

***527 INHERITANCE LAW, LEGAL CONTRACTIONS, AND THE PROBLEM OF DOCTRINAL CHANGE**

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Introduction

Law is stable but never static. Like the natural landscape, the legal landscape shifts over time. Law's changeability has long absorbed legal historians, who typically approach the subject by illuminating individual episodes of legal transition. Now the jurists must expand upon their efforts: The central challenge ***528** of jurisprudence is to probe the dynamics of legal doctrine as a process. [\[FN1\]](#)

Like most problems, this one can be pursued from any number of perspectives. Most prominently of late, theorists have plotted the trajectory of legal change, some arguing that it proceeds ineluctably toward economically efficient rules, [\[FN2\]](#) while others, dipping of late into the well of complexity theory, [\[FN3\]](#) maintain that law follows no predictable heading. [\[FN4\]](#) A closely related issue is the impetus for legal change--that is, the forces which set the law on its course. Some attribute doctrinal evolution to a virtually Darwinian ***529** struggle between litigants, [\[FN5\]](#) or lobbyists, [\[FN6\]](#) fought out in the environment of the courtroom, or the cloakroom. But others portray doctrinal evolution as peaceful evolution, emphasizing the conscious and conscientious efforts of lawmakers to keep the law in step with the social, and intellectual, times. [\[FN7\]](#)

The velocity of legal change along its trajectory presents another, connected problem. Justice Oliver Wendell Holmes, Jr., one of the earliest American scholars to weigh in on the problem of doctrinal dynamics, viewed it as a process of accretion of small mutations within the common law, as old learning came to be ignored or forgotten. [\[FN8\]](#) The process unfolded in a "slow, coasting way," [\[FN9\]](#) said Holmes, via "interstitial[]" modifications that confined the common law "from molar to molecular motions" [\[FN10\]](#) along its path. More recent scholars have emphasized the episodic nature of legal change in response to seismic transformations [\[FN11\]](#)--sometimes of society, [\[FN12\]](#) but also sometimes of thought. [\[FN13\]](#) ***530** Still other scholars have surmised that the content of legal thought itself affects the pace of change: Whereas formalism ostensibly retards change by masking the need for it, scholars posit that eras and substantive areas in which lawmakers have justified rules as instruments of public policy witness more rapid shifts of doctrine in response to societal developments. [\[FN14\]](#)

Finally, scholars have looked into the means whereby legal change is (and ought to be) [\[FN15\]](#) accomplished. One recent observer has emphasized the phased aspect of the process. Rather than overturning prior doctrines overnight, lawmakers typically carve out exceptions until at last the old rule is entirely hollowed out. The resulting pattern "can best be described as jagged, and a path of development [is] characterized by disintegration and decay"--and, of course, by gradualism. [\[FN16\]](#)

The premise of this Article is that any of these aspects of doctrinal change may be powerfully influenced by another variable, one that demands greater attention: namely, the direction from which doctrinal change is undertaken and introduced. Students typically have simplified their models of legal evolution by assuming that rules and revisions of rules are contemplated by a unitary lawmaking authority. But, of course, that assumption is ***531** unrealistic: Our legal system diffuses authority among an array of lawmaking bodies. What is more, that array is arranged hierarchically: At the base of the pyramid lie inferior courts, atop which sit appellate tribunals and ultimately, at the summit, a legislative body. To be sure, students are well aware that different sorts of lawmaking bodies function in different ways, and some effort has been made to examine the patterns of doctrinal change produced by legislatures, in comparison to courts. [\[FN17\]](#) But, even putting these differences to one side, the core fact of lawmaking hierarchy, causing lawmakers to revisit rules previously installed by strata of authority situated either above or below them, has significant jurisprudential implications in and of itself. In this Article, we shall

explore those implications, with particular emphasis on a doctrinal phenomenon that needs to be more clearly identified as a feature of the legal landscape and as an engine for its transformation--what we shall dub herein the "legal contraption." [FN18]

Ideally, we would take a bird's eye view of it all. But every author's vision is bounded by his learning, and in any event no one article can soar across the vast expanse of the law. Accordingly, even as we broaden our horizon to take in a neglected dimension of the problem of doctrinal change, we shall confine our analysis to a single patch of the legal landscape--namely, to the law of trusts and estates. It is an old vineyard with a rich history of doctrinal development. As such, it provides a perfect laboratory for the study of legal dynamics, revealing evolutionary patterns *532 that are bound to reappear within other, far-flung areas of doctrine.

At the same time, the analysis that follows may be of substantive interest to lawmakers and scholars tilling this particular field. For the study of legal development within a hierarchical model will help us to understand the advent of certain trusts and estates doctrines that would be puzzling, or even baffling, otherwise.

I Dynamics within Hierarchy

A. Lawmaking from Above

Let us begin with the theoretically less distinctive side of the model. When a superior lawmaking body confronts a rule previously established by lesser oracles, hierarchy dictates that it is free to behave as it pleases. Thus, a state legislature or a high court, operating from above, can announce rules that rain down upon the common law--possibly altering it in a marginal way or, just as possibly, in a catastrophic way. Here, the dilemma that lawmakers face arises out of public policy rather than systemic constraints: Lawmakers have long recognized that the stability of rules constitutes a value, and against the benefits of doctrinal reform they have weighed the intrinsic costs of embarking on a change-of-law. Those costs include the expenditures already incurred by citizens in reliance on the existing rule and, secondarily, their diminished capability to benefit by relying on rule-stability thereafter. [FN19] This dilemma exists, incidentally, whether the lawmaker in question is a court or a legislature. [FN20]

*533 The problem, then, differs little from the one faced by a lawmaking body reevaluating a rule which that body has itself previously set out, and which it is also at liberty to revise. [FN21] In practice, a superior lawmaking body could feel less inhibited when resolving issues of first impression before it than when it has previously spoken on those issues. A court may reason that fewer citizens will have relied upon a rule earlier announced by a (mere) lower court. [FN22] A legislature reevaluating high court precedent would be less justified in making this assumption but still might show less reluctance to create new law when codifying in an area for the first time. Be this as it may, the fact remains that a lawmaking body possesses equal authority to overrule its inferiors and itself. Hence, considered from a structural point of view, the two situations are indistinguishable.

Lawmakers operating from above can quite simply, and quite literally, lay down the law. But when the tables are turned and a subordinate lawmaker encounters what it deems an anachronistic rule imposed by a high court or (more typically) by a state legislature--in other words, when the acting lawmaking body operates from below--the dilemma that arises and the patterns of change that may unfold are altogether different, more troublesome--and more interesting! That is the problem to which we now turn.

B. Lawmaking from Below

1. The Trio of Responses

Put the case: A court faces the prospect of applying a superior rule with which it begs to differ. How might it proceed? The most obvious move is for the court dutifully to follow the rule *534 and do nothing more than grumble, metaphorically wring its hands, and (not infrequently) implore superior lawmakers for relief.

Consider a 1952 case, decided by the Supreme Court of Washington state. A son slew his father and pleaded guilty to murder in the second degree. The victim had failed to execute a will; under the terms of the state intestacy statute, his assailant stood to inherit as his sole heir. The court ruled that the statute governed the case. "Although the result shocks our conscience (and well it should), we believe that the existing applicable statutes can only be construed to permit appellant to inherit his father's estate," the court decreed. [FN23] "A result more consistent with acceptable standards of common decency must await action by the state legislature We have no doubt," the court concluded pointedly, "the legislature will take prompt action so the result we are forced to reach in the instant case may be avoided in the future." [FN24]

Opinions along these lines are surely common; [FN25] they are not, *535 however, obligatory. Even judges who have felt compelled to follow this formula sometimes wink at brethren who have broken ranks. In 1979, the probate court of New York enforced another superior rule causing a testator's named beneficiaries to forfeit their bequests. [FN26] "This court has no doubt at all that this was never, never the intention of the testat[or]," the judge observed emphatically. [FN27] He continued, in an intriguing twist on our last motif, "[e]xcept for the ingenuity of an Appellate Court, . . . it would appear that only legislative action can provide needed redress. This court has exhausted every avenue it could think of without success." [FN28]

As this delightful, and rather unguarded, allusion to judicial "ingenuity" makes clear, a subordinate lawmaker's decision to abide by rules dictated from above is not its only option. Another move is for the subordinate lawmaker to interpret creatively the rule it is ostensibly following--a practice that critics have pejoratively dubbed judicial legislation. Take another, older case, also hailing from the Empire State. Here, the highest tribunal in New York again faced a murdering beneficiary. [FN29] But this court denied the slayer's right to inherit from his victim's estate. In point of fact, the court had to admit, legislators in New York, like those in Washington, had made no exception for this case in the relevant corpus of statutory law; nor had they even provided any vague language for the court to strain. Nonetheless, the court opined,

If such a case had been present to their minds . . . it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it *536 were within the letter The writers of laws do not always express their intention perfectly, . . . so that judges are to collect it from probable or rational conjectures. [FN30]

Few modern courts have been quite so bold in announcing their preparedness to second-guess a superior lawmaking authority. [FN31] But who can deny (pace Justice Scalia) that courts continue to make this move less conspicuously, or even surreptitiously? [FN32] One could enter into evidence any number of examples, even within the placid realm of inheritance law. [FN33]

*537 Creative interpretation is one means of accomplishing doctrinal change from below, a means that commentators have recognized before. [FN34] But subordinate lawmakers also have another card up their sleeves, one that they play frequently yet deftly enough to avoid attracting much notice within the jurisprudential literature: Faced with an awkward but superior rule, lawmakers may seek to circumvent (rather than to construe) the rule, while continuing formally to observe it. [FN35]

We can witness courts making this final, anti-authoritarian move, once again, in connection with murdering heirs. In a strategy adopted fairly widely, courts have given effect to statutory law allowing a slayer to inherit--but then have imposed upon him an equitable constructive trust, so that the slayer takes as trustee, ex maleficio, for the benefit of alternative beneficiaries. [FN36] *538 A different weapon of choice--but, once again, when the smoke clears, the murdering heir has himself been dispatched, a victim in turn of judicial ingenuity. [FN37]

It is this last, underappreciated mode of effecting legal change from below that tempts further thought and interest, for it differs fundamentally from other tools of doctrinal development. When a lawmaking body establishes rules from above, it is free to be inventive, following whatever principles it deems best suited to the state of society. And it also has the luxury, assuming the lawmaking body is so inclined, of working out those principles comprehensively. The result of this effort we shall call a legal contrivance.

But when a lawmaking body operates from below and seeks to find a way around superior rules, it must be inventive in a different way--very like the inventiveness of a tax accountant. Here, the lawmaker must act

opportunistically, rummaging in the toolbox of available rules and remedies for ones it can apply to the immediate task. (Typically, attorneys acting on behalf of clients will do the actual inventing; courts adopt doctrinal strategies urged upon them in legal briefs. [FN38]) The result is not a contrivance, but what we shall call a legal contraption [FN39]--a device of law that is jury-rigged out of whatever juridical odds and ends happen to be on hand. [FN40] In this respect, although the process *539 whereby they develop remains deliberate, legal contraptions bear a structural resemblance to evolutionary adaptations in nature: for both are constrained by history, taking forms dictated by the raw materials (be they genetic or forensic) present in the environment at any given point in time. [FN41]

However deeply embedded in the law, legal contraptions remain relatively easy to identify. They stand out from other rules by virtue of a number of typical, although not always uniform, characteristics. Often, as we shall see, legal contraptions incorporate and depend upon fictitious factual assumptions. Often, they function through growth of another branch of the law that comes within the subordinate lawmaker's power; that other branch can then operate in *pari materia* with the superior rule. Often, they subsist despite internal, logical contradictions. Often, they are atomistic, offering multiple solutions for the same doctrinal problem. But the one attribute legal contraptions all seem to have in common--unsurprisingly, given their ad hoc origins--is that, like nature, they display imperfections.

Consider the equitable constructive trust. It accomplishes the job, depriving slayers of their inheritances even while formally adhering to statutory prescriptions. But it avoids those prescriptions in a clumsy and inefficient way, requiring the intervention of a court of equity (often separate from the probate court), and by the same token it deprives the alleged slayer of the opportunity to try the issue before a jury, which is alien to equitable proceedings. [FN42] More subtly, recourse to an equitable remedy limits the scope of the slayer rule. In order to invoke an equitable constructive trust, a court of equity traditionally must find unjust enrichment ensuing from some sort of wrongdoing. [FN43] Depriving slayers of the spoils of their crimes stands as one policy justification *540 for seizing their inheritances, widely highlighted in the case law. [FN44] In this respect, slayer rules within inheritance doctrine resemble Son of Sam laws. [FN45]

One can, however, conceptualize and justify a slayer rule in another way, stemming from the distinct policy of intent effectuation. One of the core principles of inheritance law is that a testator's wishes concerning the disposition of her estate should, with only a few exceptions, be respected. Ordinarily, testators are responsible for registering all changes of intent by executing a revised will or codicil. But some events display the interesting quality of altering a testator's intent while simultaneously disabling her from formally revising her estate plan. Pointing a sharp metal object at the testator's throat and thrusting it forward is the sort of act likely to snap the sociological bonds that hitherto had tied the testator to her assailant. But the testator lacks time to communicate the change of intent anticipated to follow from that act. In this instance, the sword is mightier than the pen. For lawmakers to impute this probable change of intent accordingly conforms with the traditional policy of inheritance law. But this added justification for a slayer rule, intent effectuation, cannot serve as the premise for imposing an equitable constructive trust! [FN46] Consequently, if our dual policies do not cover identical *541 sets of circumstances, but merely intersecting sets, [FN47] the equitable remedy (invoked only for misdeeds) can fail to provide adequate relief.

And that is in fact the case: Consider the slayer who can prove he was criminally insane when the slaying occurred. Such a slayer is not, technically, a wrongdoer and hence the court cannot impose on him an equitable constructive trust. [FN48] Yet, were lawmakers to approach the problem from the perspective of intent-effectuation, it seems doubtful they would distinguish the case; the slayer's subjective inability to appreciate the wrongfulness of his conduct appears unlikely to affect the victim's last-minute change of intent. [FN49] Thus, it turns out, this legal contraption operates not only in a procedurally cumbersome way but also haphazardly, failing some of the time.

The equitable constructive trust is just one of many contraptions found within the inheritance field. And new contraptions continue periodically to appear on the scene--they comprise one segment of the law's ongoing growth. [FN50] We shall not, however, take this occasion to sort through the contraptions of inheritance law comprehensively. Our object is to cast the spotlight on this *542 mode of lawmaking as an isolated phenomenon and to explore its structural ramifications. For that purpose, just a few more specimens will suffice.

2. Legal Contraptions: Four Illustrations

a. Will Substitutes

Consider the problem of probate avoidance. Many persons wish to plan their estates in a manner that, for better and for worse, dispenses with administration by the probate court, a process that can be time-consuming and costly, or even in some venues a modern form of grave-robbery. [FN51] Superior lawmakers could satisfy this desire by offering each testator, as an alternative to probate, the option of an unsupervised process for distributing and clearing title to the property she bequeaths. [FN52] But they have not: Statutory law continues to grant probate courts exclusive jurisdiction over the administration of decedents' estates (other than de minimis ones). [FN53]

***543** This rule invites evasion. [FN54] Estate planners have sought to evade it by making transfers that in substance take effect at death but which are formally labeled as occurring inter vivos, hence beyond the jurisdiction of the probate court. [FN55] Thus, settlors have placed assets in trusts that they ostensibly created inter vivos--but subject to revocation and retention of all income by the settlor, effectively reserving all incidents of ownership until death. In response, courts might have followed the forgotten dictum of a seventeenth-century British judge that "we must take off this veil and colour of words, which make a shew of being something, and in truth are nothing." [FN56] In the event, however, many courts have played along and made something out of nothing, countenancing what we nowadays call will substitutes.

