

Let's Get Serious: Spousal Abuse Should Bar Inheritance

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INTRODUCTION

Pick your statistic: in the United States, every nine seconds a woman is physically abused.¹ The Department of Justice concluded that between 1998 and 2002, of the almost 3.5 million violent crimes committed against family members, forty-nine percent of these were crimes against spouses.² In a 1995–1996 study conducted in the fifty states and the District of Columbia, nearly 25% of women and 7.6% of men were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or dating partner/acquaintance at some time in their lifetime (based on a survey of 16,000 participants, equally male and female).³ Despite a dramatic increase in awareness over the past twenty years, the problem seems intractable.⁴

It's time that responses to domestic violence reach beyond criminal and family law, using both a systemic approach and invoking the law's expressive function to intervene across the legal spectrum. This Article reaches into the realm of succession law to propose that evidence of spousal abuse should raise a presumption of duress that would, unless rebutted, bar the abuser from inheriting under the victim's will and through nonprobate transfers. I also argue that spousal abuse should bar inheritance under intestacy in the very frequent cases in which a decedent does not leave a will. Unlike the few previous articles that have covered this topic in passing, this one proposes a complete ban—that is, on inheritance under a will, a will

¹ *Violence Against Women: Data & Statistics*, WASH. ST. DEP'T OF HEALTH, http://www.doh.wa.gov/hsqa/emstrauma/vaw/data_stats.htm (last visited Sept. 25, 2011). For books that collect statistics on domestic violence in general, see MICHELE HARWAY & MARSALI HANSEN, *SPOUSE ABUSE: ASSESSING & TREATING BATTERED WOMEN, BATTERERS, & THEIR CHILDREN* 27 (1994).

² *Domestic Violence Assault*, WHOCANISUE.COM, <http://personal-injury-assault-and-battery.whocanisue.com/domestic-assault> (last visited Sept. 25, 2011).

³ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE* iii (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

⁴ EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 362–63 (2007) (noting the failure of reforms since the 1980s to make significant inroads into the problem).

substitute (such as a trust or a life insurance policy), or under intestacy—lays out justification for the bar in the context of inheritance law, and offers a detailed plan for implementation. In the context of wills and nonprobate transfers, I use an existing basis for invalidating a will, namely, duress: I argue that spousal abuse constitutes duress under existing doctrine and that sufficient evidence of abuse should create a rebuttable presumption that the will is invalid. With respect to intestacy, I make the same argument that evidence of abuse should raise a rebuttable presumption that the accused is barred from inheriting.

Part I of this Article defines terms, namely, “coercive control,” the phrase that describes the particular type of abuse that I address here, and “succession law,” the term I use to describe the area of law that my proposal covers—that is, both the law of intestate succession and inheritance under wills. Part II explains that the bar is necessary because of its systemic impact and expressionary value. Part III outlines the several rationales for the bar in the context of succession law. This Part will also show that it is consistent both with the rationales underlying traditional slayer statutes in force in all jurisdictions, as well as with more recent statutes that bar inheritance for abusive behavior that does not result in the decedent’s death. Part IV takes on the issue of intent, explaining why the bar legitimately overrides the decedent victim’s expression of intent in testamentary instruments, and why doing so does not stereotype or disempower women. Part V outlines several aspects of implementation of the bar, such as evidentiary matters and standing, and offers a draft statute.

The bar to succession and inheritance are necessary for two reasons: they are systemic interventions that address the broader social and political inequalities that both allow coercive control to take place and which coercive control itself exacerbates.⁵ Because women remain disadvantaged in the “public sphere,” they are susceptible to dependence and violence in the private sphere. Conversely, women who are victimized in the “private sphere” are re-victimized in the “public sphere” by loss of employment, an inadequate criminal justice system response, and lack of resources.⁶ One important aspect of this disadvantaging of women in society at large is the disparity in access to resources between men and women,

⁵ STARK, *supra* note 4, at 172–74 (describing domestic violence as an integral part of a system of patriarchy that operates in both the private and public spheres).

⁶ *Id.* at 363.

a disparity that contributes to women's susceptibility to spousal abuse.⁷ The bar I propose intervenes to some extent in the process of the disparate accumulation of resources—wealth—in male hands.

Second, the bar is an important use of the law's expressive function, through which it enunciates what a society values.⁸ As things stand, that message is negative: while many laws bar inheritance on the part of people convicted of child and elder abuse, no such laws address inheritance on the part of those who commit spousal abuse.⁹ The existing regime of behavior-based inheritance law,¹⁰ then, sends the affirmative message that society cares about wealth transfer in cases of abused children and elders but not victims of spousal abuse. This message is harmful to women, fails to express society's values, and must change.

A note on gender. An assumption underlying my analysis is that the overwhelming majority of victims of coercive control are women. While men and women in intimate relationships assault each other at similar rates,¹¹ experts disagree about whether men are ever victims of the coercive control cycle that concerns me here;¹² it seems clear that because abuse among same-sex partners occurs at the same rates as it does among heterosexual couples,¹³ that men are

⁷ See Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 367, 368 (2003) (noting that, for example, women recipients of Temporary Assistance to Needy Families are "victims of domestic violence at rates . . . ten times higher than women in" the general population and observing generally that poverty makes women more susceptible to intimate partner violence).

⁸ For a discussion of the law's expressive function, see E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1099–2001 (1999) (arguing for the law's expressive function in the context of legitimizing domestic partnerships); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 9 (1987) (arguing that the content and very existence of laws "influence the manner in which we perceive reality").

⁹ See *infra* notes 104–10, 123–32 and accompanying text.

¹⁰ For a discussion of behavior-based inheritance law, see generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001–2002) (discussing the family model for inheritance and its limits).

¹¹ STARK, *supra* note 4, at 91–92 (discussing studies that show equal rates of assaultive behavior among men and women).

¹² Although Evan Stark insists that men are never victims of coercive control, STARK, *supra* note 4, at 91–92, Kelly Stoner, Director of the Native American Legal Resource Center and domestic violence expert at Oklahoma City University School of Law, has handled cases of coercive control with male victims. See E-mail from Kelly Stoner to Carla Spivack, author (on file with author).

¹³ Same Gender Violence Statistics, U. OF WISCONSIN-STOUT, http://www.uwstout.edu/cvpp/same_gender_stats.cfm (last visited Sept. 25, 2011).

probably also victims.¹⁴ In this Article, I refer to victims of coercive control as women, using “she” and “her” throughout, but in doing so I do not take a position on whether men can also be victims or what their rate of victimization might be. I do, however, think it is clear that the majority of those targeted by coercive control tactics in intimate relationships are women, and that, as a social and political phenomenon, coercive control is connected to gender inequality. If men are also victims, it reflects the fact that gender roles and power differentials appear in an endless variety of permutations in individual relationships;¹⁵ it does not undermine the notion that there is a link between intimate violence and broader social inequality between the sexes. In any case, the legislation I propose is gender neutral.

The bar I propose is limited to the specific set of behaviors collectively labeled “coercive control.” Coercive control refers to a pattern of “repeated battery and injury, psychological abuse, sexual assault, progressive social isolation, deprivation, and intimidation” by the intimate partner,¹⁶ and is akin to the kinds of brainwashing techniques used on prisoners of war, political prisoners, hostages, and kidnap victims.¹⁷ This is a phenomenon that goes far beyond occasional, or even frequent, situation-specific physical assaults; rather, it is a strategic use of threats and force to “deter or trigger specific behaviors, win arguments, or demonstrate dominance”;¹⁸

¹⁴ Whether men are victims of domestic violence, and what definition of domestic violence should apply to ascertain the answer to the question, are both highly fraught issues. See, e.g., Alexander Detschelt, *Recognizing Domestic Violence Directed Towards Men: Overcoming Societal Perceptions, Conducting Accurate Studies, and Enacting Responsible Legislation*, 12 KAN. J.L. & PUB. POL’Y. 249, 251 (2002–2003) (discussing the cultural stereotypes that make domestic violence against men less visible than violence against women). But see Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 115 (2003) (observing “that females are generally victims of the entire cycle/structure of abuse, [e.g., coercive control] not just of the physical violence which constitutes domestic abuse as the law defines it”).

¹⁵ The fact that men are also victims of domestic violence does not undermine the claim that domestic violence is linked to gender inequality: I agree with Adele Morrison’s assertion that spousal violence is not “male” in the sense of endemic to the male sex, but rather, “an aspect of the ‘socially constructed’ . . . man’s behavior, which can be committed regardless of the biological sex, sexual orientation or sexual community of the offender.” Morrison, *supra* note 14, at 92 (internal footnote omitted).

¹⁶ STARK, *supra* note 4, at 12; *American Medical Association Diagnostic and Treatment Guidelines on Family Violence*, 1 ARCHIVES OF FAM. MED. 39–47 (1992).

¹⁷ STARK, *supra* note 4, at 12.

¹⁸ Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 743 (2005).

and serves to “control [the] victim through a variety of tactics [which] may include fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectation of sex roles.”¹⁹ This Article proposes that evidence that a spouse engaged in a pattern of coercive control would raise a rebuttable presumption that any transfer by a will or will substitute merits invalidation on the ground that it was the product of duress. As I will show, coercive control fits the existing paradigm of duress well. Further, I propose that such evidence also serves to raise a presumption barring succession under intestacy in cases where the decedent left property not disposed of under a will or nonprobate transfer. In both cases, if the presumption prevails, the surviving spouse would be treated as if he or she had predeceased the decedent.

I limit the proposed bar to the coercive control phenomenon for two reasons: to limit the possibility of false positives, and to alleviate evidentiary problems. Confining the bar to cases of coercive control reduces the chance of false positives because the targeted behavior encompasses a highly specific cluster of actions that are distinguishable through specific indicia from other forms of violence and dysfunction between intimate partners such as situation-specific assault or verbal abuse. First, and most importantly, the term “coercive control” consists of a pattern of behavior over time.²⁰ Isolated incidents, without more, do not necessarily support a finding of coercive control.²¹ Second, coercive control is marked by an idiosyncratic and extreme set of behaviors all motivated by the desire to control the victim’s daily life. These behaviors are not all unique to coercive control situations but, when found together, strongly suggest its presence: destruction of personal belongings, threats of harm or suicide, threats toward pets or children, and minute surveillance of daily life like requiring a spouse to keep a log of her

¹⁹ Judy L. Postmus, *Analysis of the Family Violence Option: A Strengths Perspective*, 15 *AFFILIA* 244, 245 (2000) (citations omitted); see also Dutton & Goodman, *supra* note 18, at 754 (explaining the need to understand spousal abuse as coercion and not as isolated “assaultive acts”).

²⁰ MARY ANN DUTTON ET AL., U.S. DEP’T OF JUST. NAT’L INST. OF JUST., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE: FINAL TECHNICAL REPORT, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/214438.pdf> (last visited Sept. 25, 2011).

²¹ Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 *SOC. PROBS.* 71, 83 (1992).

locations and activities throughout the day.²² A finding of coercive control does not require that all of these behaviors be present, but several of them continuing over time strongly support such a finding.

This limitation to specific elements also reduces the role that cultural bias might play in raising a presumption. For example, a couple may follow a religion that restricts the woman's autonomy, denies her decision-making power in the household, and mandates obedience to the husband. Such a code of conduct is mutually agreed upon, however, and lacks indicia like physical threats, a pattern of violence, public humiliation, destruction of belongings, threats and abuse directed toward pets or children, or obsessive surveillance, that would support a finding of coercive control. For example, in the case of *Muhammad v. Muhammad*, a wife sought a divorce based on cruelty because she and her husband lived in a strict religious community in which women were not allowed to make important decisions about childrearing and household affairs, were deprived of money, and were encouraged to stay in the home.²³ The initial decision to join the community had been mutual; but the wife had grown dissatisfied with this lifestyle, and the husband refused to leave.²⁴ The court found a basis for the cruelty claim,²⁵ but *Muhammad* is clearly distinguishable from the coercive control scenario: despite the institutionalized subordination of the wife in the marriage, there was no pattern of threats against the wife or children, no surveillance, no stalking or destruction of possessions. This case illustrates how the coercive control net is fine-meshed enough to let cultural or religious observance, without more, evade the definition.

Several rationales justify the bar, both as a presumption of duress and as a bar under intestacy. First, as a public policy matter, the bar would allow the law to make a powerful statement against spousal abuse: little is more powerful than taking away an abuser's expectation of property. Second, many of the traditional rationales for so-called slayer statutes—which prevent a murderer from inheriting from his victim²⁶—also apply, as I will show, to cases of

²² LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 87 (1986) (describing techniques employed by abusers).

²³ *Muhammad v. Muhammad*, 622 So. 2d 1239, 1242 (Miss. 1993).

²⁴ *Id.* at 1241.

²⁵ *Id.* at 1250.

²⁶ For discussion of the slayer rule and its rationale, see Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 102 (2007) (noting that the rule is grounded in the maxim that “no [one] can take advantage of his or her own wrong” but also in other

spousal abuse that fall short of killing. Third, such a bar would use harmful behavior toward the decedent as a potential bar to inheritance. This behavior-based approach represents a growing trend, which the inheritance bars against those who committed child or elder abuse represent.²⁷ Moreover, abuse breaches the marriage contract; thus, as a moral matter, denying the abuser the fruits of that contract in the form of spousal inheritance is just.²⁸

Finally, my approach is systemic. Interventions against domestic violence over the past twenty years have failed to take on the structural inequality that both enables and is enabled by it: women's inequality in the workforce, in political life, and in wealth acquisition all make them susceptible to intimate abuse, and intimate abuse, in turn, perpetuates those inequalities by depriving women of full access to those forms of equality.²⁹ Eradication of partner abuse must address this nexus between abuse and other forms of inequality. One area in which to do this is inheritance law. Barring inheritance by abusers acknowledges and addresses the nexus between intimate

principles, such as “the moral principle [that] human life is sacred; the equitable principle . . . preventing unjust enrichment; and the legal principle [that] a third party (in this case, the slayer) should not interfere with the transfer of another’s property (here, the victim’s)” (first alteration in original) (internal footnotes omitted)); *see also* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986) (arguing “that the slayer rule is an essential element of the property transfer law system and does not rest solely on equity principles”).

²⁷ For discussion of behavior-based inheritance regimes, see generally Foster, *supra* note 10 (discussing the family model of inheritance and its limits); Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998) (discussing the Chinese system and its consideration of good and bad behavior toward the decedent); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) (addressing family principles and intestacy law); Paula A. Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?* 49 MIAMI L. REV. 257 (1994) (applying behavior-based models to child support issues); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994) (linking parental behavior with intestacy rights). Others express concern about this trend. *See generally* Richard Lewis Brown, *Undeserving Heirs?—The Case of the “Terminated” Parent*, 40 U. RICH. L. REV. 547 (2006) (addressing problems with the termination of parental rights statutes); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004) (expressing concern that such systems are too subjective and value laden); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CINN. L. REV. 803 (1993) (questioning slayer statutes).

