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## A SOCIAL WELFARE THEORY OF INHERITANCE REGULATION

Mark Glover\*

### *Abstract*

*The law of succession grants donors broad freedom to decide how to distribute their property upon death. It does so in hopes of increasing social welfare in two general ways. First, freedom of disposition generates socially beneficial estate planning decisions. In particular, donors are in the best position to evaluate their own specific circumstances and to make decisions that, on the whole, produce the greatest utility from the transfer of their estates. Second, the donor's autonomy over estate planning decisions incentivizes socially beneficial behavior, such as productivity during the life of the donor. Because the law views freedom of disposition as maximizing social welfare in these ways, it generally defers to the estate planning decisions of individual donors.*

*Although the law typically relies upon the choices of autonomous decision-makers to maximize the social welfare that is generated by the inheritance process, it regulates inheritance in some circumstances through both prescriptive and proscriptive restrictions of freedom of disposition. Prescriptive restrictions are rules that require donors to distribute property in certain ways thereby preventing them from transferring property to other donees. By contrast, proscriptive restrictions are rules that directly limit freedom of disposition by prohibiting donors from distributing property in particular ways. Scholars have catalogued the various ways that the law regulates inheritance; however, they typically examine them in isolation without developing an overarching framework for analyzing inheritance regulation.*

*To better understand the role that inheritance regulation plays within the law of succession, this Article analyzes restrictions of freedom of disposition in relation to the law's social welfare goals. It does so both by recognizing defects in the donor's decision-making process that suggest she might make suboptimal estate planning decisions and by identifying potentially socially detrimental incentives that freedom of disposition can*

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*produce. It then explores how particular restrictions of freedom of disposition address these social welfare concerns. Ultimately, this analysis explains how inheritance regulation can maximize social welfare and develops a framework that can aid policymakers in deciding when inheritance regulation is appropriate and how such regulation should be crafted.*

#### INTRODUCTION

The Restatement (Third) of Property (the “Restatement”) explains that, within the realm of inheritance, “[t]he main function of the law . . . is to facilitate rather than regulate.”<sup>1</sup> The law pursues this facilitative goal primarily by adopting a deferential approach to inheritance, as it generally acquiesces to the donor’s decisions regarding how to distribute property upon death.<sup>2</sup> The rationale underlying the law’s passivity in this area is that freedom of disposition maximizes social welfare.<sup>3</sup>

Policymakers are rightfully skeptical that they can craft a mandatory estate plan that fits all familial situations or that probate courts can consistently and accurately assess the merits of particular dispositions of property.<sup>4</sup> By contrast, donors are in the best position to evaluate their own specific circumstances and to make decisions that produce the greatest utility from the transfer of their estates.<sup>5</sup> Moreover, this social welfare rationale of freedom of disposition suggests that individual autonomy over inheritance creates incentives for donors and potential donees that promote societal wellbeing.<sup>6</sup> As such, the law largely relies upon the choices of autonomous decision-makers to maximize the social welfare that is generated by the inheritance process.

Despite the broad freedom of disposition that donors enjoy, the law regulates inheritance in various ways. For example, it typically requires the donor to transfer a portion of her estate to her surviving spouse, thereby preventing the transfer of

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<sup>1</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>2</sup> *See id.* (“American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”).

<sup>3</sup> *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1135 (2013); Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 288–92.

<sup>4</sup> Kelly, *supra* note 3, at 1136–37 (“[L]egislatures must rely on general rules governing the succession of property (e.g., the first child inherits everything or each child receives an equal share), which can be overinclusive, underinclusive, or both. Typically, courts have neither the time nor the institutional capacity to investigate the circumstances of each decedent to determine the optimal distribution.”).

<sup>5</sup> *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992); Kelly, *supra* note 3, at 1136.

<sup>6</sup> *See infra* notes 26–30 and accompanying text.

property to other donees.<sup>7</sup> Additionally, the law prohibits certain types of transfers. For instance, the donor cannot condition a testamentary gift in a manner that incentivizes the donee to engage in illegal activity.<sup>8</sup> Thus, while the law usually defers to the donor's decisions, it regulates inheritance in certain situations by requiring certain transfers and prohibiting others.

Although legal scholars have catalogued the various ways that the law regulates inheritance, they typically examine them in isolation without developing an overarching framework for analyzing inheritance regulation.<sup>9</sup> This failure to provide context to inheritance regulation has obscured the interconnectedness of various restrictions of the donor's freedom of disposition and has stifled the development of a general theory of inheritance regulation.<sup>10</sup> Therefore, to better understand the role that regulation plays within inheritance law, this Article analyzes the law's restrictions of the donor's ability to make decisions regarding the disposition of her estate in relation to the law's social welfare goals.<sup>11</sup> Ultimately, this analysis explains how inheritance regulation can maximize social welfare and develops a framework that can aid policymakers in deciding when inheritance regulation is appropriate and how such regulation should be crafted.

This Article proceeds in four Parts. Part I describes the rationales underlying the law's deferential approach to inheritance and focuses particularly on the social welfare maximization goal of the law. Parts II–IV then shift the Article's focus squarely upon inheritance regulation. Specifically, Part II describes the restrictions that the law places on the donor's discretion to freely decide how her estate should be distributed, and Part III explains how such limitations can further the law's goal of maximizing social welfare. Finally, Part IV identifies opportunities for reform that will better align inheritance regulation with the law's central objective of maximizing social welfare.

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<sup>7</sup> See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 512–16 (9th ed. 2013); see, e.g., UNIF. PROBATE CODE § 2-201 (amended 2010); see also *infra* notes 78–80 and accompanying text.

<sup>8</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>9</sup> See, e.g., Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487 (2000) (focusing on the restriction on the donor's freedom to decide how to distribute property that requires her to transfer property to her surviving spouse); Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291 (2013) (focusing on the restriction on the donor's freedom of disposition that limits the reach of the donor's influence over time).

<sup>10</sup> Although most have focused on individual regulations in isolation, some scholars have drawn connections between various regulations. See, e.g., Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011) (drawing connections between restrictions on freedom of contract and restrictions on freedom of testation); Kelly, *supra* note 3 (arguing that *ex ante* justifications of inheritance regulation are more persuasive than *ex post* justifications).

<sup>11</sup> See *infra* Parts II–IV.

## I. FREEDOM OF DISPOSITION AND SOCIAL WELFARE

To understand when and how the law should regulate inheritance, one must first understand how and why the law generally defers to individual decision-makers regarding the disposition of property after death. In particular, one must keep in mind that the donor's freedom of disposition is the bedrock principle of the modern law of succession,<sup>12</sup> and as such, donors enjoy nearly unlimited discretion to choose how their property should be distributed upon death.<sup>13</sup> As Professor Robert Sitkoff explains:

The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems. . . . The right of a property owner to dispose of his or her property on terms that he or she chooses has come to be recognized as a separate stick in the bundle of rights called property.<sup>14</sup>

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<sup>12</sup> *In re* Estate of Malloy, 949 P.2d 804, 806 (Wash. 1998) (“A basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires.”); THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 349 (5th ed. 2011) (“Freedom of disposition is a hallmark of the American law of succession.”); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444–45 (2012) (“Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession.”); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989) [hereinafter Hirsch, *Insolvent Heir*] (“[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy.”); Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1010 n.94 (2012) (“Freedom of testation and testator’s intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates.”); 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, 278 (1999) (“The ideal of testamentary freedom grounds the law of testation.”).

<sup>13</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) (“The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882–85 (2012) (“Americans enjoy nearly unbridled testamentary freedom, a right that has been fully engrained in the American psyche.”).

<sup>14</sup> Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643–44 (2014) (emphasis added); see *Cantrell v. Cantrell*, No. M2002-02883-COA-R3-CV, 2004 WL 3044907 at \*5 (Tenn. Ct. App. Dec. 30, 2004) (“A fundamental principle of the law of wills is that a testator is entitled to dispose of the testator’s property as he or she sees fit, regardless of any perceived injustice that may result from such a choice.”); Weisbord, *supra* note 13, at 882 (“The most fundamental guiding

The contemporary explanation of the donor's broad freedom of disposition and the law's deference to the dead hand rests upon what Professor Daniel Kelly describes as "functional considerations."<sup>15</sup> He explains, "[t]his functional perspective emphasizes the 'social welfare' of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor's disposition of property may effect."<sup>16</sup> Put differently, the law generally defers to dead hand control because broad freedom of disposition is seen as maximizing the social welfare that is produced by the inheritance process.<sup>17</sup> Consequently, both the law's facilitation and regulation of freedom of disposition must be analyzed from this social welfare perspective.

#### A. *Justifying the Freedom*

Broad freedom of disposition maximizes social welfare in a number of ways. The first is by maximizing the donor's individual welfare.<sup>18</sup> The ability to freely decide how to distribute property after death can be a source of great comfort and satisfaction to the donor.<sup>19</sup> This is particularly true when the donor feels as though she is supporting close family and friends through the distribution of her estate.<sup>20</sup> If the law substantially reduced the discretion that the donor has over the disposition of her property after death, then the donor might lose a source of satisfaction during life, and consequently, overall social welfare could decline.<sup>21</sup>

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principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.”).

<sup>15</sup> Kelly, *supra* note 3, at 1135.

<sup>16</sup> *Id.*; see Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 432 (2001) (“The most prevalent justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior.”).

<sup>17</sup> For a discussion of the meaning of social welfare, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2–3 (2004) (“According to the framework of welfare economics, social welfare is assumed to be a function of individuals’ well-being, that is, of their utilities. An individual’s utility, in turn, can depend on anything about which the individual cares: not only material wants, but also, for example, aesthetic tastes, altruistic feelings, or a desire for notions of fairness to be satisfied.”).

<sup>18</sup> Kelly, *supra* note 3, at 1135–36.

<sup>19</sup> Hirsch & Wang, *supra* note 5, at 8 (explaining that “modern social scientists” assume that “persons derive satisfaction out of bequeathing property to others”).

<sup>20</sup> SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, A.B.A., DEATH, TAXES AND FAMILY PROPERTY 5 (Edward C. Halbach, Jr. ed., 1977) (“[A] society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.”); Glover, *supra* note 12, at 443–46.

<sup>21</sup> See SHAVELL, *supra* note 17, at 65 (“In an important sense, bequeathing property is simply one way of using property. And therefore society should not interfere with bequests”

In addition to maximizing the donor's welfare, freedom of disposition likely also maximizes the donee's welfare. Permitting the donor to make decisions regarding the disposition of her property after death allows for intelligent estate planning.<sup>22</sup> If the donor did not enjoy broad freedom of disposition, policymakers would have to make decisions regarding the distribution of the donor's estate, and these policymakers would not know the individual circumstances of potential donees.<sup>23</sup> A default estate plan would therefore not account for the idiosyncratic needs of the donor's family.<sup>24</sup> By contrast, the donor is in the best position to evaluate the specific circumstances and relative needs of her individual family members, and she can place her property in the hands of the donees who will benefit the most.<sup>25</sup> As such, freedom of disposition maximizes social welfare because the donee can assess the particular circumstances of her family and distribute property in a way that generates the greatest utility.

Finally, freedom of disposition maximizes social welfare by placing incentives on donors and donees. In particular, by allowing the donor to make decisions regarding the disposition of her estate, the law provides the donor an incentive to be productive during life.<sup>26</sup> If the law severely restricted freedom of disposition, the donor might not find it worthwhile to continue to generate wealth,<sup>27</sup> and overall

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because "this tends to reduce individuals' utility directly (a person will derive less utility from property if he wants to bequeath it but is prevented from doing so) . . . ."; see Hirsch & Wang, *supra* note 5, at 8 ("To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared."); Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971) ("Individuals before their death would be injured if they are prohibited from passing on their estate to their heirs because it eliminates one possible alternative which they might otherwise choose.").

<sup>22</sup> Hirsch & Wang, *supra* note 5, at 12–13; Kelly, *supra* note 3, at 1136–37.

<sup>23</sup> Hirsch & Wang, *supra* note 5, at 12–13; Kelly, *supra* note 3, at 1136–37.

<sup>24</sup> Hirsch & Wang, *supra* note 5, at 12–13; Kelly, *supra* note 3, at 1136–37.

<sup>25</sup> Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44 (1995) [hereinafter Hirsch, *Spendthrift Trusts and Public Policy*] ("Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rationale manner."); Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTEL. PROP. L. 163, 177 (1996) ("Testamentary freedom . . . allows the testator to weigh the varying needs of his family."); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 484 (2006) ("[T]he testator . . . can distribute property in accordance [with] each family member's needs.").

<sup>26</sup> Hirsch & Wang, *supra* note 5, at 8 ("[F]reedom of testation creates an incentive to industry and saving."); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 749 (1990) ("Allowing owners to give their assets and money to others, whether at death or inter vivos, creates an incentive for productive activities.").

<sup>27</sup> SHAVELL, *supra* note 17, at 65 (explaining that restricting freedom of disposition "lowers [individuals'] incentives to work (a person will not work as hard to accumulate property if he cannot bequeath it as he pleases)").

societal wealth might decline.<sup>28</sup> Additionally, the donor's freedom of disposition maximizes social welfare by incentivizing the donee. If the donor's family members know that the donor can exercise freedom of disposition by disinheriting them, then they will have the incentive to care for the donor during the later stages of her life.<sup>29</sup> In turn, intrafamily caregiving for aging or ailing donors increases social welfare.<sup>30</sup> The donor's broad freedom of disposition therefore maximizes social welfare not only by providing a source of comfort and satisfaction to the donor and allowing the donor to engage in intelligent estate planning but also by providing important incentives to both the donor and the donee.

### B. Facilitating the Freedom

Because the donor's freedom of disposition is seen as maximizing social welfare, the law is designed primarily to facilitate the donor's exercise of this freedom.<sup>31</sup> This facilitative goal is advanced most obviously by probate courts' inability to second-guess the donor's estate planning decisions.<sup>32</sup> As the Restatement explains, "American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."<sup>33</sup> Beyond deferring to the donor's decisions, the law facilitates the donor's exercise of freedom of disposition by also focusing on the donor's intent.<sup>34</sup> The Restatement explains further: "The law serves [its facilitative] function

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<sup>28</sup> Hirsch & Wang, *supra* note 5, at 8 ("[T]hwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink.").

<sup>29</sup> Kelly, *supra* note 3, at 1137.

<sup>30</sup> Hirsch & Wang, *supra* note 5, at 9–10 (explaining that freedom of disposition "serves the public interest" by "support[ing] . . . a market for the provision of social services" and "encourag[ing] . . . [the donor's] beneficiaries to provide [the donor] with care and comfort—services that add to the total economic 'pie.'").

<sup>31</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>32</sup> RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 6–7 (2010) (explaining that under "American law . . . freedom of testation is paramount and the courts have no power to deviate from a person's will.").

