

# THE MADNESS OF INSANE DELUSIONS

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*In the United States, the law of wills professes to be organized around the principle of freedom of testation. “Work and earn and save,” it says, “so that you can pass your wealth to whomever you please.” This principle is attractive, but it simply is not borne out in the administration of too many testators’ estates. Rather, judges and juries routinely substitute their preferred distributions for testators’ expressed preferences.*

*One particularly troubling situation arises when testators attempt to pass their estates to organizations that champion unpopular beliefs. If the deciding judges or juries dislike the testators’ beliefs, they may be tempted to invalidate these devises as the product of insane delusions. Sometimes these supposed “delusions” have been beliefs about divisive social issues—like advancing women in the early twentieth century. Other supposed “delusions” have been religious beliefs that depart from the mainstream faiths. Allowing judges and juries to label these beliefs “delusional” does not further testamentary freedom. Rather, it substitutes majoritarian preferences for the counter-majoritarian views of the testator. This is a dangerous proposition. It was once regarded as fact that the Earth was flat. Now the prevalent view is that the Earth is round. Should a devise that champions either one of those ideas be labeled “delusional”? Unfortunately, the outcome may be dictated by the popular opinion of the testator’s times.*

*This Article shares two ideas for reform. First, the doctrine of insane delusions should not be applied to devises that seek to advance beliefs, ideas, or viewpoints. There is just too great of a risk that judges and juries will strike down such devises when the testator’s viewpoints diverge from their own.*

*Second, the time may have come to admit that the law of wills is not as committed to the principle of testamentary freedom as it is often espoused to be. The literature is rife with examples of a latent norm of familial support. Currently, this norm is expressed when judges and juries manipulate flexible doctrines to distribute decedents’ estates to decedents’ family members against decedents’ stated preferences. Perhaps it is time for the law to expressly acknowledge that familial*

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*support is important in our society and reserve a share of every decedent's estate for distribution to the decedent's family. The second proposal set forth in this Article, "the forced intestate share," would compel distribution of a portion of each estate to the decedent's intestate takers. Adopting some version of this proposal may actually afford testators with greater testamentary freedom overall because, by expressly fulfilling the norm of familial support, it would reduce decision-makers' biased tendencies to invalidate devises to nonfamily members. Indeed, the counterintuitive solution to achieving greater actual testamentary freedom may be to remove testators' control over some share of their estates through a forced intestate share.*

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### INTRODUCTION

Even a first-day student of decedents' estates class knows that the law of wills in the United States is organized around the principle of freedom of disposition.<sup>1</sup> Subject to limited exceptions, the testator's wishes trump all else.<sup>2</sup> And it's not even close. Sure, *other countries* have systems that mandate familial support by decedents, but not us.<sup>3</sup> We're all about freedom here. Right?

Well, no. At least, not exactly. By and large, testamentary freedom is not about valuing personal choice. Rather, its purpose is to create an incentive for

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1. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014) (suggesting that a trusts and estates course can be organized around the principle of freedom of disposition to match the law's organization around the same principle in this area of the law).

2. See *infra* Section I.A.

3. See *infra* Section I.C.

individuals to accumulate and conserve wealth and discourage wastefulness.<sup>4</sup> Without testamentary freedom, we are told, individuals would be deterred from working and would recklessly spend through their assets.<sup>5</sup>

Creating incentives is all about appearances. Credibility, rather than the result, is the coin of the realm. Thus, if the goal is truly to create incentives to earn and save, then the organizing principle of the law of wills is not achieving the *result* of testamentary freedom. Rather, the organizing principle is creating the *appearance* of testamentary freedom. The appearance of freedom is both sufficient and necessary to achieve the goal of incentivizing behavior. Actual freedom is unnecessary.

Placing this subtle lens over the law of wills explains much about how the doctrine is actually applied. The *administration* of the law of wills is at odds with the professed *theoretical* exaltation of testamentary freedom of disposition. The disconnect between the theory and the administration creates a con game of sorts. It's a classic bait and switch. "Hey, you, come over here," beckons the theory. "Work and earn and save through your life." Why? "Because when you die, you control what happens to your estate." So, you buy into the system. You work and earn and save, and—ever importantly—you make a will. Then you die. And what happens next? Unless your preferences square with the prevailing societal norms regarding familial duty, the administration of the law of wills may do its damndest to undermine your preferred devise. Want to leave your estate to the Flat Earth Society? Sorry, but that type of devise just might be deemed the product of an insane delusion. After your demise, a judge or jury may well decide to invalidate the devise and distribute your estate to the natural objects of your bounty instead. By that point, you won't be around to cause a fuss.<sup>6</sup>

This Article builds upon previous research that has demonstrated that the current administration of the law of wills is much more likely to effectuate testamentary freedom when a testator's devises align with cultural norms, particularly with the norm of familial support and maintenance.<sup>7</sup> Judges and juries are simply less likely to carry out devises that depart from the mainstream. If a testator wishes to leave her estate to her spouse, her kids, or her siblings, a judge or a jury is more likely to carry that out—all in the name of furthering testamentary freedom. But if a testator tries to cut close relatives out of her estate plan or to distribute her estate in a way that strikes many people as unfair, the result is a much higher likelihood that the will or the devise will be found to be invalid.<sup>8</sup> Such is not a system of true testamentary freedom.

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4. See *infra* Section I.A.

5. See *infra* Section I.A.

6. Applying the familiar principle of "once bitten, twice shy," see, e.g., GREAT WHITE, ONCE BITTEN, TWICE SHY (Capitol Records 1989), the testator is necessarily deceased by the time she is bitten by the administration of the law of wills. Administration of a decedent's estate only occurs once. Thus, she lacks an opportunity to be shy of it in the future.

7. See *infra* Section III.A.

8. See *infra* Section III.A.

This Article focuses on abuses of the doctrine of insane delusions.<sup>9</sup> If a testator wishes to leave her estate to an organization that champions an unpopular message, she risks invalidation of the devise as an insane delusion. Such devises that sought to advance women or certain nonmainstream religions have been invalidated as delusional in the past.<sup>10</sup> In our increasingly divided society, there is little to stop a judge or jury from labeling all manner of beliefs delusional, be they religious, political, or social in nature.<sup>11</sup> Selecting which beliefs are “true” and “false” should not be the decision-maker’s role, particularly when set against the backdrop of testamentary freedom.

This Article proposes two potential reforms. First, it counsels courts to stop applying the doctrine of insane delusions to devises that seek to advance certain beliefs or viewpoints.<sup>12</sup> Second, it suggests that testamentary freedom may actually be advanced by taking away testators’ freedom of disposition over a portion of their estates.<sup>13</sup> If decision-makers are irreparably biased in favor of devises to close family members, then perhaps it is time that the law acknowledges the bias and satiates it. To that end, this Article proposes a “forced intestate share,” in which some portion (say, 20%) of a testator’s estate would automatically be distributed to the decedent’s surviving family members. By forcing the fulfillment of the decision-maker’s majoritarian preference for familial support, a system of forced partial intestacy would hopefully make the decision-maker more open to fairly assessing and carrying out a decedent’s counter-majoritarian devises. In other words, the forced intestate share is a tribute—a payment to fulfill the majoritarian sense of familial duty—that may actually have the result of increasing the testator’s actual freedom of disposition over the rest of her estate.

This Article proceeds in three parts. First, it provides some necessary background on testamentary freedom as the theoretical framework around which the law of estates is supposedly molded in the United States. In Part I, the Article identifies the traditional rationales for prioritizing freedom of disposition, notes where the law purposefully departs from this rationale, and explains how other countries do it differently. Then, Part II chronicles the doctrine of insane delusions, particularly how the doctrine is applied to devises that seek to advance specific beliefs. Lastly, Part III sets forth the two reforms described in the preceding paragraph.

### I. THE APPEARANCE OF TESTAMENTARY FREEDOM

The law governing decedents’ estates in the United States is obsessed with testamentary freedom. The emphasis is on the donor rather than the donee.<sup>14</sup> Indeed, a donee possesses no cognizable legal rights until after the donor’s demise.<sup>15</sup> This

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9. *See infra* Part II.  
10. *See infra* Section II.B.  
11. *See infra* Section II.B.  
12. *See infra* Section III.A.  
13. *See infra* Section III.B.  
14. Sitkoff, *supra* note 1, at 644.  
15. *Id.*

Part explores the law's fixation on testamentary freedom and the purposes that this freedom is meant to serve. It also identifies exceptions—areas in which a testator's freedom is limited. Finally, it examines systems of succession in other countries to highlight the uniqueness of the American fascination with freedom of disposition.

#### A. *The American Obsession with Testamentary Freedom*

The concept of testamentary freedom is foundational to the law of decedents' estates in the United States.<sup>16</sup> It is, after all, the “controlling consideration” and the “organizing principle” motivating policy decisions in this area of the law.<sup>17</sup> As the “first principle of the law of wills,” testamentary freedom is paramount.<sup>18</sup> Everything else is secondary. Students of decedents' estates learn it on day one,<sup>19</sup> and it recurs throughout the doctrine as an ever-ready explanation for almost every policy decision in this area of the law.<sup>20</sup>

Why testamentary freedom? Freedom of testation is often justified as a means to produce net-positive outcomes. In other words, it creates incentives for individuals to act in ways that, on the whole, benefit society at large.<sup>21</sup> Allowing individuals to select their post-death beneficiaries encourages them to work and earn and save so that they may pass along their wealth.<sup>22</sup> On the donee side, freedom of testation creates an incentive for would-be beneficiaries to care for soon-to-be

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16. See LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 19, 46 (2009) (“Freedom of testation is supposed to be the guiding principle of modern law. In essence, you can leave your money to anybody you choose to leave it to. . . . This is a fundamental principle of law. It is also, apparently, a fundamental social norm.”); Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 414 & n.5 (referring to testamentary freedom as “the bedrock principle in the modern law of succession” and listing supporting sources).

17. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 & cmt. a (AM. LAW INST. 2003).

18. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975). This proposition is so central that Professor Langbein did not even cite authority for it.

19. See Sitkoff, *supra* note 1, at 644 (noting that “the nature and function of freedom of disposition” is one of the topics that ought to be taught “at the outset of the Trusts and Estates course”).

20. Not all commentators agree that testamentary freedom should be so dominant. See, e.g., Jeffrey Evans Stake, *Biologically Biased Beneficence*, 48 ARIZ. ST. L.J. 1101, 1101 (2016) (identifying testamentary biases and concluding that “testamentary freedom should be demoted from the organizing principle to an important consideration in the design of the law of succession”).

21. See Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 291 (“[F]reedom of disposition promotes the maximization of societal wealth.”); Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2186 (2011) (“Whether or not we deem it a good per se, economic autonomy facilitates our obtaining other goods.”).

22. Glover, *supra* note 21, at 291; Hirsch, *supra* note 21, at 2187 (“Giving persons the right to make a will therefore encourages them to produce and save more wealth, again adding to the sum of capital stock.”).

decedents in the hope or anticipation of being remembered in the decedent's will—or at least not to ignore soon-to-be decedents in the hope of not getting disinherited.<sup>23</sup>

Aside from the beneficial incentives, testators are also viewed as having superior information regarding how wealth should be divided among family members.<sup>24</sup> Even if the government wished to pass wealth along family lines, it would necessarily have to paint with a broad brush.<sup>25</sup> An individual testator, on the other hand, knows much more about the intricacies of her family, including which potential beneficiaries are in the greatest need or could put a devise to the greatest use.<sup>26</sup> Additionally, testamentary freedom is also said to produce utility in the form of added happiness or gratification during the testator's lifetime.<sup>27</sup>

Finally, as further support for testamentary freedom, commentators have observed that lack of testamentary freedom would incentivize all manner of sub-optimal behavior. If individuals lacked control over the distribution of their estates, not only would they lack the incentive to amass sizable estates, but they would actually be incentivized to spend their wealth down to zero or to take back control by giving away their wealth through *inter vivos* transfers.<sup>28</sup> If this practice were not perfectly timed, the result would be the impoverishment of a large number of elderly individuals who gave their wealth away too hastily as lifetime gifts. Such an outcome would not be viewed positively by the society that would then take up

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23. Glover, *supra* note 21, at 291 (“The possibility of disinheritance incentivizes the provision of family caregiving, which in turn promotes overall social welfare.”); Hirsch, *supra* note 21, at 2187–88 (“Freedom of testation can simultaneously give rise to a virtual market for reciprocal altruistic transfers, beneficiaries providing social services that benefactors value in implicit exchange for a share of their estates.”).