²⁸ For discussions of the idea of marriage as contract, see generally TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* 47–83 (2010); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 122–23 (1989).

²⁹ STARK, *supra* note 4, at 362–63 (noting that the movement against domestic abuse has failed because it has “failed to address the inequalities at its core”).

violence and women's wealth inequality: coercive control often includes financial control and prevents women from acquiring and keeping wealth and, often, from getting or keeping jobs or maintaining careers. The resources that a victim spouse might transfer to the perpetrator through inheritance would likely both reflect this aspect of coercive control and contribute to the overall skew in wealth between men and women in society at large. In this sense, it's possible to see such transfers as the irrepressible ghost of coverture, perpetuating, and enabled by, gender inequality in marriage.

Few people have paid attention to the intersection between domestic abuse and succession law.³⁰ Two exceptions to this inattention are Robin Preble's 1995 article arguing that spousal abuse should bar intestate succession under Minnesota intestacy statutes and the *Uniform Probate Code*,³¹ and Thomas H. Shepherd's 2001 Comment, which builds on Preble's suggestion by proposing a statute and an evidentiary standard for use in implementing the bar.³² In addition, a recent article includes, without great detail, spousal abuse as one of several forms of "marital fault" that should bar inheritance.³³ Although admirable, these suggestions do not go far enough: I argue here that evidence of the pattern of coercive control should raise a presumption that the surviving spouse is barred from inheriting both under wills and under intestacy, and I also expand the scope of evidence admissible to establish the behavior, address concerns about the stereotyping and disempowerment of battered women, and offer a detailed plan for implementation.

I

DEFINITION OF TERMS

The behavior I seek to address here is the all-encompassing cycle in intimate relationships called coercive control, not that of occasional

³⁰ For this term, see *infra* Part I. It is interesting that the three articles on this topic in the literature are by students and one recent graduate, not members of the legal academy. See *infra* notes 31–33.

³¹ Robin L. Preble, Comment, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401, 402 (1995).

³² Thomas H. Shepherd, Comment, *It's the 21st Century . . . Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 ST. LOUIS UNIV. PUB. L. REV. 449, 464–66 (2001).

³³ Allison Bridges, Comment, *Marital Fault as a Basis for Terminating Inheritance Rights: Protecting the Institution of Marriage and Those Who Abide by Their Vows—'Til Death Do Them Part*, 45 REAL PROP. TR. & EST. L. J. 559 (2010).

or even frequent violence in a relationship that lacks the other features of the control cycle.³⁴ A number of scholars have redrawn the contours of the phenomenon over the past twenty years to reconfigure it to the coercive control paradigm. Evan Stark, for example, domestic violence expert and Professor and Chair of Urban Health Administration at Rutgers University, rejects what he calls the “violence approach” in favor of the coercive control paradigm.³⁵ Stark explains that “coercive control” consists of the combination of “repeated battery and injury, psychological abuse, sexual assault, progressive social isolation, deprivation, and intimidation” by the intimate partner, and is akin to the kinds of brainwashing techniques used on prisoners of war, political prisoners, hostages, and kidnap victims.³⁶ Other scholars in the field have made the analogy to prison camp inmates and have observed ten similar phenomena among coercive control victims and inmates of German concentration camps, as recorded by Bruno Bettelheim:

- 1) guilt . . .
- 2) significant loss of self esteem;
- 3) detachment of emotion from incidents of severe violence . . .
- 4) failure to observe the controller’s rules because of arbitrariness of punishment;
- 5) extreme emotional reactions;
- 6) difficulty planning for the future . . .
- 7) fear of escaping the coercive control situation;
- 8) child-like dependency on the controllers, and identification with them;
- 9) imitation of controllers’ aggressiveness, and adoption of their values;
- 10) maintenance of the hope that the controller is kind and just.³⁷

In a similar vein, another scholar notes that “[t]he reaction to such traumatic or catastrophic events experienced by many targeted women is more than fear for their immediate safety or the safety of

³⁴ The “Power and Control Wheel,” describing the elements and cycle of domestic abuse, is widely available on the Internet. See, e.g., *Power and Control Wheel*, NAT’L CENTER ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf> (last visited Sept. 25, 2011). One segment of the wheel is headed “Economic Abuse” and lists the following forms of financial control exercised over the victim spouse: “Preventing her from getting or keeping a job. Making her ask for money. Giving her an allowance. Taking her money. Not letting her know about or have access to family income.” *Id.* For further discussion of the financial abuse aspect of domestic violence, see STARK, *supra* note 4, at 130–31, 272 (giving examples of ways male abusers exploit women financially).

³⁵ STARK, *supra* note 4, at 12.

³⁶ *Id.*

³⁷ OKUN, *supra* note 22.

their children; they may be immobilized; the trauma of the violence governs, guides, or influences their actions and decisions.”³⁸

Of particular relevance here is the financial aspect of this control: one of the ways abusers exercise control is by confiscating the victim's wages and property, denying her access to resources even when they are hers, and forcing her to sign her property over to them.³⁹ This context supports the presumption that the victim of coercive control did not make testamentary dispositions “voluntarily,” that is, as she would have done without the control. It also supports the proposition that the victim's estate should not pass to an abusive surviving spouse under intestacy; because about half the population dies without wills, the amount covered by intestacy is significant.

As a final definitional matter, I use the term “succession law”⁴⁰ to refer to inheritance through bequests in wills and through nonprobate transfers as well as succession to property under intestacy statutes. As noted above, the proposal to bar succession under intestacy for perpetrators of spousal abuse has already been made, and I fully support it. This Article advocates expanding such a bar to include wills, and thus dwells on that area of the law, but I use the term to indicate that any such a bar should include intestate succession as well.

II

WHY THE BAR IS NECESSARY

A. *The Systemic Impact*

Coercive control in the home is located “within a larger (and potentially criminal) pattern of male domination”⁴¹ in society at large, a component of which is women's deprivation of property and lack of equal access to financial wealth. If we reconfigure domestic violence as the private replication of social patterns of male domination, we can see how it contributes to an overall pattern of women's economic disadvantage.⁴² In this context, testamentary transfers from victims

³⁸ Isabel Marcus, *Reframing “Domestic Violence”: Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 11, 33 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

³⁹ See examples *infra* Part III and accompanying notes.

⁴⁰ For which I thank Frederic S. Schwartz.

⁴¹ Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 981 (1995).

⁴² STARK, *supra* note 4, at 363.

of coercive control to their abusers contribute to this overall social phenomenon and should be seen as causing, in part, the social harms that result from it. In this light, a law such as the one I propose is an antidiscrimination law akin to the Equal Pay Act. Such laws would seek to right discriminatory patterns that disadvantage women.

Such a view—that transfers from abused spouses to their abusers is enabled by and reinforces the systemic oppression of women—does not require that abusers engage in a vast social conspiracy to disempower women. Certainly, employers whose workplace policies create so-called “glass ceilings,” making it difficult for women to reach the highest levels in the organization, deny women compensated time off for childbirth and childcare, and lack on-site daycare; governments that decline to mandate paid parental leave, and advertisers who objectify women’s bodies to sell products are all motivated by various forces, often economic ones, and do not operate out of the psychological needs that drive the abuser who exercises coercive control. Conversely, economic gain is not what moves abusers to seek control of spousal property; economic gain is a by-product of the abuser’s quest for control.⁴³ These differing motivations, however, do not make the forced transfer of spousal property any less embedded in the systemic inequality of women. For example, women, especially women with children, are often financially dependent on men because of their inequality in the workplace, thus making it harder for them to leave abusive relationships and further empowering the abuser. The inequality of women results from a range of exercises of power from different sites in society; such power is diffuse and appears detached from any particular individual,⁴⁴ yet its cumulative effect is undiminished thereby.

Inheritance is part of this diffuse system. Inheritance is the “genetic code of a society,” guaranteeing that each “generation will, more or less, have the same structure as the one that preceded it.”⁴⁵ This result is often unrelated to the motivations of the individual testator or decedent, who may have any of a wide range of reasons for making whatever dispositions he or she makes. Nonetheless, the

⁴³ *Id.* at 205 (noting that economic abuse is part of a strategy of maintaining control, not an end in itself).

⁴⁴ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 220 (Alan Sheridan trans., 1979).

⁴⁵ Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in *DEATH, TAXES AND FAMILY PROPERTY* 9, 14 (Edward C. Halbach, Jr. ed., 1977).

transfers that are the subject of this Article likely arise both from the individual's desire to control the donor and the systemic inequality that enables that control. Thus, testamentary and nontestamentary transfers are a particularly suitable locus for the intervention I propose, perpetuating, as they do, this systemic oppression from one generation to the next.

B. *The Law's Expressive Function*

It is unlikely that either the presumption of duress or the presumptive bar on intestate succession will deter many abusers. The need to control an intimate partner stems from psychological factors that are likely not susceptible to rational decisions based on long-term consequences,⁴⁶ even if the perpetrator is aware of those consequences. An important rationale other than deterrence, however, arises from what has variously been called law's "expressive function"⁴⁷ or its "constitutive function."⁴⁸ This is the idea that the law "teaches as it governs"; put another way, "The law has great potential to teach and reinforce the values that ground it or appear to ground it. Those who experience the law operating upon them personally and those who observe the law operating on others . . . learn whom the law respects, ignores, privileges, and disadvantages."⁴⁹ Law never merely adjudicates or mandates certain actions as opposed to others; it also influences belief.⁵⁰ A law that

⁴⁶ STEVEN M. MORGAN, CONJUGAL TERRORISM: A PSYCHOLOGICAL AND COMMUNITY TREATMENT MODEL OF WIFE ABUSE 19–22 (1982) (discussing psychological profile of abusers); see also Brown, *supra* note 27, at 567 (calling the idea that that the extinction of inheritance rights of abusive parents will deter child abuse "highly improbable").

⁴⁷ See Spitko, *supra* note 8 (arguing for the law's expressive function in the context of legitimizing domestic partnerships).

⁴⁸ An extensive literature has arisen around this idea. See, e.g., GLENDON, *supra* note 8, at 138–42; Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); see also Palma Joy Strand, *Law as Story: A Civic Concept of Law (With Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 603 (2009) (developing the similar notion of "law[s] as a complex social system in which doctrinal law emerges from collaborative communicative interactions among the many members of society").

⁴⁹ Spitko, *supra* note 8, at 1100 (internal footnotes omitted).

⁵⁰ METZ, *supra* note 28, at 92 (noting in the context of marriage "that laws shape identities to a significant degree" and influence the self-understanding of individuals

prevented abusers from inheriting property from their victims would be a clear condemnation of such behavior and would teach a lesson that the law “respects and privileges” a woman’s right to live free of the domestic terrorism that is coercive control. Even codifying the notion that evidence of abuse raises a presumption of duress, using, as it does, an existing doctrine, constitutes a statement of this kind: it acknowledges the profoundly coercive nature of abuse and intervenes in the debate about battered women’s intent and responsibility.

Some scholars have expressed skepticism about the notion that succession law has an expressive function, at least in the context of intestacy.⁵¹ Such skepticism seems reasonable in that context. Adam Hirsch, for example, points out, fairly enough, that intestacy law is obscure to most people, few having the need to acquaint themselves with it, and few actually “witness [it] in action.”⁵² He adds, also fairly, that intestacy rules, as default rules, “do not represent strong statements about anything.”⁵³ My response to these arguments is twofold: first, I am primarily concerned here with wills, because the argument about a spousal abuse bar in intestacy has already been made,⁵⁴ and Hirsch’s arguments do not ring as true in that context. People do see the probate of wills in action, and a law invalidating a testamentary disposition is far more powerful than a default rule, which only operates when the decedent failed to make an affirmative decision. I do, however, want to defend the intestacy bar as well. As I have discussed, other reasons exist for a spousal abuse bar in succession law, which justify it under intestacy as well as under wills—namely, its nature as a systemic intervention into the transfer of resources in the context of spousal abuse and in the broader context of gender inequality.

In this context, I want to address Hirsch’s main argument against empowering law to express social values, namely, that it opens the door to the politicization of inheritance law, potentially allowing legislators to infuse it with values inimical to my own or to the ones

and of society at large). Mary Ann Glendon is perhaps the best-known proponent of this idea about the law’s constitutive effect on marriage: she argues that the content and very existence of marriage laws influence the way citizens “perceive reality”). GLENDON, *supra* note 8, at 9.

⁵¹ See, e.g., Hirsch, *supra* note 27, at 1054 (“[T]he expressive ramifications of intestacy law appear alternately negligible and irrelevant, and . . . they should not influence the formulation of rules of intestacy or other inheritance defaults in (virtually) any respect.”).

⁵² *Id.* at 1055.

⁵³ *Id.*

⁵⁴ See *supra* notes 31–33 and accompanying text.

expressed here. He argues, to the contrary, that the best course is for inheritance laws to decline the imposition of any set of values, focusing only on the effectuation of testamentary intent. My response to this argument is that inheritance law—and all law—expresses values whether we want it to or not; value-neutrality is not an option. What look like value-free rules—in this context, “just” effectuating testamentary intent—do in fact express values, and only appear neutral based on one’s perspective. Someone who came from a Western European country whose laws mandated the heirship of children, for example, might well see laws allowing for the disinheritance of children in the interest of effectuating the testator’s intent as expressing the value that supporting one’s family was less important than promoting dead hand control. In fact, as I argue here, the lack of laws addressing transfers in the context of coercive control expresses values as dramatically as would the law I propose: as it stands, the law’s message to the abused spouse is that they were coerced into making transfers they would not otherwise have made—a scenario remedied in every other context—is unworthy of the law’s consideration.

III

WILLS AND NONPROBATE TRANSFERS: COERCIVE CONTROL AND DURESS

A. Duress Is the Best Doctrine Under Existing Will Contest Law to Address the Coercive Control Scenario

The existing grounds, other than execution formalities, on which an interested party may contest a will are as follows: capacity, fraud, undue influence, insane delusion, and duress.⁵⁵ The elements of duress, as I will show, best embody the coercive control phenomenon. First I will review the other will contest doctrines and discuss their inadequacy, and then I will fit coercive control into the duress paradigm.

The capacity threshold for executing a valid will is very low: indeed, the only legal institution with a lower capacity requirement is marriage.⁵⁶ The testator must be eighteen or older, be

capable of . . . understanding in a general way [(1)] the nature and extent of his or her property, [(2)] the natural objects of his or her

⁵⁵ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 159–221 (8th ed. 2009).