<sup>33</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>34</sup> See, e.g., Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) ("The primary goal of the American law of wills is the effectuation of the decedent's testamentary intent."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 552–53 n.1 (1999) ("Most scholars agree that giving effect to testamentary intent is the primary objective of wills law.").



by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention.<sup>35</sup> The intent-fulfilling rules to which the Restatement refers are found throughout the law of succession.

For instance, the law facilitates freedom of disposition by providing a process through which probate courts can accurately distinguish authentic wills from inauthentic wills. If inauthentic wills were routinely admitted to probate or, conversely, if authentic wills were routinely denied probate, then the law would undermine the donor's freedom of disposition because property would be distributed in unintended ways.<sup>36</sup> Thus, to facilitate the disposition of property according to the donor's intent, the law distinguishes authentic wills from inauthentic wills by relying upon a variety of will execution formalities, such as the requirements that a will be written, signed, and witnessed.<sup>37</sup> On the one hand, if the donor complies with these formalities, the court presumes that the will is authentic, and, on the other hand, if the donor does not comply, the court presumes that the will is inauthentic.<sup>38</sup> Although critics argue that the will-authentication process could be made more accurate,<sup>39</sup> the primary goal of will execution formalities is to facilitate freedom of

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<sup>35</sup> UNIF. PROBATE CODE § 1-102(b)(2) (amended 2010) (stating that one of the “underlying purposes and policies” of the law of succession is “to discover and make effective the intent of the a decedent in distribution of his property”); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003); *see id.* at § 10.1 cmt. a (“This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor’s intention; and (2) that the donor’s intention is given effect to the maximum extent allowed by law.”); Weisbord, *supra* note 13, at 877–78 (“The polestar of American inheritance law, testamentary freedom is a right protected by the U.S. Constitution, and once it is exercised, courts go to great lengths to implement the decedent’s intent by closely honoring and interpreting testamentary instructions.”).

<sup>36</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 147–48 (explaining that “[b]oth kinds of error dishonor the decedent’s freedom of disposition” and that probate “gives effect to a false expression of testamentary intent” and “the latter denies effect to a true expression of testamentary intent.”); *see generally* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016) (providing a detailed analysis of the error costs associated with making incorrect determinations of a will’s authenticity).

<sup>37</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 147–49; Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN’S L. REV. 597, 601 (2014).

<sup>38</sup> When the decedent complies with the formalities of will execution, a rebuttable presumption of authenticity is triggered, meaning that the court will consider extrinsic evidence that suggests the decedent did not intend the will to be legally effective. *See* Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 363–66 (2016). By contrast, when the decedent does not comply with the formalities of will-execution, a conclusive presumption of inauthenticity is triggered, meaning the court will not consider extrinsic evidence that suggest the decedent intended the will to be legally effective. *See* Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 97–98 (2014).

<sup>39</sup> John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 51–54 (1987); *see also* Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New*

disposition by providing the donor a reliable method to communicate her intent to the probate court.<sup>40</sup>

Similarly, the law attempts to facilitate freedom of disposition by providing guidelines by which probate courts interpret the meaning of wills. If the court routinely interprets the dispositive provisions of wills in ways that do not conform with the donor's intended estate plan, then freedom of disposition is undermined because property is distributed in an unintended manner. To avoid this scenario, probate courts focus on the donor's intent when interpreting wills.<sup>41</sup> As the Supreme Court of Mississippi explains, "[t]he paramount and controlling consideration [of will interpretation] is to ascertain and give effect to the intention of the testator."<sup>42</sup> To discern the actual intent of the donor, courts traditionally employ the plain meaning rule.<sup>43</sup>

When probate courts apply this rule, they attribute the plain or ordinary meaning to the donor's words, and they do not consider extrinsic evidence that suggests that the donor intended an idiosyncratic meaning.<sup>44</sup> The Supreme Court of

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*Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP., PROB. & TR. J. 577, 578–79 (2007) (providing examples to "illustrate how over-enforcement of Wills Act formalities and a fear of false positives can result in frustration of testator intent"); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 541–43 (1990) ("Abolishing the attestation requirement for formal wills would bring their formalities more in line with the formalities required for other ways of passing property at death . . .").

<sup>40</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 1999) ("The formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves."); Champine, *supra* note 16, at 391–92 ("To facilitate realization of testamentary freedom, the law historically has required individuals to set forth dispositive desires in a written statement executed with formalities sufficient to identify to the individual executing the instrument and the world at large that the writing is intended to be a will.").

<sup>41</sup> UNIF. PROBATE CODE § 2-601 (amended 2010) (explaining that "the widely accepted proposition" is "that a testator's intention controls the legal effect of his or her dispositions."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."). Courts also focus on the donor's intention when interpreting trusts. See Kelly, *supra* note 3, at 1134 ("Many courts emphasize that, just as the court's role in interpreting a will is to facilitate a testator's intent, the role of the court in construing a trust is to effectuate the settlor's intent."); see also Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1171 (2008) ("Historically, the settlor's intent was the defining force in trust law—the 'polestar' which guided all aspects of trust administration.").

<sup>42</sup> *Deposit Guar. Nat'l Bank of Jackson v. First Nat'l Bank of Jackson*, 352 So. 2d 1324, 1327 (Miss. 1977).

<sup>43</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 328; Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 70–72 (2005).

<sup>44</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 328 ("Under this rule, extrinsic evidence may be admitted to resolve certain ambiguities, but the plain meaning of the words of a will

Mississippi explains further: “The surest guide to testamentary intent is the wording employed by the maker of the will”;<sup>45</sup> thus “if the language of the will is clear, definite, and unambiguous, the court must give to the language its clear import.”<sup>46</sup> Although critics again argue that the process of will interpretation could be reformed to better decipher the donor’s intent,<sup>47</sup> the plain meaning rule’s overarching purpose is to facilitate freedom of disposition by providing courts a reliable and consistent way to interpret the meaning of wills.<sup>48</sup>

The law’s methods of authenticating and interpreting wills are therefore designed to decipher the donor’s actual intent in an effort to facilitate the donor’s freedom of disposition. Sometimes, however, the donor’s actual intent is indiscernible.<sup>49</sup> In these situations, the law turns to the decedent’s probable intent to fulfill its facilitative goal. Instead of granting courts the discretion to decide what is best for the disposition of the donor’s property,<sup>50</sup> policymakers have designed rules to guide courts in deciding what the donor likely would have wanted when the donor’s original intent is unclear.<sup>51</sup>

Rules that are designed to implement the donor’s probable intent not only facilitate freedom of disposition by achieving the result that the donor likely intended, but also maximize social welfare by reducing the transaction costs of estate planning. The donor’s act of crafting and implementing an estate plan involves the

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cannot be disturbed by evidence that the testator intended another meaning.”); Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 814 (2001) (“The plain meaning rule appears simple: courts shall not admit extrinsic evidence to contradict or add to the plain meaning of the words in a will.”).

<sup>45</sup> *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659, 663 (Miss. 1987).

<sup>46</sup> *Bullard v. Bullard*, 97 So. 1, 2 (Miss. 1923); see also *In re Estate of Cole*, 621 N.W.2d 816, 818 (Minn. Ct. App. 2001) (“[T]he court is to avoid doing any violence to the words employed in the instrument and to distrust the reliability of looking to sources outside the instrument for information about its meaning . . .”).

<sup>47</sup> See Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 611–15 (2016).

<sup>48</sup> See Champine, *supra* note 16, at 401 (“By limiting courts to the unambiguous language of the will, these testators receive assurance that their wishes will not be overturned because they are unpopular. More generally, the rule-oriented approach offers predictability to all testators, assuring them that their wishes, if expressed unambiguously, will be respected.”).

<sup>49</sup> It could be argued that the donor’s actual intent is never discernable. See James L. Robertson, *Myth and Reality—Or, Is It “Perception and Taste”?—In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1052 (1993) (“Vain is the search for actual intent in a world where probable intent at one fleeting moment in time is the most we may ever know . . . . We need to accept the reality that the donor’s subjective individuated intent may not be known with sufficient certainty and completeness and frequency that we may successfully ground in it our jurisprudence of donative documents.”).

<sup>50</sup> See Kelly, *supra* note 3, at 1136–37.

<sup>51</sup> See Sitkoff, *supra* note 14, at 644 (“Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent’s probable intent.”).

time and effort of drafting and executing a will, trust, or other donative document and also likely entails the monetary costs of engaging a lawyer.<sup>52</sup> Moreover, because the donor must confront her own mortality, estate planning can also have psychological and emotional costs.<sup>53</sup> The time, effort, money, and emotional energy expended by the donor represent the transaction costs of estate planning.

By establishing default rules for the disposition of property that fulfill the donor's probable intent, the law provides the donor an estate planning option that does not produce these transaction costs. Some, if not many, donors will have testamentary preferences that do not conform to the majoritarian default rules, and they must bear the transaction costs of estate planning to opt out of these rules.<sup>54</sup> However, by setting the default rules to match the preferences of the largest segment of donors, the law can realize the benefits of freedom of disposition while allowing some donors to avoid the associated transaction costs. In this way, the law attempts to maximize social welfare.<sup>55</sup>

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<sup>52</sup> See Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 837 (2015) (explaining that estate planning “entails transaction costs, including estate planning lawyers and a significant time investment . . . .”); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1039 (2004) [hereinafter Hirsch, *Inheritance Law*] (“For contractual theorists, default rules serve to minimize the expense of bargaining. Gratuitous transfers do not ordinarily involve bargaining, to be exact, but they do entail drafting and formalization, in the form of a will.”); Weisbord, *supra* note 13, at 879 (“[T]he complexity of the will-making process deters the exercise of testamentary freedom by imposing substantial transaction costs, including the cost of professional counsel or the investment of time necessary to prepare a proper will . . . .”).

<sup>53</sup> See Hirsch, *Inheritance Law*, *supra* note 52, at 1050 (“[P]sychological barriers accompany transaction costs, conspiring to impede the testamentary process.”). See also Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 145 (2012) (explaining that the “antitherapeutic consequences” of estate planning “may dissuade the testator from completing her estate plan and may impair the testator’s decision-making capabilities.”). The psychological consequences of estate planning also arise when the donor uses non-probate will substitutes. See Mark Glover, *The Solemn Moment: Expanding Therapeutic Jurisprudence Throughout Estate Planning*, 3 SUFFOLK U. L. REV. ONLINE 19, 22–23 (2015).

<sup>54</sup> See Hirsch, *Inheritance Law*, *supra* note 52, at 1037–38 (“Of course, parties who disfavor the rules will still have to incur costs to opt out of the default regime, but so long as each default rule selected by lawmakers constitutes a majoritarian default, transaction costs are reduced in the aggregate.”); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1425 (2014) (“The logic behind the majoritarian default-rules theory is simple: since default rules aim to decrease transaction costs, they should fit the parties’ preferences as closely as possible. There would always be some parties that prefer a rule different from the one preferred by the majority, and these parties would then have to opt out of the default rule and incur the attendant transaction costs. But the majority of parties would not opt out, thereby avoiding the transaction costs they would have incurred in the absence of the default rule.”).

<sup>55</sup> See Bruce H. Kobayashi & Larry E. Ribstein, *Law as Product and Byproduct*, 9 J.L. ECON. & POL’Y 521, 547 (2013) (suggesting that lawmakers “can increase social welfare by providing default rules that reduce . . . transaction costs”).

The most obvious situation in which the law's default rules are designed to fulfill the donor's probable intent is when the donor does not leave behind a will. In this situation, the law cannot rely upon the express intent of the donor to guide it in the distribution of the donor's property. Instead, the law has developed the default estate plan of intestacy, which dictates the distribution of estates of donors who die without wills.<sup>56</sup> Through this default estate plan, the law attempts to distribute the donor's property in the manner that she likely would have wanted.<sup>57</sup> As Sitkoff explains, "[i]n accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death."<sup>58</sup> By fulfilling the donor's probable intent through a default estate plan, the law facilitates freedom of disposition in the absence of a will,<sup>59</sup> and it also reduces the transaction costs that donors must bear because many need not execute wills to dispose of their estates in the way they intend.<sup>60</sup>

In addition to the intent of donors who die intestate, the actual intent of some donors who die with wills is unclear.<sup>61</sup> A substantial amount of time can pass between the execution of a will and the donor's death, and within this intervening period circumstances might change in ways that suggest the donor's will no longer reflects her actual intent regarding the disposition of her estate.<sup>62</sup> For example, the

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<sup>56</sup> See DUKEMINIER & SITKOFF, *supra* note 7, at 63–65.

<sup>57</sup> See Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 789 (2012) ("The primary goal of intestacy statutes, as stated by the drafters of the UPC and by scholars, is to transfer property according to the probable intent of a decedent who dies without a will. The statutes try to reach the result that most intestate decedents likely would want . . ."); Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 419 (2009) ("The primary goal of intestacy is to distribute the estate in accordance with the decedent's probable wishes; an intent the law assumes is to direct assets to surviving family members."); Reid Kress Weisbord, *Anatomical Intent*, 124 YALE L.J.F. 117, 125 (2014) ("For the most part, intestacy law operates by ascertaining and employing commonly held preferences as a proxy for the probable intent of intestate decedents.").

<sup>58</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 63.

<sup>59</sup> See Weisbord, *supra* note 57, at 125 (explaining that "dissonance between a system of intestate distribution and majoritarian preferences would tend to frustrate the donative intent of unformed individuals who lack knowledge of their state's intestacy rules or the need to contract around the default regime.").

<sup>60</sup> See Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1426 (2013) ("Orthodox default-rule theory dictates that when a citizen fails to execute a will, lawmakers should give effect to whatever distributive scheme they expect the citizen would prefer, given her circumstances. By doing so, lawmakers enable citizens to rely on the estate plan provided by the intestacy statute and thereby avoid the transaction cost of executing a will.").

<sup>61</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 562–63 (suggesting that in some cases the testator's actual intent may not be evident).

<sup>62</sup> See *id.* at 327 ("Another difficulty in construing wills stems from the gap in time that intervenes between the making of a will and the testator's death. During this gap, which may span years or even decades, circumstances can change in a way that renders the will stale or

donor's actual intent is ambiguous when she executes a will while married but subsequently divorces. In this situation, the donor likely would not want her ex-spouse to benefit from her estate, despite that her will unambiguously states otherwise.<sup>63</sup> The changed circumstance of divorce leads the law to doubt that the donor's will accurately reflects her intended estate plan. Based upon the likelihood that the donor mistakenly failed to update her will,<sup>64</sup> the law presumes that she would not want her ex-spouse to benefit from her estate, and it consequently revokes any gifts to the donor's ex-spouse.<sup>65</sup> This result not only fulfills the donor's probable intent but also eliminates the need for the donor to incur the transaction costs of updating her estate plan to match her changed circumstances.<sup>66</sup>

In sum, the law grants the donor broad freedom of disposition in an effort to maximize social welfare.<sup>67</sup> The donor is in the best position to evaluate her own particular circumstances and to distribute property in a way that will generate the greatest utility.<sup>68</sup> As such, the law generally defers to donor's decisions regarding the disposition of her estate.<sup>69</sup> Furthermore, the law facilitates the donor's exercise of freedom of disposition by attempting to honor the actual or probable intent of the donor.<sup>70</sup> Indeed, the bulk of the law of succession, including the default estate plan of intestacy and the rules regarding the authentication, interpretation, and construction of wills, is designed to carry out the donor's intent.