24. Hirsch, *supra* note 21, at 2189 (“Assuming a family is tied together by bonds of affection, leaving estate plans to owners’ discretion exploits their knowledge (and hence their comparative advantage as contrasted with legislators or courts) to devise a plan that enhances the family’s welfare.”); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 (1992) (labeling this the “father knows best” hypothesis).

25. See Glover, *supra* note 21, at 290 (“Donors likely have a better understanding of how to distribute their wealth upon death in a way that maximizes the utility of donees rather than the policymakers who would direct the disposition of estates in the absence of freedom of disposition.”).

26. See *id.*

27. See *id.* (“Freedom of disposition could . . . be explained as promoting social welfare by providing a source of happiness and satisfaction to individual donors.”); Hirsch, *supra* note 21, at 2187 (“Although benefactors cannot share in a beneficiary’s utility from an inheritance at the time of its receipt, they can envision it, and derive present utility from its anticipation.”).

28. See Glover, *supra* note 21, at 288 (“Even if the law attempted to sever[e]ly limit the ability to dispose of property upon death, for example by eliminating disposition of property by will, people would find ways around these limitations, such as by transferring property during life or by other means designed to transfer property at death.”); Hirsch & Wang, *supra* note 24, at 11.

supporting them through tax-funded social benefits.<sup>29</sup> Thus, freedom of testation makes it more likely that individuals will hold onto their wealth long enough to support themselves through the ends of their lives.

In fostering testamentary freedom, the law of wills occasionally goes beyond simply effectuating a decedent's expressed intent. In certain situations, the law guesses at a testator's likely preferences and carries them out, particularly when a will—a “delayed-action document”—has grown stale in the wake of more recent developments.<sup>30</sup> In these matters, the law is guided by its best guesses at the likely preferences of the typical decedent. The law will intervene to alter the distribution of the testator's estate when it is deemed likely that the testator wished to update her estate plan but simply did not.<sup>31</sup> For example, a spouse or issue acquired by the testator *after* the execution of the testator's will is deemed “pretermitted.”<sup>32</sup> Unless the testator has indicated otherwise, a portion of the estate will be distributed to a pretermitted spouse or issue even though they were not mentioned in the testator's will.<sup>33</sup> In a similar vein, divorce revokes any devise made to a former spouse (and potentially to a former spouse's relatives), even when the testator takes no affirmative steps to revise the will after the divorce.<sup>34</sup> These types of alterations are thought to effectuate the results most in keeping with the typical testator's intent—in effect, the law presumes that the testator simply failed to keep her estate plan up to date with her preferences.<sup>35</sup>

#### ***B. Exceptions to Testamentary Freedom***

Of course, the law does not grant a testator unlimited freedom of distribution. There are some devises that simply will not be sustained, no matter how clearly communicated.<sup>36</sup> Devises that conflict with other strongly held public policies will not be upheld.<sup>37</sup> For example, the law will not give effect to conditions

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29. See, e.g., Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2013 (1994) (discussing the vilification of welfare recipients and the welfare system).

30. John V. Orth, *Second Thoughts in the Law of Property*, 10 GREEN BAG 2D 65, 71 (2006); see also Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIAMI BUS. L. REV. 31, 42–43 (2015).

31. See Bennardo, *supra* note 30, at 42.

32. *Id.* at 44. The construction of the term *issue* has prompted considerable debate. See Merrill I. Schnebly, *Testamentary Gifts to “Issue,”* 35 YALE L.J. 571, 571 (1926). However, it is generally understood to simply mean an individual's descendants. E.g., UNIF. PROBATE CODE § 1-201(24) (amended 2010).

33. UNIF. PROBATE CODE §§ 2-301(b) (spouses), 2-302 (issue) (amended 2010).

34. UNIF. PROBATE CODE § 2-804(b)(1) (amended 2010).

35. See, e.g., *Gier v. Deoneseus* (*In re Estate of Deoneseus*), 906 P.2d 922, 923 (Wash. 1995) (stating that the purpose of pretermitted-spouse provisions is “to prevent the unintentional disinheritance of the surviving spouse of a testator who marries after making a will and then dies without ever changing it”).

36. See Orth, *supra* note 30, at 73 (“[I]n some cases the testator's actual intention is known, not merely presumed, but crossed nonetheless.”).

37. See Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1326–32 (2011).

on devises that restrict marital freedom or encourage illegal behavior.<sup>38</sup> In almost every state, a testator is not permitted to leave her estate to her slayer.<sup>39</sup> While the general rule that a slayer may not inherit from her victim is partially grounded in the concept of testamentary freedom—the typical decedent likely would not want to leave her estate to her slayer but lacks the time and opportunity to update her will as she is being slayed—the law goes one step further and makes the rule a mandatory one unalterable by the decedent.<sup>40</sup> Thus, the law will not carry out a devise commanding the distribution of assets to a particular beneficiary “even if he kills me.”<sup>41</sup> This result, which runs contrary to testamentary freedom, is supported by the equitable doctrine that a wrongdoer may not profit from her wrong.<sup>42</sup>

A decedent’s surviving spouse is protected from total disinheritance.<sup>43</sup> Aside from the spouse, however, U.S. law does not expressly protect other family members. A testator is free to disinherit children, including minor children.<sup>44</sup> While this extreme level of testamentary freedom has been criticized, especially as applied to minor children—whom parents have a legal obligation to support while the parents are alive<sup>45</sup>—such freedom persists in the United States. The one exception is Louisiana where, under the civil law tradition, children may only be disinherited for just cause.<sup>46</sup> Elsewhere in this country, testamentary freedom gives way only to the spouse; all other relatives take only at the testator’s fancy.

### C. A Comparative Perspective from Abroad

Most other countries don’t do it this way. American law “embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.”<sup>47</sup> As Professor Melanie Leslie pointedly put it, “[t]he United States alone insists on paying lip service to the idea that testamentary freedom is preeminent.”<sup>48</sup> Other countries’ testamentary systems are not obsessed solely with elevating freedom of testation, but rather balance freedom of testation

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38. See *id.* (overviewing kinds of conditions placed on devises that have been held to be contrary to public policy).

39. UNIF. PROBATE CODE § 2-803(b) (amended 2010).

40. See Bennardo, *supra* note 30, at 37–38.

41. See *id.*

42. See *id.* at 38–39.

43. UNIF. PROBATE CODE § 2-202 (amended 2010). Protection of surviving spouses is described *infra* in Subsection III.B.2.

44. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 556 (9th ed. 2013).

45. See Stake, *supra* note 20, at 1117–18 (“For decades, American academics have argued to no avail that states should do more to protect children from disinheritance.”); see also Glover, *supra* note 16, at 442 (“The donor’s discretion to disinherit children stands in stark contrast with her legal obligation to support her minor children during life. . . . [B]y dying with an estate plan that omits her minor children, the donor can shift the cost of child support from herself to others.”).

46. LA. CIV. CODE ANN. art. 1621 (Westlaw through 2018 1st Extraordinary Sess.).

47. Sitkoff, *supra* note 1, at 643–44.

48. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 273 (1996).

against family-support obligations. In most Western countries, a significant portion of a decedent's estate will be distributed to the family of the decedent, even if that result runs counter to the distributive intent manifested in the decedent's will.<sup>49</sup> This is true of both common law and civil law countries.<sup>50</sup>

In common law countries, these rules generally take the form of family-maintenance statutes.<sup>51</sup> Such statutes do not reserve a specific portion of the decedent's estate for children, spouses, or other heirs, but rather grant discretion to the court to deviate from the terms of the will in order to make the distribution more equitable in support of eligible claimants.<sup>52</sup> For example, in England and Wales, a family member<sup>53</sup> who was financially supported by the decedent "may apply to the court for an order for 'reasonable financial provision' out of the deceased's estate if, by reason of the deceased's will or intestacy, they do not receive reasonable financial provision."<sup>54</sup> The court then has the authority to order that a portion of the estate be distributed to the applicant.<sup>55</sup>

On the other hand, civil law countries typically protect descendants from disinheritance through forced heirship (also known as forced succession).<sup>56</sup> For

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49. *Id.* at 270 ("Most other Western countries expressly acknowledge a strong public policy of restricting freedom of testation to protect dependents, family members and others who are viewed as having a claim on a decedent's assets."); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 117 n.111 (1994) ("Most of the civilized countries in the world provide direct protection from disinheritance to children of a testator.").

50. *See* Ray D. Madoff, *A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems*, 37 B.C. INT'L & COMP. L. REV. 333, 336 (2014) ("[M]ost of the common law countries other than the United States have modified their laws to provide greater protection for families by enacting family maintenance statutes."); Brashier, *supra* note 49, at 117 ("Forced heirship is a characteristic of the laws of succession in civil law countries . . .").

51. *See* RAY D. MADOFF, IMMORTALITY AND THE LAW 59 (2010); Leslie, *supra* note 48, at 270–73 (summarizing family-protection systems in England and Canada); Brashier, *supra* note 49, at 121–22 & n.128 (chronicling the history of family-maintenance statutes from New Zealand, England, Australia, and Canada); Stake, *supra* note 20, at 1116–17.

52. *See* MADOFF, *supra* note 51, at 59–60 (overviewing the English family-maintenance system); Brashier, *supra* note 49, at 124–25 (observing that the English family-maintenance statute "effectively permits a judge not only to alter the testamentary wishes of the decedent, but also to do so in a highly discretionary manner" with no "well-defined guidelines").

53. Or a person with whom the decedent had a family-like relationship. *See* John Wood, *England and Wales*, in INTERNATIONAL SUCCESSION 255, 260–61 (Louis Garb & John Wood, eds., 4th ed. 2015) (listing eligible relationships).

54. *Id.* at 261.

55. *Id.*

56. MADOFF, *supra* note 51, at 58–59; *see also* Brashier, *supra* note 49, at 117–21 (overviewing forced heirship in France and Louisiana); Ryan McLearn, Comment, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 EST. PLAN. & CMTY. PROP. L.J. 323, 326–28 (2011) (overviewing forced heirship in France, Germany, and Italy).

example, in France “[t]he legal right to an inheritance is one of the cornerstones” of the law of succession.<sup>57</sup> This focus on the beneficiary’s right to inherit stands in stark contrast to the American focus on the decedent’s right to bequeath. French law strikes a balance that places much more emphasis on the donee side of the equation. Under this system, the estate is divided among the “disposable share” and “compulsory shares.”<sup>58</sup> French decedents have freedom to direct the disposition only of the disposable shares of their estates.<sup>59</sup> Compulsory shares are generally reserved for the decedent’s direct descendants and can consume up to three-quarters of the estate.<sup>60</sup> Thus, a testator may control as little as one-quarter of the estate.

## II. INSANE DELUSIONS

Under the Uniform Probate Code, a “sound mind” is necessary to make a will.<sup>61</sup> Every state and territory has adopted a similar requirement.<sup>62</sup> The threshold

57. Frank Lipworth et al., *France*, in *INTERNATIONAL SUCCESSION* 275, 280 (Louis Garb & John Wood, eds., 4th ed. 2015).

58. *Id.* at 280–81.

59. *Id.* at 281.

60. *Id.* The compulsory share is one-half if the decedent has one child, two-thirds if the decedent has two children, and three-quarters if the decedent has three or more children. *Id.* A surviving spouse is only due a one-quarter compulsory share, and only if the decedent lacked any surviving descendants. *Id.* Subject to some exceptions, however, a surviving spouse is entitled to half of the couple’s community property. *Id.* at 283.

61. UNIF. PROBATE CODE § 2-501 (amended 2010) (“An individual 18 or more years of age who is of sound mind may make a will.”).