***544** The process whereby this occurred is well understood, although rarely explicated structurally. Subordinate lawmakers here shied away from any direct reinterpretation of the statutory provisions governing probate and its exclusive domain over transfers at death. This tract of the legal landscape has remained wholly untouched and unchanged. Instead, courts developed an adjoining parcel, one that was not covered by superior, statutory law and hence which still stood under their sway, to wit, the law of gifts. Estate planners had labelled their transfers inter vivos; courts now proceeded to conjure up a theory for evaluating the temporal characteristics of a transfer serving to substantiate the estate planners' labels, albeit via a radical distortion, to the point that may reasonably be called fiction, [FN57] of the traditional meaning of a gift. Under the so-called "present interest" test, any immediate concession of a right, however insignificant or even illusory, sufficed to render the transfer complete and in praesenti. [FN58] The law of gifts, then, effectively invaded the realm of transfers upon death, and in the process transformed that realm--not through its own intrinsic evolution but rather as a consequence of being overrun from beyond. Courts cooperated with estate planners in this dilation of the legal boundaries of the gift--really a game of make-believe--because they appreciated the virtues of allowing persons to avoid probate. [FN59] But subordinate lawmakers had to resort to a temporal fiction in order to accomplish this result without legislative assistance. [FN60] And ***545** because that fiction was necessary, legal change came at a price--principally [FN61] confusion and a flood of litigation, which has never abated, over whether other secondary doctrines applicable to testamentary transfers also applied to these nominally complete, nontestamentary transfers. [FN62]

***546** And that is not the only by-product of lawmaking from below illustrated by this example. Another is its tendency to develop atomistically. [FN63] Necessity is the mother, first and foremost, of experimentation. Faced with a steady demand for probate avoidance, estate planners have floated upward an assortment of trial balloons--and over time different subordinate lawmakers, focusing on discrete cases, have ratified an alarming variety of will substitutes: [FN64] the revocable "living" trust, the whole life insurance policy with revocable beneficiary designations, the bank account with revocable pay-on-death designations (known as the Totten trust [FN65]), and so on. [FN66] These in turn have bred independent bodies of law around them, scarring the legal landscape with needless complexity and pointless inconsistencies. [FN67]

***547** b. Equitable Adoption

Atomistic development and reliance upon fictions are common attributes of legal contraptions. Both are illustrated by another example, the doctrine of equitable adoption. [FN68] Here, courts have confronted the problem of how to divide estates of intestate decedents who raised and treated like their own children persons whom they never formally adopted. The legal requirements for adoption and for heirship are set out in plain language in the statute books, and some courts (as usual) shrink from defying them. [FN69] Resort to contraptions is not to every court's taste and temperament.

Still, these cases often feature compelling evidence of donative intent , [FN70] and while some subordinates take orders, others take *548 pains. Intent-effectuation affords no legal basis for overriding statutes, of course, but bolder courts have avoided the dictates of superior intestacy laws by dipping once again into their reservoir of equity powers. [FN71] That reservoir is sizable, and different courts in these cases have embraced different equitable theories to achieve the same result. [FN72] Yet even the available remedies ill-suit the facts in these cases, forcing courts to rely as well on fictional assumptions. [FN73] Hence, some courts conjecture an implicit contract to adopt and proceed to enforce it (post-mortem!) by equitable decree of specific performance. [FN74] Other courts assume detrimental reliance on the part of the unsuspecting, but in truth uncomprehending, child, and provide redress through equitable estoppel. [FN75]

By hook or by crook, the decedent's imputed intent is fulfilled. [FN76] But, alas, such devices, once seized on in one case, may *549 fail to serve in another: Along with multiplicity and fiction, another common aspect of legal contraptions is their fallibility. [FN77] Consider the opposite side of the scenario just raised: Suppose it *550 is the informally-adopted child who dies intestate. [FN78] Surely, a parent-child relationship, whether rooted in biology or in social psychology, is inherently reciprocal, and hence any inference of donative intent drawn in such a case should be mutual. [FN79] But the equitable remedies courts have resorted to in this situation fail to depend explicitly on findings of donative intent and prove inadequate here. Without exception, courts have denied relief to foster-parents when an informally-adopted child dies intestate because the parties who, in theory, breached their duty to adopt cannot claim the aid of equity. [FN80]

One commentator has accused these courts of reification, succumbing to "confusion caused by taking fictions literally." [FN81] To be sure, such confusion has a long and unfortunate history in our law. [FN82] But the difficulty courts face in this instance appears a *551 different one, stemming in essence from lawmaking hierarchy: Here, courts have limited room to maneuver, hemmed in as they are by statutory law on the one hand and by the arbitrary but sacrosanct boundaries of equitable relief on the other. In granting a cause of action in equity to informally adopted children, courts have grasped at opportunity; they have resorted to the only remedial apparatus available to give balm in eligible cases and have relegated the rest, perforce, to the strictures of superior law. It appears to be a case of tied hands, not of formalistic minds. [FN83]

c. Honorary Trusts

Just as some legal contraptions fail by their nature to function comprehensively, others manifest their imperfection in a different way: Even in those cases where they can be put to use, they do not operate fully to accomplish the desired change-of-law. Take another example from the realm of trust law. Trust law posits as a basic rule that, in order to be valid, a trust must have one or more beneficiaries with standing to enforce the terms of the trust against the trustee. [FN84] This "beneficiary principle" has not, in fact, been widely codified, [FN85] but the doctrine long since became so hallowed that even high courts have felt bound not to overrule it. [FN86] Even today, the drafters of the Restatement *552 (Third) of Trusts suggest that it would be appropriate only for legislators to do so. [FN87]

What then of a testator who seeks to create a trust to effectuate a purpose, lacking discrete beneficiaries? By ancient common law practice, trusts for charitable purposes, benefiting society at large, have been enforced by the state attorney general, a rule now confirmed by statute in many states. [FN88] Legislators might have developed some similar enforcement mechanism for noncharitable purpose trusts (providing care for a grave or a pet, for example). In the absence of legislation, most English courts have held such trusts to be void, as violative of the beneficiary principle. [FN89]

Still, the occasional testator has wished to effectuate reasonable non-charitable purposes, and the chain of events that followed in the United States can be reconstructed historically. [FN90] Some early courts refused to meddle with the beneficiary principle and held these attempted trusts void, even as they characterized that result "a matter of regret." [FN91] But in 1888, one quite obscure attorney, representing a probate estate that included a bequest to fund a trust for a noncharitable purpose, argued that, although the beneficiary principle prevented the trust from being enforced, this fact should not bar the trustee from carrying it out if he were willing to do so. The attorney sought to recharacterize the enforceable trust as an unenforceable power of appointment, to which the beneficiary

principle would not apply. The strategy, in effect, was to circumvent the beneficiary principle by embellishing another aspect of the common law of trusts, that is, the court's power to amend ex post facto defective trust instruments.

The submission was ingenious but proved unpersuasive. The *553 trust failed--but the court did take the trouble to recount and respond to the argument, and its opinion soon appeared in a state reporter, [FN92] where Dean James Barr Ames happened upon it. Ames subsequently developed and championed the argument in a law review article. [FN93] Professor Austin Scott picked up the baton from there; he incorporated the idea into the Restatement of Trusts, leading to its gradual adoption by courts. [FN94] The "honorary trust," having begun as a flash of creativity in one litigator's mind--and which might have ended as a flash in the pan--caught fire and spread to become orthodox doctrine. [FN95]

Note well, however, the attributes of this doctrinal change. It operates to sidestep the beneficiary principle, but it does not go the distance. Instead of accomplishing what the testator wanted done--making the bequest enforceable--the remedial honorary trust doctrine makes the bequest possible, so long as the trustee is prepared to exercise his power. It is a half-way measure, serving, as observers have put it, to "fulfill[] . . . so much of [the testator's] intention as can be carried out" [FN96]--so much, that is, without reform from on high of the beneficiary principle. Again we see a common pattern with respect to legal contraptions: Change comes not in a straight line but by indirection, and it gets us only part of the way around, not completely around, the impediments presented by superior rules.

d. Will Formalities

Let us explore one final, illuminating example. In order effectively to execute a will, a testator must observe a number of formalities, established invariably at the top, by the state statute of wills. [FN97] Execution formalities serve useful purposes: For instance, *554 the universal requirements that a testator set out her will in writing, sign the document, and also have it countersigned by witnesses ensure that accurate evidence of her testamentary wishes will survive her. [FN98] Still, these statutes have an underside--whereas they lay out a desirable course of conduct, they simultaneously create an obstacle course that has succeeded in tripping up more than a few earnest-but-hapless testators.

Faced with minor infractions of the mandated protocols, many courts (as usual) have enforced the statutes strictly, [FN99] while occasionally bidding legislators to hearken to the sighs and tears of thwarted beneficiaries. [FN100] Unwilling to wait for superior intervention, other courts have added their own creative glosses onto the statutes in order to save technically-defective wills. [FN101]

*555 But still other courts, declining either of these moves, have acquiesced in roundabout solutions. One is the judicial doctrine of dependent relative revocation: If a testator who ineffectively executes a will happens to have revoked by act a prior, effective will under the mistaken assumption that the new will would replace it, courts (as a legal fiction) [FN102] have deemed the revocation of the prior will conditional upon the effectiveness of the new will, if the prior will comes closer to the testator's desired estate plan than would intestate distribution. [FN103] Observe the internal logical contradiction here: Implementation of the doctrine depends on a court being sufficiently convinced that it knows what estate plan the testator wanted. [FN104] But that is not the estate plan the testator *556 gets. Rather, that estate plan serves as the model for determining whether the testator would prefer the prior estate plan over the scheme of distribution dictated by the intestacy statute. [FN105] One rubs one's eyes at an intellectual exercise that, viewed in isolation, appears at once paradoxical and circuitous--law in the image of Lewis Carroll, if not Rube Goldberg. But when we factor in the element of lawmaking hierarchy, it all begins to make sense, after a fashion. Surely, a court would prefer to give the testator the estate plan she did want, but the statute of wills stands in the way. In the face of this impediment, courts connive in an elaborate fiction in order to bypass it [FN106]--but, as usual, the contraption succeeds imperfectly, it does not carry us all the way!

As in other instances, subordinate lawmakers have taken more than one stab at this problem. We have previously witnessed courts using similar but distinct legal vehicles, [FN107] and separate but functionally equivalent theories, [FN108] to reach the desired result. But sometimes alternative solutions developed from below converge on their

target from very different directions. In another response to the rigidity of the statute of wills, courts in many states have allowed thwarted beneficiaries to sue for malpractice an attorney responsible for misexecuting a will into which they were written, despite the absence of privity of contract. [FN109] Here, *557 as with will substitutes, we witness the strategy whereby a subordinate lawmaker counteracts an implacable statutory law by further elaborating a separate--and in this instance, far removed--body of nonstatutory law. [FN110] Its remoteness may tend to obscure, but fails to diminish, the analytical paradox of the emerging rule: In order to find for the thwarted beneficiaries, a court (once again) must first satisfy itself that the testator intended the estate plan which, notwithstanding that intent, the court is failing to put into effect. [FN111] Unlike dependent relative revocation, this legal contraption does achieve the result the testator wanted--assuming, that is, an attorney stood at fault, and assuming she can satisfy the judgment. But this exercise in lawmaking from below also produces an unnecessary side-effect, namely the enrichment of the heirs--persons whom the testator *558 did not intend to benefit. Here, when all is said and done, the intended beneficiaries receive what they would have gotten if the court could have implemented the defective will, but a pointless wealth transfer from the attorney to a third party also occurs. [FN112] Once again, we find the familiar pattern of a legal contraption operating to undermine superior law in a messy way. [FN113]

Taking stock, we may conclude that legal contraptions reflect a manner of lawmaking quite distinct from the ways of lawmaking from above. By their nature, contraptions carry the law along an indirect, and incomplete, course--setting a pattern neither of Holmesian "interstitial" [FN114] evolution, nor of "disintegration and decay," [FN115] but rather one of contingency, contortion, ramification, and devious growth. When common law courts engage in lawmaking from below, they weave a tangled, and not a seamless, web--although, still and all, a functional web.

*559 II Jurisprudential Implications

All of which raises a host of deeper, jurisprudential questions. We could at this juncture proceed to explore the propriety of lawmaking from below undertaken within a hierarchical system that comes to us, after all--and above all--as a constitutional mandate. On that basis, many lawmakers have disavowed creative construction of statutes as illegitimate, [FN116] and the academic literature of late has buzzed with this issue. [FN117] Creative evasion *560 of statutes by resort to legal contraptions has attracted less attention but could be questioned, and arguably condemned, on the same basis-- although, in their defense, one could counterargue that contraptions violate the "spirit," rather than the "letter," of lawmaking hierarchy, in that they outflank, and never frontally assault, superior rules. [FN118]

Be that as it may, any condemnation of lawmaking from below ensuing from such analysis immediately raises the meta-question of whether we should content ourselves with a hierarchical structure that lawmakers on so many occasions have seen fit to transgress. We do, of course, have it in our power to restructure our legal system, should we find that desirable. Contemplating how we might better design the lawmaking process so as to achieve an optimal degree of doctrinal plasticity presents another, more fundamental, perspective on our problem.

This shift of focus opens before us a new world of alternatives. At a revolutionary extreme, we could put an end to the problem of doctrinal change within hierarchy by abolishing hierarchy, either by flattening the existing pyramid of lawmaking bodies into an array of co-equal (specialized?) bodies, or by compressing it into a single body--cures, it seems safe to predict without saying more, that would entail complications significantly more vexing than the disease. [FN119]

Less radical, and possibly more promising, are systemic alterations that would blur the ranks of lawmaking authority without eliminating them, allowing subordinates openly to exercise initiative, to leap into the breach. Under such a scheme, a subordinate lawmaker might have the right to "underrule" [FN120] doctrine, but only on the explicit assumption, which could be confirmed or confuted in due course, that superiors would approve. Proposals *561 along these lines have been aired over the years by a procession of scholars led by the late Grant Gilmore, and continuing with Judge Calabresi, among others [FN121]--occasioning another round of academic deliberation. [FN122]

The fact remains that these alternative legal systems lie at best in prospect, while subordinate lawmakers have

choices to make here and now-- choices, one might add, that have consequences. A third approach to the problem of lawmaking hierarchy, to which we now turn, begins by acknowledging that, however appropriately as a matter of right, subordinates can and do make law from below as a matter of power, in the ways earlier described. Subordinates wield that power without risk of discipline or impeachment. [FN123] For lawmakers minded to accomplish doctrinal change within the existing hierarchical system, what then in practice is the most expedient response to legal obsolescence? Ought they to go ahead and exercise their power--either by creatively construing superior law or, alternatively, by developing legal contraptions that circumvent it--or will they better serve the legal process by exercising self-restraint and awaiting change from above?

Plainly, the risk of restraint is that it may delay the desired change. That is true, incidentally, whether the doctrine at issue comprises a statutory rule or a superior rule of common law. In the case of a statutory rule, a subordinate lawmaker's failure to intervene means that doctrinal revision must await legislative action. *562 If and when that action comes, it will not ordinarily take effect retroactively. Appellate review of common law rules operates differently, of course: Subordinate lawmakers can defer to a superior court, knowing that if it acts to change the rule, even after a protracted appellate process, the litigant who raised the issue below will still receive redress. The difficulty, however, is that subordinate lawmakers cannot rest assured that a case turning on an obsolescent rule of common law will receive any appellate process at all! Litigants appeal only a fraction of their suits, and superior courts must pick and choose even among those. [FN124] Hence, a common law rule that subordinate lawmakers find obsolescent may never receive superior attention--and because courts, unlike legislative bodies, do not set their own agendas, subordinates cannot know when, if ever, litigants will venture to raise the issue again.

Inaction by a subordinate lawmaker thus comprises what chess-players would call a gambit--a tactical sacrifice (here, continued enforcement of an obsolescent rule) borne in the hope of a strategic advantage (here, a supervening rule-change, rendered clearly and cleanly from above) down the road. Manifestly, the prayers for intervention that inferior lawmakers frequently address to superiors within opinions adopting this approach [FN125]--which a purist could even object to as insubordinate and irrelevant apostrophes [FN126]--are intended to increase the gambit's promise of success. And, often enough, those prayers are heard, and heeded: In Washington state, for example, where the supreme court read its intestacy statute literally, allowing a slayer-heir to inherit while calling upon superiors to amend the law, the legislature responded promptly, enacting the desired amendment *563 within three years. [FN127] Yet, as any chess-player knows, gambits sometimes fail: In Illinois, the legislature spurned an equivalent invitation to reconsider the treatment of slayer-heirs for a quarter century. [FN128] This is, if naught else, a dangerous game, and inferior lawmakers appreciate all too well the bind they are in. [FN129]

But if restraint may prove costly, so too may activism. When subordinates rush in, they could do harm, in ways that ought to give them pause.

