BIG DATA AND THE MODERN FAMILY

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Despite numerous reforms over the years, intestate succession rules continue to privilege traditional, white, heterosexual families. It is evident that the one-size-fits-all scheme cannot truly reflect diversity of lifestyles and associations. This Article considers an innovative option that has become increasingly popular in recent years: using big data to create personalized rules, tailored to the personal characteristics of each decedent. This Article explores the promise and drawbacks of personalized intestacy, arguing that personalized default rules fall short in the realm of inheritance, because these rules are personal and inheritance law is inherently relational. It then offers preliminary guidelines for adapting big data techniques to the relational aspects of inheritance.

INTRODUCTION

Intestate succession rules present a longtime challenge to legislators and academics alike. They are notorious for privileging the nuclear family, to the exclusion of modern forms of associations and relationships.[1] This Article considers an innovative possibility: using

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1. *See* Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341 (2017); Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Non-Traditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1 (2015); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. J. 1 (2000); E. Gary Spitko, *The Expressive Function of Succession Law*

big data to create personalized intestate rules that will replace intestate rules altogether. It examines whether personalized rules will be an improvement on current rules and account for heterogeneous, diverse families. The central argument of the Article, though, is that current suggestions for personalizing default rules fall short in the realm of inheritance, because these rules are personal and inheritance law is inherently relational. More work is required to advance intestate rules to the era of big data.

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According to common wisdom, intestate succession rules are designed to track the intent of most decedents, thus saving them the costs of executing a will.[2] They are majoritarian rules. Nonetheless, these rules are often criticized as being arcane, unsuited for the modern family.[3] Critiques claim that intestate rules mostly reflect the preferences of white, heterosexual, wealthy families.[4] Such critiques have led to a number of reforms and inspired a continuing attempt to refine intestate rules and bring them as close as possible to the will of a diverse group of decedents.[5]

Despite these important and thoughtful reforms, three problems persist. First, intestate rules in many jurisdictions still exclude certain types of familial relations: stepchildren, unmarried partners, nonbiological children, and multigenerational households.[6] Second, intestate rules are strict. The relationship between the decedent and her relatives, or the behavior of the potential heirs, is not a consideration in

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and the Merits of Non-Marital Inclusion, 41 ARIZ. L. REV. 1063 (1990); Paula A. Monopoli, "*Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257 (1994); Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession,* 75 U. COLO. L. REV. 211 (2004).

2. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1034 (2004); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 11–12 (1998); Thomas P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1523 (1999).

3. *See* sources at *supra* note 1.

4. Wright & Sterner, *supra* note 1, at 373; Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 896–97 (2012) (explaining that white people are more likely to execute a will and do not die intestate); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 492 (2010).

5. *See, e.g.*, Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 275–77 (2010) (discussing reforms in the definition of parenthood).

6. Wright & Sterner, *supra* note 1, at 375–76.

the rules.[7] Formal relationships, even if empty and existing strictly on paper, create an entitlement.[8] Third and perhaps most importantly, meaningful informal relations are not recognized in intestate succession rules. Friends, godchildren, children of friends or neighbors are never intestate heirs.[9] Intestate rules keep wealth within the family and inhibit any real chance of challenging concepts of intimacy. In other words, they do not allow for true freedom of association.

To all these problems, a skeptic will simply reply that decedents can execute a will, stipulating their desired distribution of the estate and creating a personalized list of preferred beneficiaries. Executing a will is the bedrock of the law of trusts and estates, and is a far superior alternative to intestate rules.[10] However, most people do not execute wills for numerous reasons,[11] and the chances of executing a will rise with age and wealth.[12] In addition, intestate rules are more than default rules, because they have an important expressive function.[13] They reflect the law's vision of a family. For both of these reasons, strict intestacy rules that privilege the nuclear family present a true challenge to the law of inheritance.

Personalized law may present an alternative.[14] It offers an invaluable opportunity to create custom-made default rules for each particular decedent that will replace the current intestate system. Indeed, in recent years there has been a surge of literature engaging with personalized law in various areas: negligence law,[15] criminal procedure[16] and consumer law.[17] A fairly recent article by Ariel Porat and Lior Strahilevitz advocates the use of personalized default rules in a

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7. *See, e.g.*, Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975 (2007); Monopoli, *supra* note 1, at 259; Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform* 13 LAW & INEQ. J. 401, 408–09 (1995).