62. Of 55 domestic jurisdictions (including the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), 48 have adopted a “sound mind” as the required mental capacity. *See* ALA. CODE § 43-8-130 (1982); ALASKA STAT. § 13.12.501 (1996); ARIZ. REV. STAT. ANN. § 14-2501 (1994); ARK. CODE ANN. § 28-25-101 (1949); CAL. PROB. CODE § 6100(a) (2009); COLO. REV. STAT. § 15-11-501 (1994); CONN. GEN. STAT. § 45a-250 (1988); DEL. CODE ANN. tit. 12, § 201 (1995); D.C. CODE § 18-102 (1976); FLA. STAT. § 732.501 (2002); 15 GUAM CODE ANN. § 101(a) (1970); HAW. REV. STAT. § 560:2-501 (1996); IDAHO CODE § 15-2-501 (1971); 755 ILL. COMP. STAT. 5/4-1 (2016); IND. CODE § 29-1-5-1 (1953); IOWA CODE § 633.264 (2006); KAN. STAT. ANN. § 59-601 (1939); KY. REV. STAT. ANN. § 394.020 (West, Westlaw through certain laws effective July 14, 2018); ME. STAT. tit. 18-a, § 2-501 (1981); MASS. GEN. LAWS ch. 190B, § 2-501 (2008); MINN. STAT. § 524.2-501 (1975); MISS. CODE ANN. § 91-5-1 (1973); MO. REV. STAT. § 474.310 (1999); MONT. CODE ANN. § 72-2-521 (1993); NEB. REV. STAT. § 30-2326 (1974); NEV. REV. STAT. § 133.020 (1957); N.J. STAT. ANN. § 3B:3-1 (2005); N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (1966); N.C. GEN. STAT. § 31-1 (2012); N.D. CENT. CODE § 30.1-08-01 (1973); 8 N. MAR. I. CODE § 2301 (through PL 20-59), [http://cnmilaw.org/pdf/cmc\\_section/T8/2301.pdf](http://cnmilaw.org/pdf/cmc_section/T8/2301.pdf); OHIO REV. CODE ANN. § 2107.02 (2012); OKLA. STAT. tit. 84, § 41 (1992); OR. REV. STAT. ANN. § 122.225 (West, Westlaw through 2018 Reg. Sess. Emergency Legis.); 20 PA. CONS. STAT. § 2501 (1976); P.R. LAWS ANN. tit. 31, §§ 2111, 2112 (1930); S.C. CODE ANN. § 62-2-501 (2013); S.D. CODIFIED LAWS § 29A-2-501 (1995); TENN. CODE ANN. § 32-1-102 (1941); TEX. EST. CODE ANN. § 251.001 (2017); UTAH CODE ANN. § 75-2-501 (1998); VT. STAT. ANN. tit. 14 § 1 (2017); V.I. CODE ANN. tit. 15, § 7 (1957); VA. CODE ANN. § 64.2-401 (2012); WASH. REV. CODE § 11.12.010 (1970); W. VA. CODE § 41-1-2 (1957); WIS. STAT. ANN. § 853.01 (West, Westlaw through 2017 Act 367); WYO. STAT. ANN. § 2-6-101 (1980).

for general testamentary capacity is low, but it is skewed in favor of familial support. A testator will be deemed mentally incapable of drafting a valid will if she cannot recognize her property or her family members as the natural objects of her bounty.<sup>63</sup> These are the only mistaken beliefs that will automatically lead to the invalidation of an entire will. Even grossly mistaken beliefs regarding other aspects of the testator's world will not lead to a finding of lack of mental capacity.<sup>64</sup> In effect, the law assumes that a testator should want to leave assets to her family, and if she cannot recognize her family then the entire estate plan is invalid. But if the testator is mistaken about other topics that are presumably less important to estate planning, the plan is not necessarily invalidated. This is an example of a doctrine that reflects using familial support as the norm, rather than taking a truly neutral approach to testamentary freedom.

While mental incapacity will invalidate a testator's entire will, an insane delusion on a particular topic will only invalidate specific devises that were the product of the delusion.<sup>65</sup> The doctrine of insane delusions rarely appears directly in the statutory law but is instead developed through judicial decisions.<sup>66</sup> The

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Of the remaining seven states, two set the standard at a "sane mind." N.H. REV. STAT. ANN. § 551:1 (Westlaw through 2018 Reg. Sess.); 33 R.I. GEN. LAWS § 33-5-2 (1988). Maryland requires a testator to be "legally competent." MD. CODE ANN., EST. & TRUSTS § 4-101 (1974). New Mexico requires a testator to "hav[e] capacity." N.M. STAT. ANN. § 45-2A-3 (1991). Georgia disallows testation by those "laboring under some legal disability arising either from a want of capacity or a want of perfect liberty of action." GA. CODE ANN. § 53-4-10 (1996); *see also* GA. CODE ANN. § 53-4-11(a) (1996) (defining *testamentary capacity* as "a decided and rational desire as to the disposition of property"). The sole civil code state, Louisiana, requires that the testator "be able to comprehend generally the nature and consequences of the disposition that he is making." LA. CIV. CODE ANN. art 1477 (1991). Michigan has some of the most detailed statutory law in this area, enumerating four conditions for mental capacity in the testamentary context. MICH. COMP. LAWS § 700.2501 (2009); *see also* CAL. PROB. CODE § 6100.5 (1995) (enumerating circumstances that disqualify an individual from mental competence to make a will).

63. *See* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 330 (2017) ("The sound mind doctrine tests testators' abilities to recognize the people to whom, and the property with which, they might wish to bequeath. The doctrine is unconcerned with the loss of ability to recognize other things.").

64. *Id.* As stated by one court, mistaken beliefs on "racial, religious, economic, or medical questions" have no bearing on a testator's mental capacity to make a will "[s]o long . . . as the natural objects of one's bounty are not members of the race, or sect, against which the prejudice is directed." *Newman v. Dixon Bank & Tr. Co.*, 265 S.W. 456, 458 (Ky. Ct. App. 1924).

65. *See* DUKEMINIER & SITKOFF, *supra* note 44, at 274-75.

66. California is the rare state that includes the concept of insane delusions directly in its statutory code rather than as merely an interpretation of the general statutory "sound mind" necessary for testation. CAL. PROB. CODE § 6100.5(a)(2) (1995) (declaring an individual not mentally competent to make a will if "[t]he individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done").

commentary to the Restatement (Third) of Property provides the majority rule for insane delusions:

An insane delusion is a belief that is so against the evidence and reason that it must be the product of derangement. A belief resulting from a process of reasoning from existing facts is not an insane delusion, even though the reasoning is imperfect or the conclusion illogical. Mere eccentricity does not constitute an insane delusion.<sup>67</sup>

An insane delusion is different than a mere mistaken belief in that “[a] mistake is susceptible to correction if the testator is told the truth,” but an insane delusion is an erroneous belief “to which the testator adheres against all evidence and reason to the contrary.”<sup>68</sup> If an insane delusion is detected, the remedy is not to invalidate the entire will. Rather, the particular devise is invalid “to the extent that it was the product of an insane delusion.”<sup>69</sup> Thus, to invalidate a devise under the doctrine of insane delusions, the party contesting the will must show both that the testator suffered from an insane delusion and that the delusion caused the contested devise.<sup>70</sup>

#### *A. Devises Premised on Delusions Regarding Familial Relationships*

Typically, an insane delusion involves a false belief about a member of a person’s family.<sup>71</sup> A testator might be delusionally committed to the belief that his

67. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (AM. LAW INST. 2003).

68. DUKEMINIER & SITKOFF, *supra* note 44, at 275. In the majority of jurisdictions, a run-of-the-mill testator’s mistake will not be corrected, although both the Restatement and Uniform Probate Code permit reformation if there is clear and convincing evidence that the terms of the will run counter to the testator’s intent. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003); UNIF. PROBATE CODE § 2-805 (amended 2010); Hirsch, *supra* note 63, at 315–18 (discussing various jurisdictions’ approaches to mistakes in wills).

69. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (AM. LAW INST. 2003).

70. *E.g.*, DUKEMINIER & SITKOFF, *supra* note 44, at 275. To borrow one court’s colorful illustration:

It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established, in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act.

Hartung v. Homes (*In re Chevallier’s Estate*), 113 P. 130, 133 (Cal. 1911).

71. DUKEMINIER & SITKOFF, *supra* note 44, at 275; *see, e.g.*, *In re Dankbar*, 430 N.W.2d 124, 130 (Iowa 1988) (testator held a “fixed, false belief that her father was an alcoholic who emotionally abused her as a child and ultimately ruined her life”).

or her spouse was unfaithful.<sup>72</sup> Or to the belief that he did not father his children.<sup>73</sup> Or to the belief that her heir or caretaker was attempting to poison or otherwise harm her.<sup>74</sup> Thus, the testator might seek to disinherit a child or spouse based on such delusions. Such beliefs—about relations within particular families—do not interest society at large.

A primary concern behind these cases is that the testator has selected *among* the natural objects of her bounty based on a false belief that is the product of mental illness. The results can lead to patently inequitable distributions—prioritizing certain close relatives over others for reasons not grounded in reality. The unfairness may be especially acute when the snubbed family member provided care to the decedent.<sup>75</sup> Although these fact patterns occupy the heartland of insane delusion cases, they are not this Article’s focus. Rather, this Article focuses on the disquieting hinterland of insane-delusion jurisprudence.

### **B. Devises Seeking to Advance “Peculiar” Beliefs**

In an unsettling body of case law, courts have applied the doctrine of insane delusions to testators’ attempts to advance beliefs or sets of beliefs. These beliefs are not of the intra-family-drama variety, for which society has no prevalent viewpoint.<sup>76</sup> Rather, the beliefs that get called into question as delusional are beliefs that run counter to prevailing views of the time.

The textbook example (literally taken from the leading textbook) of labeling a counter-majoritarian belief as an “insane delusion” is *In re Strittmater’s Estate*, a 1947 decision of the Court of Errors and Appeals of New Jersey (the predecessor to the current state supreme court).<sup>77</sup> The will of Louisa Strittmater left her estate to the National Woman’s Party.<sup>78</sup> Her only living relatives were some

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72. See Joshua Tate, *Personal Reality: Delusion in Law and Science*, 49 CONN. L. REV. 891, 906–10 (2017) (summarizing cases); Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 88–89, 95 (2007) (summarizing cases).

73. See Tate, *supra* note 72, at 906–09 (summarizing cases).

74. See *id.* at 922–23 (describing *M.I. Marshall & Isley Tr. Co. of Ariz. v. McCannon (In re Killen)*, 937 P.2d 1368 (Ariz. Ct. App. 1996)); Fogel, *supra* note 72, at 102–03 (same).

75. For instance, in *Killen*, the testator suffered from delusions that three of her four nieces and nephews were attempting to harm her by sprinkling parasites and chemicals on her from above. 937 P.2d at 1370. The record reflected that those same nieces and nephews actually cared for the testator. *Id.* In her will, the testator left the majority of her estate to the nephew about whom she had no delusions and a dollar apiece to the other three. *Id.* at 1369. The appellate court affirmed the invalidation of the will because the testator’s “insane delusions focused on natural objects of her bounty and thus materially affected her disposition of her property.” *Id.* at 1374.

76. Society lacks an opinion on whether Uncle Henry was faithful to Aunt Sally or whether Billy was actually fathered by the mailman.

77. *In re Strittmater’s Estate*, 53 A.2d 205 (N.J. 1947), reproduced in part in DUKEMINIER & SITKOFF, *supra* note 44, at 275–77.