One way inferior lawmakers might do harm is simply by being wrong. Arguably, those lower in rank are less competent to evaluate legal policy; [FN130] what appears an obsolescent rule to a baseline court could strike a high court or a legislature differently. That subordinates should approach the enterprise of lawmaking *564 from below with the utmost caution and deliberation can scarcely be gainsaid. Whether we can go so far as to conclude that subordinates are unfit per se to make those evaluations, however, and on that basis insist that they exercise unwavering self-restraint, seems more doubtful. [FN131] Courts staffed at the lowest rank may even enjoy an intellectual advantage over their superiors: In some substantive areas, including probate in several states, baseline courts function as specialized courts of limited jurisdiction and so exhibit an expertise that evaporates at higher levels. [FN132] At least on the basis of our anecdotal evidence, we would hardly rate law made from below as, in general, bad law. On the contrary, the examples unpacked in the foregoing pages are widely credited as sound in their assessments of public policy. [FN133] And, of course, the (inefficient) safety-valve of superior overruling or enactment remains to correct policy errors committed by inferiors.

Along with this substantive concern, however, come additional process concerns that are less easy to dismiss. Lawmaking from below as a method of decision may implicate costs that have to be recognized, and reckoned with.

Critics have long identified creative construction as a two-edged sword, accomplishing doctrinal change while subverting the credibility of lawmakers in the bargain. [FN134] What is perhaps more important to notice is that this insight also points inward: When the pretense of construction becomes sufficiently transparent, subordinate

lawmakers could stir perverse emotions in their status-conscious superiors. So long as a ruling from below under the cover of construction reaches a result that, even if strained, is at least colorable, not palpably flying in the face of authority, superior lawmakers may well join in the fiction that hierarchy has *565 been duly observed, grateful that a subordinate has eased their own burdens. But when construction reaches the point of becoming a flagrant ruse, and there is no denying to oneself or to others that an underdog is behaving like an overdog-- in other words, when overdogs can no longer suspend their disbelief--they might be expected to react indignantly. [FN135] No matter how welcome and well-intentioned a subordinate lawmaker's rule-change, superior lawmakers might be inclined to override it, simply in order to reassert their supremacy. [FN136] This fact places practical, if substantively arbitrary, boundaries on the scope of creative construction, which most subordinates appear intuitively to apprehend, and to adhere to. [FN137]

If subordinate lawmakers choose instead to build contraptions, working their way around a moldy-but-superior rule, the risk of igniting an emotional reaction on appeal or legislative hearing diminishes. Here, lawmakers can keep up appearances of deference in a manner sufficient to maintain credibility, both within and without the hierarchical system. [FN138] And, in fact, courts having *566 recourse to legal contraptions have typically been mindful of those appearances, often decorating their opinions with assurances of formal obedience to their superiors. [FN139] But that way lies another set of hazards, which have to be equally borne in mind.

One difficulty, as we have seen, is the constraints on contraptions imposed by the legal environment. Contraptions (in contrast to constructions) exploit pathways not of credibility, but of opportunity--and these, alas, prove no less arbitrary. As a consequence, at least when examined within a snapshot of doctrinal change, every contraption we have looked at has proven inefficient.

And when we carry the story forward to consider the jurisprudential sequels to contraption-building, we catch sight of several more dangers, not yet identified. One is simply the risk that legal contraptions installed from below will retard contrivances from above. By interposing stopgap measures that, although sub-optimal, are nonetheless good enough, subordinate lawmakers relieve pressure for change of the more painstaking sort, undertaken by superior lawmakers. [FN140] Possibly, the lawmaking *567 process is a zero-sum game, and this easing of pressure serves to free up superior lawmakers' time, which they can then devote to other pressing problems. Or possibly not: If superior lawmakers need to be galvanized by a palpable doctrinal malfunction, such as a slayer-heir inheriting, in order to inspire them to innovate, then the consequence of pressure-relieving may actually be a net decline in rigorous lawmaking and a net increase in muddling along.

And that is only the half of it. A second danger lurks here: for if a legal contraption, a half-way measure, endures for long enough, lawmakers may begin to take it for granted. Just as abstractions in the law tend to outlive their usefulness, becoming (so to say) concrete abstractions, [FN141] so may half-way measures come to be regarded over time as the only way to accomplish the end in view. [FN142] One of the more striking lessons of our legal history is that the past functions as a powerful distraction--one that is all too capable of overwhelming imagination. It is a phenomenon I have elsewhere dubbed historical glare. [FN143] A cognitive psychologist would likely ascribe it to a number of underlying mental processes that remain under experimental inquiry, in particular salience-bias, [FN144] and habitual thinking. [FN145]

*568 And the result is an identifiable lawmaking pathology: When superior lawmakers get around to reviewing obsolescent rules which inferior lawmakers have avoided by fabricating legal contraptions, superiors sometimes adopt the contraptions serving to evade their own rules, even though they, and they alone, possess the formal authority to contrive new and better rules.

And so, one discovers that in three states, when legislators eventually addressed the problem of the slayer-heir, they dealt with it by codifying the principle that slayers' inheritances are held in an equitable constructive trust. [FN146] What a startling turn! *569 Instead of revising the intestacy statute and the statute of wills to bar inheritance by slayers in these jurisdictions, legislators imposed upon them by virtue of enactment an equitable remedy. It verges on the oxymoronic. And on top of that, only two legislatures have thought to revisit the scope of the slayer rule, cabined in so obtrusively by the traditional boundaries of equity. In Indiana and Ohio alone, slayer statutes operate to bar inheritance by slayers irrespective of a finding of "wrongdoing," so that slayers who successfully plead insanity nonetheless lose their inheritances. [FN147]

This pattern has appeared repeatedly, although by no means invariably. One state has codified the doctrine of dependent relative revocation instead of liberalizing its will execution statute, [FN148] and one other state has codified the doctrine of attorney liability for failing to execute a will properly, again without altering the statute of wills. [FN149] Five states have codified the honorary trust doctrine instead of modifying the beneficiary principle, as legislators are perfectly capable of doing, to render non-charitable purpose trusts enforceable to the full extent testators intend. *570 [FN150] Three states have codified as it stands the nonreciprocal principle of equitable adoption. [FN151]

But this pathology is most clearly apparent, indeed pandemic, in the arena of will substitutes. Instead of following the simple course of allowing testators to execute non-probate wills (or some other simple course), every state with legislation on point has codified and even expanded the preexisting menagerie of subordinate will substitutes, complete in many instances with the temporal fiction of inter vivos transfer, [FN152] multiple legal vehicles, and conflicting secondary rules [FN153]--all quite unnecessary at this *571 stratum of lawmaking. [FN154] Had superior lawmakers dealt with the issue of probate avoidance at the outset, on a clean slate, no such doctrinal configuration would have been remotely conceivable. Any legislator mad enough to dream it up would have been dismissed as overwrought.

Thus, we discover that when inferior lawmakers take matters into their own hands, the extended prognosis for the law is problematic. We might expect these to be helping hands; they do, after all, move the law closer to optimality more quickly than would twiddling thumbs. But at the end of the day, circumvention gimmicks may prove too clever by half, holding back the law from an optimality it might otherwise have achieved. For, once implanted in the landscape, legal contraptions can prove stubbornly difficult to uproot.

And that, in turn, affords a nice illustration--and a new application--of a well-known theorem, to wit, the principle of the second-best: When a market (or any complex system) suffers from multiple imperfections, eliminating one of its imperfections without eradicating all of them may actually shift the market (or system) farther away from optimality. [FN155] Stoically awaiting revision of superior rules within the lumbering cycles of appellate and legislative review is indeed a second-best option in the "imperfect" world of lawmaking hierarchy, but the immediate circumvention of those rules can prove even worse in the long run. [FN156] For delayed reconsideration of rules within a hierarchical order is not *572 the only imperfection with which our legal system has to contend. Others include the competing responsibilities and cognitive limitations of those lawmakers who staff the system and hence who must do the considering. Those imperfections can come back to haunt us whenever subordinate lawmakers decide to improvise.

That the principle of the second-best often bears on the setting of substantive legal policy has been recognized before. [FN157] Here, we witness its structural relevance within the larger sphere of jurisprudence.

Conclusion

This Article has explored the hierarchical element in the process of doctrinal change. As we have seen, that element affects the process of change profoundly: Legal transformations undertaken from above and from below follow patterns that differ markedly. And as we have also recognized, this divergence presents subordinate lawmakers with a troubling dilemma: They can either hold back from revising obsolescent rules at the risk of procrastination from above, or they can take the plunge and install better--but never best--rules by way of legal contraptions at the risk of retarding, or even precluding, further improvements from above.

We have presented this dilemma from the subordinates' perspective. But, ultimately, responsibility lies with superior lawmakers for creating the dilemma, and they as well have reason to learn a thing or two. For their part, superiors need to remain constantly alert to societal pressures for doctrinal change. The alternative to change from above is not continuity. It may instead be change orchestrated, however imperfectly, from below. And when change does flow from that direction, as inevitably it will from time to time, superior lawmakers must learn to look out for it, to beware of its telltale signs. More particularly, superiors need to single out legal contraptions as a quarry and to target them for replacement at the earliest opportunity. These should not be suffered to persist, lest their

conspicuousness as outstanding doctrine indoctrinate lawmakers later on. Needless to add, when superior lawmakers do turn their attention to a rule *573 they have identified as a contraption, they should resolve consciously not merely to tinker with it, but to re-engineer it from scratch. [FN158]

Commissioners entrusted with the task of promulgating superior Uniform Laws should also take these lessons to heart. Judged from this perspective, the Commissioners who have tended to the field of trusts and estates merit praise, mixed nonetheless with several dollops of criticism. [FN159]

In the end, however, that criticism should come as no surprise and should cause lawmakers no embarrassment. Our legal landscape is, after all, seeded and weeded by mortal folk who share the same frailties as the rest of us. [FN160] That lawmakers may, if they are not careful, lose sight of the makeshift nature of various bits of their horticulture attests not only to a professional shortcoming, but more fundamentally to a human shortcoming. Frederick Nietzsche made the observation some time ago--translated from the German, and remarkably germane--that "the most common stupidity consists in forgetting what one is trying to do." [FN161] Thankfully, we are continuing to deepen our understanding of our all-too-human frailties. Those that lie submerged within our legal institutions are in fact the very same, and, as the digging progresses, they will simultaneously be brought to light.

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[FN1]. See Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 *Tex. L. Rev.* 645, 645-46 (1985) (emphasizing the centrality of the problem of legal evolution). For surveys of early works of scholarship on the jurisprudence of legal change, see id.; E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 *Colum. L. Rev.* 38 (1985). A more recent, parallel body of scholarship explores the problem of extra-legal change, to wit, the evolution of social norms (which, of course, resolve a vastly larger body of social disputes). Robert Ellickson, The Evolution of Social Norms: A Perspective from the Legal Academy (Yale Law Sch., Program for Studies in Law, Economics, and Public Policy, Working Paper No. 230, 1999); Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 *Mich. L. Rev.* 338, 391-432 (1997). There is interesting comparative work to be done on the relation between the evolutionary processes of legal rules and those of extra-legal norms. See *infra* note 4.

[FN2]. E.g., Richard A. Posner, Economic Analysis of Law § 21.5, at 614 & n.7 (5th ed. 1998) (analysis confined to the common law) (citing to prior discussions); cf. Robert D. Cooter, The Strategic Constitution 199-200 (2000) (questioning traditional explanations for the common law's evolution toward efficiency); Robert Cooter & Lewis Kornhauser, Can Litigation Improve the Law Without the Help of Judges?, 9 *J. Legal Stud.* 139 (1980) (asserting that common law will tend to approach, but not to achieve, optimality over time); R. Peter Terrebonne, A Strictly Evolutionary Model of Common Law, 10 *J. Legal Stud.* 397 (1981) (observing the adverse impact of litigation costs); *infra* note 17 (on the evolution of statutory law).

[FN3]. Mark J. Roe, Chaos and Evolution in Law and Economics, 109 *Harv. L. Rev.* 641 (1996); J.B. Ruhl, Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State, 45 *Duke L.J.* 849 (1996); J.B. Ruhl, The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy, 49 *Vand. L. Rev.* 1407 (1996).

[FN4]. E.g., Richard A. Epstein, The Static Conception of the Common Law, 9 *J. Legal Stud.* 253, 269-75 (1980) [*hereinafter*, Epstein, Static Conception]; Gillian K. Hadfield, Bias in the Evolution of Legal Rules, 80 *Geo. L.J.* 583 (1992). By contrast, Professor Epstein argues that under certain conditions extra-legal norms tend in the direction of

efficiency. Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 *J. Legal Stud.* 1, 11-16 (1992); cf. Paul G. Mahoney & Chris William Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?* (Univ. Va. Law Sch., Legal Studies, Working Paper No. 00-15, 2000). For a suggestion of a connection between the evolution of laws and norms, see Cooter, *supra* note 2, at 200.

[FN5]. E.g., Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. Legal Stud.* 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 65 (1977).

[FN6]. Daniel A. Farber & Philip P. Frickey, *Law and Public Choice* 21-33 (1991). Some thinkers saw legislative lawmaking as the product of a competitive struggle long before the birth of public choice theory. For an early discussion by Justice Holmes, see Oliver Wendell Holmes, Jr. & J.T. Morse, *The Gas-Stokers' Strike*, 7 *Am. L. Rev.* 582 (1873) (published anonymously), reprinted in 1 *The Collected Works of Justice Holmes* 323-25 (Sheldon M. Novick ed., 1995).

[FN7]. E.g., Melvin Aron Eisenberg, *The Nature of the Common Law* 5, 44, 70- 71 (1988); Epstein, *Static Conception*, *supra* note 4, at 271-73; *infra* note 8.

[FN8]. Whereas "[i]gnorance is the best of law reformers," Holmes spotlighted the willingness of judges consciously to reform the law: "in substance the growth of the law is legislative," that is, it responds to "considerations of what is expedient for the community," and accordingly "ancient rules... gradually receive a new content, and at last a new form [.]" Oliver Wendell Holmes, Jr., *The Common Law* 35-36, 78 (Dover 1991) (republishing of Little, Brown, 1st ed., 1881).

[FN9]. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443, 446 (1899).

[FN10]. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[FN11]. An analogy can be drawn here to the modern evolutionary theory of punctuated equilibrium in nature, which of course was unknown to, but undoubtedly would have interested, Holmes. Stephen Jay Gould, *The Panda's Thumb: More Reflections in Natural History* 179-93 (1980).

[FN12]. E.g., Grant Gilmore, *The Ages of American Law* 5-6 (1977) (tracing the rapidity of legal change in late eighteenth-century England to the industrial revolution).

[FN13]. In this regard, scholars have focused both on broad intellectual movements or receptions and, more narrowly, on the publication of major treatises. E.g., J.H. Baker, *An Introduction to English Legal History* 27-28 (2d ed. 1979) (remarking two waves of Romanization of English law); Lawrence M. Friedman, *A History of American Law* 107-09, 403-06 (2d ed. 1985) (remarking two codification movements in American law); Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 *U. Miami L. Rev.* 439 (1982) (discussing the impact of Gray's treatise on perpetuities law).

[FN14]. E.g., Friedman, *supra* note 13, at 114-15; Gilmore, *supra* note 12, at 62-64, 108-09; Morton J. Horwitz, *The Transformation of American Law, 1780- 1860*, at 30 (1977); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 *Ind. L.J.* 1, 55-56 (1992) (observing the relatively high degree of formalism, and correspondingly slow evolution, of the law of future interests). Likewise, comparativists have noted that legal

systems premised on natural or divine law tend to experience slower rates of legal change. E.g., Jeffrey A. Schoenblum, The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust, 32 Vand. J. Transnat'l L. 1191, 1192-93 (1999); see also George L. Priest, Measuring Legal Change, 3 J.L. Econ. & Org. 193, 193-96 (1987).