⁵⁶ *Id.* at 166.

bounty, [(3)] the disposition that he or she is making of that property, and [(4)] relating these elements to one another and forming an orderly desire [of] the disposition of the property.⁵⁷

The requirement of a general understanding of the nature of the property is a test of capability, not actual accurate knowledge: a testator, for example, who mistakenly but reasonably believed that her child is dead and makes testamentary dispositions accordingly would still be deemed to have sufficient capacity to execute a will.⁵⁸ The capacity requirement, therefore, would likely be met in cases of coercive control. Nothing about the phenomenon of spousal abuse undermines the victim's capacity to understand the nature of her assets or the objects of her bounty.⁵⁹

Nor is the will of a victim of coercive control likely to be invalidated for fraud. The elements of fraud in a will contest are: (1) a deliberate misrepresentation, (2) the intent to deceive, (3) the purpose of influencing the will, and (4) the result of making the testator make a disposition she would not have made had the misrepresentation not been made.⁶⁰ Again, this doctrine is not likely to be applicable to cases of coercive control, where the abuser's deception of the testator is not the issue. Certainly, a common aspect of coercive control is that the abuser lies to the victim about his actions or whereabouts, but an inquiry about this fails to reach the main elements of the phenomenon, which are control and coercion. An abuser may not make any misrepresentations, but still exerts coercion to influence the will and force the testator to make a disposition she would not have made without the abuse. However, without the deliberate misrepresentation with respect to the will's dispositions, fraud is not applicable.

The doctrine of undue influence might seem more suited to an inquiry that addresses the presence of this kind of control. Undue influence occurs when "the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."⁶¹ Because such facts are difficult to prove directly, most

⁵⁷ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (2003).

⁵⁸ DUKEMINIER ET AL., *supra* note 55, at 159.

⁵⁹ *See id.*

⁶⁰ *Id.* at 207.

⁶¹ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (2003).

jurisdictions allow the presumption of undue influence to arise when the contestant can show that there was a “confidential relationship”—that is, a relationship of trust and dependence or interdependence—between the parties accompanied by some other “suspicious circumstance” such as the wrongdoer’s procuring of the will, the donor’s weakened intellect, or the wrongdoer’s receipt of the bulk of the estate.⁶² Some jurisdictions allow the mere existence of a confidential relationship to raise the presumption.⁶³

The problem with this presumption is that a confidential relationship between spouses is presumed to exist and is seen as a natural and beneficial part of an intimate relationship.⁶⁴ Further, most spouses leave the bulk of their estates to the other spouse, and both spouses are usually involved in the preparation of the estate plan.⁶⁵ Thus, for this doctrine to expand to fit the coercive control scenario, every marriage or marriage-like situation would raise the presumption. This seems burdensome and impractical.

Insane delusion offers no better alternative; in fact, it is probably least suited, of all the doctrines discussed, to will contests of the kind I propose. A will, or part of a will, is invalid under this theory if the testator had an irrational belief, was unresponsive to evidence to the contrary, and this belief caused the testator to make a will or part of a will that the testator would have made differently without the belief. Although some victims of coercive control exhibit irrational beliefs—that their abusive spouse has telepathic powers, for example, or cannot be physically harmed or killed—the scope of coercive control is far broader than these irrational beliefs and does not necessarily involve them.⁶⁶ Insane delusion would be a clumsy tool with which to contest wills in coercive control cases because its elements fail to coincide with most of the indicia of the syndrome.

Duress, however, is a will contest doctrine well tailored to the coercive control scenario. Duress in the testamentary context occurs when “the wrongdoer threatened to perform or did perform a

⁶² *Id.* § 18.3 cmt. h (2003) (providing a non-exhaustive list of possible suspicious circumstances).

⁶³ DUKEMINIER ET AL., *supra* note 55, at 185.

⁶⁴ Jo Carrillo, *The M Word: From Partial Coverture to Skills-Based Fiduciary Duties in Marriage*, 22 HASTINGS WOMEN’S L.J. 257, 266 (2011).

⁶⁵ DUKEMINIER ET AL., *supra* note 55, at 327.

⁶⁶ Lenore E.A. Walker, *Understanding Battered Women Syndrome*, TRIAL, Feb. 1995, at 30, 30 (reporting the case of a woman who shot her husband six times as he lay in bed then warned the police about entering the room where he was lying dead to “[b]e careful, he has a lot of guns in there. He’s going to be very angry and will shoot you”).

wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.”⁶⁷ A “wrongful act” is one which “is criminal or that the wrongdoer had no right to do.”⁶⁸ Unfortunately, the doctrine of duress has become entangled with that of undue influence⁶⁹ in a way that is unhelpful for my purposes. Untangling the two, the New York County Surrogates Court in *Estate of Rosasco* denied summary judgment on the issue of whether a will was the product of duress.⁷⁰ The court found that questions of fact existed as to whether the testator’s great nephew had exercised duress over his great aunt with respect to the dispositions in her will when “[h]e berated decedent and her sisters loudly and often,” struck and pushed his sister in the aunts’ presence, punched his sister in the stomach, and “tried to intimidate [the decedent and her sisters] physically.”⁷¹ The court found that the nephew’s violent “behavior had a keen effect on [the] decedent,” noting testimony that she had been afraid to change the executor of her will from the nephew to the niece because she was afraid he would find out about it and “hurt” the niece and “he’s just going to end up making things a lot worse and he’s going to hurt [the niece].”⁷²

The court concluded that the contestants had established a prima facie case for duress.⁷³ It quoted the *Restatement (Third) of Property*, quoted above,⁷⁴ and then turned to the *Restatement (First) of Contracts* to amplify the notion of duress in a way that makes clear its applicability to coercive control: the *Restatement (First) of Contracts* notes that “the doing of an act often involves, without more, a threat that the act will be repeated”⁷⁵ and that past events often import a threat.⁷⁶ The court also noted that “the standard for evaluating whether ‘an act or threat produces the required degree of fear is not objective,’” but, rather, a subjective one, asking “whether the threat

⁶⁷ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (2003).

⁶⁸ *Id.* § 8.3 cmt. i.

⁶⁹ *In re Estate of Rosasco*, 31 Misc. 3d 1214 (2011), 2011 WL 1467632, at *11.

⁷⁰ *Id.* at *8–9.

⁷¹ *Id.* at *2.

⁷² *Id.* at *3.

⁷³ *Id.* at *8.

⁷⁴ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (2003).

⁷⁵ RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. d (1932).

⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS: DURESS & UNDUE INFLUENCE § 175 cmt. b (1981).

[or] act induced such fear in the testator ‘as to preclude the exercise . . . of free will and judgment.’⁷⁷

Itemizing the elements of contractual duress, Farnsworth explains, “First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim’s manifestation of assent. Fourth, it must be sufficiently grave to justify the victim’s assent.”⁷⁸ A threat must be the manifestation of the intent to inflict harm on another; importantly for coercive control purposes, one blow or act of harm can constitute duress because it implies, or can imply, the threat of further such acts.⁷⁹ While one act alone is not often considered duress, one act, in a pattern of behavior, may indicate coercive control.

Especially when drawn to include its application in the law of contracts, as the *Rosasco* court drew it, duress is a doctrine whose parameters fit well with the scenario of coercive control. Other contracts cases bear out this intuition. Courts have found premarital agreements to be unenforceable as the result of duress: in *Holler v. Holler*, a court found such an agreement to be procured by duress when, (1) the wife was a Ukrainian national whose American fiancé threatened not to marry her shortly before her visa was due to expire unless she signed the agreement, (2) the wife spoke very little English and could not translate the agreement or get it translated for her, and (3) the wife had no means to support herself or her child.⁸⁰ These facts, the court went on, constituted the elements of duress, i.e., “(1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was . . . obtained as a result of this state of mind.”⁸¹

In fact, many cases involving wives who claimed to have signed an agreement or property transfer under duress appear to be hidden spousal abuse cases, revealing a pattern of coerced property transfers to which the doctrine of duress was amenable. In *Trane Co. v. Bond*, a wife claimed she had signed a payment bond as surety on a construction contract with her husband’s company under duress because her husband “physically threatened her and abused her to coerce her to sign a number of documents, including the payment

⁷⁷ *Rosasco*, 2011 WL 1467632, at *7.

⁷⁸ E. ALLAN FARNSWORTH, CONTRACTS § 4.16 (3d ed. 1999).

⁷⁹ *Id.*

⁸⁰ *Holler v. Holler*, 612 S.E.2d 469, 475–76 (S.C. Ct. App. 2005).

⁸¹ *Id.* at 475.

bond, and would not answer her regarding their content.”⁸² Relying on the *Restatement (Second) of Contracts* and its “reasonable alternative test,” the court denied summary judgment and remanded to the district court for fact finding as to whether the wife was in “imminent fear of death, serious personal injury, or actual imprisonment.”⁸³ In reviewing the relevant precedent, the court cited three earlier cases in which a wife had attempted to void a contract claiming she had signed it because of physical threats by her husband; in all three, the courts found duress.⁸⁴ The duress doctrine also appears in cases challenging the validity of contracts between spouses. In *Eckstein v. Eckstein*, the court found duress where a wife signed a separation agreement when she had left the marital residence with no clothes or money, and when the husband had withheld her belongings, closed their joint checking account and threatened never to let her see the children again.⁸⁵

In sum, duress—especially when expanded to include contractual duress—fits the coercive control scenario well. The acts that led the *Rosasco* court to find a prima facie case of duress are typical of the kind of acts abusers perform: intimidation through acts of violence directed at family members, berating of the victim, and instilling the victim with fear of the consequences of noncompliance. Importantly, the duress doctrine encompasses the notion that one act of violence implies the threat of another such act and that that atmosphere of implied threats can create duress. The *Restatement (Second)*’s adoption of the “no reasonable alternative” test is also well tailored to explain the decisions an abuse victim might make in the context of the coercive relationship: it acknowledges the reality of coerced choice and limited options that constitute the environment of abuse.

B. Existing Statutory Regimes

Existing statutory regimes fail to address spousal abuse, although they do offer precedent for the kind of regime I propose. Four states have statutes that bar inheritance for some form of abuse of the

⁸² *Trane Co. v. Bond*, 586 A.2d 734, 735 (Md. 1991) (internal quotations omitted).

⁸³ *Id.* at 740.

⁸⁴ *Id.* at 735–37 (citing *Cent. Bank v. Copeland*, 18 Md. 305, 319 (1862); *Whitridge v. Barry*, 42 Md. 140, 153–54 (1875); *First Nat’l Bank v. Eccleston*, 48 Md. 145, 160 (1878)).

⁸⁵ 379 A.2d 757, 763–65 (Md. Ct. Spec. App. 1978).

decedent.⁸⁶ These laws, however, as noted above, are tailored to apply to the elderly and the disabled, and, even when their language is fairly expansive, they are ill-suited to address the coercive control situation. The *California Probate Code*, for example, gives as the heading for its section on abuse, “Effect of Homicide or Abuse of an Elder or Dependent Adult.”⁸⁷ Even the more expansive of the two terms describing those covered by the section, “dependent adult,” would be stretched beyond its capacity to include coercive control victims. Section 15610.23 of the *Welfare and Institutions Code* defines “dependent adult” as

any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.⁸⁸

This definition does not cover spouses or partners who find themselves in coercive control relationships. Similarly, the relevant Illinois statute covers “financial exploitation, abuse, or neglect of an elderly person or a person with a disability.”⁸⁹ Maryland’s law barring inheritance for abuse is titled, “Financial Crimes Against Vulnerable Adults”;⁹⁰ a “vulnerable adult” is defined as “an adult who lacks the physical or mental capacity to provide for the adult’s daily needs.”⁹¹ Finally, Oregon’s relevant statute covers abuse of the elderly, disabled, or incapacitated.⁹² A victim of coercive control is not necessarily elderly or mentally or physically disabled, and thus likely does not fall under the purview of these statutes. These statutes, however, offer templates and precedents for a specifically tailored regime that would address the particular challenges of the coercive control scenario.

⁸⁶ See CAL. PROB. CODE § 259(a)(1) (West 2010); 755 III. COMP. STAT. ANN. 5/2-6.2(b) (West 2010); MD. CODE ANN., CRIM. LAW § 8-801(e) (West 2010); OR. REV. STAT. ANN. §§ 112.455–112.465 (West 2010).

⁸⁷ CAL. PROB. CODE div. 2, pt. 7.

⁸⁸ CAL. WELF. & INST. CODE § 15610.23(a) (West 2010).

⁸⁹ 755 ILL. COMP. STAT. ANN. 5/2-6.2.

⁹⁰ MD. CODE ANN., CRIM. LAW § 8-801(a)(10).

⁹¹ *Id.* § 3-604.

⁹² OR. REV. STAT. ANN. §§ 112.455–112.465.

IV

RATIONALES FOR THE BAR UNDER INTESTACY

A. *Using Fault to Bar Inheritance Is Not New*

There is nothing new about applying a fault standard to bar spousal inheritance.⁹³ Indeed, ancient Roman law barred certain parties from inheriting on the grounds of “indignitas,” that is, behavior toward the decedent that made the putative beneficiary unworthy to receive under the will.⁹⁴ The most obvious: in all states, statutes or case law bar someone from inheriting, under wills or intestacy, from someone he or she has killed, treating the killer as if he or she had predeceased the victim.⁹⁵ Many of the rationales for these so-called “slayer rules” also support a bar on inheritance by those who have abused a decedent spouse—that is, they support a bar on abusive behavior that does not result in death.⁹⁶ Rationales for the slayer rules are multiple: the common-law maxim that no one can benefit from his (or her) own wrongdoing,⁹⁷ the moral principle that human life is sacred and must

⁹³ See, e.g., Linda Kelly Hill, *No-Fault Death: Wedding Inheritance Rights to Family Values*, 94 KY. L.J. 319, 320 (2005) (“The states’ use of fault in probate runs the full gamut—from denying all inheritance rights unless the surviving spouse is ‘totally free of fault’ to awarding the decedent’s estate regardless of fault simply because one ‘blunders into matrimony.’” (internal footnote omitted)).

⁹⁴ MAX RADIN, *HANDBOOK OF ROMAN LAW* 437–39 (1927).

⁹⁵ Forty-eight states do so by statute; the rest still rely on case law. See, e.g., *Bierbrauer v. Moran*, 279 N.Y.S. 176, 180 (N.Y. App. Div. 1935) (prohibition on inheritance extends to slayer’s estate); *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889) (slayer prohibited from inheriting). New York’s slayer rule differs from that of most other jurisdictions by remaining a creature of common law rather than statutory law. However, the principles underlying the common-law rule are essentially the same as those embodied in the statutory law of other jurisdictions. See, e.g., ALA. CODE § 43-8-253 (2010); IDAHO CODE ANN. § 15-2-803 (West 2010). See generally UNIF. PROBATE CODE § 2-803 (amended 2005); RESTATEMENT (THIRD) OF RESTITUTION § 45 (2007). The Supreme Court adopted this English common-law rule in *New York Mutual Life Insurance Co. v. Armstrong*, 117 U.S. 591, 600 (1886), and it was taken up by state courts beginning with *Riggs*.