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obsolete.”). See generally Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (exploring in depth the problem of changed circumstances during the course of the testator's life).

<sup>63</sup> See *Coughlin v. Bd. of Admin.*, 199 Cal. Rptr. 286, 287 (Cal. Ct. App. 1984) (“[U]pon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, [testators] would most likely intent to provide for their new family members, and/or revoke prior provisions for their ex-spouses.”).

<sup>64</sup> See *id.* at 288 (explaining that testators “often fail to . . . revoke, not out of conscious intent, but simply from a lack of attentiveness.”).

<sup>65</sup> See, e.g., UNIF. PROBATE CODE § 2-804(b) (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(b) (AM. LAW INST. 1999) (“The dissolution of the testator's marriage is a change in circumstance that presumptively revokes any provision in the testator's will in favor of his or her former spouse.”); DUKEMINIER & SITKOFF, *supra* note 7, at 239. The law also includes related rules that give the donor's spouse and children a portion of her estate when the donor executed a will before marriage or the birth of children. See Sitkoff, *supra* note 14, at 657–58 (explaining that these rules are meant to implement freedom of disposition).

<sup>66</sup> Hirsch & Wang, *supra* note 5, at 13 (“Wills frequently mature years after they are executed, and the cost (both economic and psychological) of adding codicils may deter testators from updating estate plans to take into account changed circumstances.”).

<sup>67</sup> See *supra* Section I.A.

<sup>68</sup> See *supra* notes 22–25 and accompanying text.

<sup>69</sup> See *supra* note 2 and accompanying text.

<sup>70</sup> See *supra* Section I.B.

## II. REGULATING THE DEAD HAND

Although the donor's freedom of disposition is expansive, it has limits. In certain circumstances, the law restricts the donor's ability to decide how to distribute property at death.<sup>71</sup> The Restatement describes the general framework by which the law limits the influence of the dead hand: "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."<sup>72</sup> As such, the law's organizing principle is that the donor has broad discretion to decide how to dispose of her estate,<sup>73</sup> but it also regulates inheritance through various overriding rules that limit the donor's freedom of disposition.<sup>74</sup>

Overriding rules of law that regulate the donor's freedom of disposition can be separated into two categories: (1) prescriptive restraints and (2) proscriptive restraints. A prescriptive restraint regulates the donor's freedom of disposition by requiring the donor to make certain posthumous transfers of property.<sup>75</sup> This type of restraint can be seen as limiting the donor's freedom of disposition because the donor cannot give the property that is the subject of a mandatory transfer to donees whom she might otherwise prefer to benefit. By contrast, a proscriptive restraint regulates inheritance by prohibiting certain dispositions of property.<sup>76</sup> Put simply, whereas prescriptive restraints limit freedom of disposition by mandating particular transfers, proscriptive restraints limit dead hand control by forbidding other posthumous dispositions.

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<sup>71</sup> Kelly, *supra* note 3, at 1138–40.

<sup>72</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003). The Restatement explains that:

The term 'rule of law' is used in a broad sense to include rules and principles derived from the U.S. Constitution, a state constitution, or public policy; rules and principles set forth in federal or state legislation or in municipal ordinances; rules and principles of the common law and of equity; and rules and principles contained in governmental regulations.

*Id.*

<sup>73</sup> See *supra* Section I.A.

<sup>74</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations. The foregoing list is illustrative, not exhaustive."). The law also places various restrictions on the donor's ability to transfer property in trust. See Kelly, *supra* note 3, at 1139–41.

<sup>75</sup> See *infra* notes 77–82 and accompanying text. Hirsch labels these types of restrictions "compulsory bequests." Hirsch, *supra* note 10, at 2221.

<sup>76</sup> See *infra* notes 83–107 and accompanying text. Hirsch labels these types of restrictions "forbidden bequests." Hirsch, *supra* note 10, at 2213.

*A. Prescriptive Restraints*

Among the overriding rules of law that can be characterized as prescriptive restraints of the dead hand are those that require the donor to transfer property to surviving spouses and to outstanding creditors.<sup>77</sup> First, the law protects the donor's spouse from disinheritance by requiring the donor to distribute a portion of her estate to her surviving spouse.<sup>78</sup> This mandatory transfer—which is sometimes called the forced spousal share<sup>79</sup>—requires the donor to distribute property to her surviving spouse regardless of how she intends to dispose of her estate. Even if the donor leaves behind a legally effective will that completely disinherits her surviving spouse, the law disregards the donor's intent by forcing a share of her estate to the surviving spouse.<sup>80</sup> The forced spousal share therefore regulates inheritance by denying the donor the ability to direct property that is the subject of the forced share to donees other than her surviving spouse.

Second, in addition to surviving spouses, outstanding creditors benefit from the donor's estate regardless of the donor's intent. Although the donor can craft an estate plan that distributes property to particular donees,<sup>81</sup> the law will not carry out her plan without first directing property to her creditors. Put differently, the law requires the donor to transfer property to outstanding creditors before she can transfer property to other donees.<sup>82</sup> Because the rights of outstanding creditors, as well as the rights of surviving spouses, require the donor to transfer property to particular donees and consequently place property outside the donor's control, both represent prescriptive restraints of the dead hand.

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<sup>77</sup> In addition to the rights of spouses and creditors, the estate tax can also be seen as a prescriptive restraint on the donor's freedom of disposition because under certain circumstances the donor must transfer a portion of her estate to the government. *See* Kelly, *supra* note 3, at 1184 (characterizing the estate tax as a “fundamental limitation[ ] on the donor's ability to transfer property at death”).

<sup>78</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 512–16; *see, e.g.*, UNIF. PROBATE CODE § 2-201 (amended 2010).

<sup>79</sup> The forced share of the surviving spouse is sometimes also referred to as the elective share or the statutory share. *See* DUKEMINIER & SITKOFF, *supra* note 7, at 513.

<sup>80</sup> Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1245 (2005) (“The power to devise is not complete in the separate property states . . . . In every separate property state, state law gives surviving spouses the right to make claims against their deceased spouses' estates, even if the deceased spouses explicitly disinherited them.”).

<sup>81</sup> *See supra* Section I.A.

<sup>82</sup> Kelly, *supra* note 3, at 1184 (explaining that a “fundamental limitation[ ] on the donor's ability to transfer property at death . . . is that the donor may not transfer property to donees before the donor has satisfied her creditors”); *see also* DUKEMINIER & SITKOFF, *supra* note 7, at 44 (explaining that a “core function[ ]” of probate is that “it *protects creditors* by providing a procedure for payment of the decedent's debts”).



*B. Proscriptive Restraints*

In addition to prescriptive restraints of the dead hand, which require the donor to transfer property to particular donees,<sup>83</sup> the law also regulates inheritance through proscriptive restraints that override freedom of disposition by denying the donor the discretion to make certain types of posthumous transfers. The first example of this type of inheritance regulation is the rule that prevents the donor from making testamentary gifts that encourage illegal activity.<sup>84</sup> By exercising freedom of disposition, the donor can make not only outright testamentary gifts but also conditional gifts that only become effective under certain circumstances.<sup>85</sup> For example, the donor can condition a gift upon the donee achieving certain educational milestones,<sup>86</sup> reaching a particular age,<sup>87</sup> or satisfying other types of conditions.<sup>88</sup> The law, however, does not allow the donor to place conditions on gifts that encourage the donee to engage in illegal activity. Kelly illustrates this prohibition of bequests that encourage illegality by suggesting that a court would not uphold a provision in a will through which “a donor attempts to devise \$1 million to a person in a murder-for-hire scheme.”<sup>89</sup> Certainly, the donor can give property to a killer through her will; however she cannot condition the gift on the killer committing the crime. Because this rule prevents the donor from transferring property under certain conditions—namely those that encourage illegal activity—it is a proscriptive limitation of freedom of disposition.

A second example of a proscriptive restraint of the dead hand is the prohibition on conditional bequests that impermissibly interfere with marriage. Testamentary

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<sup>83</sup> See *supra* notes 77–82 and accompanying text.

<sup>84</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (“Among the rules of law that prohibit or restrict freedom of disposition in certain instances are . . . provisions encouraging illegal activity . . .”). Restrictions on the enforceability of bequests that encourage illegal activity can be seen as a subset of the more general restriction that prohibits bequests against public policy, which also includes restrictions against bequests that encourage tortious activity or divorce. See DUKEMINIER & SITKOFF, *supra* note 7, at 12.

<sup>85</sup> Kelly, *supra* note 3, at 1170 (“Historically, donors have included a wide variety of conditions in their bequests.”); Tate, *supra* note 25, at 449 (“Conditional gifts are not a new phenomenon. Parents long have sought to influence the behavior of their children through financial rewards, both before and after death.”). Although they can be included in wills, “[i]n contemporary practice, conditional gifts . . . are more typically made in trust, sometimes call an *incentive trust*.” DUKEMINIER & SITKOFF, *supra* note 7, at 9.

<sup>86</sup> Tate, *supra* note 25, at 453–56.

<sup>87</sup> Shelly Steiner, Note, *Incentive Conditions: The Validity of Innovative Financial Parenting by Passing Along Wealth and Values*, 40 VAL. U. L. REV. 897, 908–09 (2006) (“Upon examining the history of incentive conditions, it is apparent that wealthy parents have historically attached conditions to the passing of their fortunes. One of the oldest and most common conditions involved an age requirement, where a beneficiary received wealth only when the beneficiary reached a named age in the trust or will.”).

<sup>88</sup> Tate, *supra* note 25, at 453.

<sup>89</sup> Kelly, *supra* note 3, at 1162.

conditions that affect marriage can take one of two general forms. Either the donor can place a condition on a gift that limits the donee's ability to marry, or she can condition a bequest in such a way that encourages divorce.<sup>90</sup> The law regulates inheritance by limiting the donor's ability to make both types of conditional bequests. First, the law prohibits the donor from making conditional gifts that unreasonably restrict the donor's ability to marry.<sup>91</sup> The Restatement (Second) of Property explains that a "restraint unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur," and continues, "[t]he likelihood of marriage is a factual question, to be answered from the circumstances of the particular case."<sup>92</sup> Second, the law also prohibits conditional bequests that encourage the donee to divorce.<sup>93</sup> Whether a conditional gift encourages divorce is also a factual question that must be resolved on a case by case basis.<sup>94</sup>

A final example of a proscriptive limit of freedom of disposition involves the reach of the dead hand over time. Although the donor traditionally exercises freedom of disposition through a will,<sup>95</sup> in contemporary estate planning the donor can transfer property after death through other avenues,<sup>96</sup> such as a revocable trust.<sup>97</sup> A trust is an arrangement in which the donor transfers property to a trustee, who holds

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<sup>90</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 12 ("The rule against a will or trust provision that imposes an unreasonable restraint on marriage is a specific application of the more general rule against conditions that are *contrary to public policy*, which includes conditions that disrupt or discourage familial relationships.").

<sup>91</sup> *Id.* at 11–12; Martin D. Begleiter, *Taming the "Unruly Horse" of Public Policy in Wills and Trusts*, 26 QUINNIAC PROB. L.J. 125, 127–28 (2012) ("Partial restraints on marriages are also valid (so long as the provision does not unduly restrain the choice of eligible marriage partners).").

<sup>92</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (AM. LAW INST. 1983). For an example of this line of analysis, see *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (Ohio Com. Pl. 1974).

<sup>93</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 12.

<sup>94</sup> *Id.* ("A provision that encourages separation or divorce is likewise invalid, but a provision that is meant to provide support in the event of separation or divorce is valid."); Begleiter, *supra* note 91, at 128 ("These rules invalidating restraints on marriage or encouraging a divorce are, however, subject to a major exception. If the dominant motive of the grantor is to provide support for the beneficiary until marriage, or provide funds needed for living and other expenses in the event of a divorce, the provision is valid.").

<sup>95</sup> Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 156 (2008) (explaining that "estate planning . . . at one time involved not much more than the drafting and execution of a will").

<sup>96</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 435 ("A donor may exercise her freedom of disposition at death other than by will in probate . . . . [R]evocable inter vivos trusts, life insurance and other pay-on-death contracts, pension plans and retirement accounts, and other legal arrangements . . . have the effect of passing property at death outside of probate. Taken together, these *will substitutes* constitute a nonprobate system of private succession . . . .").

<sup>97</sup> *Id.* ("The revocable trust has . . . emerged as the successor to the will as the centerpiece instrument in contemporary estate planning.").

the property for the benefit of the beneficiary of the trust.<sup>98</sup> The trustee acquires legal title to the trust assets but must distribute property to the trust beneficiaries as directed by the donor.<sup>99</sup> When the donor uses a revocable trust as a will substitute, she transfers legal title of the trust assets to a trustee and remains the primary beneficiary of the trust, thereby retaining continued enjoyment of the trust property during her life.<sup>100</sup> Moreover, the donor designates a contingent beneficiary, who will enjoy the benefit of the trust property after her death. In this way, a trust can function similarly to a will.

By exercising freedom of disposition through a trust, the donor can extend the reach of dead hand control into the future, or as Sitkoff puts differently, “the trust implements the principle of freedom of disposition by projecting the donor’s will across time.”<sup>101</sup> For example, a donor who wants to benefit her descendants can simply leave property to her children through a will. By doing so, the donor exercises freedom of disposition, but her control terminates upon the distribution of the estate because her children acquire authority over the property. The extent to which subsequent generations of descendants benefit from the donor’s property depends upon how the donor’s children exercise their freedom of disposition.

Alternatively, the donor can place property in trust and establish a line of successive beneficiaries. She can direct the trustee to distribute income from the trust property to her children for their lifetimes and then to distribute income to her grandchildren for their lifetimes, and so forth down the line of successive generations.<sup>102</sup> Under this scenario, the donor’s control over the property does not terminate at the initial transfer but instead spans the entire duration of the trust. By exercising freedom of disposition in this way, a donor can retain control over property long after death.

Although the donor could theoretically assert freedom of disposition by extending dead hand control indefinitely,<sup>103</sup> the law traditionally places durational limits on the donor’s freedom of disposition through the rule against perpetuities.<sup>104</sup>

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<sup>98</sup> *Id.* at 385.