78. *Strittmater’s Estate*, 53 A.2d at 205.

cousins whom she rarely saw.<sup>79</sup> The trial court set aside the devise as an insane delusion, finding that it was the product of an “insane hatred” of men.<sup>80</sup> According to the court, Strittmater suffered from “feminism to a neurotic extreme” and harbored a “morbid aversion to men” that included “look[ing] forward to the day when women would bear children without the aid of men, and all males would be put to death at birth.”<sup>81</sup> The high court of New Jersey affirmed the finding that the devise was the product of an insane delusion, and thus the estate was distributed to Strittmater’s cousins instead.<sup>82</sup>

To summarize: Strittmater was a woman in a legal era dominated by men. Her “delusion” was simply that she did not like men very much, and that belief caused her to leave her estate to an organization devoted to advancing women. This action does not seem particularly objectionable, especially when viewed through the lens of using the law of wills to effectuate the decedent’s intent. Instead, Strittmater’s devise was likely invalidated because it offended the decision-makers who evaluated it after her death.<sup>83</sup> This type of bias furthers societal norms rather than testamentary freedom.

Another troublesome area is religion, especially when the testator’s religious beliefs diverge from the mainstream faiths. The doctrine of insane delusions is a hazard to fringe religious beliefs, even (or especially) when they are truly and dearly held. This result is especially troubling given the common mantra that religious beliefs are irrelevant as evidence of mental capacity to make a will.<sup>84</sup>

It is generally quite easy for a court to find that religious beliefs do not bear on mental capacity when the will is not influenced by those beliefs.<sup>85</sup> After all, a

79. *Id.*

80. *Id.* at 205–06.

81. *Id.* at 205.

82. *Id.* at 206.

83. For those bothered by the court’s ill treatment of the *Strittmater* testator’s dim view of men, a somewhat satisfying corollary may be found in *Joslyn v. Sedam*, 7 Ohio Dec. Reprint 350 (Ohio Dist. Ct. 1877). The *Joslyn* testator harbored a delusion that all women were prostitutes and could support themselves “out of the wages of sin.” *Id.* at 353. As a result, he left a disproportionately large amount of his estate to his son rather than his two daughters who, like all women, he believed to be prostitutes. *Id.* The will was set aside based on a finding that the testator was laboring under both mental incapacity and the undue influence of his son. As a result, the three children inherited the estate in equal shares. *Id.* at 350–51.

84. *See, e.g.,* *Belz v. Piepenbrink*, 149 N.E. 483, 485 (Ill. 1925) (“The belief of a person upon religious or political questions cannot be made a test of his sanity.”); *Nalty’s Adm’r v. Franzman’s Ex’r*, 299 S.W. 585, 585 (Ky. Ct. App. 1927) (“A belief in the doctrines of Mohammed, Confucius, Zoroaster, or any other doctrine or religion, may not be offered as evidence on the question of testamentary capacity.”). *But see* *Davis’ Ex’r v. Laughlin*, 133 S.W.2d 544, 546 (Ky. Ct. App. 1939) (stating that evidence that testator had embraced Catholicism in the final months of her life after a lifetime of great antipathy toward Catholics was competent evidence of lack of mental capacity to make a will).

85. *See, e.g.,* *Buchanan v. Pierie*, 54 A. 583, 585 (Pa. 1903) (“[W]hile the testator held firmly to the conviction that he could, through mediums, communicate with the spirits of the departed, and particularly with the spirit of his dead son, yet it does not appear that he

devise must be the *product* of an insane delusion for the doctrine to invalidate it.<sup>86</sup> But when particular devises are premised on religious beliefs, testators risk offending the decision-makers' sensibilities and prompting the invalidation of the religiously motivated devise.

An insane delusion must, by definition, be an erroneous belief. Thus, the soundest approach for courts to take when considering religious beliefs is simply to confess that "[t]he truth or falsity of a religious belief is beyond the scope of a judicial inquiry."<sup>87</sup> There is, quite literally, "no test (known to men) by which it can be tried and its truth or falsity demonstrated."<sup>88</sup>

Other courts are not so open-minded about religious beliefs. A devise premised on a nonmainstream religious belief can lead to its invalidation.<sup>89</sup>

believed or ever admitted that he was influenced in any way by the spirits in the preparation of his will."); *In re Randall*, 59 A. 552, 553 (Me. 1904) ("Some persons believe they have communications from and interviews with the spirits of deceased persons. This may be a delusion, and is so regarded by many; but, unless such supposed communications control the disposition of property, the believer in them is not thereby rendered incompetent to make a valid will.").

86. See *supra* note 70 and accompanying text.

87. *In re Brush's Will*, 72 N.Y.S. 421, 425 (N.Y. Surr. Ct. 1901) (finding that a testator's devise of the bulk of her estate to a Christian Science church was not the product of an insane delusion); see also *Scott v. Scott*, 72 N.E. 708, 710 (Ill. 1904) (overturning jury's invalidation of a will that contained devises designed to advance the writings of Emanuel Swedenborg: "[A] belief in Swedenborgianism, and enthusiasm manifested in propagating that faith, furnish no evidence of monomania, insane delusion, or insanity.").

88. *In re Elston's Estate*, 262 P.2d 148, 150 (Okla. 1953) ("[N]o creed or religious belief, in so far as it pertains to an existence after death, can be regarded as a delusion . . ."). As the Supreme Court of Tennessee put it:

We can comprehend the delusion of the man who fancied he was Jesus Christ, and kindly extended his forgiveness when asked, saying, I am the Christ; also his, who imagined he corresponded with a princess in cherry juice, who dreamed dreams, and heard voices directing him to burn York Minster church. But we can not comprehend a delusion upon a point of belief as to the nature of future rewards and punishments [in the afterlife], and the principles of justice upon which they will be distributed. This is a subject beyond the ken of mortal man, and in one sense of the word, perhaps, every individual is laboring under a delusion who attempts to solve it. Yet there is no subject we are more disposed to theorize about, and about which there is no greater conflict of opinion. The fool hath said in his heart there is no God; and of course no future rewards and punishments [in the afterlife]; a dreadful error, yet no one apprehends that it amounts to insanity, and that he has not a disposing mind [sufficient to make a will]. The Turk looks to his heaven of sensual enjoyment, the Christian to his intellectual points of faith, differing as widely as the sources of their religion. *Delusion in its legal sense can not be predicated of either, and indeed of no creed upon the subject, because there is no test by which it can be tried.*

*Gass' Heirs v. Gass' Ex'rs*, 22 Tenn. (3 Hum.) 278, 284 (1842) (emphasis added).

89. As one court stated:

Believers in Spiritualism—communications with the dead—once faced particular hostility from the decision-makers. Devises have been invalidated for establishing Spiritualist churches and libraries,<sup>90</sup> for founding a home for poor and aged mediums,<sup>91</sup> and for the benefit of “spiritualist work” by the National Spiritualists’ Association of the United States.<sup>92</sup> Courts have gone as far as to say that any will that is the product of a belief in Spiritualism is invalid.<sup>93</sup>

The Supreme Court of Washington offered its views on devises based on “peculiar” religious beliefs in the case of *Ingersoll v. Gourley*:

[W]hile testamentary capacity is not to be measured by religious belief or opinions, yet if these opinions are of a nature which produces a will which is wholly the result of them, in other words, if the will in question would not have been made if the testator had not entertained some peculiar religious belief, his testamentary capacity may well be doubted.<sup>94</sup>

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A man may be insane about his religion, as well as about any other subject. If he believes and practices things in connection with a religion which he accepts and to which a substantial number of people adhere, which things are contrary to the experiences of normal human life, and contrary to the practices and beliefs of such religion, such beliefs and practice may be shown as proof of mental incapacity. Insane delusions may, and do, exist about religion, and it would be unsound to hold that, if a man was mentally unbalanced about his religion, such mental state, and his acts, words, and conduct flowing therefrom, might not be proven as evidence on the question of his testamentary capacity. There is a clear distinction between a religious belief and insane delusions.

Nalty’s Adm’r v. Franzman’s Ex’r, 299 S.W. 585, 585–86 (Ky. Ct. App. 1927).

90. Owen v. Crumbaugh, 81 N.E. 1044, 1055–56 (Ill. 1907) (reversing jury’s finding that testator lacked testamentary capacity where will devised bulk of estate to establish a Spiritualist church and library).

91. O’Dell v. Goff, 112 N.W. 736, 738 (Mich. 1907) (finding that evidence supported jury’s finding that testator’s “mind dwelt upon the subject of Spiritualism so persistently and profoundly as to make him incapable of reasoning” and thus either lacking in mental capacity to make a will or subject to undue influence from spiritualistic communications, where testator devised bulk of estate for the purpose of founding, building, and equipping a home for poor and aged spiritual mediums).

92. Irwin v. Lattin, 135 N.W. 759, 763 (S.D. 1912) (affirming trial court’s denial of probate based on a finding that “testatrix was possessed of the belief that she had frequent and continual communication with departed spirits . . . and that she had been directed by said spirits to give and bequeath all her property to the Spiritualists’ Association”).

93. *In re Rohe’s Will*, 50 N.Y.S. 392, 395 (Sur. Ct. 1898) (“The will of one who believes in Spiritism is not on that account void, nor is it evidence of mental unsoundness. It must be shown, in order to avoid a will on that account, that it was the offspring of such belief.”); *see also* Compton v. Smith, 150 S.W.2d 657, 660 (Ky. Ct. App. 1941) (“[I]t is likewise true that a normal belief in spiritualism is not evidence of insanity, unless such belief is possessed to the extent that it destroys the will power and overcomes it or indulged in to such an extent as to indicate insane delusions.” (internal citation omitted)).

94. *Ingersoll v. Gourley*, 139 P. 207, 209 (Wash. 1914).

The *Ingersoll* testator bequeathed half of his estate to Thomas Gourley to be held “in trust for the benefit and use of widows, orphans, and deserving poor.”<sup>95</sup> Gourley was the founder of a religious sect known as the Saints of the Lord, which was “peculiar” in the eyes of the court.<sup>96</sup> As a result, the court invalidated the devise, finding that the testator was “the victim of a morbid and insane delusion as to the power, and mission of Gourley, believing him to be possessed of superhuman attributes and powers and charged with a mission beyond that committed to ordinary men . . . .”<sup>97</sup> In doing so, the court implicitly ruled that the testator’s religious belief was erroneous. Such treatment appears to be reserved only for religious beliefs that are deemed to be “peculiar.”

### III. TWO IDEAS FOR REFORM

Our society professes to prize testamentary freedom, but our courts rankle at actually carrying out this freedom when faced with bequests that run counter to societal preferences. This Part lays out two proposed reforms, the first of which focuses on the threat of applying the doctrine of insane delusions to devises that seek to advance unpopular viewpoints. The proposed reform is simply to shrink the doctrine and refrain from applying it to this category of devises.

The second proposal addresses the greater challenge of aligning estate administration generally with the latent societal preference that decedents pass wealth to their families. Currently, this norm rears its head on an ad hoc basis when courts and juries manipulate flexible doctrines to invalidate devises with which they disagree. The second proposal suggests that it may be more straightforward to simply recognize expressly that inheritance by family is an important societal norm and require that decedents leave some share of their estates to family members. Doing so would pay tribute to the norm of familial support and potentially make judges and juries less likely to invalidate devises to nonfamily members. Although testators would be denied freedom over a portion of their estates, that restriction may actually result in greater overall testamentary freedom in the form of less meddling by judges and juries. These proposals are not mutually exclusive—courts could implement the former, and legislatures could implement the latter.

#### ***A. Refrain from Applying Insane Delusions to Devises that Seek to Advance Beliefs***

The doctrine of insane delusions simply should not be applied to devises that seek to advance particular beliefs. These devises are distinct from the mine-run insane-delusion cases in which testators suffer from delusions that affect their relationships with the natural objects of their bounties. Moreover, the threat of judges and juries importing their own subjective viewpoints and cultural norms is especially acute when testators seek to advance a fringe belief.<sup>98</sup>

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95. *Id.* at 208.

96. *Id.* Among other tenets, the Saints of the Lord apparently believed that Gourley could work miracles and was a steward sent by God to distribute his followers’ property to the poor. *Id.*

97. *Id.* at 209.

98. *See supra* Section II.B.