⁹⁶ Here I part ways with Richard Lewis Brown’s thoughtful analysis, in which he concludes that many of the rationales behind the slayer rules do not apply to parents who abandon or abuse their children. Brown, *supra* note 27, at 552. From my analysis, it should be clear that I think these rationales could also apply to child abuse cases.

⁹⁷ The term “slayer” is used as the generic rather than “murderer” or “killer” because the statutes differ so widely in their specifics, like whether the rule is triggered by first degree murder or manslaughter, whether a legal conviction is required, etc. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. e (2003).

be protected, and the equitable aversion to unjust enrichment.⁹⁸ Another rationale is that the slayer rules also presume to honor the donor's intent, by assuming that the donor would change the disposition benefiting the slayer if he were able.⁹⁹ This rationale certainly applies in cases of wills, and may also arguably apply in cases of intestacy; because intestacy laws were designed, at least in part, to reflect a decedent's likely intent.¹⁰⁰ Finally, slayer rules also serve a retributive function, punishing the evildoer by denying him or her a benefit to which he or she might otherwise have been entitled.¹⁰¹

These rationales can also apply, as I argue they do, in cases of abuse that do not result in the spouse's death. As for benefiting from a wrong, a spouse who exercised coercive control over his partner, as noted above, likely prevented her from leaving assets to a third party, or indeed from leaving the marriage, and should not benefit from this wrong by being allowed to retain the property. A bar against inheritance by abusers also expresses the principle that life is sacred and that murder is not the only form of harm to human life that such a statute should address. The kind of harm that abuse inflicts deprives the victim of a free human life and is thus an assault upon that human life. The doctrine of unjust enrichment, which holds that a party relinquish a benefit when it would be inequitable for him to retain it, also fits the slayer rule paradigm: it would be inequitable for the abuser to retain the benefit from the victim.¹⁰²

⁹⁸ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(2) (Tentative Draft No. 5, 2007).

⁹⁹ Sneddon, *supra* note 26, at 103.

¹⁰⁰ Early in the twentieth century, Thomas Atkinson identified two bases for intestacy laws: provision for the decedent's dependents and provision for those the average property owner would be most apt to favor. Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 324 (1935). More recently, scholars have added to decedent's wishes the rationales of avoidance of title complications, promotion of the nuclear family, and encouragement of industry. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323–24.

¹⁰¹ Some courts and scholars have questioned the retributive function of slayer rules insofar as they would also deprive heirs of the wrongdoer from inheriting from the estate, a criticism based on the constitutional prohibition against corruption of the blood. *See generally* Callie Kramer, Note, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y.L. SCH. J. HUM. RTS. 697, 698 (2003) (arguing that family members of slayers should not be barred from inheriting for the above-noted considerations and summarizing cases that have addressed the issue).

¹⁰² FARNSWORTH, *supra* note 78, § 2.20. Of course, the presumption that the disposition was the result of the abuse could be rebutted. *See infra* Part VI.

The intent rationale also applies to coercive control cases. The victim of coercive control, had she been able to make a disposition free of the control, would presumably have changed the disposition that benefitted the abuser. All of the above rationales thus offer a bridge from slayer statutes—which bar inheritance to those who kill the decedent—to statutes that bar inheritance for those whose abuse of the decedent does not result in death.

Increasingly, states already use fault that falls short of causing the death of a decedent to bar inheritance under wills or intestacy. Such laws, for example, currently address child abuse or abandonment and elder abuse. Many states' Termination of Parental Rights (TPR) statutes also extinguish the parents' right to inherit from the child.¹⁰³ The logic motivating these laws is the notion that a parent who neglected or abused the child severely enough to lose parental rights forfeits the right to inherit from the child—that is, he or she loses his or her right to benefit from the parent-child relationship.¹⁰⁴ These statutes arguably make less sense than a statute barring the succession rights of an abusive spouse: it's not at all clear that termination is always or even in the majority of cases based on factors that would justify the extinction of succession rights according to the above rationales, such as abuse and neglect.¹⁰⁵ For example, courts have terminated parental rights on the basis of mental illness and mental retardation, which do not constitute parental fault or wrongdoing.¹⁰⁶ Termination of Parental Rights statutes also disproportionately impact minority families and mothers as opposed to fathers¹⁰⁷ due to these

¹⁰³ For example, Virginia law provides:

[A]n order terminating residual parental rights . . . shall terminate the rights of the parent to take from or through the child in question but the order shall not otherwise affect the rights of the child, the child's kindred, or the parent's kindred to take from or through the parent or the rights of the parent's kindred to take from or through the child.

VA. CODE ANN. § 64.1-5.1(5) (West 2010).

¹⁰⁴ Monopoli, *supra* note 27, at 259 (explaining the justification for barring inheritance based on parental behavior).

¹⁰⁵ For analysis of the way social welfare agencies disproportionately target poor families and families of color, for example, see, e.g., Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 587–89 (1997); Brown, *supra* note 27, at 551 (“The disinheritance provisions of termination statutes are poorly tailored for [the] purpose [of punishing “bad” parents], being both seriously over-inclusive and under-inclusive in their effect.”).

¹⁰⁶ Brown, *supra* note 27, at 570–73 (citing cases).

¹⁰⁷ *Id.* at 578 (“Parents charged with maltreatment of their children are disproportionately poor, disproportionately minorities (despite the fact that ‘there is no correction between race

groups' higher rates of involvement with the welfare system,¹⁰⁸ while authorities largely fail to investigate abuse and neglect in wealthy and upper class families, despite the fact that child abuse is as likely to occur in these social sectors.¹⁰⁹ This disproportion suggests that some parental rights may be terminated due to cultural and economic factors rather than parental fault. Again, courts have terminated parental rights of a mother in cases where the mother is a victim of domestic violence on the grounds that exposing the children to the abuse constituted neglect.¹¹⁰ Whether or not such action is necessary to protect children, it hardly seems to indicate a failure of parenting by mothers worthy of the punishment of disinheritance. Yet, many states bar inheritance on these grounds.

Other fault-based grounds for barring a parent's succession from a child include abandonment, refusal to acknowledge the child, the commission of certain crimes against the child, and even, in a few states, some crimes against the other parent.¹¹¹ Both the *Uniform Probate Code* (UPC) and the *Restatement (Third) of Property* allow for the disinheritance of undeserving parents. The UPC bars succession unless a parent has acknowledged and supported the child;¹¹² the *Restatement* bars succession by a parent who abandoned or refused to acknowledge the child.¹¹³ The rationale underlying these prohibitions is punishment of the abusive or neglectful parent

and rates of child maltreatment'." (quoting Appell, *supra* note 105, at 584 n.35) (internal footnotes omitted)).

¹⁰⁸ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 32 (2002) ("[T]he heightened monitoring of poor families [by welfare and other social service agencies] results in the discovery of a great deal of child maltreatment . . . that would have gone unnoticed had it occurred in the privacy afforded wealthier families.").

¹⁰⁹ Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 *BERKELEY WOMEN'S L.J.* 9, 29 (1994).

¹¹⁰ Brown, *supra* note 27, at 572. This phenomenon—battered women losing custody of their children due to their status as abuse victims—was the subject of a scathing opinion by U.S. District Court Judge Jack Weinstein in the class action case brought against the City of New York and its Administration for Children Services, in which Judge Weinstein referred to the "widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children." *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

¹¹¹ For a discussion of these statutes, see Rhodes, *supra* note 27.

¹¹² UNIF. PROBATE CODE § 2-114(c) (amended 2005).

¹¹³ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5(5) (1998).

through denial of the benefit of the parent-child relationship.¹¹⁴ This logic would seem to apply with equal if not greater force to the case of the abusive spouse who stands to inherit his victim's estate: neither abusive parent nor spouse should benefit from the relationship that gave rise to the benefit. This is a moral argument not based on the proposition that the victim of abuse was coerced into leaving her estate to the abuser; it simply recognizes the injustice of a parent or spouse who violated the essential terms of the parental or spousal relationship benefitting from that relationship.

My point is that fault-based bars to inheritance are already part of the legal landscape, and have been for some time, but often in forms that fail to meaningfully target those who are actually at fault in a way that justifies the inheritance bar. Parental termination statutes, as explained, often target parents based on class and cultural differences rather than abusive behavior. Compared to these regimes, my proposal is focused on actual perpetrators of harm—as opposed to those whose cultural or lifestyle differences trigger the bar but in reality do not perpetrate the harm the statute seeks to address. A bar against succession by perpetrators of coercive control, on the other hand, addresses precisely the harmful behavior meant to be targeted: coercive control and its result in the transfer of resources.

Fault between spouses can also serve as grounds for the extinction of succession rights. For example, barring an adulterous spouse from inheriting is an ancient tradition, codified as far back as the Statute of Westminster II, which “barred a woman from dower if she had abandoned her husband [to] live[] in [adultery] with another” man.¹¹⁵ Today, five states bar a spouse who has committed adultery from inheriting from the other spouse, though all five allow for the bar to be suspended if the couple had reconciled and resumed cohabitation (Kentucky and Missouri), if the aggrieved party was found to have condoned the adultery (North Carolina and Ohio), or if the adulterous relationship ended before the decedent's death (Indiana).¹¹⁶ In a

¹¹⁴ Rhodes, *supra* note 27, at 527.

¹¹⁵ Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 978 (2007).

¹¹⁶ See IND. CODE ANN. § 29-1-2-14 (West 2010); KY. REV. STAT. ANN. § 392.090 (West 2010); MO. ANN. STAT. § 474.140 (West 2010); N.C. GEN. STAT. ANN. § 31A-1(a)(2) (West 2010). As Anne-Marie Rhodes has observed, these “soft bars” suggest that while adultery is still seen as a fault with the potential to bar inheritance, the discretion lies increasingly with the parties involved, suggesting that society's presumed intent of the decedent has yielded to the adequately proven intent of the particular decedent. Rhodes, *supra* note 115, at 979.

related vein, at least forty states address bigamy as a bar to inheritance, either by having adopted the UPC's provision in this regard,¹¹⁷ or through case law.

Both spousal¹¹⁸ and child¹¹⁹ abandonment bar inheritance in some states. Most of the spousal abandonment statutes allow for suspension of the bar if the parties had reconciled and resumed their duties to each other before the decedent's death; again, the social judgment is outweighed by the particular party's intent.¹²⁰ Eleven states bar inheritance from a child by a parent who abandons that child.¹²¹

¹¹⁷ UNIF. PROBATE CODE § 2-802(b)(2) (amended 2005) (stating in relevant part that "a surviving spouse does not include . . . an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual"). Nine states have adopted this version of the UPC. See ALASKA STAT. ANN. § 13.12.802(b)(2) (West 2010); ARIZ. REV. STAT. ANN. § 14-2802(b)(2) (West 2011); COLO. REV. STAT. ANN. § 15-11-802(2)(b) (West 2011); HAW. REV. STAT. § 560:2-802(b)(2) (West 2010); MD. CODE ANN., EST. & TRUSTS § 1-202(c) (West 2011); MONT. CODE ANN. § 72-2-812(2)(b) (2009); N.M. STAT. ANN. § 45-2-802(B)(2) (West 2011); N.D. CENT. CODE ANN. § 30.1-10-02(2)(b) (West 2009); UTAH CODE ANN. § 75-2-802(2)(b) (West 2011); WIS. STAT. ANN. § 851.30(2)(b) (West 2011).

Six states have adopted an earlier version of the *Uniform Probate Code*, which omits the phrase "an invalid" in the code section, but clarifies in the subsequent comment that the divorce or annulment secured by the decedent was invalid. See UNIF. PROBATE CODE § 2-802 (amended 1975); see also ALA. CODE § 43-8-252(b)(2) (2010); CAL. PROB. CODE § 78(c) (West 2010); IDAHO CODE ANN. § 15-2-802(b)(2) (West 2011); ME. REV. STAT. ANN. tit. 18-A, § 2-802(b)(2) (2010); NEB. REV. STAT. § 30-2353 (2010); S.C. CODE ANN. § 62-2-802(b)(2) (2010).

Two states have adopted a more modified version of the *Uniform Probate Code* language. See MICH. COMP. LAWS ANN. § 700.2801(2) (West 2010) (including amongst the preclusion provisions that the remarriage may follow "an invalid decree or judgment of divorce" or that the survivor "at the time of the decedent's death, is living in a bigamous relationship with another individual"); TENN. CODE ANN. § 31-1-102(b)(2) (West 2010) (noting that the survivor's remarriage can follow either a "valid or invalid" divorce decree).

¹¹⁸ See, e.g., CONN. GEN. STAT. ANN. § 45a-436(g) (West 2010); IND. CODE ANN. § 29-1-2-15 (West 2010); MICH. COMP. LAWS ANN. § 700.2801(2)(e) (West 2010); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(5) (McKinney 2010); 20 PA. CONS. STAT. ANN. § 2106(a)(1) (West 2010). Other jurisdictions may also acknowledge spousal abandonment. See, e.g., HAW. REV. STAT. § 533-9 (West 2010); MASS. GEN. LAWS ANN. ch. 191, § 15, ch. 209, § 36 (West 2010).

¹¹⁹ See, e.g., CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West 2010); 755 ILL. COMP. STAT. ANN. 5/2-6.5 (West 2010); MD. CODE ANN., EST. & TRUSTS § 3-112(a)(1) (West 2010); S.C. CODE ANN. § 62-2-114 (2010); VA. CODE ANN. § 64.1-16.3(B) (West 2010). For an excellent analysis of the issues behind such statutes, see Brown, *supra* note 27, at 549 (reviewing existing statutes); Monopoli, *supra* note 27, at 261.

¹²⁰ Rhodes, *supra* note 115, at 983.

¹²¹ Rhodes, *supra* note 27, at 532-33. For this purpose, I am not including jurisdictions that have enacted the *Uniform Probate Code* section 2-114-type statutes

Elder abuse is a bar to inheritance in four states,¹²² and has been urged for adoption in others.¹²³ Oregon, for example, bars an abuser as well as a slayer of an “elderly, disabled or incapacitated” person from taking a share of that decedent’s estate, by will or trust as well as by intestate succession; it treats the abuser as if that person had predeceased the decedent.¹²⁴ Indeed, Oregon’s law goes further: it also prevents a slayer or an abuser from inheriting from an heir of the decedent unless that heir so provides in a will or other instrument executed after the victim’s death.¹²⁵ Oregon law defines “abuse” as either physical or financial, and physical abuse includes, among other things: “conduct against a vulnerable person that would constitute . . . [a]ssault, . . . [m]enacing, . . . [r]ecklessly endangering another person, . . . [c]riminal mistreatment, . . . [r]ape, . . . [s]odomy, . . . [u]nlawful sexual penetration, . . . [s]exual abuse, . . . [s]trangulation, . . . [or] unreasonable physical constraint.”¹²⁶ Financial abuse, under Oregon law, includes taking or appropriating “money or property of a vulnerable person without regard to whether the person taking or appropriating the money [or property] has a fiduciary relationship with the vulnerable person.”¹²⁷ These statutes barring inheritance only apply, however, “if the decedent dies within five years after the abuser is convicted of a felony by reason of [the] conduct” at issue.¹²⁸

Illinois law provides:

Persons convicted of financial exploitation, abuse, or neglect of an elderly person or a person with a disability shall not receive any property, benefit, or other interest by reason of the death of that elderly person [The abuser’s] interest shall pass as if the person convicted . . . died before the decedent¹²⁹

regarding paternity that could arguably be used to disinherit abandoning parents. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 2-109 (2010); N.M. STAT. ANN. § 45-2-114 (West 2010); TENN. CODE ANN. § 31-2-105 (West 2010); UTAH CODE ANN. § 75-2-114 (West 2010).