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

<sup>100</sup> Bradley E.S. Fogel, *Teaching Trusts and Estates: Trust Me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS L.J. 805, 807 (2014).

<sup>101</sup> Sitkoff, *supra* note 14, at 653.

<sup>102</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 440 (explaining that one benefit to the donor of a trust is that she “can draft its provisions precisely to her liking.”).

<sup>103</sup> Sean Hannon Williams, *Lost Life and Life Projects*, 87 IND. L.J. 1745, 1774 (2012) (“With the demise of the rule against perpetuities, trusts allow settlors to extend dead-hand control indefinitely into the future. Although public policy concerns set some limits on dead-hand control, people have several powerful tools to extend their influence beyond their own lives.”).

<sup>104</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (“Among the rules of law that prohibit or restrict freedom of disposition in certain instances are . . . the rules against perpetuities and accumulations.”); DUKEMINIER & SITKOFF, *supra* note 7, at 877 (explaining that “the Rule imposes a time limit on the reach of the dead hand.”); Kelly, *supra* note 3, at 1182 (“The rule against perpetuities

In its conventional form, the rule against perpetuities limits the reach of the dead hand to twenty-one years after the death of all lives in being at the time of the transfer.<sup>105</sup> If a contingent future interest created by the donor's transfer of property will not vest or fail within that timeframe, it is void.<sup>106</sup> While the durational limit imposed by the traditional rule varies depending on the donor's particular circumstances, Sitkoff explains that "the Rule puts an outer boundary of roughly 100 years or so on the temporal reach of the dead hand."<sup>107</sup> This rule can therefore be seen as a proscriptive limitation on the donor's freedom of disposition because it directly regulates the manner by which the donor can transfer her property.

In sum, although the donor enjoys broad liberty to dispose of property as she chooses,<sup>108</sup> the law regulates inheritance in various ways.<sup>109</sup> The law's restrictions of freedom of disposition fall within one of two categories. First, the law places prescriptive limits on freedom of disposition by requiring the donor to transfer property to particular donees, such as surviving spouses and outstanding creditors.<sup>110</sup> Prescriptive limitations regulate inheritance by placing property that is the subject of these mandatory transfers outside the reach of the dead hand. Second, the law places proscriptive limitations on freedom of disposition by directly restricting the donor's ability to transfer property in certain ways.<sup>111</sup> Proscriptive restraints of the dead hand include the rules that prohibit bequests that encourage illegal behavior or that interfere with marriage and the durational limitation imposed by the rule against perpetuities.

### III. INHERITANCE REGULATION AND SOCIAL WELFARE

Freedom of disposition is the organizing principal of the law of succession because it is viewed as maximizing social welfare.<sup>112</sup> Given freedom of disposition's primacy and its social welfare foundation, the law's regulation of inheritance must also be grounded in the maximization of social welfare. In this regard, inheritance regulation can be explained as addressing two general concerns that suggest freedom

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invalidates certain contingent interests that may vest too far into the future, and thereby prevents donors from exercising control over great-grandchildren and their descendants.").

<sup>105</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 882.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 880. Some states have either abolished the rule against perpetuities or have extended the durational limitations on freedom of disposition to such an extent that they have effectively authorized perpetuities. *See id.* at 889–95; *see generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005) (stating that "[b]y the end of 2004, twenty states had validated perpetual trusts by abolishing the centuries-old Rule Against Perpetuities").

<sup>108</sup> *See supra* Part I.A.

<sup>109</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>110</sup> *See supra* notes 77–82 and accompanying text.

<sup>111</sup> *See supra* notes 78–107 and accompanying text.

<sup>112</sup> *See supra* Part I.

of disposition does not achieve its social welfare goals in all instances. First, unrestricted freedom of disposition permits the donor to make some estate planning decisions that are not optimal from a societal perspective.<sup>113</sup> Second, if left unfettered, the donor's freedom of disposition might incentivize certain types of socially undesirable conduct.<sup>114</sup> Both the concern of suboptimal decision-making and suboptimal behavior can justify the law's regulation of inheritance under specific circumstances.

#### A. *Allocating Wealth & Suboptimal Decisions*

Although broad freedom of disposition allows the donor to make estate planning decisions that benefit society,<sup>115</sup> there is no guarantee that she will actually do so. In fact, freedom of disposition presents the possibility that the donor will dispose of her estate in a socially suboptimal manner.<sup>116</sup> Therefore, while the law generally does not question the merits of the donor's estate planning decisions,<sup>117</sup> it does place limited restraints on the dead hand that can be characterized as addressing three specific concerns that stem from broad freedom of disposition and that might result in the socially suboptimal exercise of this freedom: (1) the donor might exercise freedom of disposition without considering relevant information; (2) the donor might dispose of her estate without adequately considering the costs her decisions impose on others; and (3) the donor will not accurately evaluate the merits of her estate planning decisions because she will be dead at the time her estate plan takes effect and consequently will not personally bear the costs of her decisions. Each of these concerns provides a potential rationale for the law's regulation of inheritance.

##### 1. *Imperfect Information*

First, some inheritance regulations could be explained as mechanisms that prevent the donor from exercising freedom of disposition based upon imperfect information.<sup>118</sup> One rationale of broad freedom of disposition is that the donor is in the best position to decide how to distribute her property upon death,<sup>119</sup> and, thus, the law typically defers to her intent.<sup>120</sup> In some instances, however, the donor does not have all of the relevant information to accurately assess the consequences of

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<sup>113</sup> See *infra* Part III.A.

<sup>114</sup> See *infra* Part III.B.

<sup>115</sup> Kelly, *supra* note 3, at 1135–38; see also *supra* Part I.A.

<sup>116</sup> Kelly, *supra* note 3, at 1138 (“Effectuating a donor’s ex ante interests is not necessarily equivalent to maximizing social welfare.”).

<sup>117</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

<sup>118</sup> Kelly, *supra* note 3, at 1158–61.

<sup>119</sup> See *supra* notes 22–25 and accompanying text.

<sup>120</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

disposing of her estate in certain ways.<sup>121</sup> When the donor exercises freedom of disposition in these situations, the assumption that she is in the best position to assess the utility of her estate plan breaks down.<sup>122</sup> As such, the law regulates inheritance in ways that alleviate these concerns regarding imperfect information.

The rule against perpetuities is perhaps the clearest example of an inheritance regulation that can be explained as limiting the donor's ability to exercise freedom of disposition with imperfect information. This rule restrains the reach of the dead hand by placing a durational limit on how long the donor can control the disposition of property.<sup>123</sup> If the law placed no temporal restriction on the dead hand, then the donor could theoretically control the disposition of property indefinitely.<sup>124</sup> Under such a scenario, the donor would decide during life how property should be utilized long after her death. Such a decision would inherently involve imperfect information because circumstances inevitably change after the donor's death in unpredictable ways. The donor simply cannot know the needs of unborn generations, and therefore, the donor's decision to provide for those future donees would be made with imperfect information.<sup>125</sup> To address these concerns regarding the quality of the donor's information, the law traditionally places a durational limit on dead hand control in the form of the rule against perpetuities, which voids certain transfers that extend beyond a time that the donor can accurately assess the consequences of exercising her freedom of disposition.<sup>126</sup>

## 2. Negative Externalities

Second, other inheritance regulations could be explained as mechanisms that prevent the donor from exercising freedom of disposition in ways that ignore

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<sup>121</sup> Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 295 (2015) ("According to one school of thought, imperfect information, particularly about future events and circumstances, may cause donors to make dispositions of their property that they would not have made had they been better prognosticators. Unfortunately, once the donor is dead, such decisions cannot be reversed." (citations omitted)); Kelly, *supra* note 3, at 1158 ("Future events are difficult to foresee and unanticipated contingencies may arise. As a result, a donor may dispose of property in a way that contradicts what the donor would have wanted with complete information.").

<sup>122</sup> Kelly, *supra* note 3, at 1158 ("One reason why effectuating donative intent is not necessarily consistent with maximizing social welfare is imperfect information.").

<sup>123</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 877–82; *see supra* notes 103–107 and accompanying text.

<sup>124</sup> Williams, *supra* note 103, at 1774.

<sup>125</sup> David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1703 (2009) ("Even the savviest investor cannot predict how to allocate assets efficiently in the distant future.").

<sup>126</sup> *Id.* (explaining that "Trust doctrine responds to [imperfect information] concerns with the rule against perpetuities, which forbids the dead from tying up resources forever."); Kelly, *supra* note 3, at 1182 ("[T]he rule against perpetuities may be necessary because of imperfect information.").

particular costs imposed on others.<sup>127</sup> When an individual or organization engages in activities, private benefits and costs are produced. For example, a business that manufactures goods for sale both incurs costs for labor and material and enjoys the benefit of revenue from the sale of its goods. The business weighs these private costs and benefits when deciding whether to continue production, and as long as the benefits of manufacturing goods exceed the costs, the business will continue operations.<sup>128</sup>

Although the internal costs of labor and material affect the business' decision, other costs likely do not. These costs, known as negative externalities, are costs that flow from the business' manufacturing operation that are not internalized by the business.<sup>129</sup> For instance, the manufacturing plant might produce pollution that has large costs for society as a whole.<sup>130</sup> When the costs of pollution are taken into account, the socially optimal decision might be to close the manufacturing plant. However, these costs do not directly factor into the business' cost benefit analysis, and consequently manufacturing operations might continue despite that the societal costs exceed the societal benefits. In this way, negative externalities can cause

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<sup>127</sup> Hirsch, *supra* note 10, at 2194; Kelly, *supra* note 3, at 1161–63. In addition to concerns regarding negative externalities, intergenerational equity could be seen as a separate justification for restricting dead hand control. *See id.* at 1163–65 (“A third theoretical justification for restricting testamentary freedom is intergenerational equity between the interests of the present generation and future generations.”); *see also* SHAVELL, *supra* note 17, at 70–71 (including “harmful external effects” and “inherent inequality in the wealth of the present generation versus that of future generations” among the “[v]alid arguments against dead hand control of property”). However, intergenerational equity can be included as part of the broader negative externality rationale. *See* Kelly, *supra* note 3, at 1163 n.240 (“Given that the present generation may not have a private incentive to incorporate fully the social costs (or benefits) of their actions on future generations, the argument based on intergenerational equity is a variation of the argument based on negative (or positive) externalities.”).

<sup>128</sup> Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1650 (2011) [hereinafter Kelly, *Strategic Spillovers*] (“In deciding whether to open a factory or increase production, a firm will compare its private benefits and costs but may ignore the social costs of pollution on local residents, other countries, or future generations.”).

<sup>129</sup> *Id.* at 1649–50 (“[S]elf-interested individuals and profit-maximizing firms use their property for various purposes, and, in doing so, these individuals and firms may impose external effects on others. That is, a party may undertake an activity that has not only private benefits and costs, which directly affect the party engaging in the activity, but also social effects, which affect the welfare of other parties. If these social effects are beneficial, the activity entails *positive externalities*; if these social effects are harmful, the activity entails *negative externalities*.”).

<sup>130</sup> Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 300 (2007) (“Environmental pollution is the archetypal example of an externality. Acme Factory produces widgets and in doing so emits pollutants into the environment. People living downstream or downwind from Acme receive the pollutants and bear some costs as a result. These costs are external to Acme’s decision to produce widgets . . .”).

socially detrimental activity to continue because the individual actor does not internalize all societal costs.<sup>131</sup>

Like the business that does not internalize the societal costs of pollution, the exercise of freedom of disposition can produce costs to society that the donor does not internalize.<sup>132</sup> If the law granted the donor absolute freedom of disposition, she could distribute her estate to any donee in any manner she chooses. The concern with this scenario as Kelly explains, “is that an owner (here, the donor) [has] an incentive to undertake activity (in this case, a gift at death) [when] the ‘activity’s private benefits exceed its private costs even though, as a result of the externality, the activity is undesirable [because] its social costs exceed its social benefits.’”<sup>133</sup> Some inheritance regulations could therefore be explained as mechanisms to address the issue of negative externalities Kelly identifies.

Consider, for example, the forced spousal share, which restricts the donor’s ability to disinherit a surviving spouse.<sup>134</sup> Generally, the law relies on the donor’s private incentives to produce socially optimal results, and allowing the donor to disinherit a spouse could be seen as falling in line with this general line of reasoning. After all, the donor likely knows her spouse’s needs better than the policymakers who craft the law of succession.<sup>135</sup> However, the donor’s decision to disinherit a surviving spouse has possible external costs that the donor likely does not internalize,<sup>136</sup> and consequently the donor’s decisions might not maximize social welfare.

In particular, a deceased spouse’s decision to disinherit a surviving spouse might impose costs upon society as a whole. One conventional justification of the forced spousal share is that the deceased spouse has an obligation to support a surviving spouse.<sup>137</sup> Under this theory, just as spouses must support each other during life, a deceased spouse should bear at least a portion of the cost of supporting

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<sup>131</sup> Kelly, *Strategic Spillovers*, *supra* note 128, at 1651 (“Operating the factory may be *socially undesirable*, even if the firm has a private incentive to operate the factory, if the social costs of operating the factory, including the external costs of the pollution, exceed the social benefits of manufacturing . . .”). It is important to note that just because an activity produces negative externalities does not mean that the activity is socially undesirable. *See id.* (“[O]perating the factory may be *socially desirable*, despite the external costs of the pollution, if the social benefits of manufacturing . . . exceed the social costs of operating the factory, including the external costs of the pollution.”).

<sup>132</sup> Kelly, *supra* note 3, at 1161–63 (“Externalities . . . may arise because of a disposition of property at death.”).

<sup>133</sup> *Id.* at 1161 (quoting Kelly, *Strategic Spillovers*, *supra* note 128, at 1644).

<sup>134</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 512–16; *see also supra* notes 78–80 and accompanying text.

<sup>135</sup> *See supra* notes 22–25 and accompanying text.

<sup>136</sup> Kelly, *supra* note 3, at 1162.