8. Monopoli, *supra* note 1, at 259.

9. Matthew R. Dubois, *Legal Planning for Gay, Lesbian and Nontraditional Elders*, 63 ALB. L. REV. 263, 315–16 (1999); Daniel Monk, *Writing (Gay and Lesbian) Wills*, 4 OÑATI SOCIO-LEGAL SERIES 306 (2014).

10. *See* Spitko, *supra* note 1, at 1068.

11. Wright & Sterner, *supra* note 1, at 343.

12. *See* Gary, *supra* note 1, at 17–18.

13. Spitko, *supra* note 1, at 1063–65.

14. Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2014); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 7–10, 56–57 (2013).

15. Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627 (2016).

16. Ric Simmons, *Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947.

17. Porat & Strahilevitz, *supra* note 14, at 1441–42.

number of legal fields, including intestate succession rules.[18] They claim, for example, that women may have different testamentary preferences than men,[19] younger people different testamentary preferences than older people, and that different cultural and religious backgrounds may also affect testamentary plans.[20] Using big data analysis will make it possible to draft personalized rules that vary based on gender, wealth, time of marriage, ages of children and so on.[21]

Porat and Strahilevitz use the example of intestate rules to illustrate the potential of personalized law, but the thrust of their paper targets consumer regulation.[22] They do not develop the inheritance argument, nor do they address the normative and theoretical differences between standard default rules and intestate rules. In addition, their argument promotes efficient intestate rules, and is not concerned with the potential for familial diversity.

This Article fills this void and asks whether big data can indeed be applied to resolve the tension between strict, cost-saving, simple rules and a diverse society composed of heterogeneous decedents. Relying both on theoretical accounts of inheritance law and on the burgeoning literature on the law and big data, the Article argues that there is an inherent discrepancy between inheritance law and personalized default rules. While personalized defaults rely on personal traits of decedents, most prominently their personality characteristics, intestate rules deal with relationships. Intestacy is profoundly relational; and relationships are dynamic, two-sided projects. Exploring only the characteristics of the decedent provides a partial, misguided understanding of the decedent's wishes. In addition, this Article claims that intestate rules constitute a vision of the legal family. Following my previous work, I argue that inheritance communicates a message of belongingness to a family and a community, and it is a symbol of continuity.[23] Even if members of a minority group truly prefer to favor their sons over their daughters, the law cannot create such a discriminatory rule, not only for reasons of equality,[24] but also because of the message of exclusion it communicates.[25]

Personalized intestate succession rules have to be adapted to fit the unique traits of intestate succession rules. This Article offers new

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18. *Id.* at 1419.

19. *Id.*

20. *Id.* at 1433–34.

21. *Id.* at 1419.

22. *Id.*

23. Shelly Kreiczer-Levy, *Property's Immortality*, 23 CARDOZO J.L. & GENDER 107 (2016).

24. *Trimble v. Gordon*, 430 U.S. 762, 769–70, 776 (1977).

25. Shelly Kreiczer Levy & Meital Pinto, *Property and Belongingness: Rethinking Gender-Biased Disinheritance*, 21 TEX. J. WOMEN & L. 119 (2011).

guidelines that contribute to an inheritance-specific personalized law. Personalization efforts should focus on a dynamic evaluation of relationships. Big data should therefore incorporate proxies for a relationship, not simply for personal preferences. This suggestion serves as a starting point for a full, comprehensive discussion of big data and inheritance law.

The Article proceeds as follows. Part I discusses intestate succession rules and their protection of the nuclear family to the exclusion of nontraditional familial relations. It also addresses the lack of judicial discretion in applying these rules. Part II engages with the literature on personalized law and reviews the relevant techniques of using big data in the law today. Part III then critically evaluates the use of personalized law in intestate succession, using a broad theoretical perspective on inheritance law. Part IV suggests preliminary guidelines for adapting big data techniques to the law of inheritance. A short conclusion follows.

I. INTESTATE SUCCESSION: GOALS AND CHALLENGES

A. The Law of Intestate Succession

Intestate succession determines the distribution of a decedent's estate when no valid will has been executed.[26] It is a state-prescribed allocation of property; a set of default rules. According to conventional wisdom, these rules are drafted so as to track the intent of the typical decedent.[27] Their primary function is to save the cost of executing a will.[28] Although intestate rules are merely default rules, and decedents can easily opt out of the default distribution, these rules are incredibly important. Many people die without executing a will because of complicated family dynamics, for reasons of procrastination, and because they seek to avoid the legal costs.[29]

Moreover, some scholars insist that intestate rules are not just default rules; they also have an expressive function.[30] People's preferences are not exogenous to the law. Intestacy law not only reflects society's norms but also "helps to shape and maintain them."[31]

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26. RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1, cmt. c (AM. LAW INST. 1999).