¹²² *See, e.g.*, CAL. PROB. CODE § 3-111 (West 2010); OR. REV. STAT. ANN. §§ 112.455–465 (West 2010).

¹²³ Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser’s Right to Inherit*, 23 QUINNIPIAC PROB. L.J. 214 (2010).

¹²⁴ OR. REV. STAT. ANN. § 112.465(1).

¹²⁵ *Id.* § 112.465(2).

¹²⁶ *Id.* § 124.105(1), (2).

¹²⁷ *Id.* § 124.110(1)(a).

¹²⁸ *Id.* § 112.457.

¹²⁹ 755 ILL. COMP. STAT. ANN. 5/2-6.2(b) (West 2010).

An abuser is defined as a caregiver who knowingly engages in conduct that will cause injury to the elder, fails to perform actions that he or she knows will cause injury to the elder, or abandons or physically abuses the elder.¹³⁰ The exception to this rule is when the abused person based on “clear and convincing evidence . . . knew of the conviction and subsequent to the conviction expressed or ratified his or her intent to transfer the property, benefit, or interest to the person convicted” anyway.¹³¹

California law, to a limited extent, bars a person from receiving from a decedent’s estate, whether by will, trust, or intestacy, if there is clear and convincing evidence that that person is “liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult.”¹³² The abuser is barred, however, only from inheriting monies that were added to the decedent’s estate as the result of an action based on the abuse.¹³³ California does not require a criminal conviction to bar inheritance under this section, but it does provide that a conviction for false imprisonment or crimes against an elder or dependent person will automatically bar that person from inheriting as well.¹³⁴ Finally, Maryland’s bar prevents inheritance from a decedent’s estate only when the heir is convicted of financial crimes against the decedent who was a “vulnerable adult.”

The law in these states makes a clear statement that elder abuse is morally wrong, socially unacceptable, and fraught with legal consequences, namely, depriving the abuser of the possibility of receiving any benefits from the abused elder. Whether this works as a deterrent to elder abuse is not clear. Some abuse may arise from the frustration of an overburdened caregiver: while this is not an excuse for the behavior, it suggests that some abuse at least may have emotional triggers and be less susceptible to rational deliberation.¹³⁵ This, in turn, suggests that the possibility of a future deprivation of an expectancy—even if the abuser is aware of such a possibility—may not be an effective deterrent. In this, elder abuse cases may be like spousal abuse cases: both forms of abuse, whether they stem from external pressure or the emotional and psychological makeup of the

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² CAL. PROB. CODE § 259(a)(1) (2010).

¹³³ *Id.* § 259(c).

¹³⁴ *Id.* § 259(b).

¹³⁵ Karl Pillemer & David Finkelhor, *Causes of Elder Abuse: Caregiver Stress Versus Problem Relatives*, 59:2 AM. J. OF ORTHOPSYCHIATRY 179, 180 (1989).

abuser, seem unlikely to be susceptible to the braking effect of rational thought and thus are unaffected by awareness of future consequences.

Nonetheless, these laws make an important statement about society's and the legal system's willingness to tolerate elder and child abuse. As things stand, the law more strongly condemns elder and child abuse than spousal abuse. It deprives someone who abused or controlled an elder from benefiting from that elder's estate, but does nothing to prevent someone who has abused a spouse from inheriting from that person. Surely we as a society condemn domestic violence as much as we do elder abuse, but these legal regimes suggest that one is more serious, at least with respect to the probate system, than the other.

One could argue that one reason for the discrepancy in the laws is the greater physical and mental frailty of the elderly and children, who seem much less able to help themselves and thus more vulnerable than adult victims of coercive control and more in need of the law's protection. And, indeed, many victims of coercive control do fight back and sometimes escape their abusers. The mere fact that some victims of a crime society abhors fight back, however, does not exempt those victims from the law's protection. While the elderly and young children may be even more vulnerable to abuse and less able to fight back, victims of coercive control are a vulnerable population as well. Indeed, resistance and escape carry high risks of death: spousal abuse victims are most likely to be killed when they try to leave the coercive control situation.¹³⁶ Thus, these victims may in fact be as vulnerable as children and the elderly based on factors other than physical and mental fitness. Nor does the fact that abuse victims may have more physical and mental resilience than children and the elderly make the law's expressive function any less applicable to them. What the law currently expresses is less concern with victims of coercive control than for other vulnerable groups. This must change.

B. Marriage: Reciprocity, Duty, and Contract

Domestic violence breaches the marriage contract and destroys the reciprocity that constitutes the marital relationship.¹³⁷ The UPC embodies the reciprocity ideal in its parental inheritance bar, section

¹³⁶ STARK, *supra* note 4, at 115.

¹³⁷ See Bridges, *supra* note 33.

2-114, which prevents a parent from inheriting from a child if his or her parental rights were terminated, or if the child dies before the age of eighteen and there was clear and convincing evidence that parental rights could have been terminated under the law of the jurisdiction due to nonsupport, abuse, neglect, or abandonment.¹³⁸ This section seems based on the idea of reciprocity in the parent-child relationship,¹³⁹ and it makes sense to import the idea of reciprocity into the marital relationship for inheritance purposes. Indeed, state statutes barring inheritance to spouses who abandon their marital partners already embody this notion.

Another way of looking at this issue is through the idea of duty: UPC section 2-114 can be read as assuming a duty between parent and child, the breach of which causes a relinquishment of rights on the part of the breaching party—in the UPC's case, the terminated parent. Again, this is a notion that translates easily into the marital context. The philosophy animating any kind of behavior-based model of inheritance is the idea that the law is a teacher, setting forth clear standards for behavior among family members, punishing dereliction of familial duties, and rewarding their fulfillment.¹⁴⁰

¹³⁸ *Uniform Probate Code* section 2-114 reads as follows:

- (a) A parent is barred from inheriting from or through a child of the parent if:
 - (1) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or
 - (2) the child died before reaching [18] and there is clear and convincing evidence that immediately before the child's death the parental rights of the child's parent could have been terminated under other law of this state on the basis of non-support, abandonment, abuse or neglect, or other actions or inactions of the parent toward the child.
- (b) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

UNIF. PROBATE CODE § 2-114 (amended 2008).

¹³⁹ Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 652–53 (2002) (“Reciprocity as a goal of intestacy statutes also has merit. . . . [T]he rationale applies to any family members who have supported each other, both financially and emotionally.”). On the other hand, the UPC indicates that these statutes are also based on the idea of a parent's moral duty to support his or her child; UPC section 2-114(c) bars a parent from inheriting from a child unless the “parent has openly treated the child as his (or hers) and has not refused to support the child.”

¹⁴⁰ Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 574 (2001).

V

THE ISSUE OF INTENT

The problem with this proposal in the context of testamentary transfers is that if the decedent spouse chose to make a devise in her will benefitting the survivor, had capacity, and the will was duly executed, the devise reflects her clear testamentary intent and should therefore be honored. Testamentary intent is the foundation of Anglo-American wills law:¹⁴¹ for example, the United States is one of the few countries in the Western world that allows a testator to intentionally disinherit his or her children.¹⁴² This bedrock notion of the power of intent, called “Control of the Dead Hand,” allows, in theory at least, for few policy-based exceptions.¹⁴³ What, then, justifies codifying a shortcut, such as the one I propose, to arrive at duress based on the general nature of a relationship? How can I argue for interfering with a disposition the victim spouse either made (if she left a will or executed a nonprobate transfer) or failed to divert away from the surviving spouse (if she died intestate)?

Moreover, isn't it patronizing for courts to deem such a transfer the product of duress when the spouse chose to make it at the time? Doesn't it deny to battered women the integrity of the choices they make? Despite the fact that I have already shown that duress is a long-accepted basis for invalidating a will, I want to address this question in the context of coercive control where questions of abused spouses' agency are hotly contested.

My response to this set of concerns is threefold. First, courts' and legislatures' commitment to a testator's intent is flexible at best: courts routinely invalidate devises that flout social norms and legislatures override testamentary intent when they deem policy objectives to outweigh it; the law contains several instances where intent is trumped by another, weightier policy goal, such as protection

¹⁴¹ For discussion of the principle of testamentary intent, see Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002).

¹⁴² DUKEMINIER ET AL., *supra* note 55, at 520–39.

¹⁴³ The idea that a testator should be free to dispose of his or her estate as he or she wishes is the basis for spendthrift and other forms of trust that allow the beneficiaries to avoid creditors and other undesirable payees: the reasoning being that the grantor, in the case of a trust, may choose not to have his estate paid to the beneficiary's creditors if he or she does not wish to do so. For criticism of dead hand control, see generally RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (2010).

for a surviving spouse or adherence to wills formalities. Second, the notion of intent with respect to a victim of coercive control is problematic, as I will discuss. Finally, the strong social policy against domestic violence should outweigh concerns about intent in this case, as it does in other cases. With respect to intent, the real question then becomes, what policy concerns are important enough for us to override it? Surely barring abusers from the unjust enrichment of inheriting from their victims is one of them.

A. Inheritance Law Historically Allows Other Considerations to Trump Intent

Despite American reverence for the dead hand, some policy concerns overrule this fundamental principle, and inheritance law can override the testator's clearly expressed intent. All states but one, for example, have elective or spousal share statutes,¹⁴⁴ which allow a surviving spouse to choose to take a statutorily determined share in addition to or instead of taking under the decedent's will.¹⁴⁵ Thus, even when a spouse makes deliberate efforts to disinherit his or her spouse, the law will thwart this intent for policy concerns deemed weightier than intent, such as supporting the survivor or recognizing the partnership theory of marriage by leaving the surviving spouse with a share of an estate he or she helped accumulate.¹⁴⁶

Indeed, some states and the UPC are willing to undo nonprobate transfers such as trusts to augment the probate estate and add to the surviving spouse's share, thus purposefully thwarting the testator's intent.¹⁴⁷ This is most often the case when the decedent seems to have made the transfer in a deliberate attempt to deplete the estate. In such cases, the evasion of the testator's intent is not a mere byproduct of some other mandate such as enforcing formalities. Rather, evasion of the testator's intent is the very purpose of the doctrine. The UPC's definition of the "augmented estate"—that is, the estate for purposes

¹⁴⁴ DUKEMINIER ET AL., *supra* note 55, at 476 n.2.

¹⁴⁵ For an overview of spousal shares, see generally *id.* at 469–519.

¹⁴⁶ *Id.* at 476–508. For discussions of the history and rationale of the spousal share, see for example, 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); Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617 (2010); Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1 (2003).

¹⁴⁷ UNIF. PROBATE CODE § 2-202 (amended 2005).

of determining the elective share—not only ignores the testator’s intent, it subverts it entirely. For example, UPC section 2-203, which defines the augmented estate, includes in it “the decedent’s nonprobate transfers to others,” which section 2-205 defines as “[p]roperty owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent’s death.”¹⁴⁸ This would apply, for example, if H created an *inter vivos* revocable trust, income to H for life, remainder to X. When H dies, without having revoked the trust, survived by W, the value of the trust corpus will be included in the augmented estate.¹⁴⁹

Even life insurance with a beneficiary other than the surviving spouse may constitute part of the augmented estate.¹⁵⁰ In other words, if a decedent spouse buys a life insurance policy with a beneficiary other than the surviving spouse, under the *Uniform Probate Code*, the value of the policy will be added to the value of the estate for purposes of calculating the elective share. The comment to this section makes clear that this provision was added explicitly to thwart intent: “Although the augmented estate under the pre-1990 Code did not include life insurance, annuities, etc., payable to other persons, the revisions do include their value; this move recognizes that such arrangements were, under the pre-1990 Code, used to deplete the estate and reduce the spouse’s elective-share entitlement.”¹⁵¹

Delaware’s augmented estate statute achieves a similar result by including in the augmented estate all decedent’s property subject to the federal estate tax.¹⁵² In taking this approach, Delaware implicitly recognized, as does the UPC, that its goal is to thwart the testator’s intent. Its model is another regime that is adversarial to decedents’ intent, probably because tax authorities have “long experience with decedents trying to avoid estate tax by lifetime transfers.”¹⁵³

Other policy reasons exist for ignoring testators’ intent, particularly when that intent involves a restraint on the ability of the surviving spouse to remarry or otherwise interfere with a family relationship. For example, in *Estate of Robertson*, the testator’s will contained a provision stating

¹⁴⁸ *Id.* § 2-205(1).

¹⁴⁹ *Id.* § 2-205(1) ex. 3.

¹⁵⁰ *Id.* § 2-205(1)(iv).

¹⁵¹ *Id.* § 2-205 cmt.

¹⁵² DEL. CODE ANN. tit. 12, § 902 (West 2010).

¹⁵³ DUKEMINIER ET AL., *supra* note 55, at 496.

I hereby give and devise my real estate . . . more commonly known as 320 Blair Pike, Peru, Indiana, IN TRUST to James Lewis Nye, as Trustee, for the following uses and purposes, to-wit:

a) The Trustee shall allow my husband, Lynn D. Robertson, if he survives me, to continue to live at said real estate as if he had been devised a life estate in said real estate, or until he remarries or allows any female companion to live with him who is not a blood relative.¹⁵⁴

The court found that the condition that the widower not remarry was a restraint on marriage and as such invalid for violating public policy.¹⁵⁵ Likewise, conditions requiring separation or divorce are likely invalid for similar reasons. In *Estate of Owen*, the court invalidated a condition prohibiting a daughter from renting a certain property as long as she remained married to an identified individual because it encouraged divorce.¹⁵⁶ *The Restatement (Third) of Property* invalidates trusts that are contrary to public policy, in particular those that constrain family, religion, and career choices.¹⁵⁷

Wills that clearly express a testator's intent can also be denied probate in the interest of upholding the formalities requirements of will execution.¹⁵⁸ For example, as recently as 1998, a West Virginia court denied probate to the will of an elderly man confined to a wheelchair because, when he took his will to his local bank to execute it, after he himself had signed it, a bank employee carried the will to be signed by two other bank employees at their work stations, and those employees testified that they did not actually see the testator physically "place his signature on the will."¹⁵⁹ Thus, the will failed the requirement that the testator sign in the presence of the witness.¹⁶⁰ My point here is not to defend this extreme and unnecessary

¹⁵⁴ 859 N.E.2d 772, 774 (Ind. Ct. App. 2007). The children, who were also the remaindermen of the trust, brought suit when the father remarried. *Id.* at 773–74.