<sup>137</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 514 (“An older and narrower justification for the elective share is that marriage entails a *support obligation* that continues after death.”).



her surviving spouse after her death.<sup>138</sup> If the donor excludes her spouse from her estate plan, the possibility arises that the cost of the surviving spouse's support will fall on society through social services and public assistance programs.<sup>139</sup> Under such a scenario, the cost of supporting a surviving spouse falls not upon the deceased spouse, but upon the taxpayers who fund these programs. Because the donor likely does not consider these potential external costs when crafting her estate plan, the law regulates inheritance through the forced spousal share.<sup>140</sup>

Consider also the rights of creditors to the donor's estate.<sup>141</sup> As explained above, the law places a prescriptive restraint on the dead hand by requiring the donor to satisfy her debts before transferring her estate to other donees.<sup>142</sup> If the donor were allowed to avoid her debts by directing her estate away from her creditors, the donor's exercise of freedom of disposition would produce negative externalities.<sup>143</sup> Specifically, if creditors could not collect payment from the donor's estate, then the cost of financing would increase in response to the increased risk of nonpayment.<sup>144</sup> This increased cost of financing is a negative externality, as it is not borne by the donor but instead falls on future debtors. Instead of allowing the donor to avoid creditors by disposing of her assets upon death, the law directs the donor to satisfy her debts before passing property to other donees in order to minimize these negative externalities.<sup>145</sup>

In addition to the prescriptive restraints of the dead hand in the form of the forced spousal share and creditors' rights,<sup>146</sup> proscriptive limitations on the donor's freedom of disposition can be founded upon negative externality concerns.<sup>147</sup> Consider, for example, the prohibition of bequests that encourage illegal activity.<sup>148</sup> A transfer of property that encourages illegality might maximize the donor's utility; however, as Kelly explains, "effectuating the donor's intent [in this situation] would

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<sup>138</sup> UNIF. PROBATE CODE art. II, pt. 2 gen. cmt. (amended 2010) ("Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate.").

<sup>139</sup> SHAVELL, *supra* note 17, at 65; Kelly, *supra* note 3, at 1162.

<sup>140</sup> Kelly, *supra* note 3, at 1162.

<sup>141</sup> *Id.* at 1184.

<sup>142</sup> *See supra* notes 81–82 and accompanying text.

<sup>143</sup> Kelly, *supra* note 3, at 1184 (explaining that the rights of creditors "prevents debtors from imposing external costs on others and increasing the price of credit.").

<sup>144</sup> *Id.* at 1163; *see also* UNIF. PROBATE CODE art. III, pt. 8 gen. cmt. (amended 2010) ("Commercial and consumer credit depends upon efficient collection procedures.").

<sup>145</sup> Kelly, *supra* note 3, at 1163.

<sup>146</sup> *See supra* notes 134–145 and accompanying text.

<sup>147</sup> Kelly, *supra* note 3, at 1185 ("[I]f a donor attempts to transfer property for a purpose that is illegal (e.g., a bequest for murder) or entails other external costs (e.g., disinheriting a spouse), the law also may have a reason to intervene.").

<sup>148</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("Among the rules of law that prohibit or restrict freedom of disposition in certain instances are . . . provisions encouraging illegal activity . . ."); *see also supra* notes 85–89 and accompanying text.

be socially undesirable.”<sup>149</sup> The social undesirability of bequests that encourage illegal activity stems from external costs that likely do not factor into the donor’s decision-making process.<sup>150</sup> Most obviously, the donor’s choice to exercise freedom of disposition in a way that promotes illegal activity, such as by conditioning a bequest on the donee’s commission of murder, imposes costs on the victim.<sup>151</sup> Such a bequest also imposes external cost more broadly upon society as a whole, which funds the investigation, adjudication, and punishment of the crime.<sup>152</sup>

One final example of an inheritance regulation that is designed to combat concerns regarding negative externalities is the law’s prohibition of bequests that interfere with marriage.<sup>153</sup> Like conditional bequests that incentivize crime, gifts that interfere with marriage could certainly increase the donor’s utility; however, both types of gifts impose costs on individuals other than the donor. Within the context of gifts that interfere with marriage, the donee whose ability to marry is restricted or whose existing marriage is disrupted bears costs that the donor does not.<sup>154</sup> Moreover, to the extent that the institution of marriage is beneficial to society as a whole,<sup>155</sup> a donor whose gifts interfere with marriage creates societal costs. Both the costs borne directly by the donee and the costs borne by society at large represent negative externalities that the donor likely does not consider when crafting her estate plan. Therefore, similar to the way the law forces a share of the donor’s estate to a surviving spouse and outstanding creditors in order to minimize the negative externalities, the law regulates inheritance by voiding bequests that encourage illegal behavior and that interfere with marriage.

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<sup>149</sup> Kelly, *supra* note 3, at 1162.

<sup>150</sup> *Id.*

<sup>151</sup> Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. RES. L. REV. 293, 340 (2012) (“[A] contract for murder would impose a negative externality on the targeted victim . . . .”); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 10 n.48 (“The external costs of crime include the distributional costs of the harm done to the victims . . . .”).

<sup>152</sup> Dau-Schmidt, *supra* note 151, at 10 n.48 (“The external costs of crime include . . . the allocative costs of deterring crime, including the costs of our criminal justice system in catching and punishing criminals.”); Cecelia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WISC. L. REV. 953, 976–77 (explaining that “externalized crime costs are often borne by taxpayers in the form of higher expenditures for policing, prosecuting, adjudicating, and punishing . . . crime”); see also Abramowicz, *supra* note 151, at 340 (explaining that a contract for murder would “impose a negative externality . . . on society at large, which is harmed by the violation of its criminal laws.”).

<sup>153</sup> See *supra* notes 90–94 and accompanying text.

<sup>154</sup> Kelly, *supra* note 3, at 1162 (“In addition, even if an activity is legal, a court may refrain from enforcing a devise on the basis of public policy if the devise entails a significant externality. For example, although disrupting family relationships is often legal, a will provision that attempts to encourage divorce or separation is unenforceable.”).

<sup>155</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.”).

### 3. *Moral Hazard*

Finally, some inheritance regulations could be founded upon moral hazard concerns.<sup>156</sup> Because the donor will be dead at the time her estate plan takes effect, she will not experience the consequences of her decisions.<sup>157</sup> If her estate plan is unfair or does not fully account for the needs of her family, the donor will neither endure the potential backlash from disappointed family members nor witness the struggles of those whom she did not benefit.<sup>158</sup> Likewise, the donor will not suffer the regret of knowing she could have better provided for her family through proper planning. Because the donor's death shields her from the costs of poor estate planning, her incentive to make estate planning decisions that maximize social welfare is diminished.<sup>159</sup> This situation in which an individual is insulated from the costs of her decisions and consequently lacks proper decision-making incentives is known as a moral hazard.<sup>160</sup>

One inheritance regulation that might be designed to address this moral hazard problem involves spousal disinheritance. If the donor were to give away substantial amounts of wealth during life to the exclusion of her surviving spouse, she would have to face the possible anger or disappointment of her spouse. These potential consequences would factor into the donor's decision-making process and would incentivize her to carefully consider her choices regarding the disposition of her property. However, by transferring her property at death, the donor avoids the consequences of her estate planning decisions. As Professor Adam Hirsch explains, when acting at death, the donor is "free to act 'irresponsibly' without paying any of

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<sup>156</sup> See Hirsch, *Insolvent Heir*, *supra* note 12, at 639 ("There is, in other words, something close to a moral hazard of testation.").

<sup>157</sup> Glover, *supra* note 3, at 300.

<sup>158</sup> Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 72–73 (1999) ("Living persons face the economic and social repercussions of their actions; dead persons do not. One consequence is that a testator can, if she is so inclined, wash her hands of her dependents, without suffering the opprobrium that a living person would bear of such behavior. Death spares the testator from interpersonal costs."); see also Harry Hirschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932) ("[A] will is a man's one sure chance to have the last word. In it he can vent his spite in safety without his victims' having a chance to answer back.").

<sup>159</sup> Hirsch, *Insolvent Heir*, *supra* note 12, at 639 ("[A] testator may lack incentives at death to distribute efficiently the assets he has amassed during life . . . . When persons act during their lifetimes, they must live with the consequences. But persons acting at the moment of death, quite literally, do not . . . ."); see also David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 572 (2014) (explaining that "the dead do not experience the consequences of their decisions" and consequently there is "the fear that people act less soberly in making decisions that will take effect only after their demise.").

<sup>160</sup> PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISES OF 2008* 63 (2009) (explaining that "the term" moral hazard "refer[s] to any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly."); see also David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 102 (2012) ("[T]he consequence-free nature of testation creates a risk of moral hazard.").

the economic or interpersonal costs that living persons must bear for such behavior.”<sup>161</sup> Because the donor need not experience the interpersonal costs of estate planning,<sup>162</sup> her decision to disinherit a spouse might be suboptimal from a social welfare perspective.

In part to address this moral hazard concern, the law regulates inheritance through the forced spousal share. As detailed above, the law restricts the donor’s freedom of disposition by requiring her to give a portion of her estate to her surviving spouse.<sup>163</sup> This inheritance regulation is primarily explained as minimizing the possibility that the donor’s estate plan will produce negative externalities,<sup>164</sup> but a secondary justification could be that the forced share prevents the donor from making a decision that likely produces costs she does not consider as a result of her death. The surviving spouse might still be disappointed with the donor’s estate planning decisions,<sup>165</sup> but the forced share eliminates the possibility that the surviving spouse will receive nothing from her estate and therefore prohibits the donor’s decision that is likely most troubling to a surviving spouse. Thus, by at least partially addressing this moral hazard concern, the forced spousal share seeks to maximize social welfare.

In addition to the prescriptive restraint of the forced spousal share, proscriptive restraints of the dead hand can also be founded upon moral hazard concerns. Consider, for example, the prohibition on conditional bequests that interfere with marriage either by unreasonably limiting the donee’s ability to marry or by encouraging the donee to divorce.<sup>166</sup> These inheritance regulations are primarily founded upon negative externality concerns, as such bequests impose substantial costs on the donee,<sup>167</sup> however they can also be grounded on moral hazard concerns.

Because the donor will be dead at the time the donee learns of a bequest that restricts the donee’s ability to marry or that is conditioned upon the donee’s divorce, the donor will not experience the potential interpersonal costs of such decision. Indeed, the donor will not experience whatever negative responses the donee might have to the donor’s meddling in her personal life. The donor therefore likely will not accurately weigh the costs and benefits of such bequests and, as a result, her estate plan might not maximize social welfare. Contrast this situation with a donor who offers a lifetime gift to a donee upon the same conditions. Under this alternate scenario, the donor is alive to experience the donee’s backlash, and consequently the interpersonal costs of such donative transfers factor into the donor’s decision-

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<sup>161</sup> Hirsch, *Insolvent Heir*, *supra* note 12, at 639.

<sup>162</sup> However, if the donor chooses to reveal her estate plan during her life, then she might very well bear the interpersonal costs of estate planning.

<sup>163</sup> See *supra* notes 78–80 and accompanying text.

<sup>164</sup> See *supra* notes 134–40 and accompanying text.

<sup>165</sup> In particular, the surviving spouse might be disappointed by the fact the donor did not affirmatively provide for her through the exercise of freedom of disposition but instead was required to do so through the forced spousal share.

<sup>166</sup> See *supra* notes 90–94 and accompanying text.

<sup>167</sup> See *supra* notes 153–55 and accompanying text.

making process.<sup>168</sup> Thus, because the donor is dead at the time her estate plan takes effect, the law's prohibition of conditional bequests that interfere with marriage could be viewed as an inheritance regulation that addresses moral hazard concerns.

In sum, broad freedom of disposition is explained today as a mechanism for maximizing social welfare,<sup>169</sup> and one component of this rationale is that the donor is in the best position to evaluate the utility of her estate plan.<sup>170</sup> Nevertheless, the law restricts the donor's freedom of disposition in certain ways,<sup>171</sup> and these limitations can be analyzed from the same functional perspective that focuses on social welfare. In this regard, inheritance regulations that restrain dead hand control can be seen as limiting freedom of disposition in situations that raise discrete concerns regarding the donor's ability to assess the costs and benefits of particular posthumous transfers of property and, in turn, to make estate planning decisions that maximize social welfare.

First, some restrictions on freedom of disposition address concerns regarding imperfect information.<sup>172</sup> If the donor does not have the relevant information to assess the utility of transferring property, then under certain circumstances the law does not defer to her intent.<sup>173</sup> Second, other restraints of the dead hand address concerns regarding negative externalities.<sup>174</sup> Even if the donor has all relevant information to assess the utility of her estate plan, her decisions might impose costs on others, and as such, the law does not honor the donor's wishes in all contexts.<sup>175</sup> Third, some inheritance regulation could be based upon moral hazard concerns.<sup>176</sup> Because the donor will be dead at the time her estate plan takes effect, she will not experience the consequences of her decisions, and accordingly she might not accurately weigh the costs and benefits of her estate plan.<sup>177</sup> Some restrictions on freedom of disposition could therefore be designed to address this moral hazard problem.

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<sup>168</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (AM. LAW INST. 2003) ("Policies concerned with deadhand control limit the use of trusts in ways that do not apply to living individuals in the direct disposition of their property" because "the 'rigor mortis' of deadhand control is not present while a property owner is able to respond to persuasion . . ."); *see also* Kelly, *supra* note 3, at 1160 ("Unlike contracts, the devisees of a will or the beneficiaries of a trust can no longer negotiate with the testator or settlor once he or she is dead . . .").

<sup>169</sup> Kelly, *supra* note 3, at 1135; *see also supra* Part I.A.

<sup>170</sup> Hirsch & Wang, *supra* note 5, at 12–13; *see also supra* notes 22–25 and accompanying text.

<sup>171</sup> *See supra* Part II.

<sup>172</sup> Kelly, *supra* note 3, at 1158–61.

<sup>173</sup> *See supra* Part III.A.1.

<sup>174</sup> Kelly, *supra* note 3, at 1161–63.

<sup>175</sup> *See supra* Part III.A.2.

<sup>176</sup> *See supra* Part III.A.3.

<sup>177</sup> Hirsch, *Insolvent Heir*, *supra* note 12, at 639.

*B. Generating Wealth & Suboptimal Incentives*

In addition to concerns regarding suboptimal decision-making on the part of the donor, concerns regarding the incentives that unfettered freedom of disposition creates might warrant the law's regulation of inheritance. As explained previously, one justification of the law's grant of broad freedom of disposition is that it can incentivize socially beneficial behavior.<sup>178</sup> For example, the threat of disinheritance and the potential of a sizeable bequest can encourage donees to care for the donor during times of illness or old age.<sup>179</sup> The intrafamily caregiving produced by this incentive not only directly benefits the donor but also increases overall social welfare.<sup>180</sup> However, just as freedom of disposition can encourage socially beneficial behavior, it can likewise incentivize socially detrimental behavior. Some restraints of the dead hand could therefore be designed to diminish socially detrimental incentives that the law's grant of freedom of disposition produces.