[FN15]. For discussions of the public policy of effecting changes of the law retroactively, see Daniel Shaviro, When Rules Change (2000); Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055 (1997); Michael J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. Pa. L. Rev. 47 (1977); Michael J. Graetz, Retroactivity Revisited, 98 Harv. L. Rev. 1820 (1985); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986); Stephen R. Munzer, Retroactive Law, 6 J. Legal Stud. 373 (1977).

[FN16]. Eisenberg, *supra* note 7, at 70-74, 105-18, 136-40; cf. Benjamin N. Cardozo, The Nature of the Judicial Process 98-99 (1921); *supra* note 8. For an early discussion of the means of legal change, see Henry Sumner Maine, Ancient Law 26-45 (Frederick Pollock ed., 1906, photo. reprint 1983) (1861).

[FN17]. Less scholarship has been devoted to the distinct problem of statutory change than to common law change. Judge Posner posits that, in contrast to common law, statutes do not tend in the direction of efficiency over time. Posner, *supra* note 2, § 19.2; cf. Hadfield, *supra* note 4, at 614-15 (arguing that Posner's reasoning is paradoxical); Eisenberg, *supra* note 7, at 196 n.35 (suggesting that statutory law, when filtered through the prism of interpretation by courts, will tend to evolve according to the same structural principles as does common law); Priest, *supra* note 5, at 72-73 (similarly suggesting that judicial review and construction will propel statutory law, like common law, toward efficiency). But cf. Martin J. Bailey & Paul H. Rubin, A Positive Theory of Legal Change, 14 Int'l Rev. L. & Econ. 467 (1994) (concluding that common law is distorted by the litigation efforts of interest-groups and so its pattern of change will resemble that of statutory law, rather than the reverse); Paul H. Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205 (1982) (same).

[FN18]. The concept is defined *infra* notes 38-41, and accompanying text. For a general call for greater scholarly attention to the jurisprudential ramifications of lawmaking hierarchy, see Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 4 (1994).

[FN19]. For a recent judicial discussion, see State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). See also Eisenberg, *supra* note 7, at 47-49; Adam J. Hirsch, Inheritance and Inconsistency, 57 Ohio St. L.J. 1057, 1157-58 (1996). In the context of inheritance law, see, for example, Jones v. Old Colony Trust Co., 146 N.E. 716, 716-17 (Mass. 1925) (observing in defense of a rule that "[d]oubtless many trusts have been declared in reliance upon [it]."). This concern is hardly new. Four centuries ago, Serjeant Mountague cautioned against doctrinal change: "[I]t would be a great mischief to change the law now, for so many inheritances in the realm depend today on uses [i.e., trusts] that there would be great confusion if this were done[.]" Y.B. 27 Hen. VIII, 10, pl. 22 (1535), quoted in Baker, *supra* note 13, at 216 n.34. For an eloquent discussion of the tension between change and continuity within the realm of inheritance law, ultimately pleading for doctrinal plasticity, see Fox v. Snow, 76 A.2d 877, 878-85 (N.J. 1950) (Vanderbilt, C.J., dissenting).

[FN20]. Although statutory law does not create a "precedent" and ordinarily operates only prospectively, it still engenders immediate reliance costs. Consequently, legislators, no less than judges, typically are sensitive to the importance of legal stability. See Hirsch, *supra* note 19, at 1157.

[FN21]. This seems a fair generalization of the state of *stare decisis* today. To be sure, different eras--and different individual judges--have felt bound by precedent in varying degrees. Compare, e.g., Mitchell v. W.T. Grant, 416

U.S. 600, 627-29 (Powell, J., concurring) with id. at 634-36 (Stewart, J., dissenting). See Baker, *supra* note 13, at 171-75; Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* 8-22 (1999); *infra* note 86. For those lawmakers who consider the principle of stare decisis to be sacrosanct, the distinction widens between lawmaking "from above," evaluating for the first time rules established by lesser authorities, and the reevaluation of rules made at a single level of authority. But the second problem of reevaluation will then tend to converge with the problem of lawmaking "from below," to be addressed hereinafter. For instances of this convergence, see *infra* note 32, text at notes 84-87.

[FN22]. On the other hand, if the rule has been followed by multiple lower courts and is of long standing, a superior court might be more hesitant to override it.

[FN23]. In re Duncan's Estates, 246 P.2d 445, 447 (Wash. 1952).

[FN24]. Id. at 447-48; accord, e.g., Crumley v. Hall, 43 S.E.2d 646, 648 (Ga. 1947) ("The law being clear and explicit, the evil, if any, can only be corrected by the General Assembly, and not by judicial action."). It appears that prior to the late nineteenth century, no court or commentator had questioned the public policy of allowing a slayer to inherit from his victim; the result mandated by the statute at issue here was not produced by a drafting glitch, but rather had grown to become socially anachronistic. See William M. McGovern, Jr., *Homicide and Succession to Property*, 68 Mich. L. Rev. 65, 66-67 (1969). For an early opinion defending the public policy of inheritance by slayers, see Deem v. Millikin, 6 Ohio C.C. 357 (1892), *aff'd* 44 N.E. 1134 (Ohio 1895); see also Owens v. Owens, 6 S.E. 794, 794-95 (N.C. 1888) (declining to find a public policy against slayer inheritance).

[FN25]. For a more recent example of judicial passivity, where a court declined to read into the state intestacy statute an implicit bar on inheritance by a parent-heir who had abandoned a minor-decedent, see Hotarek v. Benson, 557 A.2d 1259, 1263 (Conn. 1989):

Even if the omission... were the result of legislative oversight or neglect, we have no power to supply the omission or to remedy the effect of the neglect.... The statutes cannot be changed by the court to make them conform to the court's conception of right and justice.... If the law is to be changed... it is for the legislature to make the change... We urge the legislature to consider doing so.

Id.; see also, e.g., In re Estate of Benson, 548 So. 2d 775, 777 (Fla. Dist. Ct. App. 1989) (involving application of the slayer statute); In re Estate of Bilse, 746 A.2d 1090, 1096 (N.J. Super. Ct. Ch. Div. 1999) (involving application of the elective share statute); In re Shiflett, 490 S.E.2d 902, 907-09 (W. Va. 1997) (same); *infra* notes 38, 64, 69, 91, 99. The same motif also can be found within opinions dealing with obsolescent-but-superior judicial decisions. E.g., Petry v. Petry, 175 N.Y.S. 30, 36-37 (Sup. Ct. 1919) ("[T]he reason for the rule [construing bequests to 'issue' as intended to allot an equal share to all descendants] having ceased,... the rule should be abrogated.... We can only express the hope that the Court of Appeals will do so. Until they do, we are compelled to follow the earlier decisions."); Evergreen Sod Farms, Inc., v. McClendon, 513 So. 2d 1311, 1313 (Fla. Dist. Ct. App. 1987) ("Because the doctrine of virtual adoption was created... by supreme court decision... that court, not this, should announce its extension beyond present holding."); see also Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 863 (1994); Sanford Levinson, On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation, 25 Conn. L. Rev. 843, 845-49 (1993).

[FN26]. In re Estate of Harris, 414 N.Y.S.2d 835 (Sur. Ct. 1979). The rule at issue--the identity test of ademption--will not be addressed in this Article.

[FN27]. Id. at 838.

[FN28]. Id. at 838-39.

[FN29]. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

[FN30]. Id. at 189. The construction principle that the court utilized unabashedly here was the Aristotelian notion of the "equity" of the statute, which is nowadays unorthodox. Baker, *supra* note 13, at 181; Richard A. Posner, *The Problems of Jurisprudence* 106-07 (1990). An analogous mode of reasoning has sometimes been articulated when lawmakers have "interpreted" prior judicial precedents. See Eisenberg, *supra* note 7, at 51-52. The Riggs case itself has drawn much attention within the jurisprudential literature. For recent discussions, see Dennis Patterson, *Law and Truth* 113-17, 123-26, 172-74 (1996); Daniel A. Farber, Courts, Statutes, and Public Policy: The Case of the Murderous Heir, 53 *SMU L. Rev.* 31 (2000).

[FN31]. But cf. In re Estate of Macaro, 699 N.Y.S.2d 634, 637-39 & n.4 (Sur. Ct. 1999) (extending the decision in Riggs in the continued absence of statutory provisions governing the inheritance rights of slayers); In re Estate of Mueller, 655 N.E.2d 1040, 1046 (Ill. App. Ct. 1995) (declining to implement the plain language of a statute that would cause a slayer's inheritance to pass instead to her minor children, because that result would violate "public policy"); Bennett v. Allstate Ins. Co., 722 A.2d 115, 117 (N.J. Super. Ct. App. Div. 1998) (declining to implement a statute that would cause life insurance proceeds otherwise payable to a slayer to go instead to the slayer's mother, because that result would "defeat the very purpose for which [the statute] was created"); In re Estate of Kolacy, 753 A.2d 1257, 1260-62 (N.J. Super. Ct. Ch. Div. 2000) (ignoring literal statutory language limiting intestate succession to children conceived before the intestate decedent's death where, in a case addressing the intestacy rights of posthumous children fertilized in vitro, the legislature "did not consciously purport to deal with the kind of problem before us.").

[FN32]. The process of creative construction of statutes is often undertaken covertly, the subordinate lawmaker protesting all the while that it is abiding by the statute's letter. See, e.g., *infra* note 101. The same covert process may occur, by analogy, when a subordinate lawmaker creatively restates a superior judicial precedent, thereby effecting change within the common law. See Caminker, *supra* note 25, at 819; Maurice Kelman, *The Force of Precedent in the Lower Courts*, 14 *Wayne L. Rev.* 3, 12-14, 26 (1967). This was a notorious practice among some of Great Britain's best-known high court justices who, although sitting at the apex of the common law hierarchy, felt they could not overrule the relevant precedents explicitly. See C.H.S. Fifoot, *Lord Mansfield* 214-15, 218-19 (1977) (denying, despite his reputation, that Lord Mansfield engaged in this practice, "save upon extreme provocation"); Samuel E. Thorne, *Sir Edward Coke, 1552-1952*, at 6-7, 12-13, & *passim* (1957). For an instance in which Judge Cardozo engaged in this practice, see Eisenberg, *supra* note 7, at 132-35.

[FN33]. See, e.g., Estate of Ganier v. Estate of Ganier, 418 So. 2d 256 (Fla. 1982); Estate of Castiglioni, 47 Cal. Rptr. 2d 288 (Ct. App. 1995), criticized in Charlotte K. Goldberg, Estate of Castiglioni: Spousal Murder and the Clash of Joint Tenancy and Equity in California Community Property Law, 33 *Idaho L. Rev.* 513 (1997); In re Estate of Jetter, 570 N.W.2d 26 (S.D. 1997), criticized in Julia M. Melius, Note, Was South Dakota Deprived of \$3.2 Million? Intestacy, Escheat, and the Statutory Power to Disinherit in the Estate of Jetter, 44 *S.D. L. Rev.* 49 (1999); 3 William H. Page, *Page On the Law of Wills* § 27.5, at 365-66 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp. 2000) (noting cases manipulating the construction of anomalous lost will statutes); *infra* note 101, and accompanying text.

[FN34]. E.g., Guido Calabresi, *A Common Law for the Age of Statutes* 6, 31- 43 (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 48-80, 252-62 (1994); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 *Geo. L.J.* 281, 298-306 (1989); Grant Gilmore, *Putting Senator Davies in Context*, 4 *Vt. L. Rev.* 233, 239 (1979). For an early discussion, see Roscoe Pound, *Spurious Interpretation*, 7 *Colum. L. Rev.* 379 (1907). Scholars have also posited judicial resort to strained findings of unconstitutionality as a technique for avoiding legislation that is merely obsolescent. Calabresi, *supra*, at 8-15; Gilmore, *supra*, at 239-40. Whereas courts have

held statutes in the trusts-and-estates area unconstitutional on occasion, few such cases can be pointed to as clear instances of the (ab)use of judicial review in order to update rules surreptitiously. But cf. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-91 (1988) (finding unconstitutional for want of procedural due process a statute failing to require actual notice of estate creditors, while also assessing the policy "practicalities" of a notice requirement--although, to be sure, fairness is relevant to constitutional analysis in this respect); see also Sarajane Love, Estate Creditors, the Constitution, and the Uniform Probate Code, 30 U. Rich. L. Rev. 411, 440-62 (1996) (criticizing the Court's constitutional analysis in Pope).

[FN35]. For a recognition of the phenomenon via the medium of legal fictions, see 2 John Austin, Lectures on Jurisprudence 609 (photo. reprint 1972, Robert Campbell ed., 5th ed. 1885) (1861) ("By accomplishing the change through a fiction, [judges] rather eluded the existing law, than formally annulled it."); see generally *id.* at 608-13; see also *infra* note 138. For a related jurisprudential discussion, see Alan Watson, Society and Legal Change 87-97 (1977).

[FN36]. The earliest such American case appears to have been Ellerson v. Westcott, 42 N.E. 540, 542 (N.Y. 1896). For a recent example, see Heinzman v. Mason, 694 N.E.2d 1164, 1167 (Ind. Ct. App. 1998). For additional cases, see 5 Austin W. Scott, The Law of Trusts § 492, at 442 n.5 (William F. Fratcher ed., 4th ed. 1987 & Supp., Mark L. Ascher ed., 2000). Courts taking this approach often emphasize their formal compliance with statutory law. E.g., Pritchett v. Henry, 287 S.W.2d 546, 550 (Tex. Civ. App. 1955) ("The statute of descent and distribution is untouched" (quoting Pope v. Garrett, 211 S.W.2d 559, 561 (Tex. 1948))).

[FN37]. See Price v. Hitaffer, 165 A. 470, 475 (Md. 1933) (acknowledging the similarity of the two alternative remedies); Dutill v. Dana, 113 A.2d 499, 501 (Me. 1952) (same).

[FN38]. Or, of course, they reject them. E.g., Whitchurch v. Perry, 408 A.2d 627, 632 (Vt. 1979) ("We acknowledge the ingenuity of plaintiff's argument, but its conclusion is flawed."). Even courts that are prepared to rule from below must make an initial judgment concerning the utility of superior rules that advocates urge them to circumvent. A court's refusal to do so may reflect its procedural fidelity to lawmaking hierarchy or instead the court's substantive approval of the superior rule at issue.

[FN39]. The semantic distinction between contrivances and contraptions adopted here comes by way of evolutionary biology. Michael T. Ghiselin, The Triumph of the Darwinian Method 136, 139, 154-55 (1969).

[FN40]. One may add here that legal actors operating from below may act opportunistically not only to get around a rule, but also to apply it for secondary purposes not originally contemplated by its creators, to which the rule proves serendipitously suited. Hence, a rule may remain unchanged but its social functions may evolve, and what began as a contrivance for one purpose may thus become a contraption for another. The trust is one example of a legal vehicle that has displayed functional versatility, and over the ages it has been turned from one social purpose to the next. See John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 637 (1995) (noting the conversion of the trust from a property-conveyancing device to an asset-management device); Monica Langley, Trust Me, Baby, Wall St. J., Nov. 17, 1999, at A1 (noting the recent employment of the trust as a behavior-modifying device). Incidentally, this same phenomenon occurs in nature, where it goes by the somewhat unwieldy term "functional change in structural continuity." Stephen Jay Gould, Bully for Brontosaurus: Reflections in Natural History 143, 139-51 (1991) (discussing the evolution of the wing from an instrument of temperature regulation to an instrument of flight).

[FN41]. On this aspect of Darwin's evolutionary insight, see Ghiselin, *supra* note 39, at 153-59; Gould, *supra* note 11, at 19-26.

[FN42]. Mary Louise Fellows, The Slayer Rule: Not Solely a Matter of Equity, 71 *Iowa L. Rev.* 489, 550-51 (1986); McGovern, *supra* note 24, at 70-71.

[FN43]. Restatement of Restitution § 160 (1937).

[FN44]. E.g., Diep v. Rivas, 745 A.2d 1098, 1102-03 (Md. 2000); Dutil v. Dana, 113 A.2d 499, 501 (Me. 1952); Neiman v. Hurff, 93 A.2d 345, 347 (N.J. 1952); In re Estate of Macaro, 699 N.Y.S.2d 634, 638-39 (Sur. Ct. 1999); Garner v. Phillips, 47 S.E.2d 845, 846-47 (N.C. 1948).