A court should not place itself in the role of arbiter of truths, particularly when the disputed issue is one of belief. What one person regards as a “truth” another may consider an opinion or belief. There are many deeply held beliefs that are not uniformly held by all members of society. Whether these beliefs constitute truths or delusions should not be the province of courts. Many would think that denial of climate change or evolution is delusional given the scientific evidence to the contrary. Or that subscription to particular political or economic theories is delusional. But should a devise to an organization that champions these beliefs be invalidated as an insane delusion? If so, then testators only possess testamentary freedom to the extent that their views are noncontrarian.

As a hypothetical, take the professed beliefs of Kyrie Irving, an all-star in the National Basketball Association.<sup>99</sup> He believes—or at least has professed to believe—that the Earth is flat.<sup>100</sup> Assume for sake of this hypothetical that it is a deeply held belief that he clings to beyond all evidence to the contrary, and it causes him to devise a portion of his estate to the Flat Earth Society.<sup>101</sup> Should that devise be invalidated as the product of an insane delusion?<sup>102</sup> If he did the same thing in the year 1491, the answer would assuredly be no, as a flat Earth was the prevailing

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99. Irving, who was educated at Duke University, is a member of the Boston Celtics. As a member of the Cleveland Cavaliers, he scored the winning shot in game seven of the 2016 NBA Finals. See BRIAN WINDHORST & DAVE McMENAMIN, RETURN OF THE KING: LEBRON JAMES, THE CLEVELAND CAVALIERS AND THE GREATEST COMEBACK IN NBA HISTORY 237–38 (2017).

100. Irving first publicly espoused this belief during a podcast interview with his former teammates, Richard Jefferson and Channing Frye. *Road Trippin' with RJ & Channing: Episode 7: Kyrie Irving – DEEP in thought 30,000 Feet High Above*, YOUTUBE (Feb. 17, 2017) at 15:43, <https://www.youtube.com/watch?v=mzjL9JxSFAk>. There has been some speculation that Irving’s statements were meant to be a commentary on the media or a call for people to challenge deeply ingrained beliefs rather than a reflection of his actual beliefs on the Earth’s lack of roundness. See, e.g., NBA Commissioner Adam Silver Has Fun with Kyrie Irving’s Flat-Earth Comments at All-Star Press Conference (Feb. 18, 2017), available at <http://www.nba.com/article/2017/02/18/commissioner-adam-silver-all-star-press-conference> (quoting NBA Commissioner Adam Silver as saying that Irving “was trying to be provocative and I think it was effective”). It has been reported that Irving’s statements contributed to a recent wave of flat-Earth believers among U.S. middle-school students. See Avi Wolfman-Arent, *The Ongoing Battle Between Science Teachers and Fake News*, NPR (July 28, 2017, 6:06 AM), <http://www.npr.org/sections/ed/2017/07/28/537907951/the-ongoing-battle-between-science-teachers-and-fake-news>; Matt Bonesteel, *Kyrie Irving’s Flat-Earth Beliefs Now the Bane of Middle-School Teachers*, WASH. POST (July 28, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/07/28/kyrie-irvings-flat-earth-beliefs-now-the-bane-of-middle-school-teachers>.

101. See generally THE FLAT EARTH SOCIETY, <https://www.tfes.org/> (last visited Aug. 2, 2017); see also Press Release, The Flat Earth Society, The Flat Earth Society Officially Reopens to New Members (Oct. 30, 2009), [http://www.theflatearthsociety.org/library/pressreleases/flat\\_earth\\_society\\_press\\_release.pdf](http://www.theflatearthsociety.org/library/pressreleases/flat_earth_society_press_release.pdf).

102. This is a pure hypothetical. The Author has no knowledge of Irving’s intended estate plan.

belief at the time. But today, the prevailing belief in society is that the Earth is not flat, and the outcome could very well be the invalidation of the devise.

Some people follow the *Harry Potter* books as religious texts.<sup>103</sup> Others find religious guidance in the Bible. Qualitatively, there is little to separate the two as religious texts: both books describe events that are fantastical, given the daily experiences of millions of humans. The only meaningful difference is the number of followers. It is not hard to imagine, however, that a court or jury would be much quicker to deem a literal belief in Harry Potter's struggles with Voldemort to be an insane delusion than it would be to deem a literal belief in Noah's experiences with the flood. This outcome—labeling a belief in Hermione Granger as delusional but a belief in a wooden ship full of animals as beyond the reach of judicial inquiry—is not based on anything other than majoritarian preferences and biases against “peculiar” beliefs.<sup>104</sup>

Hostility toward “peculiar” beliefs has been well documented in other areas of estate administration. Indeed, biases are bound to emerge whenever judgment is involved.<sup>105</sup> Decision-makers are constantly tempted to review the equity of a testator's distributions and reform them to align with the decision-maker's own notions of fairness and appropriate behavior.<sup>106</sup> This temptation may reflect the belief that the often-elderly individuals who make wills lack sound judgment<sup>107</sup> or

103. HARRY POTTER AND THE SACRED TEXT, <http://www.harrypottersacredtext.com/> (last visited Aug. 3, 2017); see also Cristela Guerra, *Could 'Harry Potter' Give Rise to a New Religion?*, BOS. GLOBE (Sept. 22, 2016), <https://www.bostonglobe.com/lifestyle/2016/09/22/could-harry-potter-give-rise-new-religion/WIAWQ431SNS2E8KFNI0aiP/story.html>.

104. The same could be said for the followers of Jediism, a faith grounded in the *Star Wars* franchise. See, e.g., Tim Donnelly, *Thousands of people have converted to the Jedi faith*, N.Y. POST (Dec. 14, 2015), <https://nypost.com/2015/12/14/the-jedi-faith-is-very-real-and-its-surging-in-popularity/>; Tom de Castella, *Have Jedi Created a New 'Religion'?*, BBC NEWS MAG. (Oct. 25, 2014), <http://www.bbc.com/news/magazine-29753530>.

105. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 696 (8th ed. 2011) (“There is no doubt a paternalistic streak in decisions by courts to disregard the terms in a will.”); Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1043 (1987) (“[I]f values are truly individual, empathy is problematic: the best faith attempts to understand another person may fail—indeed, they are probably doomed to fail. In such instances, we are left to impose our wishes and values on the testator instead of effectuating the testator's own desires.”).

106. See Sitkoff, *supra* note 1, at 649 (“Judges and juries may be tempted to find undue influence or incapacity if the testator's dispositions seem unfair or unnatural.”). Note that a different set of considerations is at play when a group's mission is itself illegal. In that situation, the invalidity of the bequest stems not just from a philosophical disagreement between the testator and the decision-maker, but from an actual tension between the stated policy objective of the group and the stated policy of the government as expressed in the criminal law. See *McCorkill v. McCorkill Estate*, 2014 N.B.R. 2d 148 (N.B. Ct. of Queen's Bench 2014) (voiding a devise to a neo-Nazi group because the documented objectives and activities of the group were illegal and violative of public policy).

107. See POSNER, *supra* note 105, at 696 (noting that “a person's will is often made while he is quite elderly [when] his judgment may not be as sound as it was when he was younger”).

simply a recognition that the testator is no longer around to make a fuss. In the words of the Supreme Court of Illinois, “It is a constantly recurring source of error in will cases that there is a strong inclination in courts, and especially in juries, to do by their judgments or verdicts what they would have advised, had the testator consulted them beforehand.”<sup>108</sup>

Thus, there is at least a serious tension—and at most an all-out conflict—between the theoretical underpinning of testamentary freedom and the practical administration of decision-makers bending pliable doctrines to effectuate their own preferred outcomes at the expense of the testator’s expressed preferences. Certain doctrines *profess* to facilitate testamentary freedom, but *in operation*, they can be used to frustrate it. In particular, the doctrines of undue influence, testamentary incapacity, and fraud have been identified as prone to abuse.<sup>109</sup> Undue influence, in particular, has been singled out as a particularly effective tool for assisting decision-makers in reforming decedents’ estate plans.<sup>110</sup>

Commentators have forcefully noted that such abuse is generally reserved for devises that break from social norms.<sup>111</sup> This poses a challenge to the entire premise of testamentary freedom: if testators are only “free” to arrange their estate plans in ways that conform to societal norms, then testators lack actual freedom. They only possess the appearance of freedom. But because most testators devise their estate plans in ways that align with societal norms, the lack of true freedom goes unrecognized.

The true test of freedom, of course, occurs when its possessor attempts to exercise it by going against the grain.<sup>112</sup> Testators who attempt to disregard their families and distribute their estates to nonfamily members risk invalidation, especially when the testators’ relationships with the recipients run counter to societal

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108. Owen v. Crumbaugh, 81 N.E. 1044, 1055 (Ill. 1907). Similarly, another court reversed a jury’s determination in a will contest:

The verdict in this case can not be accounted for on any theory other than prejudice of the jury. The modern tendencies of juries in will contests is to be governed by their own notions as to what the will should be, and how the testator, according to their individual notions, should have disposed of his property. . . . The only theory upon which the verdict can be accounted for was the bias and prejudice of the jury.

Bd. of Foreign Missions of Presbyterian Church v. Bevan, 24 Ohio C.D. 318, 326 (Ct. App. 1913) (jury had invalidated testator’s will where it devised a portion of his estate to the Board of Foreign Missions of the Presbyterian Church rather than to his wife and son).

109. See *infra* note 120 and accompanying text.

110. See *infra* note 137 and accompanying text.

111. See *infra* notes 116–17 and accompanying text.

112. See Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245, 249 (2010) (“The principle of testamentary freedom is not necessary to protect conventional bequests that conform to general experience; rather, it exists to carry out devises that fail to conform to social norms yet reflect the testator’s will.”).

norms.<sup>113</sup> For example, certain decision-makers have shown discomfort with devises to same-sex partners or much-younger companions.<sup>114</sup>

Numerous doctrines that govern testation are flexible by design to accommodate the wide range of potential factual scenarios that may arise.<sup>115</sup> Flexible doctrines, however, are prone to manipulation.<sup>116</sup> When distributing testators' estates, judges and juries are more likely to validate a will or a devise if it conforms with societal norms and expectations regarding distributing assets to close family members.<sup>117</sup>

In her seminal work, *The Myth of Testamentary Freedom*, Professor Melanie Leslie concluded that “testamentary freedom exists for the vast majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes—but often not for those who hold non-conforming values.”<sup>118</sup> Later works have built upon Leslie's observations and contributed further evidence that majoritarian preferences often dictate testamentary outcomes at the expense of the testator's expressed preferences.<sup>119</sup> In sum, a devise to a nonfamily member is more likely to be invalidated as the product of undue influence, testamentary incapacity, or fraud than a similar devise to a family member.<sup>120</sup>

113. Irene D. Johnson, *There's a Will, But No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 108–09 (2011) (“Courts and juries seem loathe to uphold plans that do not dispose of the leftover property to ‘the natural objects of the testator's bounty’—the testator's closest family members.”).

114. See Spivack, *supra* note 112, at 276–86 (summarizing cases that betrayed the decision-maker's ideological disapproval of the testator's relationships); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 592–600 (1997) (chronicling the case of Weiss v. Kaufmann (*In re Kaufmann's Will*), 247 N.Y.S.2d 664 (App. Div. 1964), *aff'd* 205 N.E.2d 864 (N.Y. 1965)).

115. See Spivack, *supra* note 112, at 264.

116. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 283 (1999) (labeling the doctrines of mental capacity and undue influence “sufficiently nebulous that they allow the fact-finder to rewrite the testator's estate plan in accordance with societal norms”).

117. *Id.* at 282 (“The ‘abhorrent’ testator who disinherits her legal spouse or close blood relations in favor of, for example, a non-mainstream religion, a radical political organization, or a same-sex romantic partner is especially at risk of having her estate plan discarded.”).