Consider the forced spousal share, which requires the donor to transfer a portion of her estate to her surviving spouse.<sup>181</sup> One of the conventional rationales of this inheritance regulation is founded upon a partnership theory of marriage.<sup>182</sup> Under this theory, a surviving spouse should be protected from disinheritance because a portion of the deceased spouse's estate rightly belongs to her. The partnership theory of marriage holds that both spouses contribute to the couple's ability to accumulate wealth over the course of the marriage regardless of whether one ostensibly earns more in the workplace.<sup>183</sup> When one spouse dies, the surviving spouse should therefore be entitled to outright ownership of a portion of the couple's wealth, and the deceased spouse should be able to exercise freedom of disposition over the remaining wealth.<sup>184</sup>

The law's protection of the surviving spouse's interest in the donor's property maximizes social welfare by incentivizing the donee to aid in the accumulation of wealth during the donor's life. If the donor's spouse knows that the donor can disinherit her through the exercise of freedom of disposition, then she will have less

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<sup>178</sup> See *supra* notes 29–30 and accompanying text.

<sup>179</sup> Kelly, *supra* note 3, at 1137.

<sup>180</sup> Hirsch & Wang, *supra* note 5, at 9–10.

<sup>181</sup> See *supra* notes 78–80 and accompanying text.

<sup>182</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 514 (“The primary justification for the elective share is that the surviving spouse contributed to the decedent spouse's acquisition of wealth. This reflects a *partnership theory* of marriage.”).

<sup>183</sup> UNIF. PROBATE CODE art. II, pt. 2 gen. cmt. (amended 2010) (“Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as ‘a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.’”).

<sup>184</sup> *Id.* (explaining that the forced spousal share is “one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed” and explaining further that, “[n]o matter what the decedent's intent . . . the surviving spouse does have some claim to a portion of the decedent's estate.”).

of a stake in the donor's success. Put differently, if the donor's spouse is concerned that the fruit of her efforts might ultimately benefit someone else, then she might not work as hard to facilitate the donor's accumulation of wealth. As a result, less wealth might be generated over the course of the marriage, and overall social welfare might decline. The law's regulation of inheritance through the forced spousal share therefore adjusts the surviving spouse's incentives in a socially beneficial way. When the surviving spouse knows that she will realize a benefit from her efforts after the donor's death, she is incentivized to contribute more to the couple's efforts in generating wealth during the donor's life. Through this incentive, greater marital wealth is generated and overall social welfare is maximized.

In sum, some inheritance regulations can be justified as mechanisms to combat problems with the donor's estate planning decisions.<sup>185</sup> In particular, inheritance regulation can address concerns regarding imperfect information,<sup>186</sup> negative externalities,<sup>187</sup> and moral hazards.<sup>188</sup> Additionally, some inheritance regulations can be justified as means to incentivize socially desirable behavior.<sup>189</sup> Although broad freedom of disposition generally is seen as creating socially beneficial incentives,<sup>190</sup> in some contexts, unlimited freedom could produce socially detrimental incentives, and thus inheritance regulation is appropriate.

#### IV. OPPORTUNITIES FOR REFORM

The preceding social welfare framework for analyzing regulation of the dead hand not only explains the rationales underlying current inheritance regulation but also reveals opportunities for policymakers to increase social welfare through reform. More particularly, the social welfare theory of inheritance regulation suggests that policymakers should increase inheritance regulation in certain areas and decrease inheritance regulation in others. Indeed, doing so would be in line with the overarching goal of the law of inheritance.

##### *A. Increased Regulation*

One area in which additional regulation of the dead hand could increase social welfare is the inheritance rights of children. In the vast majority of American jurisdictions, the donor currently enjoys the unrestricted ability to disinherit a child.<sup>191</sup> In other words, the donor's freedom of disposition allows her to omit her

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<sup>185</sup> See *supra* Part III.A.

<sup>186</sup> See *supra* Part III.A.1.

<sup>187</sup> See *supra* Part III.A.2.

<sup>188</sup> See *supra* Part III.A.3.

<sup>189</sup> See *supra* Part III.B.

<sup>190</sup> See *supra* notes 26–30 and accompanying text.

<sup>191</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 556 (“In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance . . .”). The one exception to the general rule that parents can disinherit children is Louisiana, which

children from her estate plan, regardless of her motivations for doing so or the consequences of disinheritance.<sup>192</sup> At first glance, the donor's ability to disinherit children would seem to be consistent with the law's social welfare goals. After all, the donor is in the best position to evaluate the needs of her family and to place wealth in the hands of the donees who will benefit the most.<sup>193</sup> If a parent decides that property would be better placed with other donees rather than with a child, then the law generally should defer to that decision.<sup>194</sup>

This conclusion comes into focus when the donor's ability to disinherit a child is contrasted with her inability to disinherit a spouse. As explained previously, if the law granted the donor the freedom to disinherit her surviving spouse, the couple would be incentivized to behave in socially detrimental ways.<sup>195</sup> In particular, if spouses knew that one could disinherit the other, then neither would be willing to work as hard to contribute meaningfully to the other's ability to accumulate wealth over the course of the marriage. This incentive would, in turn, reduce social welfare. By contrast, the donor's ability to disinherit a child does not raise the same social welfare concerns. Because a child does not contribute to the donor's economic prosperity in the same way that a spouse does,<sup>196</sup> the donor's ability to disinherit a child does not disincentivize socially beneficial conduct, and therefore the donor's freedom of disposition within this context does not minimize social welfare.

Also weighing in favor of the donor's ability to disinherit children is the incentive for caregiving. As suggested above, the threat of disinheritance may be a useful tool for influencing the behavior of donees in ways that promote social welfare.<sup>197</sup> If the donor's children know that the donor possesses the ability to exclude them from her estate plan, then they will more likely act in ways that please the donor.<sup>198</sup> In particular, children may be more likely to care for an aging or ailing donor in order to stay in the donor's good graces and to remain a part of the donor's

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"protect[s] against the disinheritance of children under 23, the mentally infirm, and the disabled." *Id.* at 557; see LA. CIV. CODE ANN. art. 1493 (2017).

<sup>192</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 511 ("A property owner may disinherit her blood relations, including her children, if that is her desire.").

<sup>193</sup> See Hirsch, *Spendthrift Trusts and Public Policy*, *supra* note 25, at 76; Hirsch & Wang, *supra* note 5, at 12–13; Kelly, *supra* note 3, at 1136–37.

<sup>194</sup> Hirsch, *supra* note 10.

<sup>195</sup> See *supra* Part III.B.

<sup>196</sup> If the child is a minor, she likely is not capable of generating substantial wealth. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 86 (1994) (explaining that "[t]he testator's minor child is largely incapable of acquiring, earning, managing, and protecting significant property interests during minority"). If the child is an adult, she likely is not part of her parents' economic unit. However, the rate of adult children living with their parents is increasing. See Shelly Kreichler-Levy, *The Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127, 150–51 (2014).

<sup>197</sup> See Hirsch & Wang, *supra* note 5, at 9–10; Kelly, *supra* note 3, at 1137.

<sup>198</sup> Hirsch, *supra* note 10, at 2234–35 ("Disinheritance has long rounded out the arsenal of threats a parent can aim at a wayward child . . . . By the same token, a parent can augment bequests as an encouragement to dutiful children.").



estate plan.<sup>199</sup> This incentive increases social welfare. As Professors Adam Hirsch and William Wang explain, the donor's ability to disinherit children "serves the public interest" because it "supports . . . a market for the provision of social services" and "encourages . . . beneficiaries to provide [the donor] with care and comfort—services that add to the total economic 'pie.'"<sup>200</sup>

Although the donor's general freedom to omit children from her estate plan is consistent with the law's social welfare goals because it does not create socially undesirable incentives,<sup>201</sup> the donor's specific ability to disinherit minor children could be problematic. The donor's discretion to disinherit children stands in stark contrast with her legal obligation to support her minor children during life.<sup>202</sup> While the law in all American jurisdictions requires a parent to provide her children a basic level of support during their minority,<sup>203</sup> the law in the vast majority of states allows the donor to disinherit her minor children.<sup>204</sup> Therefore, by dying with an estate plan that omits her minor children, the donor can shift the cost of child support from herself onto others.

The cost of supporting the donor's minor children that falls upon others represents a negative externality, which affects the social welfare analysis of the donor's decision to disinherit her children. This aspect of the donor's decision to disinherit a minor child resembles the donor's decision to disinherit a surviving spouse.<sup>205</sup> Because the donor does not bear the costs of supporting a disinherited spouse, she might not accurately evaluate the overall utility of spousal

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<sup>199</sup> See Hirsch, *supra* note 10, at 2235 (suggesting that "the behaviors parents might seek to elicit" through the exercise of freedom of disposition "take many forms, but one of them now looms in importance," namely "end-of-life care giving"); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 179 (2008) [hereinafter Tate, *Testamentary Freedom*] (explaining that "[t]he U.S. rule" of broad freedom of disposition "allows a parent to punish a child for failing to provide care, but it also allows a parent to reward a child . . . who does provide care.").

<sup>200</sup> Hirsch & Wang, *supra* note 5, at 9–10; see Hirsch, *supra* note 10, at 2234 (explaining that "[g]ranting parents leeway to vary or deny bequests to children produces economic benefits of the sort that freedom of testation ideally achieves.").

<sup>201</sup> See generally Brashier, *supra* note 196; Hirsch, *supra* note 25; Hirsch, *supra* note 10, at 2234–35; Hirsch & Wang, *supra* note 5, at 9–10, 12–13; Kelly, *supra* note 3, at 1136–37; Kreiczler-Levy, *supra* note 196; Tate, *Testamentary Freedom*, *supra* note 199; Part III.B. and accompanying text.

<sup>202</sup> 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, 337 (2014) ("The ability to disinherit minor children is particularly surprising in light of the fact that virtually every state imposes an obligation on parents to support their minor children during life.").

<sup>203</sup> Hirsch, *supra* note 10, at 2236.

<sup>204</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 556.

<sup>205</sup> Deborah A. Batts, *I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1199 (1990) ("[T]he possibility that children will become wards of the state if disinherited is at least as compelling a concern for the state as the possibility that surviving spouses will become its wards.").

disinheritance. In particular, the donor likely does consider the cost of support when a surviving spouse must seek support from governmental assistance programs.<sup>206</sup> Because the donor likely does not consider these potential costs, her decision to disinherit a spouse might be suboptimal from a social welfare perspective.<sup>207</sup> When the donor's ability to disinherit a surviving spouse is analyzed in this way, the negative externality that relates to the cost of support provides at least a partial justification for why the law restricts the donor's ability to disinherit a surviving spouse through the implementation of the forced spousal share.<sup>208</sup>

Because the donor can externalize the cost of child support in the same way that she can externalize the cost of spousal support, similar inheritance regulation might be needed to increase the likelihood that the donor's exercise of freedom of disposition maximizes social welfare. Existing regulation, namely the forced spousal share, at least partially addresses these externality concerns. When the donor chooses to disinherit minor children, the external cost of disinheritance most likely falls upon the donor's surviving spouse, who likely will retain custody of the child and who has her own legal obligation to support the child. The donor may give a portion of her estate to her surviving spouse, which can be used to support a minor child.<sup>209</sup> However, in cases in which the donor leaves nothing to her surviving spouse, the forced spousal share provides the surviving spouse a portion of the donor's estate, which can also be used for the support of minor children.<sup>210</sup> When the donor provides for the surviving spouse either through an affirmative exercise of freedom of disposition or through the forced spousal share, she indirectly provides for the support of her minor children.

Even if in most instances the support of a minor child falls upon the shoulders of a surviving spouse, others will care for some minor children after a donor dies. In cases in which the donor has no surviving spouse or the surviving spouse is unable to care for a minor child, the donor's decision to disinherit a minor child could have external costs that affect the social welfare analysis of such decision. For example, if the donor dies and her minor child becomes a ward of the state, the cost of the

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<sup>206</sup> SHAVELL, *supra* note 17, at 65; Kelly, *supra* note 3, at 1162.

<sup>207</sup> See DUKEMINIER & SITKOFF, *supra* note 7, at 514; Kelly, *supra* note 3, at 1162; Shavell, *supra* note 17, at 65; UNIF. PROBATE CODE art. II, pt. 2 gen. cmt. (amended 2010).

<sup>208</sup> Kelly, *supra* note 3, at 1162.

<sup>209</sup> Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 5 (explaining that in "the traditional one-marriage situation . . . the surviving spouse would likely use the decedent's property to support the children of that marriage."); Kelly, *supra* note 3, at 1181 ("It seems likely that most donors provide for their children directly or give property to their surviving spouse with the expectation that the spouse will use this property to provide for their children."); see also Madoff, *supra* note 202, at 337 (explaining that "disinheritance of minor children is usually not a problem for the child who lives with both parents").

<sup>210</sup> Kelly, *supra* note 3, at 1181 ("Moreover, even if a decedent does not provide for children at all, the default rule allowing filial disinheritance is based on an expectation that, in most of the remaining cases, a surviving spouse can utilize the spousal elective share to support minor children.").

child's care falls upon individual taxpayers who fund child welfare programs.<sup>211</sup> Similar to the external costs associated with a surviving spouse whose support comes from governmental assistance programs,<sup>212</sup> the cost of state funded childcare represents a negative externality that may render the donor's estate plan suboptimal from a social welfare perspective.<sup>213</sup> Because the law cannot rely upon the donor's decision to maximize social welfare in this situation, additional inheritance regulation is needed.

To address the concern that the costs of a minor child's care might fall upon society as a whole, a small number of states have implemented inheritance regulation.<sup>214</sup> Specifically, these states have enacted statutes that allow the county officials who administer child welfare programs to seek payment from a deceased donor's estate to cover the cost of the child's care.<sup>215</sup> Montana's statute is illustrative. It states: "If a parent chargeable with the support of a child dies leaving the child chargeable to the county and leaving an estate sufficient for the child's support, the county commissioners of the county may claim provision for the child's

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<sup>211</sup> Batts, *supra* note 205, at 1263 ("When parents die, the dependent status of their minor children does not also die. While the parent no longer is there to provide for the child as he was expected to be while alive, the needs of the child remain. When the parent has the means to continue the support of the child, the state should protect the child by requiring some of the assets to be set aside for the child. For if the state does not enforce this protection, the state itself may have to support the child."); Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 3 (1996) [hereinafter Brashier, *Protecting the Child*] ("When the disinherited child is a minor, unable to provide for himself, society often must bear the cost of the parent's disinheriting act."); SHAVELL, *supra* note 17, at 65 (explaining that a "dependent child who does not inherit may receive public support").

<sup>212</sup> See DUKEMINIER & SITKOFF, *supra* note 7, at 514; Kelly, *supra* note 3, at 1162; SHAVELL, *supra* note 17, at 65; UNIF. PROBATE CODE art. II, pt. 2 gen. cmt. (amended 2010).

<sup>213</sup> Hirsch, *supra* note 10, at 2236 ("[O]ne potential justification for compulsory bequests to children is spillover costs, which could arise with regard to minor or disabled children who are unable to fend for themselves."); Kelly, *supra* note 3, at 1181 ("[T]he elective share may be necessary to prevent the external costs that a decedent can impose on the public by disinheriting a spouse. By contrast, each state (except Louisiana) allows donors to disinherit their children, including minor children, even though a similar type of externality might exist.").