[FN45]. Congress and some forty state legislatures have enacted statutes designed to prevent criminals from profiting from the publicity generated by their crimes. Orly Nosrati, Note, Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?, 20 *Whittier L. Rev.* 949, 953 nn.48-49 (1999).

[FN46]. For this reason, presumably, courts invoking the equitable constructive trust have failed to address this alternative rationale for denying slayers their inheritances. This justification can only be found--and rarely at that--in opinions resolving the issue on the basis of interpretation of the relevant statutes. Bennett v. Allstate Ins. Co., 722 A.2d 115, 117- 18 (N.J. Super. Ct. App. Div. 1998); Riggs v. Palmer, 22 N.E. 188, 192 (N.Y. 1889) (Gray, J., dissenting); In re Wilkins' Estate, 211 N.W. 652, 656 (Wis. 1927); cf. Pope v. Garrett, 211 S.W.2d 559, 561 (Tex. 1948) (asserting in a constructive trust case that slayer rules operate "irrespective of and even contrary to the intention of the parties."); In re Wilson's Will, 92 N.W.2d 282, 285, 287-88 (Wis. 1958) (deeming the testator's imputed intent relevant only to the issue of who should take the bequest in lieu of the slayer). For academic discussions, see Thomas E. Atkinson, *Handbook of the Law of Wills* § 37, at 154 (2d ed. 1953); Posner, *supra* note 2, § 18.2; Fellows, *supra* note 42, at 493-96; McGovern, *supra* note 24, at 71-72; Jeffrey G. Sherman, Mercy Killing and the Right to Inherit, 61 *U. Cin. L. Rev.* 803, 856-74 (1993).

[FN47]. The union of these two sets defines the proper scope of a slayer law, a point I shall develop further in another essay.

[FN48]. E.g., Ford v. Ford, 512 A.2d 389, 398-99 (Md. 1986) ("[T]he slayer's rule is simply not applicable when the killer was not criminally responsible at the time he committed the homicide.... [T]he maxims prompting the rule--no one shall be permitted to profit by his own fraud... [are] inappropriate when a person is criminally insane."). For earlier cases, see *id.* at 400-04; Michael G. Walsh, Annotation, Homicide as Precluding Taking Under Will or By Intestacy, 25 *A.L.R.4th* 787, 863-68 (1983).

[FN49]. This conclusion is based upon inference rather than empirical evidence, for none is extant: Obviously, the matter strongly resists inquiry, apart from hypothetical polling of unvictimized testators. It remains possible that in some instances "softhearted" testators would prefer to leave bequests to their slayers in place, as presumably would the "victims" of mercy killings. In such cases, in the event of a further finding of insanity, the absence of a second rationale for dispossessing slayers grounded in wrongdoing would justify an exception to the rule that slayers forfeit their inheritances. Intuition suggests, however, that these cases are relatively few in number and hence would not sustain a general rule or presumption that insane slayers should inherit from their victims.

[FN50]. The process of contraption-building has gone on since the very beginning of the common law. For some medieval examples, see *infra* note 54. For two fledgling contraptions, see Carr v. Carr, 576 A.2d 872 (N.J. 1990) (creating a novel equitable remedy to avoid strict application of the elective share statute); In re Estate of O'Keefe,

583 N.W.2d 138 (S.D. 1998) (creating a novel equitable remedy to override devisees' statutory right to inherit by will money damages they themselves had paid into the decedent's estate which stemmed from an action brought against them by the estate for their financial misconduct toward the decedent).

[FN51]. The probate process in New York City, for example, has earned a notoriously predatory reputation. See Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 33 n.10 (4th ed. 1990) (not in later editions); Matthew Purdy, *Lawyers Are Feeding on an Heiress's Vision; Money Doris Duke Meant for Charity Is Making a Lot of Other People Rich*, N.Y. Times, Jan. 24, 1997, at B1. One should add that the virtues and vices of probate avoidance in most venues remain controversial; still, individual circumstances may dictate a strong preference for this path, if it is not legally obstructed. For recent discussions, see Roy Adams, *The Revocable Trust, Tr. & Est.*, June 2000, at 57; Edwin G. Fee, Jr., *Living Trusts: Debunking the Myths*, *Prac. Law.*, June 1997, at 27; Stanley Hagedorf & Wayne A. Hagedorf, *Should a Trust Be Used as a Will Substitute?*, 75 *Taxes* 77 (1997); Bernard E. Jones, *Putting Revocable Trusts in Their Place*, *Tr. & Est.*, Sept. 1990, at 8; Jay D. Waxenberg & Henry J. Leibowitz, *Comparing the Advantages of Estates and Revocable Trusts*, 22 *Est. Plan.* 265 (1995).

[FN52]. For a less radical proposal along these lines, see C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (pt. 2), 43 *U. Fla. L. Rev.* 599, 717-21 (1991).

[FN53]. See, e.g., Nat'l Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 121-22 (Mass. 1944); McEvoy v. Boston Five Cents Sav. Bank, 87 N.E. 465, 466 (Mass. 1909). But cf. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *Harv. L. Rev.* 1108, 1129-30 (1984) (questioning this assumption as a matter of statutory construction). At the same time, lawmakers have stopped short of making probate mandatory: Informal settlements of decedents' estates are not forbidden by law and, in fact, occur with great frequency. But, probate does constitute the only available formal mechanism for collecting and clearing title to property upon death. In many states, however, statutes offer alternative procedures of various sorts for settling small estates, which are eligible for formal, but nonetheless unsupervised, modes of administration. The Uniform Probate Code includes provisions (although sparsely adopted) offering unsupervised administration as an option for larger estates, in order to render the prospect of probate less irksome. Unif. Probate Code art. 3, pts. 3, 12 (amended 1997); William M. McGovern, Jr., et al., *Wills, Trusts, and Estates* § 14.2 (1988); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 *Ind. L.J.* 191 (1969).

[FN54]. Indeed, it has been ever thus: Efforts undertaken from below to avoid the formal transfer of property upon death were already notorious in England in medieval times, when estate taxes (viz., the feudal incident of relivium) lay at stake. The trust (known then as the use) began its life as a legal contraption serving this end. When Parliament enacted the Statute of Uses in 1535 to stymie that contraption, medieval estate planners furrowed their brows and dreamt up another one, the use upon a use. Baker, *supra* note 13, at 205-06, 210-17, 242-44. Along with the rest of the feudal incidents, relivium was abolished upon the Stuart Restoration in 1660, *id.* at 218, and trusts began to take on other functions. Yet modern gimmicks for avoiding probate were being tested in reported American cases as early as the mid- nineteenth century, e.g., Stone v. Hackett, 78 *Mass. (12 Gray)* 227, 232-33 (1858) (holding effective living trusts), and were common long before Norman Dacey's famous indictment of the probate system. Norman F. Dacey, *How to Avoid Probate!* (rev. ed. 1993) (1965); 1A Scott, *supra* note 36, § 57.1, at 125 n.1 (citing many early cases); A. James Casner, *Estate Planning--Avoidance of Probate*, 60 *Colum. L. Rev.* 108, 109 n.7 (1960) (same); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 *Yale L.J.* 1, 24 (1941) (noting the gimmicks' frequency as of that writing). Prominent among these modern gimmicks is none other than the trust, which has thus rediscovered, in a sense, its feudal roots!

[FN55]. This temporal reclassification has been the strategy from the beginning. See, e.g., Stone, 78 *Mass. (12 Gray)* at 232-33. It should be noted that estate planning is not the only possible motivation for making an inter vivos transfer of property over which the owner retains control and beneficial enjoyment. She might create for her own

benefit a custodial trust serving to anticipate her subsequent incapacity, or simply in order to relieve herself of the burden of managing property. Custodial trusts can do double-duty as probate-avoiding devices, although they need not. Gerry W. Beyer, Simplification of Inter Vivos Trust Instruments--From Incorporation by Reference to the Uniform Custodial Trust Act and Beyond, 32 S. Tex. L. Rev. 203, 243-44 (1991).

[FN56]. Bushell's Case, in 6 Cobbett's Complete Collection of State Trials 999, 1007 (C.P. 1670) (London 1810) (Vaughan, C.J.).

[FN57]. Others have also identified it as such. Langbein, *supra* note 53, at 1128.

[FN58]. A classic statement of the test appears in Farkas v. Williams, 125 N.E.2d 600, 603-08 (Ill. 1955). For a critical discussion, see Langbein, *supra* note 50, at 1126-29.

[FN59]. "We recognize that... the arrangement of the parties provides a substitute for a will. But we see no harm in that." Blanchette v. Blanchette, 287 N.E.2d 459, 463 (Mass. 1972).

In some cases in this court it has apparently been thought of consequence that the settlor sought... to "evade" or "circumvent" the statutory requirements for a will ... We deem such considerations immaterial... If an owner of property can find a means of disposing of it inter vivos that will render a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it.

Nat'l Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 122 (Mass. 1944) (emphasis added). "It is necessary for us to... [lay] down such a rule as will best promote the interests of all the people in the state. After much reflection upon the subject..." In re Totten, 71 N.E. 748, 752 (N.Y. 1904).

[FN60]. One court was remarkably blunt about the matter:

[C]andor compels the concession that [the Totten trust] amounts to a judicial addition to the mode permitted by [state statutory law] for the transmission of property on death. This is not said in disparagement of the rule, since its enunciation is but another evidence of the attempt of the courts to conform the law to the customs of the community.... For those, however, to whom such a frank recognition of the verities of the nature of the transaction would be abhorrent, the same result is attainable by a more devious process.

In re Estate of Reich, 262 N.Y.S. 623, 626 (Sur. Ct. 1933); see also Wilbur Larremore, Judicial Legislation in New York, 14 Yale L.J. 312, 315-16 (1905) (asserting that the Totten trust "impugns the policy of the statute of wills.... On the other hand, as a piece of constructive legislation the decision could hardly be too highly praised.").

[FN61]. Whether the exemption of will substitutes from the formalities of will execution by virtue of their classification as inter vivos transfers constitutes a "cost" of this legal contraption remains a matter of scholarly debate. Whereas some commentators doubt the adequacy of the alternative formalities applicable to will substitutes, others argue that those formalities suffice to serve all of the public policies underlying the statute of wills. Compare William M. McGovern, Jr., The Payable on Death Account and Other Will Substitutes, 67 Nw. U. L. Rev. 7, 7-14, 41 (1972) (taking the first view) with Olin L. Browder, Giving or Leaving--What Is a Will?, 75 Mich. L. Rev. 845, 853-54, 875-77 (1977) and Langbein, *supra* note 50, at 1130-32 (taking the second). For judicial defenses of the sufficiency of the formalities applicable to will substitutes, see for example Farkas, 125 N.E.2d at 608; Blanchette, 287 N.E.2d at 464.

[FN62]. Litigants first raised this issue in connection with a will substitute's ability to avoid wealth taxation upon death, and they received a sharp rebuke: No return would there be to that golden age, when the trust was bane to the medieval tax collector! See Bullen v. Wisconsin, 240 U.S. 625 (1916) (state inheritance taxes); Corliss v. Bowers, 281 U.S. 376 (1930) (federal income taxes, and by implication federal estate taxes); *supra* note 54. Litigation concerning the susceptibility of will substitutes to the elective share and other spousal rights adhering upon death

followed, and this proved a far thornier issue, resolved in a variety of ways by different courts. W.D. MacDonald, *Fraud on the Widow's Share* (1960); McGovern et al., supra note 53, § 3.8, at 118-22. In recent decades, a host of other related questions has plagued the courts. See, e.g., id. § 10.4, at 420-23 & nn.5-6, 26-29 (citing cases on either side of the proposition that the principle of lapse, requiring will beneficiaries to survive the testator in order to take, applies to living trusts); Fellows, supra note 42, at 506-08 (addressing the application of slayer rules to will substitutes); *In re Estate and Trust of Pilafas*, 836 P.2d 420 (Ariz. Ct. App. 1992) (raising the issue whether the doctrine of revocation by act applies to living trusts); *In re Estate of Robinson*, 720 So. 2d 540 (Fla. Dist. Ct. App. 1998) (raising the issue whether living trusts featuring unilateral drafting mistakes can be reformed under rules applicable to inter vivos trusts or are unreformable under rules applicable to wills); *Upman v. Clarke*, 753 A.2d 4 (Md. 2000) (raising the issue whether the testamentary version of the doctrine of undue influence applies to living trusts). Compare, e.g., *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985) (applying to a living trust the principle that divorce revokes by operation of law all bequests to the former spouse) with, e.g., *Schultz v. Schultz*, 591 N.W.2d 212 (Iowa 1999) (declining to do so). See also infra note 67. Indeed, so plentiful are these questions that they have spilled over into other fields of law; see, e.g., *In re Crandall*, 173 B.R. 836 (Bankr. D. Conn. 1994) (raising the issue whether living trusts should be treated as inter vivos or testamentary transfers for purposes of a bankruptcy proceeding); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start."* 45 *Hastings L.J.* 175, 181-82 & n.24 (1994).

[FN63]. For a remarkably similar story of atomistic contraption-building in response to a single social demand (analogous to the demand for probate avoidance) outside the field of trusts and estates, see 1 Grant Gilmore, *Security Interests in Personal Property* § 9.1 (1965).

[FN64]. Or, alternatively, they have punctured those balloons and abided by lawmaking hierarchy. E.g., *McEvoy v. Boston Five Cents Sav. Bank*, 87 N.E. 465, 466 (Mass. 1909) ("[T]he only material effect of the instrument was testamentary, and... it cannot be given effect under our statutes, which permit a testamentary disposition of property only by a duly executed will.") (involving an attempted Totten trust); *Nutt v. Morse*, 6 N.E. 763, 764 (Mass. 1886) ("The transaction was intended to be in the nature of a testamentary disposition, and it was an attempted evasion of the statute of wills.") (Totten trust); *Sherman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 581, 583-84 (1885) (Totten trust). (More recent courts in Massachusetts have proven less inhospitable to this contraption. 1A Scott, supra note 36, § 58.3, at 212- 13.) Pay-on-death designations in various kinds of contracts have also received a mixed reception. Compare, e.g., *In re Estate of Koss*, 150 A. 360, 360-61 (N.J. 1930) (ratifying such a contraption), with *In re Estate of Atkinson*, 175 N.E.2d 548, 549-50 (Ohio Prob. Ct. 1961) (rejecting one).

[FN65]. The name derives from the case that first signaled judicial approval of this contraption. *In re Totten*, 71 N.E. 748 (N.Y. 1904).

[FN66]. 1A Scott, supra note 36, § 57.1, 57.3, 58.2, 58.3, 58.4A; Gulliver & Tilson, supra note 54, at 18-39.

[FN67]. For example, courts have usually ruled that the settlor of a Totten trust can amend its terms by will, and furthermore that the beneficiaries of a Totten trust must survive the settlor in order to take their interests under it. The majority of courts take the opposite view in both instances with respect to living trusts. McGovern et al., supra note 53, at § 10.4, at 420- 21; 1A Scott, supra note 36, § 58.4, at 215-21; 2 id. § 112.3, at 167; 4 id. § 330.8, at 364-66; McGovern, supra note 61, at 21-25. Likewise, some courts have distinguished the susceptibility of living trusts to claims for the satisfaction of spousal rights adhering upon death from the immunity of Totten trusts and revocable life insurance policies to those same claims. MacDonald, supra note 62, at 121-28, 200-01, 205-11, 235-42; 1A Scott, supra note 36, § 58.5, at 229-35; see also McGovern, supra note 61, at 8-11 (pointing out even more fundamental inconsistencies between the legal effectiveness of alternative attempted will substitutes).

[FN68]. For recent cases on point, see *Williams v. Pender*, 738 So. 2d 453 (Fla. Dist. Ct. App. 1999); *Welch v.*

Wilson, 516 S.E.2d 35 (W. Va. 1999). For doctrinal analysis and commentary, see Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 21.11 (2d ed. 1987); McGovern et al., *supra* note 53, § 2.2, at 55-57; George A. Locke, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 97 A.L.R.3d 347 (1980); Jan Ellen Rein, Relatives by Blood, Adoption, and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 766-806 (1984). For recent student notes on the subject, see Rebecca C. Bell, Comment, Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme, 29 Stetson L. Rev. 415 (1999); James R. Robinson, Comment, Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements, 48 Emory L.J. 943, 954-67 (1999).