118. Leslie, *supra* note 48, at 237.

119. See Madoff, *supra* note 114; Spitko, *supra* note 116.

120. See Leslie, *supra* note 48, at 236–37 (“[C]ourts faced with an offensive will often use other doctrines ostensibly designed to ascertain whether the testator formulated testamentary intent—doctrines such as capacity, undue influence and fraud—to frustrate the testator's intent and distribute estate assets to family members.”); Leslie, *supra* note 48, at 243–58 (exposing how the doctrine of undue influence is manipulated to promote family protection and “just results” in the eyes of the decision-maker); Spitko, *supra* note 116, at 280 (“[A]ll things being equal, a testamentary disposition favoring family is more likely to survive a capacity, undue influence or fraud challenge than is a disposition favoring non-family.”); Johnson, *supra* note 113, at 106 (“[T]estamentary plans that conform to social norms, such as

Likewise, an instrument is more likely to be found noncompliant with the requisite formalities for making a valid will when it contains bequests that deviate from societal norms.<sup>121</sup>

Invalidating these devises—or the wills that contain them—often results in a family member being substituted as the beneficiary. After devises of specific property in a will are carried out, a residuary devise conveys the remainder of the testator’s estate.<sup>122</sup> Thus, if a particular devise fails, the property falls into the residue and is distributed to the beneficiary of the residuary devise.<sup>123</sup> That beneficiary is often a close family member.<sup>124</sup> If there is no residuary devise, or if the residuary devise or the entire will is invalidated, the affected property falls into intestacy and is practically guaranteed to be distributed to a family member.<sup>125</sup> In one example, a will that sought to devise the estate in equal parts to three religious organizations was invalidated for lack of mental capacity because the testator was found to suffer from delusions that “manifested themselves chiefly as religious fanaticism.”<sup>126</sup> The result was that the estate was distributed, instead, to the decedent’s heirs-in-law.<sup>127</sup>

Given decision-makers’ demonstrated preference for inheritance by family members, Professor Irene Johnson called freedom of testation “a thing of smoke and mirrors, lulling testators into a false sense of security about their testamentary plans”<sup>128</sup> and observed that “[o]ne begins to wonder why [an individual] should write a will at all” given that the results often feel preordained.<sup>129</sup> All too often it seems that the decision-maker will find one way or another to arrive at the same destination—distributing the decedent’s estate to the family.

The doctrine of insane delusions simply provides judges and juries with another tool to impose their own views on testamentary outcomes, and this menace is particularly grave when it comes to devises that seek to advance peculiar beliefs.

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providing for members of the decedent’s family, are likely to be upheld; while wills that seek to dispose of property in a less conventional manner are often defeated on various grounds. . . .”).

121. See Leslie, *supra* note 48, at 258–68. In general, a will must be in writing, signed by the testator, and either witnessed by at least two individuals or acknowledged by the testator before a notary public. UNIF. PROBATE CODE § 2-502(a) (amended 2010). *But see id.* § 2-502(b) (permitting unwitnessed, holographic wills that are written in the hand of the testator).

122. See DUKEMINIER & SITKOFF, *supra* note 44, at 374 (providing the following example of a residuary devise: “a devise to A of ‘all of the rest, residue, and remainder of my property and estate’”).

123. See *id.* at 351; UNIF. PROBATE CODE § 2-604(a) (amended 2010).

124. See MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 83-120 (1970) (reporting results of empirical study in which testators overwhelmingly left devises to family members); see also DUKEMINIER & SITKOFF, *supra* note 44, at 65.

125. See DUKEMINIER & SITKOFF, *supra* note 44, at 351–52. Intestacy is described *infra* in Subsection III.B.1.

126. *Hankins v. Mabee (In re Murray’s Estate)*, 144 P.2d 1016, 1022 (Or. 1944).

127. *Id.* at 1017, 1023.

128. Johnson, *supra* note 113, at 106.

129. *Id.* at 109.

Decision-makers often have their own opinions and beliefs on these same topics, and the law should not tempt them with the opportunity to prioritize their own beliefs over those of the testator. If freedom of testation is the organizing principle, it should be a principle that is borne out in how estates are actually administrated on a daily basis.

Society at large (or testators' families) may deem it "wasteful" for testators to spend their estates on advancing viewpoints that are believed to be wrongheaded.<sup>130</sup> However, there are meaningful differences between spending money to advance the theory that the Earth is flat and flushing the money down the toilet. Assets that are burned, buried, or drowned no longer contribute to society. Razing a house diminishes property value.<sup>131</sup> Transferring the house to the Flat Earth Society so that it can be sold to generate funds to support flat-Earth messaging does not diminish property value. It simply passes the asset through the organization. Society is economically no worse off—all that has been generated is some propaganda that champions counter-majoritarian ideas.<sup>132</sup>

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130. The dead hand, for all of its supposed freedoms, lacks the power to destroy. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 838 (2005) ("As a general matter, the law recoils at the idea of allowing the dead hand to destroy property."); see also John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 376 n.8 (2010) (collecting cases). As such, the living and the dead hand are treated unabashedly unequally:

This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other interest in the property.

To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.

*Eyerman v. Mercantile Tr. Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975). Surely many decedents are buried with some of their personal effects, and some even in their automobiles. See MADOFF, *supra* note 51, at 14 & 158 n.4 (describing decedents whose requests to be buried in their cars were followed); see also Noam Kutler, Note, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1663 (2011). But this practice is best viewed as an acquiescence by the living rather than a power of the dead.

The primary justification for this approach is that testators should not have the power to destroy property when they will not suffer the economic consequences of its destruction. See RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. E (AM. LAW INST. 2003) ("Although one may deal capriciously with one's own property, self-interest ordinarily restrains such conduct."); see also Strahilevitz, *supra* note 130, at 839–41 (describing and criticizing this justification). This approach, of course, diminishes testamentary freedom in that it limits what testators may do with their property at death. See Strahilevitz, *supra*, at 838–39 ("[T]he law's resistance to dead hand destruction pushes against the grain of American trusts and estates law, which is for the most part relatively deferential to the wishes of testators and settlors regarding the disposition of their property.").

131. See *Eyerman*, 524 S.W.2d at 213 (finding that razing the house would reduce the value of the property from \$40,000 to \$650 and depreciate neighbors' property values by approximately \$10,000).

132. A testator could certainly spend her wealth during her lifetime challenging round-Earth beliefs. Taking away her ability to do so after death only incentivizes attempts

Moreover, the anti-waste doctrine is narrow: it is best applied in situations in which assets are literally destroyed. That is a fairly bright-line inquiry that leaves very little room for judgment—and therefore little room for bias. Making a qualitative judgment that a particular idea is so worthless that propagating it would be “wasteful” is a qualitatively different type of decision. It puts the judge or jury in the position of determining which ideas are worthwhile and which are not. This dangerous proposition would further marginalize minority viewpoints.

Beliefs evolve. At one time it would have been thought wasteful or delusional to spend money to advance the theory that microorganisms called germs spread disease.<sup>133</sup> At some point, medical science tipped the balance: germ theory became the favored view, and its opponents were the erroneous ones.<sup>134</sup> For the great many of us, however, even such “proven facts” are taken as a matter of faith. I believe that the world is round and microorganisms spread contagions, but I haven’t independently verified those claims. My ancestors likely were equally assured of the contrary perspective. The law of wills—a body of law organized around freedom of testation—should not impose prevailing, contemporary views on all testators. Rather, it should cast a big enough tent to accommodate devises that champion causes or perspectives that are unpopular or uncomfortable to society at large.

Because the doctrine of insane delusions is not expressly written into statutes,<sup>135</sup> the reform need not be a legislative one. Instead, courts can—and should—refuse to apply the doctrine to devises that seek to advance a particular set of beliefs. Even in cases that do not involve such devises, courts should be mindful about how they describe the doctrine. Appellate courts should not describe it so broadly that it could be wielded in future cases as a tool to further majoritarian bias and marginalize counter-majoritarian beliefs. A simple, clarifying comment should be added to the Restatement to guide courts in this respect.

### ***B. Further Unshackling the Dead Hand***

In addition to the above suggestion targeted at the doctrine of insane delusions, the law of wills needs broader reform to guard against decision-maker bias. As explained above, it has long been observed that decision-makers manipulate flexible doctrines to attain distributions that accord with the decision-makers’ preferences.<sup>136</sup> This biased administration of estates undermines freedom of testation.

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to circumvent the probate process through *inter vivos* wealth transfers—for example, making a large gift to the Flat Earth Society during life to ensure that it is not frustrated after death.

133. See ROBERT P. GAYNES, *GERM THEORY: MEDICAL PIONEERS IN INFECTIOUS DISEASES* 89–90, 159–61 (2011).

134. See *id.* at 312 (“Despite infectious diseases claiming countless lives from prehistoric times, the theory of ‘contagion’ due to living entities, i.e., the germ theory, is a relatively recent one in the annals of Western medicine.”).

135. See *supra* note 66 and accompanying text.

136. See *supra* Section III.A.

Commentators have urged that the doctrines most prone to abuse—like undue influence—should simply be abolished.<sup>137</sup> Indeed, I just urged the same thing regarding a portion of the doctrine of insane delusions.<sup>138</sup> However, the answer to the overarching problem of decision-maker bias cannot be to simply abolish all of the abused doctrines. Rather, it may be time for the law of wills to admit that freedom of testation is not the whole deal and that society harbors a very powerful preference for distributions to family. Acknowledging that norm allows for the law to expressly account for it instead of pushing it to the sidelines for decision-makers to apply on an ad hoc basis.

The discussion below sets forth a proposal for a “forced intestate share.” The forced-intestate-share proposal extends and modifies the familiar concept of providing an elective share for surviving spouses.<sup>139</sup> In short, the forced intestate share is simply setting aside a certain share of every estate that must be transferred as though the decedent died intestate. It is a tribute to be paid to the decedent’s family. By paying that tribute and satisfying the societal norm of familial support, however, the decedent may be able to purchase something closer to true testamentary freedom over the remainder of the estate. In other words, requiring that, say, 20% of the estate must go to close family members may reduce the likelihood that judges and juries will invalidate the other 80% of the estate plan based on bias.

The following Subsections explain the intestate system, the elective share, and how the two can be combined into a workable framework that safeguards freedom of testation by acknowledging a societal preference for familial support.

#### *1. Intestacy Explained*

When a decedent dies intestate—without a will—the estate is distributed according to the plan set forth in the state’s intestacy statute. An intestacy statute creates an “estate plan by default” that seeks to effectuate the likely desired estate plan of the typical intestate decedent.<sup>140</sup> The intestate system is premised on approximating freedom of distribution by attempting to construct the estate plan that a typical decedent would have wanted, had she bothered to write it down.<sup>141</sup>

In an attempt to fulfill majoritarian preferences, intestacy statutes prioritize distributions to close relatives and then, in the absence of surviving members at each

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137. See Spivack, *supra* note 112, at 245 (arguing that historical, doctrinal, and psychological objections all warrant the abandonment of the doctrine of undue influence).

138. See *supra* Section III.A.

139. See *infra* Subsection III.B.2.

140. DUKEMINIER & SITKOFF, *supra* note 44, at 63.

141. See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991) (“Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent’s intention. Of course, the law gives effect to intention by imputation.”).

layer of distribution, expand out to distributions to more distant relatives.<sup>142</sup> For example, a surviving spouse will always take a significant portion of an estate—and oftentimes, the entire estate—through intestacy.<sup>143</sup> In the absence of a surviving spouse, surviving descendants inherit the estate.<sup>144</sup> If the decedent leaves no surviving spouse or descendants, the decedent’s parents will inherit the estate.<sup>145</sup> And so forth and so on. The intricate web of intestacy law spirals out—through spouses, descendants, ancestors, and collateral kin—until it reaches the point at which the likely preferences of the typical intestate decedent can no longer be presumed.<sup>146</sup> That outer limit of many intestacy statutes is the decedent’s grandparents and their descendants.<sup>147</sup>

If the decedent was not survived by any relatives who are qualified to take under the intestacy statute, then the decedent’s estate escheats to the state—meaning that it is forfeited to the government.<sup>148</sup> This final fallback position is not designed to carry out the decedent’s likely intent—few decedents would be gratified by watching their estates being turned over to the government<sup>149</sup>—but rather is necessary to facilitate a workable intestacy system.<sup>150</sup> Once the outer bounds of distant relatives are surpassed, the estate simply has to go somewhere, and the

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142. UNIF. PROBATE CODE §§ 2-102, 2-103 (amended 2010); *see* Bennardo, *supra* note 30, at 40–42 (summarizing order of intestate distributions under the Uniform Probate Code).