<sup>214</sup> Brashier, *Protecting the Child*, *supra* note 211, at 16–17 ("A few states have statutes providing that when a testator disinherits his minor children leaving them dependent upon the county, the county itself may claim support from the estate. Based on reported opinions, it appears that these provisions are almost never used.").

<sup>215</sup> See, e.g., CAL. FAM. CODE § 3952 (2017); MONT. CODE ANN. § 40-6-213 (2017); N.D. CENT. CODE § 14-09-12 (2017); S.D. CODIFIED LAWS § 25-7-14 (2017).

support from the parent's estate . . . ."<sup>216</sup> Montana's statute therefore limits the donor's freedom of disposition by imposing a prescriptive restraint on the dead hand in an effort to minimize the negative externalities generated by the donor's estate plan.

Not only would an inheritance regulation that requires the donor to provide for the care of minor children after death address externality concerns, but such a requirement would also maintain the incentive for caregiving that increases social welfare. As discussed previously, the donor's freedom to disinherit a child encourages the child to care for an aging or ailing donor.<sup>217</sup> A requirement that the donor provide for the care of a child could therefore raise concerns that this incentive would be weakened and overall social welfare would decline. However, a restriction on the donor's freedom of disposition that requires her to provide for the care of minor children would not reduce social welfare because the children to which this forced distribution would apply likely would not be able to provide meaningful care to an aging or ailing donor. Indeed, the incentive for intrafamily caregiving is directed primarily toward adult children, who are in the best position to care for their elderly parents. A requirement that a donor provide some support to minor children after death would not reduce an adult child's incentive for caregiving and consequently would not reduce social welfare.

In sum, all states should implement inheritance regulations that allow the state to seek payment from the donor's estate to cover the cost of state-provided childcare.<sup>218</sup> This type of regulation would minimize the negative externalities produced by the donor's exercise of freedom of disposition and would in turn maximize the social welfare generated from the disposition of the donor's estate. Furthermore, this opportunity for additional inheritance regulation exemplifies the power that the social welfare model of inheritance regulation has for illuminating potential areas of reform.

### B. Decreased Regulation

One area in which decreased inheritance regulation could increase social welfare is the slayer rule. Under certain circumstances, the slayer rule prevents the

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<sup>216</sup> MONT. CODE ANN. § 40-6-213 (2017) (stating further that "for this purpose [the county commissioners] may have the same remedies as any creditors against that estate and against the heirs, devisees, and the next of kin of the parent.").

<sup>217</sup> See *supra* notes 29–30, 197–200 and accompanying text.

<sup>218</sup> There are, of course, other types of inheritance regulation that could achieve the same result. Brashier, *Protecting the Child*, *supra* note 211, at 17 ("Although the use of such statutes could serve to protect the interests of society, the process of collection imposes a substantial administrative burden on the county. It seems more appropriate to recognize the claim as belonging to the child. After all, the parent's moral obligation serves primarily to benefit the child. The benefit to society is the secondary benefit that flows from fulfillment of the moral obligation.").

donor's killer from benefiting from the donor's estate.<sup>219</sup> For instance, if a donee who is named in the donor's will murders the donor, the law treats the killer as having predeceased the donor, thereby directing the gift to an alternate donee.<sup>220</sup> At first glance, the slayer rule does not necessarily appear to be a limitation of the donor's freedom of disposition at all. Instead, a common explanation of the rule is that it fulfills the donor's probable intent because the donor likely would not want her killer to receive a gift from her estate.<sup>221</sup> Relatedly, the slayer rule can be seen as reducing the transaction costs of estate planning because the donor need not explicitly provide in her will that a donee's gift is revoked if the donee kills her.<sup>222</sup> The slayer rule can therefore be viewed similarly to other majoritarian default rules, which are designed to facilitate, rather than regulate, the donor's freedom of disposition.<sup>223</sup>

Upon closer inspection, the slayer rule can also be seen as limiting the reach of the dead hand because it ignores the express intent of the donor. Even if the donor foresees the possibility that the donee will kill her and explicitly provides in her will that her killer should benefit from her estate, the slayer rule in the vast majority states voids the gift.<sup>224</sup> This element of the slayer rule stands in stark contrast to other rules that are designed to fulfill the probable intent of the donor. For example, the law revokes gifts to the donor's ex-spouse under the rationale that the donor likely would not want to benefit her ex-spouse.<sup>225</sup> Unlike the slayer rule, the revocation upon divorce rule creates merely a rebuttable presumption of revocation.<sup>226</sup> Put

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<sup>219</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 137–39 (discussing variations in the slayer rule across the states); *see, e.g.*, UNIF. PROBATE CODE § 2-803(b) (amended 2010) (“An individual who feloniously and intentionally kills the decedent forfeits all benefits . . . with respect to the decedent’s estate . . .”).

<sup>220</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 138 (stating that although “[t]he prevailing view is that the killer is treated as having predeceased the victim . . . [s]ome states extend the bar by statute to the killer’s descendants” and “[o]ther states limit the right of the killer’s descendants to take by case law.”).

<sup>221</sup> Hirsch, *supra* note 10, at 2214 (“This rule adjusts the estate plan to the probable intent of the victim in most instances, for testators rarely wish to provide for their assassins . . .”).

<sup>222</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 693 (8th ed. 2011) (“The rule against allowing the testator’s murderer to inherit thus serves the by now familiar function of reading into a contract or conveyance an implied term to govern remote contingencies.”).

<sup>223</sup> *See supra* notes 61–65 and accompanying text.

<sup>224</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 137 (“Suppose *H*, aware of *W*’s psychological instability, provides in his will for the creation of a trust for the benefit of *W* even if *W* kills him. *W* then kills *H*. Does *W* take? . . . In [the vast majority of] states, the answer appears to be No.”).

<sup>225</sup> *See supra* notes 63–65 and accompanying text.

<sup>226</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1(b) cmt. o (AM. LAW INST. 1999) (“The presumption is rebuttable. The Revised UPC provides that the presumption is rebutted if it is provided otherwise in the express terms of the will, a court order, or a contract relating to the division of the marital estate made between the testator and the former spouse before or after the marriage, divorce, or annulment.”).

differently, the donor can opt out of the revocation upon divorce rule by expressing an unequivocal intent to benefit her ex-spouse. By contrast, the slayer rule creates a conclusive presumption of revocation from which the donor cannot opt out. Whereas the revocation upon divorce rule is a majoritarian default rule designed to facilitate the donor's freedom of disposition, the slayer rule is a mandatory rule that can be seen as a proscriptive restraint of the dead hand.<sup>227</sup>

The law's regulation of inheritance in this way undercuts the overarching social welfare theory of the donor's freedom of disposition. After all, the donor is in the best position to decide how to distribute her property upon death, and consequently the law generally defers to her intent.<sup>228</sup> If the donor decides that her property is best placed in the hands of her killer, then the law should defer to that decision and carry out her intent to benefit the slayer. In other words, the law's general deferential approach to inheritance should apply in this situation, unless, of course, one or more of the rationales discussed in this Article's inheritance regulation framework suggests that the law should not trust the donor to make the best decisions.<sup>229</sup>

In this regard, the slayer rule might be at least partially founded upon concerns of imperfect information. If the donor does not have access to all of the relevant information to decide that benefiting her killer is the best use of her property, then the law should not necessarily rely upon the donor to make that decision.<sup>230</sup> The donor could contemplate that a named donee might kill her,<sup>231</sup> but at the time she makes the decision to give a gift to her killer, she cannot know the precise circumstances surrounding her death. Moreover, because death closes her opportunity to update her estate plan to reflect the circumstances of her killing,<sup>232</sup> the donor's decision to benefit her killer likely will never be made with perfect information.<sup>233</sup> Without this relevant information, the donor's decisions to benefit her killer might not be socially optimal.

Although the donor's inability to give a gift to her killer by opting out of the slayer rule could be founded upon concerns regarding imperfect information, such a rationale is not overly compelling because the exercise of freedom of disposition inherently involves imperfect information. The donor's attainment of perfect information is impossible, and the law generally does not concern itself with whether the donor diligently collected and accurately processed the information that was relevant to her estate planning decisions. As Professor Kevin Bennardo explains:

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<sup>227</sup> Hirsch, *supra* note 10, at 2214 (characterizing the slayer rule as a "restriction on freedom of testation").

<sup>228</sup> See *supra* Part I.A.

<sup>229</sup> See *supra* Part III.

<sup>230</sup> See *supra* Part III.A.1.

<sup>231</sup> Hirsch, *supra* note 10, at 2214 (suggesting that "the testator might include Dr. Kevorkian in his or her will, in return for assisting in the testator's suicide.").

<sup>232</sup> *Id.* (explaining that "only the speed of the assault typically stymies formal disinheritance of the slayer.").

<sup>233</sup> The lone exception might be if "[a] mortally wounded testator . . . linger[s] for a time, and in the aftermath forgive[s] his or her slayer, republishing the original will." *Id.*

The law of succession is not concerned with [whether the donor] had complete knowledge of the lifestyle and actions of every would-be beneficiary. If that were the rule . . . the probate system would be a forum to uncover all of the facts relevant to the [donor's] life and the lives of the [donor's] friends, relatives, and other potential beneficiaries.<sup>234</sup>

Recognizing the impracticality—if not the absurdity—of such a system, Bennardo concludes: “[o]f course, that is not the law of wills. The law of wills effectuates the [donor's] manifested intent given [her] always limited and often flawed knowledge . . . .”<sup>235</sup>

Thus, the law recognizes that the donor's possession of perfect information is unlikely—if not impossible—and it generally tolerates the donor's exercise of freedom of disposition with imperfect information. The one clear exception to the law's tolerance of imperfect information is the rule against perpetuities, which limits the timeframe over which the donor can exert control over property.<sup>236</sup> The traditional rule against perpetuities essentially limits the reach of the dead hand to one hundred years after the donor's death.<sup>237</sup> After this period, the donor can no longer exert control over her property.<sup>238</sup> The rule against perpetuities therefore is not concerned with imperfect information regarding the circumstances at or near the time the donor exercises freedom of disposition, as it does not prevent the donor from making specific types of transfer or giving gifts to particular donees. Instead, the rule against perpetuities is concerned with imperfect information regarding circumstances well into the future. Whatever the extent of the donor's knowledge regarding circumstances at the time she makes her estate planning decisions, she cannot know circumstances long after her death, and consequently the law limits the donor's ability to control property after a prescribed period of time.<sup>239</sup>

By contrast, to the extent the slayer rule is founded upon a rationale of imperfect information, it is concerned with the donor's inability to precisely know circumstances at the time of her death. The donor cannot know exactly how, when, or why a donee might kill her, and the law might consequently restrict her ability to benefit her killer.<sup>240</sup> However, this imperfect information rationale is inconsistent not only with the law's general tolerance of the donor's imperfect information but also with the rule against perpetuities, the one inheritance regulation that is undoubtedly founded upon imperfect information concerns. The rule against perpetuities tolerates a greater risk of imperfect information because the donor

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<sup>234</sup> Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIAMI BUS. L. REV. 31, 55–56 (2015).

<sup>235</sup> *Id.* at 56 (providing the following example: “An alcoholic, gambling-addicted child is not disinherited even though her parent may have been less willing to leave her an inheritance if the parent had known of the child's foibles.”).

<sup>236</sup> Kelly, *supra* note 3, at 1182.

<sup>237</sup> See *supra* notes 103–107 and accompanying text.

<sup>238</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 882.

<sup>239</sup> See *supra* notes 123–126 and accompanying text.

<sup>240</sup> See *supra* notes 230–233 and accompanying text.

cannot know how things will change during the one hundred year period in which the donor can exert control. The donor therefore has a better opportunity to know the relevant circumstances for the exercise of freedom of disposition that the slayer rule prohibits than she does for the exercise of freedom of disposition that the rule against perpetuities permits. As such, the imperfect information rationale does not fully explain the donor's inability to opt out of the slayer rule.

In addition to imperfect information, another potential justification of the slayer rule involves negative externalities and incentives. Negative externalities are costs of a donor's estate planning decisions that are borne by others, which the donor likely does not consider.<sup>241</sup> If the donor does not consider all of the costs of her decisions, then her estate plan might not maximize social welfare.<sup>242</sup> One particular context in which negative externalities are problematic involves the donor making bequests that incentivize the donee to engage in socially detrimental conduct. For instance, the law generally prohibits the donor from conditioning a bequest upon the donee committing a crime.<sup>243</sup> Lured by the prospect of a testamentary gift, the donee might commit a crime that she otherwise would not. In turn, the crime produces costs in the form of harm to the victim,<sup>244</sup> and because the donor likely does not factor these costs into her decision-making process, her estate plan might be suboptimal from a social welfare perspective.<sup>245</sup> Consequently, the law regulates inheritance by prohibiting the donor from incentivizing the donee in this way.

Similarly, the slayer rule is sometimes justified in terms of the incentives that the donor's estate plan places on donees. In particular, the slayer rule is sometimes explained as disincentivizing the killing of the donor.<sup>246</sup> If a killer knows that she will not benefit from her victim's estate, then she might decide not to go through with the killing because a benefit of such conduct is eliminated.<sup>247</sup> The slayer rule therefore appears to be merely a subcomponent of the inheritance regulation that prohibits bequests that incentivize crime. Murder is a crime regardless of whether the victim is the donor or someone else, and thus it might seem obvious to apply the

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<sup>241</sup> See *supra* Part III.A.2.

<sup>242</sup> Kelly, *supra* note 3, at 1161–63.

<sup>243</sup> See *supra* notes 84–89 and accompanying text.

<sup>244</sup> See *supra* note 151 and accompanying text.

<sup>245</sup> See *supra* notes 146–152 and accompanying text.

<sup>246</sup> Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 798 (2012) (“The rule reflects criminal-law values of deterrence and retaliation in attributing paramount importance to life’s integrity and in striving to prevent any incentive to commit what appears to be a profitable crime.”).

<sup>247</sup> Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 493 (1986) (“[D]enying succession rights to slayers in these types of cases reinforces criminal punishment for a felonious killing because the denial deters a person from killing to succeed to another person’s property.”). *But see* Carla Spivack, *Killers Shouldn’t Inherit from Their Victims—Or Should They?*, 48 GA. L. REV. 145, 194 (2013) (“Unlike criminal law, inheritance law does not serve to deter dangerous or violent crimes or other socially disruptive acts.”).



same type of inheritance regulation to bequests that incentivize murder regardless of the identity of the particular victim.