[FN69]. E.g., In re Estate of Robbins, 738 P.2d 458, 462 (Kan. 1987) ("[W]e... decline to recognize this doctrine [equitable adoption]. The right to take as an heir exists only by grant of the legislature."); In re Carroll's Estate, 68 A. 1038, 1039-40 (Pa. 1908):

The personal attitude of the [intimates] of a family... is a matter entirely for the parties. But the matter of inheritance is entirely under the regulation of the law.... The legal act of adoption, carrying with it the right to inherit, is purely statutory, and the statute must... be strictly followed. *Id.*; Bank of Maryville v. Topping, 393 S.W.2d 280, 282 (Tenn. 1965) ("Adoption is a creature of statute and not of the common law."). See also the delightfully witless inconsistency in Tarver v. Evergreen Sod Farms, 533 So. 2d 765, 767 (Fla. 1988) (holding that, whereas the doctrine of equitable adoption does prevail in the state "to avoid unfair... application of intestacy statutes," the doctrine nonetheless could not be extended to allow a suit in equity for wrongful death by the informally-adopted child because "the [workers' compensation] statute is unambiguous, and it would be improper for us to judicially amend the statute"--adding, in a typical postscript, "[t]his is a harsh result, which we suggest the legislature address.").

[FN70]. See *infra* notes 76, 79.

[FN71]. Courts have again typically taken care to assert their formal subservience to statutory law in equitable adoption cases. E.g., Barney v. Hutchinson, 177 P. 890, 893 (N.M. 1918):

In so holding [that a child was equitably adopted] we do no violence to the statutes of inheritance. We simply hold that equity will consider that [the child] was in all respects the legally adopted son of the [decedent].... The laws of inheritance consequently are not impaired, but follow their natural course.

Id.; Lankford v. Wright, 489 S.E.2d 604, 607 (N.C. 1997) ("We are convinced that acting in an equitable manner... does not interfere with the legislative scheme for adoption."). On the other hand, the occasional court has been surprisingly candid in explaining the structural consequences of implementing this contraption: "Virtual adoption is... usually invoked to avoid an unfair result from the application of intestacy statutes." Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973).

[FN72]. Because it flows out of equity, the doctrine of equitable adoption adds a distinctive element to intestacy law, which at this juncture--and only at this juncture--follows a standard, instead of a rule. And, like the rules of intestacy law, the pertinent standard for invoking equitable adoption varies somewhat from state to state. Rein, *supra* note 68, at 767 & nn.226-27, 772 & n.247, 776 & nn.266-67, 780-84; see also O'Neal v. Wilkes, 439 S.E.2d 490 (Ga. 1994) (where majority and dissenting opinions disputed the standard to apply, and where the choice of equitable remedies affected the outcome of the case).

[FN73]. Students of equitable adoption have recognized this fictive element in the case law. Clark, *supra* note 68, § 21.11, at 678, 681; Joel C. Dobris & Stewart E. Sterk, Estates and Trusts: Cases and Materials 104-05 (1998); Rein, *supra* note 68, at 772-80.

[FN74]. E.g., In re Williams' Estates, 348 P.2d 683, 684 (Utah 1960).

[FN75]. E.g., Holloway v. Jones, 246 S.W. 587, 591 (Mo. 1922); Wooley v. Shell Petroleum Corp., 45 P.2d 927, 931-32 (N.M. 1935) (rejecting the first theory in favor of the second).

[FN76]. To be sure, as we have just seen, intent-effectuation does not (and, indeed, could not, given statutory law) explicitly underlie the doctrine of equitable adoption. By necessity of the remedies available, courts emphasize the foster-parents' breach of their duty to adopt. At the same time, quite unlike inheritance by slayers, the notion of wrongdoing in this situation appears more-or-less a sham; courts have ruled uniformly that children can seek no relief in equity during their foster-parents' lifetimes, e.g., Besche v. Murphy, 59 A.2d 499, 501-02 (Md. 1948), or in the event that a foster-parent dies testate, e.g., In re Estate of Wall, 502 So. 2d 531, 531-32 (Fla. Dist. Ct. App. 1987), for disinheritance even of natural or formally-adopted children is perfectly permissible. Courts have restricted relief to matters of intestate inheritance, where a finding of wrongdoing appears a surrogate for accomplishing the principal policy of intestacy law, namely effectuation of the decedent's probable intent. A reading of the equitable adoption cases (unlike the slayer cases) reveals that courts pay close attention to evidence of a foster-parent's donative wishes, and one may draw the inference that, in practice, a court will invoke the doctrine only when it fulfills those wishes. See, e.g., In re Lamfrom's Estate, 368 P.2d 318, 320 (Ariz. 1962) (noting that "[s]everal witnesses testified to statements by the [decedents] that defendant would inherit all of their property"); Monahan v. Monahan, 153 N.E.2d 1, 4 (Ill. 1958) (observing after extended factual analysis that the "evidence is positive... that [decedent] intended for plaintiff to be his heir"); Gardner v. Hancock, 924 S.W.2d 857, 859 (Mo. Ct. App. 1996) ("[T]he doctrine is applied... to give effect to the intent of the decedent to adopt and provide for the child."); Pemberton v. Pemberton's Heirs, 107 N.W. 996, 997, 999-1000 (Neb. 1906) (decedent "frequently stated to his neighbors that plaintiff was his adopted son and that 'some day all his property would go to him'," and "he desired" that result); Cubley v. Barbee, 73 S.W.2d 72, 82 (Tex. 1934):

Equity considers that done which should have been done, and, since the plaintiff's right to the share to which he would have been entitled if legally adopted can be recognized without violating any expressed intention of the deceased to the contrary, the decree awarding him that share was just and equitable.

Id. (emphasis added) (citations omitted); Wall, 502 So. 2d at 531-32 ("The doctrine is usually applied... to give effect to the intent of the parties."). See also the case quoted *infra* note 79. But cf. Wooley, 45 P.2d at 930, 932 (observing that decedent "repeatedly stated in substance to numerous persons that [plaintiffs] were their adopted children and would inherit their property," but then adding that when a child relies on a decedent's promise to adopt, a court will hold her "heirs at law... estopped, as she [the decedent] herself would have been, to assert that there had been no adoption in law") (emphasis added); Laney v. Roberts, 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982) ("[E]ven if, *arguendo*, the relationship between [plaintiff and decedent] was distant--even non-existent--after 1963 when [plaintiff] was thirty-five, such a fact does not serve to defeat [plaintiff's] claim, long since vested by virtue of the actions of the [decedent and plaintiff] during [plaintiff's] childhood."). See also Rein, *supra* note 68, at 783 (acknowledging that equitable adoption doctrine is subject to manipulation, "depending on whether or not [courts] want to find a contract").

[FN77]. Because the contraption at issue here relies upon equity powers, it is also inevitably cumbersome. See *supra* note 42 and accompanying text. Whether its atypical, discretionary aspect within intestacy law is also a drawback is debatable: Some commentators favor injecting more equity into intestacy. Cf. McGovern et al., *supra* note 53, § 1.4, at 20-21; John Gaubatz, Notes Toward a Truly Modern Wills Act, 31 U. Miami L. Rev. 497, 559-60 (1977).

[FN78]. Many other collateral issues arise in connection with equitable adoption. Rein, *supra* note 68, at 768-70, 787-806. For a recent extension of the doctrine, see Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. Dist. Ct. App. 1998).

[FN79]. Notice that children below the age of majority do not even possess the power affirmatively to execute wills in favor of their foster-parents, because they are *per se* incompetent to avoid intestacy. E.g., Unif. Probate Code § 2-501 (amended 1997). Hence, arguably, one finds a stronger justification for fulfilling imputed intent in this

situation. By way of contrast, see Lindsey v. Wilcox, 479 N.E.2d 1330, 1332 (Ind. Ct. App. 1985) (declining to recognize the doctrine of equitable adoption in connection with a foster-parent's estate because, inter alia, "[w]ith other readily available alternatives of disposing of property by will or gift, no compelling reason surfaces to create a judicial doctrine to serve the same purpose").

[FN80]. Travelers Ins. Co. v. Young, 580 F. Supp. 421, 423-24 (E.D. Mich. 1984) (life insurance proceeds); In re Estate of Edwards, 435 N.E.2d 1379, 1382 (Ill. App. Ct. 1982) (wrongful death action); Rumans v. Lighthizer, 249 S.W.2d 397, 401 (Mo. 1952); In re Estate of Riggs, 440 N.Y.S.2d 450, 452 (Sur. Ct. 1981); Heien v. Crabtree, 369 S.W.2d 28, 30-31 (Tex. 1963) (resulting in an escheat); Whitchurch v. Perry, 408 A.2d 627, 632 (Vt. 1979) (wrongful death action and inheritance dicta). In one case, the court went out of its way to observe the absence of any clear donative intent on the part of the decedent toward the foster-parents. Geiger v. Estate of Connelly, 271 N.W.2d 570, 573 (N.D. 1978) (resulting in an escheat); cf. Lawson v. Atwood, 536 N.E.2d 1167, 1169-70 (Ohio 1989) (allowing a wrongful death action by the parent of an informally adopted child under the state wrongful death statute, but explicitly rejecting a claim by that parent premised on equitable adoption).

[FN81]. Clark, supra note 68, § 21.11, at 680-81. On the other hand, Professor Rein appears to take the articulated rationales for the doctrine more seriously, justifying equitable adoption as necessary "[t]o correct... injustice," "estop[ping]... den[ial] [of] the relationship... represented to the child," and affording "fundamental fairness" to the child in the face of "a species of detrimental reliance, however difficult to articulate or prove." Rein, supra note 68, at 767, 775, 778-79. In light of the additional concern for maintaining the sanctity of formal adoption procedures, Professor Rein would limit equitable adoption to cases directly premised on ostensible injustice, and accordingly she endorses, as a matter of public policy, courts' formulation of the doctrine as a limited, non-reciprocal remedy. *Id.* at 800-06.

[FN82]. As we have already observed herein: Thus courts, having developed the fiction that will substitutes transfer property to the beneficiary inter vivos in order to render them valid, have often continued to abide strictly by this fiction when assessing the very different issue of whether subsidiary rules pertaining to wills should be imported into the realm of gift law when the "gift" at issue is a will substitute. See supra note 62; MacDonald, supra note 62, at 128-32; Langbein, supra note 53, at 1134, 1136.

[FN83]. In one unhappy case, where a natural parent who had abandoned an informally-adopted child intervened to seek dismissal of a wrongful death claim by the foster-parents, the court openly expressed its sympathy for the foster- parents but added that it was "required" to rule against them. Estate of Edwards, 435 N.E.2d at 1382.

[FN84]. Restatement (Second) of Trusts § 112 (1959).

[FN85]. But see Ga. Code Ann. § 53-12-20 (1997); Nev. Rev. Stat. Ann. § 163.006 (Michie 1993).

[FN86]. This has been true more generally in eras when precedent enjoyed what Henry Maine termed a "superstitious" inviolability. Maine, supra note 16, at 31. At such times, the problem of lawmaking from below and the problem of lawmaking at a single level of authority converge, and courts have then found occasion either to construe creatively, or to circumvent, their own prior pronouncements. See supra note 32. Oddly enough, legislative bodies have also sometimes found themselves in this predicament, as a pathological by-product of the committee system: By evading a preexisting statute instead of tackling it head on, one committee can avoid the encroachments of another committee that holds formal legislative jurisdiction over the preexisting statute. For an example outside the trusts-and-estates arena, see Charles J. Tabb, *Freight Undercharges and the Negotiated Rates Act*, Bankr. L. Letter, Jan. 1995, at 1-3.

[FN87]. Restatement (Third) of Trusts § 2 & cmt. h, § 47 & Reporter's Notes (Tentative Draft No. 2, 1999).

[FN88]. 4A Scott, *supra* note 36, § 291.

[FN89]. Adam J. Hirsch, Bequests for Purposes: A Unified Theory, 56 Wash. & Lee L. Rev. 33, 35-40 (1999). Other typical sorts of bequests for noncharitable purpose include ones for the saying of masses or the construction of monuments, for the preservation of homes and collections, and for the publication of intellectual products. Id. at 56, 58 n.97.

[FN90]. Id. at 41-49 (laying out in greater detail the summary of this paragraph). For a discussion of the policy justifications for giving effect to bequests for noncharitable purposes, see id. at 49-84.

[FN91]. McHugh v. McCole, 72 N.W. 631, 636 (Wis. 1897).

[FN92]. Holland v. Alcock, 16 N.E. 305, 309-10 (N.Y. 1888).

[FN93]. J.B. Ames, The Failure of the "Tilden Trust", 5 Harv. L. Rev. 389, 401-02 (1892) (citing to the original, losing argument).

[FN94]. Restatement of Trusts § 124 (1935); Restatement (Second) of Trusts § § 123-24 (1959). Scott referred to Ames's article in Austin W. Scott, Control of Property by the Dead (pt. 1), 65 U. Pa. L. Rev. 527, 539 (1917).

[FN95]. For modern case law, see Hirsch, *supra* note 89, at 48 n.62; Adam J. Hirsch, Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws, 26 Fla. St. U. L. Rev. 913, 921 n.47 (1999).

[FN96]. J.H.C. Morris & W. Barton Leach, The Rule Against Perpetuities 307 (1st ed. 1956) (in the 1st ed. only); see also, e.g., Lyon Estate, 67 Pa. D. & C.2d 474, 478 (Orphan's Ct. 1974).

[FN97]. For a fairly up-to-date tally of the statutory requirements in the fifty states, see Restatement (Second) of Property: Donative Transfers § 33.1 statutory note 1(a) (1992).

[FN98]. For a more detailed discussion of the public policies underlying will formalities, see Hirsch, *supra* note 19, at 1060-69.

[FN99]. For a recent example, see Norton v. Hinson, 989 S.W.2d 535, 537- 38 (Ark. 1999) ("[T]he legislature has clearly and unambiguously expressed its intention... and we will not override or overlook those requirements."). For a compilation of earlier cases, see 2 Page, *supra* note 33, § 19.4, at 67-68; likewise in Great Britain, see, for example, In re Beadle, [1974] 1 All E.R. 493, 495 (Ch. 1973) (holding a defective will invalid, albeit once again "regretfully").

[FN100]. In recognition of the overall utility of execution formalities, courts have been guarded in their criticisms:

There is no doubt that the deceased intended the document to be her will, but the right to dispose of property by will is governed... entirely by statute ..., however much we may appreciate the hardship... in the present case.... Even if we had the right to express our views in the present case as to what the statute ought to be, we are not prepared to say what changes should be made.

In re Wolcott's Estate, 180 P. 169, 170-71 (Utah 1919).

We recognize that the result... frustrates legitimate testamentary intent.... However, the Utah Legislature has seen fit, in its collective wisdom, to preserve this [formal] requirement, apparently believing its benefit in preventing the substitution of surreptitious wills outweighs its potential unfairness. That judgment is appropriately one for the Legislature rather than this court... [e]ven if we might see the merits of legislation differently.

Taylor v. Estate of Taylor, 770 P.2d 163, 167 (Utah Ct. App. 1989); see also In re Hale's Will, 121 A.2d 511, 520 (N.J. 1956) (applying the statute of wills strictly, while citing to criticism of its "almost ritualistic complexity"). But cf. In re Noyes' Estate, 105 P. 1013, 1016 (Mont. 1909) (defending strict enforcement on policy grounds).