27. Hirsch, *supra* note 2, at 1074.

28. *Id.* at 1039.

29. Susan N. Gary, *Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787 (2012).

30. *See, e.g.*, Spitko, *supra* note 1.

31. Spitko, *supra* note 1, at 1100.

For these reasons, the importance of the rules can hardly be disputed. In many ways, they constitute the legal vision of the family for the purpose of inheritance. Despite various reforms over the years, intestate rules continue to privilege a family based on formal relationships: biology, adoption, and marriage.[32]

Intestate rules vary by state, and yet shared principles exist. The spouse is the primary heir in many jurisdictions. The Uniform Probate Code has increased the share of the spouse over the years.[33] According to the Revised UPC, the surviving spouse inherits the entire intestate estate when the decedent is not survived by descendants or parents.[34] In addition, the surviving spouse also inherits the entire estate in case the decedent is survived by descendants who are also the descendants of the surviving spouse and the surviving spouse has no other descendants who are not the decedent's descendants.[35] Other non-UPC statutes provide different shares to the spouse, but the overall conclusion remains that the spouse is considered to be the most important relationship in people's lives.[36] However, when it comes to informal partnership, the law is not as accepting. The UPC does not grant unmarried partners a share of the estate, though in some states, registered domestic partners do inherit each other's estate.[37]

Children and other descendants represent a second group of important intestate takers. When a decedent is not survived by a spouse or a domestic partner, descendants may inherit the entire estate.[38] Only biological or adopted children inherit their parents' estate.[39] Biological children who were conceived posthumously using assisted reproductive technology also inherit from their parents' estate under certain conditions.[40]

However, children who were not formally adopted by their functional parents are excluded from inheriting the estate;[41] this rule is especially troubling because adoption is not always a legal option. Unmarried couples and same-sex couples may face barriers when seeking to adopt.[42] In addition, a formal adoption will cut off

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32. Gary, *supra* note 29, at 792–93.

33. *Id.* at 794–95.

34. UNIF. PROBATE CODE § 2-102A(a)(1) (1990) (amended 2008).

35. *Id.*

36. *See* RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 cmt. c (AM. LAW INST. 1999).

37. Gary, *supra* note 29, at 798–99.

38. *Id.* at 800; RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 (AM. LAW INST. 1999).

39. Gary, *supra* note 29, at 803–04.

40. *Id.*

41. *Id.* at 793.

42. Wright, *supra* note 1, at 6.

inheritance rights from a biological parent.[43] Assume that the biological parents of a child divorce, the mother remarries, and the stepfather wishes to adopt the child. Such an adoption will cut ties to the biological father, even if the relationship between the father and child persists.[44]

Stepchildren have a unique position in the law today. In a 2008 amendment to the UPC, a special provision was added to acknowledge stepchildren as intestate takers. However, stepchildren only inherit if there are no other heirs at all.[45] California recognizes inheritance rights of a stepchild or a foster child under two strict conditions.[46] First, the relationship began during the child's minority and continued throughout the joint lifetimes of the child and the foster parent or stepparent. Second, it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.[47]

When there are no descendants or a surviving spouse, intestacy statutes typically grant the estate to the decedent's parents or the parent's descendants (siblings). If parents or their descendants do not survive the decedent, then the decedent's grandparents or their descendants inherit the estate.[48]

Finally, informal ties are excluded altogether from intestate succession rules. Children being cared for by extended family members (aunts, uncles, grandparents, godparents) or other forms of kinship will not inherit from the estate of their caregivers.[49] Grandchildren, nephews, and nieces will only inherit if the decedent is not survived by descendants.

This brief review clearly demonstrates that intestate succession defines a family in a fairly strict and narrow way. Although there have been significant developments over the years, the core of the rules centers around the spouse and biological or adopted children.

B. A Critique of Current Rules

Intestate rules protect a certain vision of the family. This vision attempts to mimic the preferences of most decedents, but it provides

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43. *Id*.

44. Gary, *supra* note 29, at 801.

45. UNIF. PROBATE CODE § 2-103(b) (amended 2010).

46. CAL. PROB. CODE § 6454 (2008).

47. For a discussion of this requirement, see Thomas M. Hanson, *Intestate Succession for Stepchildren: California Leads the Way, but Has It Gone Far Enough?*, 47 HASTINGS L.J. 257 (1995).

48. RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 (AM. LAW INST. 1999).

49. *See* Gary, *supra* note 29, at 807.

much too narrow a definition of family to account for diverse lifestyles and associations. The rules fail to account for the modern family for three main reasons: exclusion of important familial ties, limited discretion to account for good or bad behavior of heirs, and the exclusion of non-familial relationships.

First, intestate succession rules exclude certain types of informal familial relationships.[50] Unmarried couples do not inherit each other's estate despite declining marriage rates and rising numbers of partners in long-term committed cohabitation.[51] Informal functional parenthood in blended, same-sex or foster families is not acknowledged as well.[52] These exclusions ignore the significant changes in familial structure over the years. Rising divorce rates, multiple marriages, single parenthood, and same-sex marriages have created new types of informal relations.[53] The current rules are ill suited for a rising number of families.

Second, intestate succession rules are strictly applied. Courts do not evaluate the quality of the relationship, and intestate rules neither sanction bad behavior[54] nor reward exceptional care or attention. There are several notable exceptions. Slayer rules bar inheritance from people who intentionally killed the decedent.[55] A few states have extended the idea of an unworthy heir to those who abandon their parents or to heirs who abuse their elderly or dependent relatives.[56] However, even states that sanction the abuse of elders or parental abandonment do not truly furnish courts with broad discretion to evaluate the behavior of heirs. Suppose, for example, that a decedent has two children. Child A cares for the parent continuously and maintains a close relationship with the parent. Child B has nearly no contact with the parent, is not available in hours of need, and plainly neglects the parent's care completely. Despite the differences in behavior, both children will inherit the parent's estate in equal shares.

Frances Foster, among others, suggests a rule that sanctions bad behavior of heirs and is sensitive to the relationship between decedents and their caretakers.[57] Yet such a reform is incredibly difficult to implement under the current non-personalized regime of intestate rules. The reasons for limited judicial discretion are clear. Strict rules save

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50. *See* Gary, *supra* note 1; Spitko, *supra* note 1; Seidman, *supra* note 1.

51. *See supra* note 50; *see also* Wright & Sterner, *supra* note 1, at 343–44.

52. Wright & Sterner, *supra* note 1, at 344.

53. *Id.* at 370–71.

54. Monopoli, *supra* note 1, at 259–60; Rhodes, *supra* note 7.

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

56. Gary, *supra* note 29, at 808–10.

57. *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 230–31, 270–71 (2001).

judicial costs and resources.[58] Unworthy heir rules tend to give the court a great deal of discretion, thus defying predictability and increasing litigation costs.[59] Moreover, it may prove difficult to evaluate a relationship after the decedent has passed away, leading to possible manipulation by relatives and misjudgments by courts.

Third, intestate rules target the family. Even if we expand the definition of family to include cohabitating couples and functional parenthood, the rules still remain very much in the realm of familial affinity. Friends, neighbors, and caretakers who are not related to the decedent will never inherit from her estate. Minority groups are particularly vulnerable to this exclusion. LGBTQ decedents who do not have a life partner or children often treat their close friends as family or may want their godchildren, nephews or nieces to inherit their property.[60] In addition, the rules do not account for extended family care and kinship caregiving, practiced by certain ethnic and racial groups.[61]

These three problems with intestate rules are not easily solved. Not every foster child or friend has a meaningful relationship with the decedent. Not all decedents care about all types of behavior of their close relations. While some exclusions may have an easy fix,[62] most of them do not. Informed, affluent decedents will have the option of executing a will and opting out of the rules. But for others, unless the law employs a costly, inaccurate and discretion-based model that is sensitive to manipulation, they are left with clear, exclusionary rules. Personalized law may offer an innovative solution to this problem that reduces the costs of judicial discretion, but still offers personally-tailored rules. These rules can serve to replace intestate succession law. The next Part considers this solution.

II. BIG DATA AND PERSONALIZED LAW

Legal rules are impersonal. They do not consider the gender, age, race, or wealth of a decedent in determining the distribution of an estate. The big data revolution has led several scholars to rethink this legal premise and argue in favor of personalized legal rules.[63] Personalized law utilizes big data analysis to create custom-made rules that fit the individual personally. For example, Omri Ben-Shahar and

58. Monopoli, *supra* note 1, at 278–79.

59. *See id.* at 280–81.