143. UNIF. PROBATE CODE § 2-102(1) (amended 2010).

144. *Id.* § 2-103(a)(1). *But see id.* § 2-102(3), (4) (providing a share of the intestate estate to surviving descendants in certain circumstances in which the decedent also leaves a surviving spouse).

145. *Id.* § 2-103(a)(2).

146. Inheritance by very distant relatives creates the situation of the *laughing heir*—an inheritance that creates a pecuniary windfall for the heir but no accompanying grief. *See, e.g., In re MacCarthy’s Estate*, 17 Pa. D & C.3d. 600, 614 (Pa. Ct. Com. Pl. 1980) (labeling potential *laughing heirs* as those relatives “who had so little interest in decedent and so little contact with him that they did not concern themselves for many years as to whether he was living or dead”); David F. Cavers, *Change in the American Family and the “Laughing Heir”*, 20 IOWA L. REV. 203, 208 (1935) (defining a *laughing heir* as “succession by one who is so loosely linked to his ancestor as to suffer no sense of bereavement at his loss . . .”). *But see* John V. Orth, “*The Laughing Heir*” *What’s So Funny?*, 48 REAL PROP. TR. & EST. L.J. 321, 324 (2013) (pointing out that emotional reaction is not a prerequisite to inheritance).

147. UNIF. PROBATE CODE § 2-103(a)(4), (5) (amended 2010). Certain states extend inheritance rights to more distant relatives or certain classes of nonrelatives. *See* Bennardo, *supra* note 30, at 42 n.56 (listing statutes).

148. UNIF. PROBATE CODE § 2-105 (amended 2010). *See generally* John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2D 73 (2009).

149. Orth, *supra* note 146, at 324.

150. *See* David C. Auten, Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 96 (1963) (“[T]he best [rationale] is that no reasonable alternative disposition has been proposed.”); Julia M. Melius, Note, *Was South Dakota Deprived of \$3.2 Million? Intestacy, Escheat, and the Statutory Power to Disinherit in the Estate of Jetter*, 44 S.D. L. REV. 49, 73 (1999) (“The state does not take by intestate succession as the last heir of the decedent, but rather, because there are no heirs capable of taking.”).

government—the ultimate benefactor of the public—is viewed as a sensible resting place.<sup>151</sup>

## 2. *The Elective Share Explained*

Despite the principle of testamentary freedom, a testator may not totally disinherit her spouse, no matter how clearly she manifests that intent. A surviving spouse may always “elect” to renounce the portion left to her in the decedent’s will and instead take a statutory share of the decedent’s estate.<sup>152</sup> This statutory share is known as the *elective share*.<sup>153</sup> As formulated by the Uniform Probate Code, the elective share recognizes both a partnership theory of marital-wealth accumulation and a support obligation between spouses.<sup>154</sup> The partnership theory presumes that spouses intend to pool their fortunes on an equal basis and recognizes the restitutionary entitlement of both spouses to an equal share of marital property.<sup>155</sup> The support-obligation theory, on the other hand, recognizes that mutual duties of spousal support should continue, in some form, after death.<sup>156</sup>

Two preliminary determinations are required to calculate the surviving spouse’s elective share: the augmented estate and the marital-property portion.<sup>157</sup> The augmented estate is meant to capture the couple’s combined assets.<sup>158</sup> The augmented estate is the sum of the following values: the value of the decedent’s net probate estate, the value of the decedent’s nonprobate transfers (to both the surviving spouse and to others),<sup>159</sup> and the value of the surviving spouse’s net assets at the time of the decedent’s death (including nonprobate transfers to others).<sup>160</sup> The marital-property portion is a scaled percentage based on the length of the marriage that approximates the portion of the augmented estate that is attributable to the

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151. See Auten, *supra* note 150, at 116 (declaring that, lacking heirs, “the state is the only reasonable taker”).

152. UNIF. PROBATE CODE § 2-202 (amended 2010).

153. *Id.*

154. See UNIF. PROBATE CODE § 2-202 cmt. (amended 2010).

155. UNIF. PROBATE CODE art. II, pt. 2 general cmt. at 71 (amended 2010). The partnership theory of marriage is also known as the “marital-sharing theory.” *Id.*

156. *Id.* at 79. A useful way to conceptualize the difference between the two theories is to consider a very short marriage and a very long marriage. Under the partnership theory, the surviving spouse of a very short marriage would be entitled to very little because very little of the decedent’s wealth was accumulated during the marriage. See *id.* at 74. But in the case of a very long marriage in which the couple’s wealth was mostly accumulated during the course of the marriage, the partnership theory would support an entitlement by the surviving spouse to a large portion of the decedent’s estate. See *id.* at 73–74. The support-obligation theory, on the other hand, makes no distinction between long and short marriages. *Id.* at 80 (“In implementing a support rationale, the length of the marriage is quite irrelevant.”). Rather, the support obligation exists equally between all spouses.

157. See UNIF. PROBATE CODE § 2-202(a) (amended 2010).

158. *Id.* art. II, pt. 2 general cmt. at 75.

159. *Nonprobate transfers* are distributions that are made outside of the probate context, such as payments made through trusts, life insurance, and pay-on-death and retirement accounts. See Sitkoff, *supra* note 1, at 654.

160. UNIF. PROBATE CODE § 2-203(a) (amended 2010); UNIF. PROBATE CODE art. II, pt. 2 general cmt. at 75–76.

marriage.<sup>161</sup> At the low end of the scale, the marital-property portion of the augmented estate is only 3% for marriages that lasted less than one year before the decedent's demise.<sup>162</sup> At the high end, the marital-property portion is 100% of the augmented estate for marriages of 15 years or more.<sup>163</sup> Once the marital-property portion of the augmented estate is identified, the elective share is simply half of that amount.<sup>164</sup>

Setting the elective share at 50% of the value of the marital-property portion of the augmented estate satisfies the partnership theory's view of equal entitlement to wealth accumulated during the marriage. In recognition of the support obligation, the Uniform Probate Code also provides for a supplemental elective-share amount, which is only activated when the surviving spouse's assets and other entitlements fall below a floor of \$75,000.<sup>165</sup> In this way, the Uniform Probate Code's approach to the elective share combines aspects of both the partnership and support-obligation theories of marriage.

When a surviving spouse claims an elective share, the elective share is first satisfied by amounts that pass to the surviving spouse under the will, through intestacy, or through nonprobate transfers as well as by the marital-property portion of the surviving spouse's property and nonprobate transfers to others.<sup>166</sup> If that amount fails to fulfill the elective share, the surviving spouse may claim the unsatisfied balance from the remainder of the decedent's estate.<sup>167</sup> Other devises and nonprobate transfers are proportionately abated to satisfy the remainder of the surviving spouse's elective share.<sup>168</sup>

### 3. *Purchasing Freedom Through the Forced Intestate Share*

As chronicled above, devises that deviate from majoritarian cultural norms are more likely to be invalidated than those that do not.<sup>169</sup> The result is often to cast the entire estate into the intestate system, which calls for it to be distributed to the decedent's closest surviving relatives.<sup>170</sup> Alternatively, the invalidation of a single devise (while upholding the rest of the will) results in the assets from that devise falling into the residuary devise and, again, often passing to family.<sup>171</sup>

161. UNIF. PROBATE CODE § 2-203(b).

162. *Id.* § 2-203(b) alt. A.

163. *Id.*

164. *Id.* § 2-202(a); *see also id.* art. II, pt. 2 gen. cmt. at 76. For example, consider the death of a spouse after ten years of marriage with an augmented estate of \$500,000. The marital-property portion of the augmented estate for a marriage of that length is 60% (\$300,000). *Id.* § 2-203(b) alt. A. The surviving spouse's elective share would be half of this amount (\$150,000). *Id.* § 2-202(a).

165. *Id.* § 2-202(b) & cmt.

166. *Id.* § 2-209(a).

167. *Id.* § 2-209(c).

168. *Id.*

169. *See supra* Section III.A.

170. *See supra* notes 122–25 and accompanying text.

171. If there is no residuary devise, the assets from the invalidated devise would fall into intestacy. *See supra* note 125 and accompanying text.

Under the current system, the decision-maker faces a binary decision: uphold a devise or invalidate it. There is no halfway option that allows for the decision-maker to make a Solomonian-like decree to split the baby.<sup>172</sup> A devise cannot be reformed to conform partially to the decision-maker's preferences and partially to the testator's preferences.<sup>173</sup> A distribution that is viewed as inequitable cannot be brought just a tad bit more in line with societal norms. It must either be followed or disregarded.

Consider an unmarried testator who left the entirety of her estate to the Flat Earth Society and nothing to her two children. Upon the testator's death, the children challenge the will. The judge or jury decision-maker, thinking it unfair that the testator failed to provide for her family, may well be tempted to invalidate the devise (or the entire will) on the basis of insane delusion or testamentary incapacity (or fraud or undue influence or failure to conform with all of the formalities necessary to make a valid will). The result of invalidation would be to cast the estate into intestacy, thereby distributing it in equal portions to the decedent's two children.<sup>174</sup> This result is undeniably at odds with the testator's expressed wishes. But carrying out the devise to the Flat Earth Society is at odds with societal norms and, assumedly, most decision-makers' preferences. For the decision-maker, the stakes

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172. That is not so in every area of the law. For example, in criminal law, a jury may decide to find a defendant guilty of a lesser-included offense as a compromise between a finding of guilt on the most serious charge and an acquittal. *See, e.g.*, *State v. Porter*, 639 So.2d 1137, 1144 (La. 1994) (“[T]he lesser verdicts which were returned indicated the jury’s refusal to accept unconditionally the victim’s version of the events.”). This middle pathway allows a jury to balance competing interests by partially nullifying and partially sustaining the prosecution. Interestingly, this type of jury nullification is often viewed as “antimajoritarian.” Stacey P. Eilbaum, Note, *The Dual Face of the American Jury: The Antiauthoritarian and Antimajoritarian Hero and Villain in American Law and Legal Scholarship*, 98 CORNELL L. REV. 711, 725 (2013) (“When courts directly address the issue of jury nullification, they often describe the jury as an antimajoritarian institution, a rogue minority of individuals who have usurped the power of the legislature by nullifying laws enacted by an elected, representative body.”). In the criminal system, even more balancing occurs during sentencing when the decision-maker exercises discretion in selecting a punishment from within a statutory range. *See, e.g.*, 18 U.S.C. § 3553(a) (2012) (requiring the court to impose a sentence “sufficient, but not greater than necessary” to achieve the enumerated goals of punishment).

173. Although the decision-maker cannot strike a compromise, the parties can. Settling an estate by agreement is an option, especially when the outcome is unclear. *See, e.g.*, *Lenoir Rhyne Coll. v. Thorne*, 185 S.E.2d 303, 307 (N.C. Ct. App. 1971) (affirming trial court’s approval of a settlement agreement because “a bona fide controversy existed as to whether the holographic document being offered for probate was a valid codicil”). Indeed, informal distribution by agreement may, in fact, be the most common method of distributing decedents’ estates. Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 60 (1985) (finding empirically that “the percentage of all decedents who leave estates that undergo administration proceedings is not high”); *see* STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, *ESTATES AND TRUSTS* 45 (4th ed. 2011) (“If the beneficiaries, however, were all content to divide Jane’s property informally (presumably in accordance with the will), no formal legal action would be necessary.”).

174. UNIF. PROBATE CODE § 2-103(a)(1) (amended 2010).

are all or nothing: either 100% honor the counter-majoritarian devise to the Flat Earth Society or 100% invalidate it and replace it with an intestate distribution to the decedent's children. What if there was another way?