¹⁵⁵ *Id.* at 776.

¹⁵⁶ 855 N.E.2d 603, 611–12 (Ind. Ct. App. 2006).

¹⁵⁷ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 29(c), cmts. j, k, & l (2003).

¹⁵⁸ Despite the protests of commentators, the UPC's Harmless Error and Substantial Compliance Rule, and the increasing flexibility of some courts, such cases are not ancient history. See *Burns v. Adamson*, 854 S.W.2d 723, 724–25 (Ark. 1993) (denying probate of will signed by testator in her hospital room because it was not signed in the presence of two witnesses when one of the witnesses signed the will before the testator had put her signature on it, despite the fact that a second witness later that day witnessed testator's signature and signed in her presence); *Estate of Proley*, 422 A.2d 136, 138–39 (Pa. 1980) (will invalid because testator signed in the wrong place).

¹⁵⁹ *Stevens v. Casdorff*, 508 S.E.2d 610, 611–12 (W. Va. 1998).

¹⁶⁰ *Id.* at 613.

formalism; rather, it is simply to point out that our inheritance system's commitment to the testator's intent is far from absolute.

Moreover, courts have a long tradition of denying probate to wills that violate social convention. For example, Melanie Leslie has shown that wills benefitting nonrelatives are more likely to be found invalid by juries than wills that benefit family members when the will diverts the decedent's estate away from apparently deserving family members to beneficiaries who are not blood relations.¹⁶¹ There has also been considerable discussion of instances in which wills leaving estates to same-sex partners are more likely to be found invalid than those reflecting heterosexual relationships.¹⁶² Such cases are not mere horror stories from the "bad old days." The doctrine of undue influence is still being used to invalidate bequests that fail to comport with a court's notions of social propriety despite having all the indicia of voluntariness and genuine intent.¹⁶³ One example of many comes to mind. In *Estate of Reid*, a court found an elderly woman's bequest to a younger man to have been the product of undue influence despite the fact that the testator had adopted the man and had testified while she was alive that she wanted to leave him her estate because he was such a good son to her, and that anyone who insinuated that she was being unduly influenced was guilty of telling a "goddamn lie."¹⁶⁴ This is not the only example: in the will contest over the Johnson & Johnson company fortune, the proponents of the will were worried enough about a finding of undue influence that they settled the case, despite testimony from the Columbia College of Surgeons Chief of

¹⁶¹ Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) ("Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent."); see also Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576-77 (1997).

¹⁶² See 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, 276 (1999) (noting that despite protestation to the contrary, "[i]n practice . . . the law disfavors testamentary dispositions that deviate from the norm; it prefers gifts to the testator's legal spouse and close blood relations over gifts to other potential beneficiaries").

¹⁶³ Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 265-66 (2010) (arguing that the doctrine is still being used to subvert testamentary intent and that the new arena for this subversion is the case in which elderly female testators leave bequests to younger men).

¹⁶⁴ *Estate of Reid*, 825 So.2d 1 (Miss. 2002); see also Spivack, *supra* note 163.

Psychiatry that the testator had complete autonomy in his financial decisions.¹⁶⁵

My point is not that a testator's intent is unimportant. Rather, it is that the value we attach to the ideal of intent in this context is relative, and, for better or for worse, often yields to other considerations. While the above-noted examples—wills being denied probate for seemingly trivial technical reasons and for failure to comport with social norms—may seem, and indeed may be, unfortunate and in need of repudiation, most of us are content with the overriding of testamentary intent when it furthers policy goals of protecting surviving spouses, invalidating restrictions on certain fundamental rights like the right to marry, or preventing illegal courses of action.

All this is to say that the law is willing to ignore a testator's intent when overriding it fosters an important social goal. Overriding a testator's intent to disinherit a surviving spouse, whether in the interest of keeping him or her off the public dole or in the interest of upholding the theory of marriage as a partnership, seems distinguishable from overriding it in the interest of punishing the surviving spouse. First of all, it is not clear that the intent of the decedent in cases of spousal abuse was at all malicious, as we assume the intent of the disinheriting spouse to have been: in the case of the latter, we ignore intent because we find that intent unworthy of validation. In the case of the former, however, there is nothing in the intent to leave property to the surviving spouse that we as a society find blameworthy or socially harmful. My point here is not to argue that these situations are analogous, but rather to set the stage by putting our claims about the importance of testamentary intent into context. The truth is, that despite our claims to honor it, we are willing to let other considerations trump it. Intent is an important value in our system of inheritance law, but it is not the only one, or always the highest one.

The role of intent poses fewer problems in the context of intestacy than it does when there is a will. First, dying without a will, as about half the population does, expresses very little in the way of affirmative intent.¹⁶⁶ Rather than being aware of, or choosing, intestate distribution, most people simply never get around to making

¹⁶⁵ DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* 575 (1993).

¹⁶⁶ Hirsch, *supra* note 27, at 1047 (enumerating factors other than affirmative intent that contribute to the failure to make wills).

estate plans for various reasons, including reluctance to face mortality, aversion to engaging a lawyer, and reluctance to spend money.¹⁶⁷ Second, the drafters of intestacy statutes based the laws on educated (by polls and studies) estimates of how decedents would want their estates to be passed.¹⁶⁸ Thus, intestacy regimes are already charged with speculating about the wishes of decedents; a law that provides for speculation that an abused decedent would not want her abuser to inherit fits in with the purposes and design of the overall regime.

B. Intent in the Context of Coercive Control

Second, the very idea of intent is problematic in the context of coercive control, to the extent that a finding of coercive control justifies, without more, a finding of duress. Recent studies of spousal abuse have shown that it is a behavioral cycle that goes far beyond acts of individual battery, resulting in what Lenore Walker famously identified as “Battered Woman Syndrome.”¹⁶⁹ It is an all-encompassing program in which every aspect of the victim’s daily existence is subjected to minute scrutiny and control.¹⁷⁰ Indeed, recent work with abuse victims outside of the medical context suggests that physical assault may not be the prominent feature of such relationships.¹⁷¹ The prominent feature is the fact that the relationship is “embedded in a strategy of control that is reinforced at a number of points of structural inequalities” in the surrounding society.¹⁷² For my purposes, the two most important ways women

¹⁶⁷ *Id.* at 147–48 (enumerating psychological factors that impede the making of wills).

¹⁶⁸ DUKEMINIER ET AL., *supra* note 55, at 75.

¹⁶⁹ For discussion of “Battered Woman Syndrome,” see generally LENORE E.A. WALKER, *ABUSED WOMEN AND SURVIVOR THERAPY* 70 (1994); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321 (1992).

¹⁷⁰ See generally STARK, *supra* note 4. Stark’s book is credited with reframing the issue of domestic violence from one of physical abuse to one of control of the victim’s life and mind.

¹⁷¹ *Id.* at 85–86, 110.

¹⁷² Stark, *supra* note 41, at 984 n.52 (identifying this feature as the difference between intimate violence against men and intimate violence against women, and using this difference to explain “why we observe the psycho-social profile distinctive of battering among women who are assaulted by their partners, but not among men”); see also Judith Lewis, *Setting the Wrong Right: Prosecutorial Use of Expert Testimony on Dominance and Control*, 23 ME. B.J. 48, 48 (2008) (“[T]o the battered woman, domestic violence is not experienced as an isolated physical act but rather as a series of physical and psychological acts by the batterer in an attempt to dominate and control her.”).

experience coercive control are through disempowerment and an altered sense of identity.¹⁷³ Stark likens the victim of this kind of control to a prisoner of war or prisoner in a concentration camp because psychologists have observed that perpetrators of coercive control employ the same techniques as guards in those situations.¹⁷⁴ Similarly, psychologist Stephen Morgan has labeled spousal abuse “conjugal terrorism,” noting what he calls the “remarkable” similarities between the behavior of the violent spouse and the political terrorist.¹⁷⁵ Another analogy to the treatment of abuse victims is the treatment by which pimps “break down” women to condition them to prostitution.¹⁷⁶ These forms of conditioning entail three stages: they break down the personality and self-concept of the victim with random abuse, threats, isolation from the outside world and outside information, then present the victim with a new and different view of reality, which then becomes “installed” in the victim’s mind.¹⁷⁷ The victim responds to the “breaking down” process with loss of self-esteem, dependence on the abuser, identification with the abuser’s aggression, fear of escape, difficulty planning for the future, and detachment from the violent incidents.¹⁷⁸ In *Next Time She’ll Be Dead*, Ann Jones presents a chart correlating practices listed in Amnesty International’s “chart of coercion” and the practices of men who exercised coercive control over women.¹⁷⁹

These techniques, like the similar methods used on political prisoners and prisoners of war, have a brainwashing effect, imposing the abuser’s worldview and reality onto the victim.¹⁸⁰ Emerge, the Boston counseling program for batterers, defines violence as “any act that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to

¹⁷³ STARK, *supra* note 4, at 100.

¹⁷⁴ These studies are cited in OKUN, *supra* note 22, at 258.

¹⁷⁵ MORGAN, *supra* note 46, at 30.

¹⁷⁶ ANN JONES, *NEXT TIME, SHE’LL BE DEAD: BATTERING & HOW TO STOP IT* 85 (1994) (“The batterer subjects his wife or girlfriend to a process of seduction and coercion (known as “romance”), while the pimp uses an *identical* process of recruitment and indoctrination (known in the trade as “seasoning”) to “turn out” a prostitute.”).

¹⁷⁷ STARK, *supra* note 4, at 200.

¹⁷⁸ *Id.*

¹⁷⁹ JONES, *supra* note 176, at 89-91 (observing that the control skills at issue in battering “resemble nothing so much as the tactics used by Nazi guards to control prisoners in the death camps, and by Chinese thought-reformers to brainwash American P.O.W.’s in Korea”).

¹⁸⁰ STARK, *supra* note 4, at 12-13.

be afraid.”¹⁸¹ In other words, coercive control “is a process of deliberate intimidation intended to coerce the victim to do the will of the victimizer.”¹⁸² Elaine Hilberman created a profile of battered women based on interviews with abuse victims:

These women were a study in paralyzing terror; the stress . . . was unending and the threat of assault ever present. Agitation and anxiety bordering on panic were almost always present. . . . The women remained vigilant, unable to relax or sleep. . . . [T]he waking lives of these women were characterized by overwhelming passivity and inability to act. They were drained, fatigued and numb, without the energy to do more than minimal household chores and child care. . . . They saw themselves as incompetent, unworthy, and unlovable and were ridden with guilt and shame. They thought they deserved the abuse . . . and felt powerless to make changes.¹⁸³

Women who are victims of coercive control have committed crimes on the orders of their partners, from minor larceny from an employer to child abuse, forgery, and grand larceny.¹⁸⁴ In one of the most infamous abuse cases in U.S. history, battered wife Hedda Nussbaum watched her adopted six-year-old daughter die of a brain hemorrhage, too afraid of her companion, Joel Steinberg, to call for help.¹⁸⁵ As Ann Jones explains,

Put brainwashing in the context of an intimate relationship where traumatic bonding is likely to occur, add physical violence, sexual coercion, sexual abuse, and drugs—and the subject’s world rapidly collapses inward. She restricts her movements, censors her thoughts, silences her opinions to match the demands of her increasingly powerful controller. Options disappear. Choice becomes dangerous. She is captive.¹⁸⁶

Add to this the fact that financial control is an important aspect of the control exercised over victims in the coercive control cycle: women are forced to turn over their paychecks, ask for even small

¹⁸¹ JONES, *supra* note 176, at 88.

¹⁸² *Id.*

¹⁸³ Elaine Hilberman, *Overview: The “Wife Beater’s Wife” Reconsidered*, 137 AM. J. PSYCHIATRY 1336, 1342 (1980).

¹⁸⁴ STARK, *supra* note 4, at 261, 325.

¹⁸⁵ For accounts of the Nussbaum case, see SAM EHRLICH, LISA, HEDDA, AND JOEL: THE STEINBERG MURDER CASE (1989); Pete Hamill, *A Tale of Abuse*, N.Y. POST, Dec. 13, 1988, at 2.

¹⁸⁶ JONES, *supra* note 176, at 186. None of this is to affirm the now discredited findings of Lenore Walker that abused women suffer from “learned helplessness.” Researchers have come to recognize the many active strategies these women use to cope, resist, and escape their batterers.

amounts of money, live on an allowance, and deprive themselves or their children of the chance to save money. Evan Stark reports cases he encountered in his work with domestic abuse victims in which a husband took his wife's earnings to support a gambling habit, another set up an embezzlement scheme in which she ended up being charged, and another refused to leave the marital home until the wife paid off his car loan and gave him the car.¹⁸⁷ In another instance, a physician husband demanded that his wife leave her job, sell the many properties that she owned, and invest the proceeds in his medical research.¹⁸⁸ In another instance, when a wife refused her husband full access to her paycheck and savings account, he tore up their marriage license and beat her, fracturing several bones and putting her in the hospital.¹⁸⁹ Stark notes, "Regardless of family income, the distribution of money within abusive relationships is sharply skewed in the man's favor, a condition that puts millions of women in affluent homes at enormous disadvantage in divorce or custody disputes."¹⁹⁰

This skewing of family wealth as a component of domestic violence suggests that the donative actions of a woman in an abusive relationship that is defined by coercive control are highly suspect. Are we comfortable speaking about the testamentary intent of a battering victim who would watch her child die without acting because she was afraid of the abuser? I suggest we should not be.

C. Does this Proposal Disempower or Stereotype Women?

A response to this proposal to invalidate the properly executed wills of women who are deemed retrospectively to have been victims of coercive control is that such a move retroactively denies these women agency, and that it also contributes to the stereotype of abuse victims as helpless and unable to make decisions in their best interest. In this respect, one might compare my proposal with the mandatory arrest and no-drop policies that require the arrest and prosecution of perpetrators regardless of the victim's wishes and may even force an

¹⁸⁷ STARK, *supra* note 4, at 324–26. Stark goes on to point out that the material gain is not the ultimate goal of the control: rather, it is an important component of the strategy of coercion. *Id.* at 334. Nonetheless, for my purposes, the main point remains: financial control plays a key role in domestic abuse scenarios, and thus any transfer of resources from the abused spouse to the abuser should be suspect.

¹⁸⁸ *Id.* at 233.

¹⁸⁹ *Id.* at 343.