60. Dubois, *supra* note 9, at 271; Monk, *supra* note 9, at 314–15.

61. Gary, *supra* note 29, at 807.

62. *Cf.* Wright, *supra* note 1 (discussing solutions to the problem of cutting the ties to a biological parent in adoption).

63. *See supra* notes 14–17.

Ariel Porat have argued in favor of personalizing negligence law.[64] Instead of an objective standard of care, courts should tailor the standard of care to "the specific actor's tendency to create risks and her ability to reduce them."[65] In other words, negligence law should replace the reasonable person standard with a "reasonable you" standard.[66] Another example is the personalization of disclosure rules. Instead of overburdening consumers with detailed, cumbersome, often irrelevant information, "pregnant women would be shown prominent warnings likely to be of greatest interest to them, and septuagenarian men would likewise see only the warnings of greatest interest to them."[67]

As part of their general argument regarding disclosure and default consumer laws, Porat and Strahilevitz promote a similar argument regarding intestate succession. While they do not focus on the modern family, they make a case for supporting defaults that reflect the true preferences of decedents.[68] Their method of creating all these different personalized defaults is the same: using big data.

Big data is defined as a process of predicting individuals' future behaviors by identifying patterns based on a computer analysis of enormous quantities of information.[69] It requires huge databases that conform, according to the literature, to the five v's: volume, velocity, variety, veracity and value.[70] Algorithms are then used to find correlations between data points, which help to assess the probability of a particular outcome.[71] The data is used to construct predictive analytical models.[72] Generally speaking, data can be collected from two different sources: private collection of data by private companies (social network companies, insurance companies and so on), and governmental collection of data.[73]

But what kind of data do we need in order to create personalized legal rules? Porat and Strahilevitz discuss two main mechanisms. First, they discuss the psychological approach of the Big Five personality characteristics: extraversion, neuroticism, agreeableness,

64. Ben-Shahar & Porat *supra* note 15.

65. *Id.* at 629.

66. *Id.*

67. Porat & Strahilevitz, *supra* note 14, at 1422.

68. *Id.* at 1422–23.

69. Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2021 (2013).

70. Venkat N. Gudivada et al., *Big Data: Promises and Problems*, 48 COMPUTER 20 (2015).

71. Caryn Devins et al., *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL'Y 357, 364 (2017).

72. *Id.*

73. Niva Elkin-Koren & Michal S. Gal, *The Chilling Effect of Governance by Data on Data Markets*, 86 U. CHI. L. REV. (forthcoming 2018).

conscientiousness and openness.[74] They argue that personality profiling identifies "powerful tendencies among individuals and groups."[75] Studies found that cellphone use and social network activity can predict these personality traits.[76] The second mechanism involves big data guinea pigs. Porat and Strahilevitz suggest that

> American law ask 1 million guinea-pig residents to make active choices about their preferences, which the law would then data mine to identify the ways in which the other 314 million individual Americans are similar to the 1 million guinea pigs. The law would provide modest compensation to the guinea pigs for the costs they incurred in the process. The guinea pigs' active choices would then become the personalized default choices for the people most similar to them across a variety of observable metrics. These surveys could be conducted through a governmental agency, like the Census Bureau or Consumer Financial Protection Bureau, or through an industry consortium.[77]

Guinea pigs would represent the broader population based on their personality traits, and take the time to consider various contractual options.[78] To take this argument to the realm of intestate succession, guinea pigs would be asked to disclose their inheritance preferences, perhaps even write wills. They can represent ethnical and racial background, age, gender, number of children, and wealth. More research is needed to show whether and how personality traits affect bequeathal preferences. Then the data would help create an algorithm for predicting personal distribution preferences.

There are variations of this model. In cases of unethical behaviors, scholars have argued that it is better to target situations, not individuals. Big data could help identify situations that increase the risk of certain behaviors, such as the time of day, the good or service provided, the specific parties to the transaction, and whether they are repeat players.[79] Instead of personalizing rules to fit people, this suggestion would personalize rules to fit situations.

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74. Porat & Strahilevitz, *supra* note 14, at 1437; *see also* Murray R. Barrick & Michael K. Mount, *The Big Five Personality Dimensions and Job Performance: A Meta-Analysis*, 44 PERSONNEL PSYCHOL. 1, 1–5 (1991)

75. Porat & Strahilevitz, *supra* note 14, at 1438.

76. *Id.* at 1438–40.

77. *Id.* at 1450.

78. *Id.*

79. Yuval Feldman & Yotam Kaplan, *Differentiated Regulation Across People and Situations: A Behavioral Ethics Perspective to Personalized Law*, at 18 (Feb. 15, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171987.