[FN101]. See, e.g., Gardner v. Balboni, 588 A.2d 634, 638 (Conn. 1991) (insisting that where witnesses signed a self-proving affidavit instead of the will, the will nonetheless strictly complied with the state statute of wills); In re Estate of Friedman, 6 P.3d 473, 476 (Nev. 2000) (holding valid under a statute of wills that required two witnesses a will signed by a witness and a notary to the witness' signature "under the unique facts and circumstances of this case"); see also Hirsch, *supra* note 19, at 1067 n.33. The truth will out, however: "[S]ome courts, although purporting to require literal compliance [with the statute of wills], have allowed probate of technically-defective wills." In re Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991) (emphasis added). Yet, having made this admission, the instant court went on to assert that the state legislature intended implicitly to give effect to all wills that complied with its statutory execution requirements substantially, and not just to those that complied strictly. *Id.* at 1345. But see In re Estate of Peters, 526 A.2d 1005, 1009-10, 1014-15 (N.J. 1987) (rebutting this statutory interpretation). See also Draper v. Pauley, 480 S.E.2d 495, 496 (Va. 1997) (averring with delightful ambivalence the court's "rigid insistence" on substantial compliance" with the statute of wills) (quoting Robinson v. Ward, 387 S.E.2d 735, 738 (Va. 1990)). One common-law rule--the doctrine of incorporation by reference--which seemingly relaxes the formal requirements for will execution in fact long predated the modern formalities; hence, courts could reasonably read the statute to codify the rule *sub silentio*. See Allen v. Maddock, 14 Eng. Rep. 757, 767-68 (P.C. 1858).

[FN102]. For a judicial acknowledgment of the fictive element of the rule, see Kroll v. Nehmer, 705 A.2d 716, 718, 722 (Md. 1998); and, in so many words, see In re Dougan's Estate, 53 P.2d 511, 524 (Or. 1936) ("In an endeavor to give effect to the deceased's intent, the doctrine construes his mistaken belief into a conditional revocation."); see also Atkinson, *supra* note 46, ¶ 88, at 454-59. But cf. Alvin E. Evans, Note, *Dependent Relative Revocation*, 16 Ky. L.J. 251, 252 (1928) ("[C]ourts... have deceived themselves.").

[FN103]. Atkinson, *supra* note 46, ¶ 88 (noting, however, early cases in which the doctrine was applied mechanically without analysis of probable intent); George E. Palmer, *Dependent Relative Revocation and Its Relation to Relief for Mistake*, 69 Mich. L. Rev. 989, 997-1000 & *passim* (1971) (same). For an early discussion, see Joseph Warren, *Dependent Relative Revocation*, 33 Harv. L. Rev. 337 (1920).

[FN104]. In those cases where courts have doubted whether the testator had resolved upon a new estate plan to replace the one contained in the revoked will--for instance, where the testator declared her intention to make a new will, or drafted a new will, but never actually went ahead and attempted to execute a new will--courts have declined to invoke the doctrine of dependent relative revocation. In re Estate of Ausley, 818 P.2d 1226, 1233 & n.5 (Okla. 1991):

[I]n our view for a determination to be intelligently made of the probable intent of a decedent, the terms of the "new" will must normally be shown with some specificity and that such terms are definitive. Without such information, there is no, or little basis, for saying decedent would have preferred the old will over intestacy. *Id.*; In re Emernecker's Estate, 67 A. 701, 702 (Pa. 1907) ("[N]o matter how fully her mind was then made up, there might be a change of intention at any time before it was permanently expressed in writing."); Kroll, 705 A.2d at 722 n.5.

[FN105]. See Kroll, 705 A.2d at 722-23;

The courts recognize that the question is always one of presumed intent.... [C]ourts that have applied the doctrine have looked to the similarity of the new [ineffective] and old [revoked] dispositive schemes as a basis for concluding that the testator indeed intended the revocation to be conditional and that he would have preferred to have his estate pass under the old will rather than through intestacy.

[FN106]. *Id.*

One opinion has put the matter plainly:

[I]f presumed intent were to control, the court would simply overlook the statutory deficiency and probate the new will, rather than overlook the legal effect of an otherwise deliberate revocation and probate the old one. That is an option the law does not permit, however. We thus must look for secondary, fictional intentions never actually possessed by [the testator].

Id. at 722.

[FN107]. See *supra* notes 64-66, and accompanying text.

[FN108]. See *supra* notes 72-75, and accompanying text.

[FN109]. For commentary, see Martin D. Begleiter, Attorney Malpractice in Estate Planning--You've Got to Know When to Hold Up, Know When to Fold Up, 38 U. Kan. L. Rev. 193, 218-22 (1990); Martin D. Begleiter, First Let's Sue All the Lawyers--What Will We Get: Damages for Estate Planning Malpractice, 51 Hastings L.J. 325, 332-37 (2000); Jesse Dukeminier, Cleansing the Stables of Property: A River Found at Last, 65 Iowa L. Rev. 151, 154-57 (1979); Gerald P. Johnston, Legal Malpractice in Estate Planning--Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629, 650-52 (1982); William M. McGovern, Jr., The Increasing Malpractice Liability of Will Drafters, Tr. & Est., Dec. 1994, at 10.

[FN110]. Without peradventure, judicial dissatisfaction with the outcome of adherence to the statute of wills has propelled courts in this direction. See Licata v. Spector, 225 A.2d 28, 30 (Conn. C.P. 1966) ("While the invalid will cannot be validated by judicial fiat, the allowing of a cause of action... would seem to be in accord with the policy... to give a party who claims to have suffered a wrong... his right to redress."); Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987) ("[I]f no cause of action could be maintained, the very purpose for which the lawyer was retained (i.e., disposition of the testator's estate in accord with his or her wishes) would be frustrated without remedy."); Succession of Killingsworth, 292 So. 2d 536, 544 (La. 1973) ("The document... [is] invalid as a will because of noncompliance with a statutory requirement... Nonetheless, it is the strongest possible proof of [the testator's] desire and intention with respect to the disposition of her estate."); Guy v. Liederbach, 459 A.2d 744, 752 (Pa. 1983) ("[W]e feel persons who are named beneficiaries under a will and who lose their intended legacy due to the failure of an attorney... should not be left without recourse or remedy."); Auric v. Continental Cas. Co., 331 N.W.2d 325, 329 (Wis. 1983) ("[Attorney liability] is consistent with and promotes this state's longstanding public policy supporting the right of a testator to make a will and have its provisions carried out."). *E contra*, those courts which view strict adherence to the statute of wills as serving to protect the sanctity of testamentary intent have also maintained the privity barrier to attorney liability. See Espinosa v. Sparber, Shevin, Shapo, Rosen, & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993) (observing that the evidentiary problem in an attorney liability case is "closely akin to the problem of determining the client's general testamentary intent," and because extrinsic evidence of that intent is barred in a suit in probate to shield the estate against fraud, no suit for attorney liability can be predicated on extrinsic evidence); Noble v. Bruce, 709 A.2d 1264, 1276-77 (Md. 1998) (same).

[FN111]. Where the facts of the case provide insufficient evidence of testamentary intent, no court will find attorney

liability. Gregg v. Lindsay, 649 A.2d 935, 940 (Pa. Super. Ct. 1994); Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573, 582-83 (Ct. App. 1995).

[FN112]. Courts could, however, avoid this wealth transfer by creating a second cause of action that allows liable attorneys to sue unjustly-enriched heirs. See Killingsworth, 292 So. 2d at 547 (rejecting such a cause of action); McGovern, supra note 109, at 14; see also John H. Langbein & Lawrence W. Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521, 588-90 (1982) (pointing out in a related context the sub-optimality of the malpractice contraption).

[FN113]. There are still other contraptions clustered around the statute of wills. For example, if a testator executes a will bequeathing property to a beneficiary but also expresses to that beneficiary an unformalized intent that he turn the bequest over to a third party (a so-called "secret trust"), courts have imposed an equitable constructive trust upon the named beneficiary to enforce the transfer over to the intended one. Courts thereby effectuate the testator's intent, despite her failure to comply fully with the statute of wills. The pretext for imposing a constructive trust in this case is prevention of "wrongdoing" by the beneficiary, who might otherwise break his (implicit) promise to the testator to hand over the bequest. But, as usual, this contraption comprises an imperfect antidote to the statute: For equity can only be summoned in the event of a wrong. Accordingly, if the testator instead informs someone other than the beneficiary of her intent that the bequest go on to a third party, the court cannot accuse the beneficiary of breaking a promise if he keeps the bequest. In such a case, there is no equitable remedy, although evidence of testamentary intent (the true desideratum) is essentially equivalent! Restatement (Second) of Trusts, § 55(1) & cmts. b, d, & f (1959); McGovern et al., supra note 53, § 6.2, at 247-48; Hirsch, supra note 19, at 1107-12. For a second chink in the armor of this contraption as applied to the statute of wills, see Hirsch, supra note 19, at 1112-13.

[FN114]. See supra text at note 10.

[FN115]. See supra text at note 16.

[FN116]. It is impossible for the courts to designate any different persons to take such estates [as provided by legislation] without violating the law. We have no possible warrant for doing so.... Unless the law itself contains some qualification which changes its application... it must have its way, because there is no other way. In re Carpenter's Estate, 32 A. 637, 637-38 (Pa. 1895) (case involving slayer-heir); see also, e.g., Taylor v. Estate of Taylor, 770 P.2d 163, 167 (Utah Ct. App. 1989) ("Even if we might see the merits of legislation differently, we must apply the law as it exists.") (case involving violation of the statute of wills); Riggs v. Palmer, 22 N.E. 188, 191-92 (N.Y. 1889) (Gray, J., dissenting) (case involving slayer-heir). This refrain has been sounded by a long line of United States Supreme Court justices when interpreting Congressional legislation and nowadays reverberates in the opinions of Justice Scalia, who has condemned creative construction of statutes as a "usurpation." West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) (Scalia, J.); see also, e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978) (Burger, C.J.) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"); Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 467-70 (1989) (Kennedy, J., dissenting) ("we are bound"); Welch v. United States, 398 U.S. 333, 367-68 (1970) (White, J., dissenting) ("[o]ur obligation"); Bank of Marin v. England, 385 U.S. 99, 105, 109-10 (1966) (Harlan, J., dissenting) ("simple propriety"); Helvering v. Clifford, 309 U.S. 331, 338, 341-42 (1940) (Roberts, J., dissenting) ("fundamental principle"). But cf. BFP v. Resolution Trust Corp., 511 U.S. 531, 552-57, 565-70 (1994) (Souter, J., dissenting) (attempting to hoist Justice Scalia on his own petard). By the same token, the Supreme Court has asserted the obligation of inferior federal courts to adhere strictly to its precedents. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989); Hutto v. Davis, 454 U.S. 370, 374-75 (1982).

[FN117]. E.g., Eskridge, *supra* note 34, at 112-20; William N. Eskridge, Jr., Spinning Legislative Supremacy, 78 *Geo. L.J.* 319 (1989); Farber, *supra* note 34 (citing to additional discussions). For an early, imaginative discussion, see Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 *Harv. L. Rev.* 616 (1949). For analogous discussions of the duty of lower courts to obey the precedents established by superior courts, see Ashutosh Bhagwat, Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power", 80 *B.U. L. Rev.* 967, 982-85 (2000); C. Steven Bradford, Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling, 59 *Fordham L. Rev.* 39, 83-85 (1990); Caminker, *supra* note 25, at 817-21, 828-39, 856-60 & *passim* (citing to additional discussions). For an observation of the unity of these two problems, see Kelman, *supra* note 32, at 4 & n.7.

[FN118]. Courts having recourse to legal contraptions have often emphasized their formal observance of lawmaking hierarchy. See *supra* notes 36, 71.

[FN119]. See generally Lewis A. Kornhauser, Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System, 68 *S. Cal. L. Rev.* 1605, 1619-28 (1995); Steven Shavell, The Appeals Process as a Means of Error Correction, 24 *J. Legal Stud.* 379, 425-26 & *passim* (1995). Historically, at least, the pressure has always come from the opposite direction, to divide and stratify the labor of lawmaking. See, e.g., Baker, *supra* note 13, at 95- 99 (discussing the evolution of Chancery into a multi-layered system of courts in Great Britain).

[FN120]. Professor Paulsen's felicitous phrase. Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 *J.L. & Religion* 33, 82 (1989).

[FN121]. Calabresi, *supra* note 34; Gilmore, *supra* note 12, at 96-98; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 446-48 (2d ed. 1975); Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 *Vt. L. Rev.* 203 (1979); Gilmore, *supra* note 34; Paulsen, *supra* note 120, at 82-88.

[FN122]. E.g., Posner, *supra* note 30, at 269-77, 300-02; Bhagwat, *supra* note 117, at 1006-14; Bradford, *supra* note 117, at 68-88; Caminker, *supra* note 25, at 839-65; Caminker, *supra* note 18; Michael C. Dorf, Prediction and the Rule of Law, 42 *UCLA L. Rev.* 651 (1995); Farber, *supra* note 34, at 307-14; Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 *Stan. L. Rev.* 213 (1983); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 *Geo. L.J.* 353 (1989).

[FN123]. The same cannot be said of judges who blatantly endeavor to underrule their superiors. In 1999, Judge J. Anthony Kline of the California First District Court of Appeal refused in a dissenting opinion to acquiesce in a state supreme court precedent. Morrow v. Hood Communications, Inc., 69 *Cal. Rptr. 2d* 489, 490-94 (Ct. App. 1997) (Kline, P.J., dissenting). In response, Kline was brought before the state Commission on Judicial Performance for willful misconduct, although the Commission eventually dismissed the charge. Kenneth Ofgang, *CJP Formally Dismisses Misconduct Charges Against Court of Appeal Presiding Justice J. Anthony Kline*, *Metropolitan News-Enterprise*, Aug. 20, 1999, at 1.

[FN124]. State appellate practice typically grants appeals as a matter of right only to an intermediate appellate court, whereas appeals to the supreme court lie at that court's discretion. Robert L. Stern, *Appellate Practice in the United States* § 1.5 (2d ed. 1981).

[FN125]. See *supra* notes 24-25, 69, 100, and accompanying text. For a court that sought to administer preventive medicine, urging the legislature to revise a statutory rule that was not even at issue in the case before the court, see In re Estate of Swanson, 397 *So. 2d* 465, 466-68 (Fla. Dist. Ct. App. 1981).

[FN126]. See United States v. Burdeau, 180 F.3d 1091, 1093-94 (9th Cir. 1999) (Kozinski, J., dissenting) (rebuking a three judge panel for offering "unsolicited advice to the other branches of government.... This will further erode the separation of powers and undermine respect for the judiciary."); United States v. Harris, 165 F.3d 1277, 1277 (9th Cir. 1999) (Kozinski, J., dissenting) ("I do not believe it is appropriate to use an opinion of this court as a vehicle for political lobbying.... [T]he decision... is a matter of legislative judgment.").

[FN127]. McGovern, *supra* note 24, at 67; see also Linda J. Maki & Alan M. Kaplan, *Elmer's Case Revisited: The Problem of the Murdering Heir*, 41 Ohio St. L.J. 905, 933 (1980) (noting other responsive legislatures); Wich v. Fleming, 652 S.W.2d 353, 355 (Tex. 1983) (following the Texas statute of wills strictly but inviting the legislature to amend it); In re Estate of Livingston, 999 S.W.2d 874, 876-77 (Tex. App. 1999) (noting that, apparently in response, the Texas legislature did amend the statute in 1991). In one interesting instance, when a lower court in New York abided by an anachronistic common law rule of will construction while urging the high court to reverse it, the gambit appeared to fail: The high court affirmed the lower court's decision summarily. But then, like a *deus ex machina*, the state legislature intervened to reverse the rule by statute. Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 Cal. L. Rev. 921, 926-29 (1964). For a related general discussion, see Calabresi, *supra* note 34, at 34- 35, 152-56.

[FN128]. Wall v. Pfanschmidt, 106 N.E. 785, 788-90 (Ill. 1914); McGovern, *supra* note 23, at 70. For another failed gambit, see, for example, Davies, *supra* note 121, at 210.

[FN129]. Faced with the novel issue of the intestacy rights of children conceived after the death of a parent by in vitro fertilization, a recent court wrestled with the dilemma:

The State has urged that courts should not entertain actions such as the present one, but should wait until the Legislature has dealt with the kinds of issues presented by this case.... I think it would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.... It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.

In re Estate of Kolacy, 753 A.2d 1257, 1261-62 (N.J. Super. Ct. Ch. Div. 2000).

[FN130]. In the venue of inheritance law, Professor Mann conjectures that this concern has prompted some appellate courts to impose upon baseline courts--and, in the bargain, upon themselves--a strictly textualist reading of the statute of wills, in order to constrain baseline courts' functional discretion. Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 Wash. U. L.Q. 39, 62-68 (1985).