¹⁹⁰ *Id.* at 272.

unwilling victim to participate in the legal process.¹⁹¹ Many feminists argue that these measures deny the woman the ability to make decisions about what is in her best interest and ignore the fact that battered women are in fact capable of taking measures which are effective in the context of the relationship at protecting themselves and their children.¹⁹² These writers urge that the state recognize that intuitions about what is best for these women must give way in the face of their experience of their own lives and their exercise of their own agency.¹⁹³

This concern is related to the broader issue of empowerment of victims of coercive control. Since her pioneering work in establishing the existence of “Battered Woman Syndrome” in the 1970s, Lenore Walker has been criticized by many feminists for promulgating stereotypes of female victims as helpless, irrational, traumatized, and psychologically damaged. Her critics have insisted on the importance of seeing these women as making rationale choices within the confines of their situation. Critics have also called for empowerment of these women by allowing them to decide what course of action is best for them to take at any given time in response to the abuse.¹⁹⁴ Such critics might well argue that my proposal perpetuates these

¹⁹¹ For a discussion of these and other developments in the prosecution of batterers, see generally Eve S. Buzawa & Carl G. Buzawa, *Introduction*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* vii, x (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (referring to “wholesale changes in state statutes dealing with domestic violence”); Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences*, in *LEGAL RESPONSES TO WIFE ASSAULT* 96, 98 (N. Zoe Hilton ed., 1993).

¹⁹² See Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 *J.L. & FAM. STUD.* 35 (2008) (citing studies showing that battered women make effective strategic use of civil protection orders even when dropping the petition by signaling to the abuser that they are prepared to make the abuse public and that such strategic use of civil protection orders results in a significant reduction of violence in the relationship).

¹⁹³ See Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 *BYU L. REV.* 515, 559–60 (noting that battered women may use the threat of prosecution “to send . . . a message that she will not tolerate the abuse” or to obtain “child custody, parenting time, child support or other material resources”). Another example is the intuition that women would be safer if they left their abusive partners, but the reality is that they are most at risk of assault and death at separation stage, so a woman’s decision to stay in an abusive relationship, while seeming to be reflect helplessness, may in fact be a strategically sound decision to protect her safety. *Id.* at 529–33.

¹⁹⁴ Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 *N.Y.U. REV. L. & SOC. CHANGE* 191, 216 (2008) (discussing the multiple goals a battered woman might have in the context of a relationship, and noting for example that “[w]hile [she] may not want to be hit, she may want and need the abusive partner to remain at home to assist with child care”).

victims' disempowerment, reinforces stereotypes, and fails to respect their decision making.

I make three responses to this challenge. First, my proposal does not perpetuate stereotypes of women. It is merely a response to a coercive situation in which more women than men find themselves, due to women's social and political inequality—and, perhaps, women's on average smaller physiques. Second, my proposal does nothing to deny the fact that women do resist their abusers in many ways, and struggle—often successfully—to retain a sense of agency. But in the cases I address, the victim is dead; the record of her moments of resistance and her other moments of strategic compliance is complete. We are left with property transfers that may represent judicious decisions at the time they were made about when to fight back and when to give in. Victims may not see struggles over property as worth the payback: one woman who shot her husband after years of abuse described to Evan Stark how she retained the “core of her survivor self” in small acts of resistance like “forgetting” to go to the store or do errands, and being “unable” to lose weight.¹⁹⁵ My proposal does not partake of the condescension Walker's critics have observed in her characterizations; rather, it allows for the possibility that these victims' forms of resistance may simply not have included refusing property transfers.

Such an understanding of the abused victim's agency conforms well with will contest and contract theories of duress. While one type of duress situation occurs when a physically or mentally stronger party literally “places another's hand on the pen and guides the other party's signature,”¹⁹⁶ the much more common and typical duress situation is one in which the assent is indeed the product of the party's volition but is given in the face of a threat.¹⁹⁷ As many commentators have noted, this is not a situation in which the assenter acts without free will: in fact, “there may be no situation in which the assenter acts with any greater degree of free will.”¹⁹⁸ The alternatives available are constrained by the person exercising the duress, but the choice between them is that of the assenter. The assenter simply had no other alternative besides the choices presented by the other party; her decision was made in that context. The evolution from the

¹⁹⁵ STARK, *supra* note 4, at 306–07.

¹⁹⁶ Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 444 (2005).

¹⁹⁷ *Id.* at 445.

¹⁹⁸ *Id.*

Restatement (First) of Contracts to the *Restatement (Second)* embodies this revision in the understanding of duress: the *Restatement (First)* defines duress as a situation which deprives the assenter of the ability to exercise free will;¹⁹⁹ the *Restatement (Second)*, instead, asks whether the assenter had any reasonable alternative to assent in the context of the threat.²⁰⁰ It asks the court to evaluate the alternatives available to the assenter and assess their viability at the time of contracting.²⁰¹ This analysis fits the coercive control situation extremely well and allows for the abused spouse's exercise of agency. It recognizes that she makes strategic decisions based on a limited set of options, deciding how to best avoid the worse harm in a given set of circumstances. This paradigm recognizes that property transfers in this context are simultaneously the product of the spouse's exercise of agency and of duress.

Finally, another corollary of the fact that the victims in this case are dead: a denial of probate on the grounds of coercive control does nothing to undermine a victim's ability to make decisions; she is no longer an actor. The only concern, therefore, is not with respect to the individual woman whose will is at issue, but rather the position this law might play in perpetuating the stereotype that the choices and decisions of female abuse victims are unworthy of respect and enforcement. I would argue that, to the contrary, such a law would send a clear message that the economic fruits of coercive control will be denied to the abuser, and that the decedent's right to her property will receive respect from the state in that it does not allow it to pass to the person who victimized her.

VI

IMPLEMENTATION

A. What Constitutes Evidence of Coercive Control?

The proposed statute would specify the type of evidence that would raise a presumption of coercive control. Such evidence would consist of findings about the alleged abuser's behavior toward the

¹⁹⁹ RESTATEMENT (FIRST) OF CONTRACTS: DURESS & UNDUE INFLUENCE § 492(b) (1932).

²⁰⁰ RESTATEMENT (SECOND) OF CONTRACTS: DURESS & UNDUE INFLUENCE § 175(1) (1981).

²⁰¹ *Id.*

decedent.²⁰² These specific findings enumerate forms of behavior, and also offer a non-exhaustive list of examples of each one. These areas include:

- Intimidation, in the form of physical assault or the threat of physical assault, or threats of harm to self, children, pets, or others the decedent cared about, in order to force the victim to perform acts against her will. Examples include, but are not limited to, causing fear in the victim by the use of looks, intimidation, actions and gestures; destroying the victim's property; threatening suicide; abusing pets; and displaying weapons.
- Emotional abuse. Examples include, but are not limited to, insulting the victim, making the victim think she is crazy, humiliating the victim, or calling the victim names.
- Isolation. Examples include, but are not limited to, restricting the victim's involvement with friends, family and coworkers; controlling the victim's activities, such as where she goes, what she does, what she reads or watches on television; or controlling access to transportation.
- Minimization and/or denial of abusive behavior. Examples include, but are not limited to, making light of the abuse, blaming the victim for the abuse, or denying that the abuse took place.
- Use of children to perpetrate the abuse. Examples include, but are not limited to, threatening to harm the children or take them away, or using visitation to harass and intimidate the victim.
- Use of male privilege. Examples include, but are not limited to, treating the victim like a servant; refusing to allow the victim a role in major decision making about household matters, such as financial, social, childrearing decisions; and using jealousy as an excuse.
- Economic abuse. Examples include, but are not limited to, preventing the victim from getting or keeping a job, making her ask for money, making her live on an allowance, taking her money, denying the victim access to family resources or income, or causing disruptions at her workplace that result in her losing her job.
- Coercion and threats. Examples include, but are not limited to, forcing the victim to perform illegal acts, making the victim drop charges against the abuser, or forcing the victim to have sex.

²⁰² These evidentiary categories are based on the "Power and Control Wheel," describing the eight areas of control the abuser exercises over the victim. *Power and Control Wheel*, *supra* note 34.

The *Uniform Probate Code* section I propose is new in the context of inheritance law, but would not be the first example of a legal regime seeking to define and punish the exercise of coercive control.²⁰³ Civil remedies statutes in some states have sought to identify the elements of coercive control as the basis for civil protection orders: one of the most applicable is *Delaware Code Annotated* title 10, section 1041(1)(g), which recognizes false imprisonment or coercion, defined as

compel[ling] or induc[ing] a person to engage in . . . or to abstain from engaging in conduct in which the victim has a legal right to engage, by means of instilling in the victim fear [of] . . . physical injury . . . damage to property, conduct constituting a crime, [accusation] of a crime . . . subject[ing] some person to hatred, contempt or ridicule, . . . provid[ing] information or withhold[ing] testimony . . . with respect to another's legal claim or defense, . . . abus[ing a person's] position as a public servant . . . , or perform[ing] any other act which is calculated to harm another person materially with respect to that person's health, safety, business, calling, career, financial condition, reputation or personal relationships.²⁰⁴

This statute, and the few others like it that provide civil remedies for psychological as well as physical abuse, offer models for defining the type of behavior that would bar inheritance under the proposed regime. Further, at least one scholar has drafted a model statute which explicitly criminalizes coercive control, defined as a “pattern of domestic violence,” in turn defined as “the commission of two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses . . . against the same intimate partner.”²⁰⁵

The draft provision is as follows:

²⁰³ See, e.g., ARIZ. REV. STAT. ANN. § 13-3601 (2010); D.C. CODE § 16-1001 (2010); FLA. STAT. ANN. § 741.28 (West 2010); LA. REV. STAT. ANN. § 46:2132 (2010); TEX. FAM. CODE ANN. § 81.001 (West 2010). For a discussion of these statutes, see Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1133–34 (2009).

²⁰⁴ DEL. CODE ANN. tit. 11, §§ 791–92 (West 2010).

²⁰⁵ Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 602 (2007) (internal footnote omitted).

EFFECT OF COERCIVE SPOUSAL ABUSE ON INTESTATE SUCCESSION,
WILLS, JOINT ASSETS, LIFE INSURANCE, AND BENEFICIARY
DESIGNATIONS.

Definitions:

Under this section

“Spousal abuse” shall mean a pattern of physical assault or threats of physical assault, and/or emotional abuse imposed on the victim by the abuser, in which the victim is in constant fear of the abuser, in which various aspects of the victim’s daily life are subject to surveillance and control by the abuser, and in which the victim is compelled, through fear of the abuser, to perform acts that he or she otherwise would not have performed, or to fail to perform acts that he or she would have otherwise performed, all of which were acts performed with the intent to gain power or control over the victim. Evidence of spousal abuse may include, but is not limited to:

- a pattern of isolation of the decedent spouse during her his or life from friends, family, coworkers;*
- a pattern of controlling the decedent’s movements, such as preventing the decedent from going to work, leaving the house, denying access to car, phone or internet, mail;*
- a pattern of physical and/or sexual assaults used to control the decedent’s behavior;*
- a pattern of control of the decedent’s finances, such as forcing the decedent to turn over paychecks, bank accounts, and other assets to the abuser;*

Spousal abuse under this Act shall not include: isolated, situation-specific physical altercations that arise in response to specific conflicts and in which neither party is fearful enough to seek outside assistance and in which there is no serious resulting injury.

(a) Under this section, a preponderance of evidence of spousal abuse shall raise a rebuttable presumption that the decedent’s will, a part of the decedent’s will, and any nonprobate transfers benefitting the surviving spouse, are the products of duress and should be denied probate. A preponderance of the evidence of spousal abuse shall raise a rebuttable presumption that the surviving spouse is barred from intestate succession to the estate of the decedent spouse.

(b) A surviving spouse who fails to rebut the presumption raised by evidence enumerated in this section is proven to have engaged in spousal abuse of the decedent and is not entitled to any benefits under the will or under this Article, and the estate of

decedent passes as if the abuser had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the abuser passes as if the abuser had predeceased the decedent.

(c) Any joint tenant who fails to rebut the presumption raised by evidence enumerated in this section is proven to have engaged in spousal abuse of the other joint tenant and thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the abuser has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(d) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who fails to rebut the presumption raised by evidence enumerated in this section is proven to have engaged in spousal abuse of the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the abuser had predeceased the decedent.

(e) Any other acquisition of property or interest by the abuser shall be treated in accordance with the principles of this section.

(f) Police reports and hospital records may constitute evidence of spousal abuse under this section, the sufficiency of which is to be determined by the court. Other evidence under this section may include: testimony of relatives, friends, neighbors and coworkers, testimony of expert witnesses in the areas of spousal abuse and victim advocacy.

(g) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the abuser, for value and without notice, property that the abuser would have acquired except for this section, but the abuser is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal express written notice of a claim under this section.

Several features of this provision strive to avoid false positives. First, it contains an intent requirement.²⁰⁶ Some authors have rejected an

²⁰⁶ For discussions of the pros and cons of an intent requirement in civil statutes defining domestic violence, see Burke, *supra* note 205, at 604–11 (arguing that the mens rea requirement correctly places the focus on the batterer rather than on the resulting psychological state of the victim). *But see* Deborah Tuerkheimer, *Recognizing and*

intent requirement when drafting model criminal laws against coercive control on the basis that such a requirement creates too high an evidentiary hurdle;²⁰⁷ I include such a requirement because it does create a significant evidentiary burden, which, in probate cases, will provide reassurance against the finding of false positives. Such a requirement will reassure critics that such behaviors as extreme nagging, frequent arguing, and mutual physical altercations, will not fall under the ban's purview. The intent requirement also has the advantage of shifting the inquiry to the alleged abuser,²⁰⁸ who in many cases will be available for questioning, and away from the victim, who will not be available, and it will also provide a context for any nonphysical crimes against the victim.

The standard of evidence required for a finding under this section is a preponderance of the evidence, the same standard that applies in other will contests under undue influence, fraud, capacity, etc. The scope of admissible evidence, however, must be wider than that previously proposed in this context: Robin Preble, for example, would limit the evidentiary inquiry to the civil and criminal records of the beneficiary spouse.²⁰⁹ The problem with this limitation is that a large percentage of cases of domestic abuse are not reported to police and thus never make their way into the court system, even to the extent of restraining orders.²¹⁰ Certainly, if civil and criminal records exist, they are highly dispositive. The extent of the underreporting of abuse, however, necessitates the inclusion of evidence other than court records to reduce the number of false negatives that court records would allow.

It is possible that an abuse victim, rather than calling the police, has at some point confided in friends, relatives, and coworkers. Thus, testimony of such people should be admitted. Expert witnesses, specifically, Victim's Advocates, paid for by the Probate Court, should also be heard. Victim's Advocates are civilians trained to detect and recognize evidence of coercive control. The Advocate in a

Remedying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. CRIM L. & CRIMINOLOGY 959, 995–96 (2004) (rejecting an intent requirement in a criminal statute because of what she determined to be its creation of too high an evidentiary hurdle).

²⁰⁷ See Tuerkheimer, *supra* note 206.