Forcing an intestate share may actually *further* testamentary freedom. In the above scenario, the decision-maker may well invalidate the devise, and the testator's expressed preference would be totally frustrated. But what if the law required the distribution of 20% of a decedent's estate to whomever would take through intestacy? In that scenario, 20% of the estate would be split among the decedent's children in equal shares. That may well satiate the decision-maker's notion of sufficient familial support. With that thirst quenched, the decision-maker may be less likely to manipulate another doctrine to invalidate the devise to the Flat Earth Society. Thus, with 20% of the estate going to close family, the decision-maker may be willing to allow the other 80% to pass to the Flat Earth Society in accordance with the testator's expressed wishes. By taking away testamentary freedom over 20% of the estate, the law could potentially better achieve actual testamentary freedom over the remaining 80%.

The current system of testation in the United States professes to largely ignore familial support as a goal, instead preferring to espouse testamentary freedom as the organizing principle.<sup>175</sup> But the biases of decision-makers have demonstrated that familial support is a latent norm in our society's approach to decedents' estates.<sup>176</sup> Instead of ignoring this norm, the law of testation could pay it its due—not necessarily because familial support is good or right or just, but because it is going to express itself in jury verdicts and judicial outcomes one way or another. Currently, it expresses itself by manipulating flexible doctrines—like mental incapacity, undue influence, and fraud—in order to invalidate nonconforming devises in favor of distributions to close family members. This system of ad hoc enforcement occurs in the shadows. To some degree, we have a family-maintenance system<sup>177</sup> already, but without the family-maintenance statute to authorize it. This reality may be surprising to many, given the resistance routinely shown to family-maintenance systems in this country.<sup>178</sup>

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175. See *supra* Section I.A.

176. See *supra* Section III.A.

177. As explained above, a family-maintenance statute grants considerable discretion to the decision-maker to reform the testator's will to provide support for various members of the testator's family. See *supra* Section I.C.

178. Granting a court the authority to override a testator's expressed preferences has been called "violat[ive of] our country's professed belief in freedom of testation" and self-determination. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 16 (2006); see also Brashier, *supra* note 49, at 132–33 (noting that "unguided and unprincipled use of judicial discretion can lead to . . . arbitrary and unsatisfactory" results). Additionally, it has been noted that the family-maintenance system's flexibility creates costs. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1165, 1189 (1986) ("Our American experience with discretionary distribution on divorce should make us extremely wary of any system that would encourage a variety of friends and relatives to challenge wills and permit a probate judge to rearrange estate plans."); see also Frances H.

A wiser approach may be to simply recognize that familial support is important to our society and expressly account for it in our system of decedents' estates.<sup>179</sup> Thus, this Article proposes that a share of a testator's estate be distributed to the decedent's intestate takers—the “forced intestate share.” Let's say the proposed forced intestate share is set at 20%, although that precise percentage is not essential to the proposal.<sup>180</sup> In the case of a will contest under the forced-intestate-share system, the court would first determine who would take the decedent's estate under the intestacy statute. Twenty percent of the estate would be required to be distributed in accordance with the intestacy statute.<sup>181</sup>

Here is an example. Tonya dies and is survived by five siblings: Abraham, Bethany, Caitlin, David, and Eleanor. Tonya has no spouse or children; thus, her intestate takers are her siblings.<sup>182</sup> If she had no will, each sibling would take 20% of her estate. But Tonya does have a will. In her will, she leaves her estate in equal 25% shares to three of her siblings—Abraham, Bethany, Caitlin—and to her one friend Francis. Her will makes no provision for David or Eleanor. Under the forced-intestate-share proposal, 20% of Tonya's estate would have to be distributed in accordance with the intestacy statute. Thus, each of her siblings would be guaranteed a distribution of at least 4% of the estate. The court would need to reform the distributions to meet the forced intestate shares to ensure that both David and Eleanor received their 4% shares. To do so, it would proportionally reduce the four devises in the will to meet the obligation. Thus, the shares to Abraham, Bethany, Caitlin, and Francis would each be reduced by 2% to create the 4% shares for David

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Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1215 (summarizing predicted costs and criticisms of family-maintenance systems); Michelle Harris, *Why a Limited Family Maintenance System Could Help American “Grandfamilies”*: A Response to Kristine Knaplund's Article on Intestacy Laws and their Implications for Grandparents Raising Grandchildren, 3 NAELA J. 239, 252–55 (2007) (same). In short, the idea of enacting a family-maintenance statute in the United States is simply a nonstarter. See DUKEMINIER & SITKOFF, *supra* note 44, at 562 (“Although the debate has consumed many pages in the law reviews, there is no credible proposal pending in any state in this country to adopt a family maintenance system . . .”).

179. See Johnson, *supra* note 113, at 120 (noting that, “if providing for dependents or close family members is an important social goal,” it would be preferable to do so directly rather than doing so through “the current situation in which courts evidence hostility toward testamentary plans that do not comport with such social norms”); Spivack, *supra* note 112, at 246, 305–07 (“If we care about protecting families, let legislatures institute forced heirship.”).

180. Certainly, a different percentage, such as one-quarter or one-third, could be workable as well.

181. I would not, however, go so far as recommending that the forced intestate share extend all the way to escheating a portion of the estate to the government. As noted above, the purpose of escheat is not to fulfill the decedent's likely distributive preferences, but rather it is simply administratively necessary to transfer the estate to some entity, and the government is the best available option. See *supra* notes 148–151 and accompanying text. Thus, decision-makers are unlikely to manipulate doctrines in order to effectuate escheat. Because the principle danger of doctrinal manipulation is not present in these cases, the proposed solution is unnecessary. Thus, the proposed system of forced intestacy should not operate in cases where the intestate taker would be the government.

182. UNIF. PROBATE CODE § 2-103(a)(3) (amended 2010).

and Eleanor. The final distribution would be 23% each to Abraham, Bethany, Caitlin, and Francis and 4% each to David and Eleanor.<sup>183</sup>

This type of arrangement would reduce a decision-maker's temptation to invent a reason to invalidate the entire will because it "unfairly" excluded two siblings. Ninety-two percent of the estate would go to the intended recipients—Abraham, Bethany, Caitlin, and Francis. By forcing the distribution of the other 8% to unwanted recipients—David and Eleanor—the forced intestate share has purchased some insurance against the judge or jury throwing out the entire will because it offended the decision-maker's general sense of moral fairness or familial obligation. The judge or jury may now be inclined to say, "At least each sibling got something. I'm okay with letting the rest of this will stand." The net gain to Tonya's testamentary freedom may well outweigh the cost of distributing a small portion of the estate to two of her siblings against her expressed wishes.

While this proposal shares similarities with forced-succession systems in civil law countries,<sup>184</sup> it is broader because it protects all potential heirs to the full extent of the jurisdiction's intestacy statute, rather than the narrower band of descendants protected by most systems of forced succession. For example, the forced-succession system in France protects only the decedent's descendants from disinheritance (or the surviving spouse in the absence of descendants).<sup>185</sup> Depending on the decedent's family situation and the jurisdiction's intestacy statute, the forced-intestate-share proposal could potentially require the distribution of a share of the estate to more distant heirs, including ancestors or lateral kin.<sup>186</sup>

This proposal also shares similarities with the elective share,<sup>187</sup> but again it is broader. Through the elective share, however, we already have experience with forcing testators to leave portions of their estates to family members. It is not a totally foreign concept. We've ironed out the mechanics for how to make these forced distributions administratively workable in the context of surviving spouses.<sup>188</sup> The forced intestate share would simply extend a version of the elective-share system to additional heirs.

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183. Of course, David or Eleanor (or both) could disclaim their 4% shares. They are not required to take anything. Thus, in a case in which family circumstances were such that a particular distribution was not sensible, the would-be intestate taker could simply decline her portion of the forced intestate share. For example, if David was very wealthy and close to death, and his will called for his estate to be distributed to his siblings, he may wish to disclaim his portion of Tonya's estate because it would be subject to estate taxes when he died.

184. *See supra* Section I.C.

185. *See supra* notes 57–60 and accompanying text.

186. *See supra* Subsection III.B.1.

187. *See supra* Subsection III.B.2.

188. *See supra* Subsection III.B.2. Certainly, a more complex forced-intestate-share system could be devised that more closely mirrors the elective share system by, for example, taking into account nonprobate transfers. The goal of this Article is not to design all of the intricacies of the forced-intestate-share system; rather, the goal is to pose the question of whether forcing some intestate share would actually increase decedents' overall freedom of testation.

In cases of married testators, the intestate taker would be the surviving spouse anyway, and the forced intestate share would make up an overlapping portion of the elective share. In cases of unmarried testators, the forced intestate share would go to the testator's children, if any exist. This result would alleviate some of the concerns of the many critics of the current system in which decedents may cease providing for their minor children.<sup>189</sup> In most cases, the forced intestate share would have no effect on the actual distribution of a testator's estate because, in most cases, a testator will have already provided more for her close family members in her will than the forced intestate share requires.<sup>190</sup>

It is only those testators who break from societal norms and attempt to distribute their estates in counter-majoritarian ways that will be materially affected by the forced-intestate-share proposal. But these testators are actually buying something with that forced intestate share. They are paying a tribute to the societal norm of familial support in exchange for a greater likelihood that the rest of their nonconformist estate plans will be left undisturbed. They are giving up a share of their alleged testamentary freedom in exchange for something closer to actual testamentary freedom with the remainder of their estates.<sup>191</sup>

### CONCLUSION

Judges and juries in probate contests have shown themselves biased in favor of distributions that align with their preferences. For most folks, this is not a problem because they more or less share the same preferences as the decision-maker. But for testators who actually seek to exercise their testamentary freedom through unpopular devises, this bias often manifests itself to the detriment of their clearly expressed testamentary preferences.

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189. See *supra* note 45 and accompanying text.

190. See Hirsch & Wang, *supra* note 24, at 14 (noting that "the majority of testators . . . have no desire to make unorthodox bequests"). If Tonya, the testator in the example from a few paragraphs above, had left at least 4% of her estate to each of her five siblings, then the proposal would have no effect on the distribution.

191. Under the current system, counter-majoritarian testators could consider forcing something approximating an intestate share onto themselves. In other words, they could attempt to purchase some measure of testamentary freedom by leaving a share of their estate to surviving family members. A testator who desires to leave her entire estate to a controversial organization that contests germ theory may want to consider splitting her estate and leave a sizable chunk to her family. Keeping some of the wealth in the family may satisfy the judge or jury's notion of fairness and keep the anti-germ-theory devise from being invalidated wholesale.

Testators paying tribute to familial support on an ad hoc basis would likely not carry the same weight with judges and juries as forcing an intestate share through a statutory reform. One of the benefits of enacting it as a statute is that decision-makers will, perhaps, be more likely to consider the statutory percentage to be adequate to fulfill the testator's duty of familial support. If, for example, the statute requires 30% of the estate to be distributed in intestacy, decision-makers may assume that 30% is a fair and appropriate amount. However, if a testator leaves 30% of her estate to her family on her own accord, the decision-maker lacks the statutory grounding point. In that situation, the decision-maker may be more likely to deem 30% insufficient and more tempted to invalidate the balance of the testator's devises.

This is especially a problem when a testator seeks to devise a portion of the estate directly to an organization that champions an unpopular idea. Judges and juries are prone to give into the temptation to invalidate such devises and to go so far as to label the testator's unpopular beliefs "delusional." These types of devises should not be invalidated under the doctrine of insane delusions. Instead, devises that seek to advance a particular viewpoint should be carried out, no matter whether society at large considers the viewpoint wrongheaded.

Additionally, the time may have come for us to admit that the law of wills in the United States is not as committed to the principle of testamentary freedom as it often espouses to be. A latent norm of familial support exists and is expressed by judges and juries who manipulate flexible doctrines to achieve distributions to the decedent's family members. Instead of relying upon this shadowy system of ad hoc enforcement, perhaps it is time for the law to expressly reserve a share of every decedent's estate for distribution to the decedent's family. The proposal set forth in this Article—the forced intestate share—would compel distribution of a portion of each estate to the decedent's intestate takers. Adopting some version of this proposal may actually provide testators with greater testamentary freedom overall because, by expressly fulfilling the norm of familial support, it would reduce decision-makers' biased tendencies to invalidate devises to nonfamily members. Indeed, the counterintuitive solution to achieving greater testamentary freedom may actually be to remove testators' control over some share of their estates through a forced intestate share.