**

*This section identifies beneficiaries of your personal residence at death subject to mortgages and liens. Use this section only if you want to give your personal residence to someone other than the Primary Beneficiaries selected in Section 2.a. Indicate Personal Residence Beneficiaries below by placing your initials next to the desired selection and, if applicable, identify the beneficiaries by name.*

- 1. \_\_\_ My spouse if s/he survives me. If my spouse dies before me, then my descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me.
- 2. \_\_\_ My descendants (i.e., children, grandchildren, great grandchildren, etc.) who survive me. (I leave nothing to my spouse.\*)
- 3. \_\_\_ The following persons, charity, organization, or trust:

Beneficiary: \_\_\_\_\_

You may select alternate beneficiaries to inherit if the person listed above dies before you:

Alternate 1: \_\_\_\_\_

Alternate 2: \_\_\_\_\_

Alternate 3: \_\_\_\_\_

- 4. \_\_\_ The following person, charities, organization, or trusts in the following shares: [Percentage shares must add up to 100%.]

Name:	Percent Share:
Beneficiary 1: _____	_____ %
Beneficiary 2: _____	_____ %
Beneficiary 3: _____	_____ %
Beneficiary 4: _____	_____ %
Beneficiary 5: _____	_____ %
Beneficiary 6: _____	_____ %

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\* [For states with an elective share statute] State law protects your surviving spouse or domestic partner from outright disinheritance. If you are married or partnered at death and select this option, your surviving spouse or domestic partner may file a petition in court to obtain a spousal elective share. This will reduce the amount passing to your selected beneficiaries.

**2. BEQUESTS (continued)**

**c. SPECIFIC GIFTS OF PERSONAL ITEMS—OPTIONAL.**

*This section identifies beneficiaries of specific personal items, such as automobiles, household furnishings, jewelry, or personal effects owned at death. Use this section only if you want to give a personal item to someone other than the Primary Beneficiaries selected in Section 2.a. For each item, provide a brief description, the beneficiary’s name, and (if desired) an alternate beneficiary should the original beneficiary die before you.*

Item	Brief Description	Beneficiary	Alternate Beneficiary
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			

**d. CASH GIFTS—OPTIONAL.**

*This section identifies beneficiaries of cash gifts. Use this section only if you want to give a cash gift to someone other than the Primary Beneficiaries selected in paragraph 2.a. For each cash gift, provide the amount and beneficiary’s name.*

Item	Cash Amount	Beneficiary
1.	\$	
2.	\$	
3.	\$	
4.	\$	
5.	\$	
6.	\$	
7.	\$	
8.	\$	
9.	\$	
10.	\$	

**3. GUARDIAN OF MINOR CHILDREN AND CUSTODIAN OF PROPERTY—OPTIONAL.**

*If you are survived by a minor child who has no other adult guardian, a court may appoint an individual to care for the child and his or her property. A guardian has the same authority with respect to the child as a parent with legal custody. A custodian has power to manage the child’s property. Use this section to select a guardian and custodian.*

**a. GUARDIAN.**

Preferred Guardian: \_\_\_\_\_  
First Alternate: \_\_\_\_\_  
Second Alternate: \_\_\_\_\_

**b. CUSTODIAN.**

Preferred Custodian: \_\_\_\_\_  
First Alternate: \_\_\_\_\_  
Second Alternate: \_\_\_\_\_

**4. EXECUTOR—OPTIONAL.**

*Use this section to appoint an executor to handle the administration of your estate. The executor will have important administrative duties, such as taking an inventory of your property, filing estate papers in court, and distributing gifts in accordance with this Will. The law protects estate property by requiring the executor to post bond, but you may waive this requirement by signing below.*

**a. NOMINATION.** I select the following individual, bank or trust company as my executor:

Preferred Executor: \_\_\_\_\_  
First Alternate: \_\_\_\_\_  
Second Alternate: \_\_\_\_\_

**b. BOND.**

My signature below means the executor is not required post bond before handling my estate:

\_\_\_\_\_  
No bond shall be required.

**5. ORGAN DONATION AND FINAL REMAINS—OPTIONAL.**

a. **ORGAN DONATION:** *Use this section to record your organ donor status. Indicate your preference by placing your initials next to the appropriate line.*

- 1. \_\_\_ I wish to donate any needed organ or tissue.
- 2. \_\_\_ I wish to donate only the following organs or tissue:  
\_\_\_\_\_.
- 3. \_\_\_ I do not wish to donate my organs or tissue.

b. **FINAL REMAINS:** *Use this section to record your preference regarding final remains. Indicate your preference by placing your initials next to the appropriate line.*

- 1. \_\_\_ Burial  
Cemetery (optional): \_\_\_\_\_
- 2. \_\_\_ Cremation  
With delivery to (optional): \_\_\_\_\_
- 3. \_\_\_ Donation for scientific research  
Hospital or University (optional): \_\_\_\_\_

**6. SIGNATURE AND DATE**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

END OF WILL

TESTAMENTARY SCHEDULE—REVOCATION FORM

**DESCRIPTION OF FORM.**

- 1. This form will revoke all Wills and Codicils. If you do not understand this form, consult an attorney for assistance.
- 2. You may not submit this form on someone else’s behalf without consent. Submission of an unauthorized form is a crime and punishable by imprisonment.

**GENERAL INSTRUCTIONS.**

- 1. Complete the form by filling in the blanks.
  - 2. Sign and date the form. If you complete this form electronically, you may use an electronic signature. No witnesses are required.
  - 3. File this form with the State Department of {\_\_}. You may do so with your state income tax return. This form will be treated as private and confidential, just like your income tax return.
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1. REVOCATION OF ALL WILLS AND CODICILS.

I hereby revoke all prior Wills and Codicils.

a. FULL NAME \_\_\_\_\_  
*Full Name (First, Middle, Last)*

b. AUTHENTICATION

*To authenticate yourself, enter the following information from your current state income tax return:*

[Tax Return Item 1]: \_\_\_\_\_  
[Tax Return Item 2]: \_\_\_\_\_

2. SIGNATURE AND DATE

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

END OF FORM