²⁰⁸ Burke, *supra* note 205, at 605–11.

²⁰⁹ Preble, *supra* note 31, at 414–15.

²¹⁰ *Domestic Violence Facts*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (last visited Sept. 25, 2011).

probate case would seek out and interview coworkers, friends, and relatives of the decedent to find out whether she had ever confided in any of them any evidence that she was the victim of coercive control.

An important function of the Advocate's investigation would be to eliminate false positives. A false positive could arise in a situation in which there was a single reported incident of violence between spouses but no evidence of a pattern of coercive control relevant to the statute. The Advocate would look for an ongoing pattern of behavior over the entire term of the relationship rather than isolated instances, which would not fall under the definition of coercive control. For example, interviewers would screen for the evidence that the decedent experienced fear and was the victim of controlling behavior as well as—or even rather than—just violence.²¹¹ Rather than relying on individual instances, the investigation would assess the relationship among all the incidents and their connection to assess whether they formed a pattern of behavior that fit the coercive control model.²¹²

This proposal would discourage false positives much more effectively than do other doctrines underpinning will contests. I have argued elsewhere for the abolition of the will contest doctrine of undue influence, partly because of its tendency to yield questionable findings of the existence of undue influence. The Johnson & Johnson case I cited earlier illustrates how much less amenable to false positives is my evidentiary regime here. Had the contestants challenged the will on the grounds of spousal abuse, adherence to the evidentiary requirements put forth here would have made the case much clearer. The evidence that the wife, Basia Johnson, had exercised coercive control over her husband would have consisted of the allegations in fact made in the case, that she verbally abused her husband, threw tantrums and even, on occasion, struck him. This evidence, as well as the clear bias of a corrupt probate judge, eventually persuaded the proponents to settle the case. The evidence at bar, however, would have been much less convincing as dispositive of coercive control. There was no evidence that Basia was successful in surveilling or controlling any significant aspect of her husband's life; indeed, her tantrums seem to have expressed her sense of a lack

²¹¹ STARK, *supra* note 4, at 366 (discussing screening programs in Scotland and England that look “for fear and control as well as [physical] violence”).

²¹² Preble, *supra* note 31, at 415 (noting the importance of a statute that does not allow “relatively minor or isolated and remote instances of abuse . . . to deprive a beneficiary of his . . . property interest in the decedent's estate”).

of control as much as anything else.²¹³ There was no evidence of threats to herself or others, no destruction of Seward's belongings, no pattern of coercion in any aspect of his life.²¹⁴ Seward seemed simply to ignore her outbursts.²¹⁵ In the context of coercive control, the psychiatric testimony offered might have been decisive instead of merely eliciting sarcasm from the judge: Dr. Herbert Spiegel, of Columbia Presbyterian Hospital, testified that Seward controlled all the areas of his life that were important to him, from his financial dealings to the arrangement of items on his bedside table.²¹⁶ Although the evidence in the case showed that there was verbal abuse and violence, it would not have fit the evidentiary regime required to show coercive control that I have set forth here—and rightly so.

B. Standing

A further issue is standing. The standing rules in will contests allow only interested parties to challenge a will's validity:²¹⁷ this means that only a person who stands to gain from the will or under intestacy is able to bring suit. In other words, the person bringing the challenge has to stand to gain by the will, or a part of the will, being denied probate. This is problematic in the coercive control scenario. The people most likely to have this kind of standing are other family members, such as children of the deceased, but children from abusive homes have complex and often counterintuitive reactions to the abuse, sometimes denying that it took place.²¹⁸ Children who grow up in abusive homes often learn that violence in intimate relationships is not only acceptable but also normal, and thus do not identify the behavior they witnessed as aberrant.²¹⁹ When called upon to testify about the behavior, they may refuse to label it as domestic violence or

²¹³ MARGOLICK, *supra* note 165, at 577.

²¹⁴ *Id.* at 576–77.

²¹⁵ *Id.* at 575.

²¹⁶ *Id.*

²¹⁷ *Children of DV Statistics*, ADVOCATES AGAINST FAM. VIOLENCE, <http://dv.services.tripod.com/id24.html> (last visited Sept. 28, 2011).

²¹⁸ *Children of DV Statistics*, ADVOCATES AGAINST FAM. VIOLENCE, <http://dv.services.tripod.com/id11.html> (last visited Sept. 28, 2011) (“Children from abusive homes show a shocking lack of ability to empathize with other's problems or needs. They become desensitized to abuse. A horrifying experience for one child may be something very minor to someone who has lived around abuse, mistreatment, and foul language all of their lives.”).

²¹⁹ MODERN FAMILY LAW: CASES & MATERIALS 326 (2003) (saying that children who witness abuse learn that it's OK to use violence on those one loves).

coercive control. In cases in which the couple had children, these will be the only people who might benefit from the will being denied probate or the barring of intestate heirs, and thus the only people with standing. I propose to keep the existing standing rules in place despite their limitations; however, in many cases, they will still allow for dispositive testimony, and expanding them might invite baseless accusations from parties not closely associated with the decedent.

C. Hearsay

The evidence I propose to allow under this provision would include the kind usually classified in civil and criminal proceedings as hearsay—that is, statements of a party not present in court offered for the truth of the matter those statements assert.²²⁰ I have suggested that the court admit the testimony of friends, family members, and coworkers about statements the decedent made that might prove or rebut allegations of spousal abuse. Hearsay is normally excluded from civil and criminal proceedings, but evidentiary rules in probate courts are generally more flexible and discretionary.²²¹ About ten states, however, still have a form of probate hearsay rule called the Dead Man’s rule, which bars an “interested party”—that is, someone who stands to gain from a challenge to the will—from testifying as to statements the decedent made when alive.²²² The definition of “interested party” varies from state to state, and is debatable at the outer edges of the term, but generally refers to someone who would gain from a will or part of a will being denied probate, or who would gain under intestacy if the surviving spouse were barred from inheriting.

Some of the testimony I propose would not be barred under the Dead Man’s rule, coming as it would from coworkers and friends, who would probably not stand to gain under the will or intestacy of the decedent and thus not qualify as “interested parties” unless they claimed to be beneficiaries under a prior will that was revoked in

²²⁰ FED. R. EVID. 801.

²²¹ See generally Wesley P. Page, *Dead Man Talking: A Historical Analysis of West Virginia’s Dead Man’s Statute and a Recommendation for Reform*, 109 W. VA. L. REV. 897 (2007) (discussing cases that employed a more flexible hearsay rule for probate cases).

²²² For discussions of the Dead Man’s rule, see generally *id.*; Shawn K. Stevens, Comment, *The Wisconsin Deadman’s Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ. L. REV. 281 (1998); Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man’s Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75 (2005).

favor of the surviving spouse. Other witnesses, however, might be barred in states with such a rule. The Dead Man's rule has received criticism from every quarter: evidence scholars attack it as being unnecessary and far more likely to bar truthful evidence about valid claims than to eliminate false ones. As a historical matter, the rule is the vestige of the old common-law bar to interested witnesses testifying in any proceeding, a rule which was abolished by the drafters of the *Federal Rules of Evidence* in 1972,²²³ and, which the American Bar Association referred to "as an anachronism and an obstruction to truth."²²⁴ In this context, my proposal offers further support for the movement to abolish this rule in the few states that still enforce it. Spousal abuse is a clear example of a situation in which allowing testimony of parties who may be interested in the estate offers the opportunity to discover truth. Another alternative is to allow probate courts to make an exception to the Dead Man's rule for cases in which spousal abuse is alleged.

Moreover, much evidence in these cases could take forms other than spoken testimony subject to Dead Man's rules. Such evidence might include: bank account records, titles to cars and other tangible objects and real property as well as records of transfers of property, phone and e-mail records, credit card records, and records showing absences from work.

D. Danger of False Positives

I suggest that there is little danger of false positives in the scheme I have outlined. Indeed, the real danger lies in the virtual certainty of false negatives. As numerous experts in the field have noted, batterers are gifted dissemblers, expert at hiding their abuse from the outside world, relatives, and friends.²²⁵ Batterers' denial of their actions is so profound that they deny their actions to themselves.²²⁶ They are talented at presenting themselves to people outside the home as "nice guys." One observer commented that "[h]e murdered his

²²³ See FED. R. EVID. 601 (Notes of Advisory Committee on Proposed Rules).

²²⁴ *Report of the Committee on Improvements in the Law of Evidence*, 63 ANN. REP. A.B.A. 570, 581 (1938).

²²⁵ See generally DONALD G. DUTTON, *THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS* (1998); Erin Street Mateer, Comment, *Compelling Jekyll to Ditch Hyde: How the Law Ought to Address Batterer Duplicity*, 48 HOW. L.J. 525 (2004).

²²⁶ Mateer, *supra* note 225, at 528 (noting that the batterer "shield[s] himself from his conscience by denying the battering to himself").

wife . . . you would have never believed it . . . he was the nicest guy.²²⁷ More than one battered women's advocate has used the phrase "Jekyll and Hyde" to describe the changes in the batterer's personality.²²⁸ Victims have observed that "[h]is friends never see the other side of him; they think he's just a nice guy, just one of the boys."²²⁹ Batterers carefully regulate their behavior in public, needing to cultivate a positive image among their peers to maintain their positive image of themselves.²³⁰

Cultural stereotypes support batterers' duplicity and will also contribute to false negatives in the probate context. American popular culture tends to associate domestic violence with lower classes and minorities—thus, ironically, aiding and abetting the duplicity of batterers in upper class families where the testamentary disposition of resources is more likely to be an issue.²³¹ Other stereotypes and cultural norms that support the covering up of coercive control in a relationship are "the idealization of heterosexual romance, the normalization of aggressive masculinity, and the conception of women as property."²³² Idealization of heterosexual romance creates an atmosphere in which aspects of domestic violence are reconfigured as passion; cultural images representing women as objects allow possessiveness to appear "normal," and well-publicized acts of partner abuse are relegated to minor status.

In support of the above assertions, I offer three recent examples. First, the movie "Black Swan" depicts a young ballerina whose artistic "passion" is "awakened" through the repeated sexual assaults of her director.²³³ This example of popular culture teaches not only that sexual assault is romantic, but that it contributes to woman's artistic and sexual growth. Second, a Super Bowl commercial for AT&T: two young men sit in a ski lift. One, holding his 4G phone, asks the other whether he minds if he asks out the other's ex-girlfriend. His friend replies that he does not, because "we broke up six months ago," but adds that he doesn't think "she'd go for a guy

²²⁷ *Id.* at 525.

²²⁸ *See, e.g., id.*; DUTTON, *supra* note 225, at 53 (reporting that his notes from therapy sessions contain allusions to batterers as having Jekyll and Hyde personalities).

²²⁹ DUTTON, *supra* note 225, at 531; Mateer, *supra* note 225, at 525.

²³⁰ Mateer, *supra* note 225.

²³¹ *Id.* at 546.

²³² *Id.* at 547.

²³³ *Black Swan*, FOX SEARCHLIGHT PICTURES, <http://www.foxsearchlight.com/blackswan/> (last visited Sept. 25, 2011).

like you.” The first young man then texts the woman in question and receives an immediate reply saying that she has wanted him to ask her out “for over a year now,” and that she is looking forward to their date. In a rage, the ex grabs the phone and throws it into the air. The message here is also clear: women are property, to be passed back and forth through negotiations among men. The ad also refigures a fairly violent act of possessiveness—throwing the phone off the ski lift—as humor, trivializing it and making it sympathetic. Indeed, the comments on YouTube confirm that this was indeed the commercial’s not-so-subliminal message: one viewer wrote that he “would have thrown [the guy] off, not the phone,” and another commented “I guess she wanted him even when she was taken.”²³⁴

Finally, David Carr pointed out in *The New York Times* that it was insulting Chuck Lorre, rather than his proven history of violence against women, that caused Charlie Sheen to be fired from his hit television comedy “Two and a Half Men.”²³⁵ Carr observed that “Hollywood has long had a soft spot for male misbehavior and, in claiming to parody childish misogyny, it seems to provide an excuse to indulge in it further.”²³⁶ In other words, shows like “Two and A Half Men” make misogyny look normal and even funny, and the result is that the natural byproduct of misogyny—violence—slides off the radar screen.

The above examples are a few of many. What they suggest is that popular culture normalizes and trivializes components of spousal abuse, thus making it disappear as an extreme form of behavior deserving of extreme sanction. This process makes it more likely that any inquiry like the one I propose will result in many more false negatives than false positives.

Another deceptive aspect of the coercive control relationship is that it cycles through three phases, at least one of which can appear innocuous to observers.²³⁷ These phases are: the tension-building phase, the battering phase, and the loving, contrite phase.²³⁸ Even the tension-building phase is hard for outsiders to discern as anything but

²³⁴ *Ski Lift Commercial*, YOUTUBE, <http://www.youtube.com/watch?v=I6PII7Qm-k0> (last visited on Sept. 25, 2011).

²³⁵ David Carr, *Insulting Chuck Lorre, Not Abuse, Gets Sheen Sidelined*, N.Y. TIMES, Feb. 28, 2011, at B1.

²³⁶ *Id.*

²³⁷ On the cycles of intimate abuse, see generally DUTTON, *supra* note 225, at 53–68; LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

²³⁸ DUTTON, *supra* note 225, at 54.

moodiness brought on by outside events, and the contrition phase appears to be a time of extreme closeness and affection.²³⁹ In this phase, the batterer is contrite and loving.²⁴⁰ He promises to get help, never to be violent again, he brings the victim gifts and tells her she is the only person who can save him and that he will kill himself if she leaves him.²⁴¹ This part of the cycle can go on for long periods of time, and while it is going on, the relationship can look blissfully happy to outside observers. The cyclic nature of the violence makes false negatives even more likely: observers during the quiet first and the peaceful third phase of the cycle will have no suspicions that there is any coercive control in the relationship.

CONCLUSION

It is time that succession law made a statement about spousal abuse as it has about other forms of behavior like child abuse and spousal abandonment; it is also time that succession law began to rectify some of the property wrongs brought about by spousal abuse. Indeed, as it now stands, succession law makes the statement that it “respects and privileges” children and abandoned spouses and that it “ignores and disadvantages” abused spouses. This is unacceptable. The regime of law by which property is passed at death has always been a forum for the expression—and enforcement—of social values, and it needs to extend that function to coercive control in intimate relationships. We as a society need to acknowledge that coercive control constitutes invalidating duress in the context of wills, and that abusers should be barred from succeeding to the estates of their victims under intestacy.

²³⁹ *Id.* at 57 (noting that during this phase the batterer seeks to woo back the victim; “[h]e promises to reform . . . to get counseling, to join Alcoholics Anonymous . . . [to] never be violent again . . . [t]emporarily she is given all the relationship power”).

²⁴⁰ *Id.*

²⁴¹ *Id.*