However, upon closer examination, the slayer rule can be distinguished from the law's general prohibition of bequests that incentivize crime in two important respects. First, in the context of the slayer rule, the donor's estate plan is indifferent to the donee's conduct. The general prohibition of bequests that incentivize crime is concerned with the donor conditioning the donee's bequest on the commission of a crime. What is problematic about the bequest is that the donee *must* commit a crime in order to receive the gift. By contrast, the slayer rule prohibits bequests that are not conditioned upon the commission of crime, as the donee need not do anything in order to receive the gift.<sup>248</sup> Instead, the slayer rule prohibits bequests that are effective *even if* the donee commits a particular crime, namely slaying the donor. By giving a gift to a donee, even if that donee kills her, the donor expresses indifference, not a preference, for the donee's criminal conduct, and consequently such a situation does not involve the donor incentivizing crime at all.

Second, the slayer rule can be distinguished from the law's general prohibition of bequests that incentivize crime in that situations that implicate the slayer rule do not produce the same negative externalities as other types of bequests that incentivize crime. When the donor incentivizes crime through her estate plan, she likely does not consider the harm to a third party victim as a cost of her estate planning decisions.<sup>249</sup> But, when the donor chooses to benefit her own killer, she necessarily internalizes the costs borne by the victim of the donee's crime. Indeed, the victim and the donor are one in the same, and therefore no direct negative externality is produced by the donor's decision to benefit her killer. Because the context in which the slayer rule applies does not raise the direct externalities that other types of inheritance regulation involve,<sup>250</sup> the law can more safely rely upon the donor to weigh the benefits of giving a gift to her own killer with the costs of such decision, including the cost borne by the victim of the crime.

In sum, this Article's social welfare framework of inheritance regulation does not provide a strong justification of the slayer rule. Although the context in which the slayer rule operates does present concerns regarding imperfect information,<sup>251</sup> the law generally allows the donor to exercise freedom of disposition in situations

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<sup>248</sup> Hirsch, *supra* note 10, at 2214 (explaining that in the context in which the slayer rule applies "no harmful condition is attached to the bequest" and instead the bequest "simply provides property to a particular party.").

<sup>249</sup> See *supra* notes 149–151 and accompanying text.

<sup>250</sup> To the extent that allowing the donor to gift property to her slayer incentivizes murder, the donor's decision to do so could produce externalities that are borne more broadly by society. See *supra* note 152 and accompanying text. The externalities represent costs that should be weighed against the benefits of the donor's freedom of disposition. See Hirsch, *supra* note 10, at 2214 ("[B]y insistently rewarding behavior that the state deems criminal, the testator's choice of bequest [to her slayer] itself causes social harm, operating perversely to encourage that behavior.").

<sup>251</sup> See *supra* notes 230–233 and accompanying text.

that present a similar risk of imperfect information.<sup>252</sup> Additionally, while some scholars suggest that the slayer rule is justified in terms of disincentivizing killing the donor, the donor's decision to benefit her killer does not produce the same incentives as other types of bequests that incentivize crime.<sup>253</sup> In fact, the slayer rule does not involve bequests that are conditioned upon the donee doing anything, including committing a crime. Moreover, because the donor is the victim of the donee's crime in situations that implicate the slayer rule, the donor internalizes much of the cost produced by the donee's crime,<sup>254</sup> and therefore the slayer rule does not address the same negative externality problems as other inheritance regulations. As such, the potential justifications of inheritance regulation do not present a compelling case for the donor's inability to benefit her killer.

However, just because this Article's social welfare framework of inheritance regulation suggests that the donor should be able to transfer a portion of her estate to her killer does not mean that the slayer rule should be completely abolished. As explained previously, the slayer rule resembles other majoritarian default rules within the law of succession that are designed to fulfill the donor's probable intent while reducing the transaction costs of estate planning.<sup>255</sup> Because most donors likely would not want their killers to benefit from their estates,<sup>256</sup> it makes sense for the law to presume that a gift to the donor's killer is revoked. Such a result carries out the donor's probable intent and reduces her transaction costs by allowing her to rely upon a default rule to carry out her intent rather than drafting a will that provides for the remote contingency of a slaying donee.<sup>257</sup> Thus, as a majoritarian default rule, the slayer rule facilitates freedom of disposition and maximizes social welfare.

That the law presumes the donor would not want her killer to benefit from her estate is therefore not problematic; instead, the problem with the slayer rule is that the donor cannot opt out of the law's default position.<sup>258</sup> Although most donors likely would prefer the law to revoke gifts to their killers, some donors likely want their killers to benefit from their estates despite the donees' actions.<sup>259</sup> For example, a terminally ill donor who enlists a donee to assist her in suicide may in fact intend the donee to benefit from her estate despite the donee's role in her death.<sup>260</sup> By

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<sup>252</sup> See *supra* notes 234–235 and accompanying text.

<sup>253</sup> See *supra* notes 246–247 and accompanying text.

<sup>254</sup> See *supra* notes 149–151 and accompanying text.

<sup>255</sup> See *supra* notes 61–65 and accompanying text.

<sup>256</sup> Hirsch, *supra* note 10, at 2214.

<sup>257</sup> POSNER, *supra* note 222, at 693.

<sup>258</sup> See *supra* note 224 and accompanying text.

<sup>259</sup> Spivack, *supra* note 247, at 160–62 (suggesting situations in which “it seems less than clear that the victim's intent would necessarily be to disinherit the killer,” specifically those involving killings between family members).

<sup>260</sup> Ryan Konsdorf & Scott Alden Prulhiere, *Killing Your Chances of Inheriting: The Problem with the Application of the Slayer Statute to Cases of Assisted Suicide*, 39 ACTEC L.J. 399, 413 (2013) (“One of the . . . main purposes behind the slayer statute is the presumption that a deceased testator would most likely not wish or intend for the murderous actor to continue to inherit, either by intestacy or by will. This is a logical presumption and

preventing this and other donors—who for whatever reason decide that the best use of their property is to place it in the hands of their killers—from opting out of the slayer rule, the law undercuts the general social welfare theory of freedom of disposition.

However, one final consideration might provide some justification for the law’s limitation of the donor’s ability to opt out of the slayer rule: namely, decision costs. The social welfare theory of freedom of disposition suggests that the law should generally defer to the donor’s intent.<sup>261</sup> Yet sometimes the donor’s intent is not clear, and the process of collecting and analyzing the information necessary to determine the donor’s intent entails costs. As Professor Adrian Vermeule explains, “[d]ecision costs’ is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including the costs of supplying judges with information needed to decide the case at hand.”<sup>262</sup> If the decision costs that are produced during the process of deciphering the donor’s intent outweigh the benefits of honoring the donor’s intent, then perhaps the law should not be concerned with the donor’s actual intent.<sup>263</sup> In particular, if it would be incredibly costly to determine whether the donor truly intended to benefit her killer, then perhaps facilitating freedom of disposition in the context of a murderous donee would not be worth the effort.

Nevertheless, a determination of whether the donor truly intended to benefit a murderous donee need not be costly. Consider, for instance, the slayer statute in Wisconsin, one of two states that explicitly allows the donor to opt out of the rule.<sup>264</sup> Wisconsin’s slayer statute establishes a default rule similar to other states in that a gift to the donor’s killer is revoked.<sup>265</sup> However, unlike other states, the revocation presumption is rebuttable, as the donor can opt out of the default slayer rule in one

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one that would seem to apply in most, if not all, cases of a murdered testator. However, this presumption does not hold weight when the factual circumstances of a particular case shift from that of a murder to that of assisted suicide.”); *see generally* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993) (arguing that those who engage in assisted suicide should not be barred from inheriting from those they helped die).

<sup>261</sup> *See supra* Part I.A.

<sup>262</sup> Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000); *see also* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006) (“Decision costs’ . . . means any burden, such as a resource expenditure or opportunity cost, associated with reaching a decision. This covers time, money, and emotional distress from uncertainty, conflict, worry and the like.”).

<sup>263</sup> C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 46 (1999) (“The efficiency of gathering and using additional information depends on the cost of the information versus the benefits.”); Michael Owens, Comment, *A Cure for Collusive Settlements: The Case for a Per Se Prohibition on Pay-for-Delay Agreements in Pharmaceutical Patent Litigation*, 78 MO. L. REV. 1353, 1380–81 (2013) (“The desirability of discovering additional information . . . depends on the costs of obtaining that information relative to the benefits of considering it.”).

<sup>264</sup> DUKEMINIER & SITKOFF, *supra* note 7, at 137 (explaining that, other than Wisconsin and Louisiana, no states allow the donor to opt out of the slayer rule).

<sup>265</sup> WIS. STAT. § 854.14(2) (2017).

of two ways.<sup>266</sup> First, Wisconsin's slayer rule will not apply if "[t]he court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property."<sup>267</sup> Second, the donor can explicitly opt out of the slayer rule if she "provide[s] in . . . her will, by specific reference to th[e] [rule], that th[e] [rule] does not apply."<sup>268</sup> Thus, either the court can decide the donor implicitly opted out of the slayer rule based upon the circumstances of her death, or the donor can explicitly opt out.

Wisconsin's two options for determining that the donor truly intended to benefit her killer entail different decision costs. If the court must decide whether the slayer rule should apply absent express language in the will, then additional decision costs are produced. The court cannot simply rely upon the words of the donor's will to determine how the donor's estate should be distributed. Instead, it must collect information regarding the circumstances of the donor's death, her relationship with the killer, and anything else relevant to the issue of whether the donor intended to benefit her killer. The task of collecting and processing this additional information increases the decision costs of probate litigation. By contrast, if the donor expressly references the slayer rule and provides that it should not apply to the distribution of her estate, then no additional decision costs are produced. The court must simply read the donor's will and distribute her property according to the donor's explicit language. No additional information is needed, and therefore, no additional decision costs are produced.

Therefore, to the extent that the slayer rule is justified as a mechanism for keeping the probate system's decision costs low, policymakers have an alternative to a mandatory rule. The mandatory slayer rule from which the donor cannot opt out can be transformed into a default rule that the donor can override with no increase in decision costs. To do so, policymakers must pay attention to the method by which the donor can opt out of the default rule. By following Wisconsin's lead and authorizing donors to opt out of the slayer rule by explicitly stating that the rule should not apply to the distribution of their estates, policymakers in other states can give donors an easy way to avoid the operation of the rule, while at the same time ensuring that little additional time and effort is expended on deciphering the donor's intent. Such a decrease in inheritance regulation can maximize social welfare because the law will facilitate the donor's freedom of disposition to a greater extent with no increase in decision costs.

In sum, all states should implement reform that allows the donor to opt out of the slayer rule. Decreasing inheritance regulation in this way is consistent with the social welfare theory of freedom of disposition. If the donor decides that placing property in the hands of her killer is the best use of that property, then the law should

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<sup>266</sup> *Id.* § 854.14(6).

<sup>267</sup> *Id.* § 854.14(6)(a). Relatedly, Louisiana's slayer rule does not prevent a killer from benefitting from the donor's estate if "he proves reconciliation with or forgiveness by the decedent." LA. CIV. CODE art. 943 (2017). Reconciliation or forgiveness "perhaps can be shown by proof of the decedent's consent to the slaying." DUKEMINIER & SITKOFF, *supra* note 7, at 137.

<sup>268</sup> WIS. STAT. § 854.14(6)(b) (2017).

generally defer to that decision.<sup>269</sup> Furthermore, none of the justifications of inheritance regulation provide a compelling argument in favor of a mandatory slayer rule.<sup>270</sup> Thus, the slayer rule both represents an opportunity for policymakers to increase social welfare through decreased regulation and illustrates how this Article's social welfare framework of inheritance regulation can identify additional areas of reform.

## V. CONCLUSION

The donor's ability to freely distribute her property upon death is founded upon social welfare considerations.<sup>271</sup> In particular, the modern justification of the donor's freedom of disposition is that the donor is in the best position to evaluate the needs of potential donees and can be trusted to place property in the hands of those who will benefit the most.<sup>272</sup> Moreover, the donor's freedom of disposition is viewed as creating incentives that encourage socially beneficial behavior on the part of the donor and potential donees.<sup>273</sup> As such, the law generally defers to the donor's decisions regarding the distribution of her estate, and it is largely designed to facilitate the donor's exercise of freedom of disposition.<sup>274</sup>

Despite this deferential approach to inheritance, the law regulates inheritance through both prescriptive and proscriptive restraints of the dead hand. Prescriptive restraints are rules that require the donor to distribute property in certain ways.<sup>275</sup> For example, the forced spousal share is a prescriptive restraint that requires the donor to transfer a portion of her estate to her surviving spouse.<sup>276</sup> It therefore limits the donor's freedom of disposition by preventing the donor from transferring the property to other donees. By contrast, proscriptive restraints are rules that directly limit freedom of disposition by prohibiting the donor from distributing property in certain ways.<sup>277</sup> For instance, the law denies the donor the ability to place conditions on bequests that encourage the donor to commit a crime.<sup>278</sup>

Recognizing the tension between the law's general deference to the donor and the various ways it regulates inheritance, this Article develops a framework for analyzing inheritance regulation in relation to the law's goal of maximizing social welfare. Specifically, it identifies rationales that explain the law's abandonment of its deferential approach to inheritance in certain circumstances. In this regard, two general concerns might justify the law's regulation of inheritance through either prescriptive or proscriptive restraints of the dead hand. First, in some instances, the

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<sup>269</sup> See *supra* Part I.A.

<sup>270</sup> See *supra* notes 230–254 and accompanying text.

<sup>271</sup> See Kelly, *supra* note 3, at 1135.

<sup>272</sup> See *supra* Part I.A.

<sup>273</sup> See *supra* notes 26–30 and accompanying text.

<sup>274</sup> See *supra* Part I.B.

<sup>275</sup> See *supra* Part II.A.

<sup>276</sup> See *supra* notes 81–82 and accompanying text.

<sup>277</sup> See *supra* Part II.B.

<sup>278</sup> See *supra* notes 84–89 and accompanying text.

donor might not accurately weigh the costs and benefits of particular transfers of property, and she therefore might not make socially optimal estate planning decisions.<sup>279</sup> Second, the law's grant of complete freedom of disposition might create incentives for the donor and potential donees to behave in ways that are socially detrimental.<sup>280</sup>

Overall, these concerns suggest that, in certain situations, inheritance regulation might be necessary to ensure that the law maximizes social welfare. With this potential in mind, this Article clarifies the role that inheritance regulation plays within the law of succession. More importantly, its social welfare theory of inheritance regulation provides policymakers a framework to decide how either additional inheritance regulation or the reform of existing regulation can further the law's social welfare goals.<sup>281</sup>

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<sup>279</sup> *See supra* Part III.A.

<sup>280</sup> *See supra* Part III.B.

<sup>281</sup> *See supra* Part IV.