[FN131]. For a related discussion, see Caminker, *supra* note 25, at 845-49.

[FN132]. Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. Rev. 377, 378-79 & *passim* (1990). This is true in New York, for example, although in some states specialized probate courts merely handle ministerial matters. Mann, *supra* note 130, at 62-63.

[FN133]. Several of those public policies have subsequently received superior recognition via widespread codification. See *infra* notes 146, 148, 150, 152. By the same token, there is little evidence that subordinate lawmakers have made law from below haphazardly. See also *supra* note 38.

[FN134]. Calabresi, *supra* note 34, at 175-76; Abner Mikva & Jeff Bleich, When Congress Overrules the Court, 79 *Cal. L. Rev.* 729, 747 (1991); Pound, *supra* note 34, at 384-86; David L. Shapiro, In Defense of Judicial Candor, 100 *Harv. L. Rev.* 731, 737 (1987).

[FN135]. See Hutto v. Davis, 454 U.S. 370, 374-75 (1982) (per curiam):

More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system.... [A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

Id.; William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/ President Civil Rights Game, 79 *Cal. L. Rev.* 613, 623-41 (1991) (noting angry Congressional reactions to legislative construction cases decided by the U.S. Supreme Court); Mikva & Bleich, *supra* note 134, at 743-44 & *passim* (same).

[FN136]. It is common enough for legislators to reenact more clearly legislation that they perceive subordinate lawmakers to have misinterpreted. For an example in the area of trust law, denoting this sort of act as "clarifying legislation," see Dep't of Soc. Serv. v. Saunders, 724 A.2d 1093, 1100-02 (Conn. 1999); see generally Daniel J. Bussel, Textualism's Failures: A Study of Overruled Bankruptcy Decisions, 53 *Vand. L. Rev.* 887 (2000); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 *Yale L.J.* 331 (1991). It is, of course, virtually impossible to document the degree to which the emotional desire to "pull rank" stimulates, or contributes to, the enactment of such bills. For a recognition of a related phenomenon, see Mikva & Bleich, *supra* note 134, at 746 ("When Congress believes the Court is needlessly obstructing legislative policy, it tends to harden and harshen its position unnaturally.... An angry or frustrated Congress is not Congress at its most considered, deliberative best."). For a related discussion, see Caminker, *supra* note 25, at 860-65.

[FN137]. See Gilmore, *supra* note 34, at 239 ("[M]isconstruction is a technique of limited usefulness at best and its usefulness progressively diminishes as we become hemmed in by statutes artfully drawn to be judge-proof.").

[FN138]. Jeremy Bentham, whose animadversions on a sub-species of the legal contraption, the legal fiction, were notorious in his day, went so far as to suggest that these devices operated to deceive superior lawmakers. Bentham claimed provocatively that courts employed legal fictions with the intention of "stealing legislative power, by and for hands which could not, or durst not, openly claim it,--and, but for the delusion thus produced, could not exercise it." Jeremy Bentham, A Fragment on Government, in 1 *The Works of Jeremy Bentham* 221, 243 (photo. reprint 1962, John Bowring ed., 1838-1843) (1776). But as Bentham's contemporary, John Austin, responded, fictions (and, one might suppose, legal contraptions in general) are obvious enough even to "the most incurious and the least intelligent" and so must have enjoyed superiors' "tacit approbation." Austin shrewdly--and timelessly--assessed the problem as one of self-esteem and respectability:

If a... subordinate judge, had said openly and avowedly, "I abrogate such a law," or "I make such a law," he might have given offence... by his direct and arrogant assumption of legislative power. By covering the innovation with a decent lie, he treated the abrogated law with all seemly respect, whilst he knocked it on the head. With regard to their causes and effects, the fictions through which judges innovate on existing law, may be likened to those conventional, and not incommodious[,] lies, through which much of the intercourse of polished society is habitually carried on. If a man, for example, call[s] at your house, and you flatly let him know that you don't wish to see him, you insult him. But if you say, through your servant, "not at home," you intimate just as clearly the same thing, and you let him know your meaning in a respectful and inoffensive manner.

2 Austin, *supra* note 35, at 610-12.

[FN139]. E.g., Carr v. Carr, 576 A.2d 872, 878-81 (N.J. 1990); *supra* notes 36, 71. On the other hand, one can point to several opinions in which courts have been surprisingly blunt about what they were doing. See *supra* notes 59-60, 71, 106.

[FN140]. For a related discussion, see Edward H. Levi, *An Introduction to Legal Reasoning* 32-33 (1949). One may point out by way of anecdotal evidence that all of the contraptions addressed in this Article are of very long standing, and many of them in numerous jurisdictions have never been superseded by statutory law. See *infra* notes 146-54, and accompanying text.

[FN141]. The abstraction's unhealthy rayonnement within legal culture has been widely recognized--and cautioned against. E.g., *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 *Cornell L. Rev.* 587, 604-05 (1989).

[FN142]. But cf. Lon L. Fuller, *Legal Fictions* 70 (1967) (originally published in 1930-31 in the *Illinois Law Review*) (asserting that a legal fiction functioning to remodel the law "is like a scaffolding in that it can be removed with ease. The fiction seldom becomes a 'vested interest;' it does not gather about it a group of partisan defenders. No one will mourn its passing.").

[FN143]. For another reflection of it, see Hirsch, *supra* note 95, at 947- 48. This phenomenon is to be distinguished from historicism, i.e., adherence to age-old tradition as a policy value, famously discredited by Justice Holmes over a century ago. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

[FN144]. "Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionately affect judgments." Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in *Judgment Under Uncertainty: Heuristics and Biases* 190, 192 (Daniel Kahneman et al. eds., 1982). For an early recognition, see Oliver Wendell Holmes, Jr., *The Use and Meaning of Law Schools and Their Methods of Instruction*, 20 *Am. L. Rev.* 919, 922 (1886). The point is understood intuitively by lay persons, who have captured it, albeit by negative inference, in a popular maxim: out of sight, out of mind. In connection with lawmaking, it can scarcely be doubted that vivid public events can concentrate legislators' minds, a fact sometimes disclosed by reference to those events in the very labels that become attached to the laws which follow, for example, the Son of Sam laws referred to earlier in this Article. See *supra* note 45, and accompanying text. The hypothesis offered here is that the salience of stimuli within the legal landscape affects that same landscape--and so, the vividness of preexisting legal contraptions can blind lawmakers to alternative rules they might otherwise have contrived on their own.

[FN145]. That is to say, approaches to problems taken at one time influence behavior at later times. For a summary of modern psychological research into this phenomenon, see J. Richard Eiser, *Social Psychology: Attitudes, Cognition and Social Behavior* 64-68, 226-32 (1986). Observations along these lines long predated the dawn of modern cognitive theory, and they have also been offered in a legal context:

[T]he character and course of [all rulers'] actions is largely influenced... by the habitual sentiments and feelings, the general modes of thinking and acting, which prevail throughout the community of which they are members.... They are also much influenced by the maxims and traditions which have descended to them from other rulers, their predecessors; which maxims and traditions have been known to retain an ascendancy during long periods, even in opposition to the private interests of the rulers for the time being.

John Stuart Mill, *A System of Logic* 484 (8th ed. London 1972) (1843), quoted in George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, in *The Limits of Rationality* 191, 201-02 (Karen Schweers Cook & Margaret Levi, eds., 1990). Another keen observer of human nature extended the point:

Most of the things we do, we do for no better reason than that our fathers have done them... and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best.

Holmes, *supra* note 143, at 468. In other words, habitual thinking, in lawmaking as in other aspects of our decisional lives, does at least display the virtue of cognitive economy! See also Holmes, *supra* note 9, at 452, 455.

[FN146]. Conn. Gen. Stat. Ann. § 45a-447(b) (West 1993); Ind. Code Ann. § 29-1-2-12.1(a) (West 1989); Ohio Rev. Code Ann. § 2105.19(B) (Anderson 1998). Other state statutes, along with the Uniform Probate Code, avoid inheritance by slayers without recourse to a constructive trust, however. Unif. Probate Code § 2-803(b) (amended 1997); cf. W. Va. Code § 42-4-2 (1997) (avoiding inheritance, but allowing for additional equitable deviation from the dictates of the statute). For a fairly up-to-date tally of the relevant statutes, see Restatement (Second) of Property: Donative Transfers § 34.8 statutory note (1992). Only five jurisdictions continue to have no statute on point.

[FN147]. Ind. Code Ann. § 29-1-2-12.1(b) (West 1989); Ohio Rev. Code Ann. § 2105.19(A) (Anderson 1998). The Uniform Probate Code does not provide for disinheritance under this circumstance. In the glare of prior contraptions, it continues to view the issue (solely) as one of counteracting wrongdoing. Unif. Probate Code § 2-803(b) & cmt. (amended 1997).

[FN148]. Wis. Stat. Ann. § 853.11(5) (West 1991 & Supp. 1999). Some jurisdictions, however, have taken steps to reduce directly the risk of inadvertent violation of the statute of wills, either by simplifying the formalities, or by giving effect to a will that substantially complies with them. Hirsch, *supra* note 19, at 1067-68. Under the Uniform Probate Code's so-called dispensing power (as yet sparsely adopted), a court can give effect to a will that fails to comply even substantially with the formalities, if testamentary intent is proved by clear and convincing evidence. Unif. Probate Code § 2-503 (amended 1997). This power largely supersedes dependent relative revocation, because the court can probate the improperly formalized will, assuming the heightened standard of proof is met. And what if it is not? The drafters of the Code ostensibly consider this stringent burden of proof "appropriate to the seriousness of the issue," and they urge courts "to police [it] with rigor." *Id.* § 2-503 cmt. Yet, paradoxically, the drafters also endorse the doctrine of dependent relative revocation in other cases, although it may operate under a less stringent evidentiary standard. *Id.* § 2-507 cmt. Hence, the drafters of the Code have succumbed in part to the lawmaking pathology identified in the text following note 142.

[FN149]. Ark. Code Ann. § 16-114-303 (Michie 1987 & Supp. 1999). This issue is not treated under the statutory laws of other states, or under the Uniform Probate Code. Nor does the Uniform Probate Code treat the secret trust doctrine, addressed *supra* note 113.

[FN150]. Cal. Prob. Code §§ 15204, 15211, 15212 (West 1991 & Supp. 2000); Mo. Ann. Stat. § 456.055 (West 1992); Tenn. Code Ann. § 35-50-118 (1996); Wis. Stat. Ann. § 701.11(1) (West 1981 & Supp. 1999); N.C. Gen. Stat. §§ 36A-145, 36A-147 (1995). The Uniform Probate Code of 1990 also took this approach, although it distinguished trusts for pets which were rendered fully enforceable. Under the amendments to the Code promulgated in 1993, however, non-charitable purpose trusts were also rendered fully enforceable. Compare Unif. Probate Code § 2-907 (9th ed. 1991), with Unif. Probate Code § 2-907 (amended 1997). The solution adopted by the Uniform Probate Code, as amended, has been codified in seven states. Hirsch, *supra* note 95, at 915 n.13. In other states, the honorary trust doctrine persists in its common law form.

[FN151]. Cal. Prob. Code § 6455 (West 1991 & Supp. 2000); Tex. Prob. Code Ann. § 40 (West 1980 & Supp. 2000), construed in Curry v. Williman, 834 S.W.2d 443, 444-45 (Tex. App. 1992) (finding statutory equitable adoption to allow intestate inheritance by the child, and not by the foster-parent); Okla. Stat. Ann. tit. 10, §§ 7501-1.3(9) & cmt., 7505-06.5 (West 1998 & Supp. 2000) (construction ambiguous). No other jurisdiction has any relevant legislation on point, and the Uniform Probate Code completely neglects to address the issue. See Unif. Probate Code § 2-114 & cmt. (amended 1997) (setting out rules for establishing the parent-child relationship under intestacy law without any provision, or even discussion in the accompanying comment, of the doctrine of equitable adoption, leaving the doctrine's continued viability under the Code ambiguous).

[FN152]. E.g., Fla. Stat. ch. 689.075 (1999); 755 Ill. Comp. Stat. Ann. 25/1 (West 1992); Ind. Code Ann. § 29-1-5-9 (Michie 1989). A Reporter for the revised Uniform Probate Code asserts that the Code "disavows the present-interest rubric." Langbein, *supra* note 53, at 1132-33. One cannot, however, draw that conclusion from a textualist reading of the Code: The relevant section states simply that will substitutes are "nontestamentary," but it says nothing about the theory causing them to be so categorized. Unif. Probate Code § 6-101 & cmt. (amended 1997). Compare the Restatement, which also speaks of will substitutes as "not testamentary," but does so explicitly on the basis of the temporal fiction. Restatement (Second) of Trusts § 57 & cmt. a (1959). The Uniform Probate Code must be judged agnostic on this matter, and it leaves some of the doctrinal ambiguities flowing out of it unresolved.

[FN153]. E.g., John F. Kuether, Significant Probate and Trust Decisions, 29 *Real Prop. Prob. & Tr. J.* 263, 322-24 (1994) (observing statutory inconsistencies, subsequently enforced by courts, between a surviving spouse's elective share rights under different categories of will substitutes); McGovern, *supra* note 61, at 37 & n.244 (same). The revised Uniform Probate Code undertakes some consolidation but adds simultaneously to the diversification of will substitutes, between which many inconsistencies remain. For discussions, see Grayson M.P. McCouch, Will Substitutes Under the Revised Uniform Probate Code, 58 *Brook. L. Rev.* 1123 (1993); William M. McGovern, Jr., Nonprobate Transfers Under the Revised Uniform Probate Code, 55 *Alb. L. Rev.* 1329 (1992). Compare Article 9 of the Uniform Commercial Code, whose drafters had the vision to sweep away the tangle of nonpossessory security interests in personal property (having, in a remarkably similar manner, grown up from below over the course of a century) and to replace it with a single, novel security device. 1 Gilmore, *supra* note 63, § 9.1-10.2. But at the same time, the Uniform Probate Code in other respects simplifies the probate process in order to reduce demand for will substitutes altogether. See *supra* note 53.

[FN154]. It may be, however, that the widespread legislative adoption of will substitutes traces in part to the prior buildup of reliance costs by settlors. See *supra* note 19. On the other hand, analogous reliance costs proved no insuperable obstacle to the contrivance, and adoption in 49 states, of Article 9 of the U.C.C.

[FN155]. For the seminal discussion, see Richard G. Lipsey & Kelvin J. Lancaster, The General Theory of Second Best, 24 *Rev. Econ. Stud.* 11 (1956).

[FN156]. Here, the imperfection in the system arises within the context of its temporal dynamics, whereby in a second-best world "a small improvement may block further progress." Kenneth Arrow, Invaluable Goods, 35 *J. Econ. Literature* 757, 761 (1997).

[FN157]. E.g., Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 *Wash. U. L.Q.* 1, 67-69 (1995); Hirsch, *supra* note 141, at 614-17.

[FN158]. Rapid replacement of contraptions will also serve to limit any reliance costs associated with them. See *supra* note 154.

[FN159]. On the positive side, the drafters of the revised Uniform Probate Code did strive to take into account societal changes that had overtaken its predecessor. Unif. Probate Code art. II, prefatory note (amended 1997). And the Code currently contains provisions that expressly supersede two contraptions--the constructive trust as applied to slayer-beneficiaries, and the remedial honorary trust. See *supra* notes 146, 150. But on the negative side, the Code neglects to address a number of contraptions, which may continue to operate in their imperfect way upon inheritance law--including the equitable adoption doctrine, attorney liability, and the secret trust doctrine. See *supra* notes 149, 151. The Code also adopts the theoretical limitations of the equitable approach to slayer-beneficiaries, and thus follows the principle that its slayer rules should (merely) avoid the unjust enrichment of wrongdoers, rather than

(also) effectuate the testator's imputed intent. See supra note 147. The Code endorses the dependent relative revocation contraption, while simultaneously reducing the need for it. See supra note 148. Similarly, the Code strives to reduce the attractiveness of will substitutes, but simultaneously aggravates their complexity. See supra notes 53, 153.

[FN160]. For a prior observation of mine along these lines, see Hirsch, supra note 19, at 1145-51.

[FN161]. Quoted in L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages (pt. 1), 46 Yale L.J. 52, 52 (1936).

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