The next Part discusses the potential problems of using personalized intestate rules. Before we continue, though, it is important to discuss the normative objections to personalized law generally. This Part works with a few notable objections that have a general scope, but are also particularly relevant to the discussion of intestate rules that immediately follows.

Because personalized law is custom-made for each individual and does not have a broad reach, such laws conflict with the jurisprudential attributes of rule-making. Personalized law may undermine the rule of law. Rules are less certain, predictable and coherent. However, because they are only designed to affect one person, who presumably knows his or her own preferences, this problem is somewhat mitigated.[80] Yet this projection requires not only accuracy in determining personalized rules, but also a certain level of individual faith in the process itself. Moreover, potential heirs may not be able to predict the preferences of the decedent. I will return to this point in Part IV.

Another problem with personalized law is that it reflects current social preferences and does not acknowledge the role of the law in shaping attitudes.[81] In other words, it significantly limits the expressive function of the law, by reducing default rules to mere preferences. Downplaying the expressive function may ultimately lead to the legal acceptance of discriminatory preferences. The legal status of personalized law is unclear. While people may be allowed to discriminate in executing wills or other private instruments, state-prescribed default rules cannot be similarly biased.[82] Are personalized rules best characterized as private instruments or state law? Indeed, while Porat & Strahilevitz argue that personalized law can be counterbalanced by social values,[83] the larger normative question regarding the legal status of the rules persists.

Furthermore, because personalized law reflects current preferences, it is not sufficiently dynamic. It does not allow individuals to change their preferences, nor does it allow social preferences more generally to develop over time. Personality traits may not be dynamic,[84] but when it comes to attitudes, situations and relational preferences,

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80. Porat & Strahilevitz, *supra* note 14, at 1457–61.

81. *Cf.* Spitko, *supra* note 1; Ronald J. Scalise Jr, *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 173–76 (2006). For a general theory of the expressive function of law, see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). For a philosophical theory, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

82. *See Trimble v. Gordon*, 430 U.S. 762 (1977).

83. Porat & Strahilevitz, *supra* note 14, at 1462.

84. *Id.* at 1469–70.

people may change their views and their perception of their commitments.

Finally, one of the main costs of big data analysis is the violation of privacy. Data requires massive amounts of personal information and the ability to track people online.[85] At the end of the day, it is a matter of tradeoffs. Is the violation of privacy embedded in big data analysis worth the advantages of using personalized law?[86]

These problems are important, but they are only a gateway to a deeper, fuller discussion of personalized law. This Article does not endorse personalized law per se, but rather, it works with personalized intestate succession to start a broad discussion of the potential and limitations of using personalized rules to acknowledge and protect the modern family.

III. PERSONALIZED LAW AND INTESTACY

Personalized intestate rules offer an alternative that will potentially replace the rigid intestate system. Normatively, personalized intestacy represents a middle ground between the execution of a will and standardized one-size-fits-all rules. The normative status of this middle ground is ambivalent. These rules could plausibly be perceived as will substitutes. When executing a will, a person can be petty, capricious or vindictive.[87] Testators may discriminate among their family members based on gender, race or sexual orientation.[88] Yet default rules, even if indeed intent-furthering, carry the normative weight of the law.[89] Legal rules therefore cannot discriminate, even if most decedents have gender-biased preferences.[90] The law has an expressive function and it must protect certain social values. Personalized law presents a challenge, as its classification is murky. It is designed to mimic the preferences of decedents, but the rules are still rules enforced by legislators and courts. They are backed by the legal system and do not involve an active choice. As such, I argue, they should not be compared to wills, but rather to legal rules that must conform to the rule of law. This insight will continue to guide this analysis.

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85. Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 159 (2017); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 3 (2015).

86. Porat & Strahilevitz, *supra* note 14, at 1467–68.

87. Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1045–46 (1987)

88. For a critique, see Kreiczer-Levy & Pinto, *supra* note 25.

89. *Cf.* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

90. *Trimble v. Gordon*, 430 U.S. 762, 775 (1977).

Personalized intestate rules are based on the guinea pig method combined with big data. These "guinea pigs" represent types of decedents. More empirical work is required to assess the factors that would be used in the database. These will probably include personal characteristics such as gender, race, age, and wealth. Familial status also is likely to prove important, including marital status, whether there is a life-partner, number of children, and other forms of informal care. According to the logic of personalized law, the list of factors is not normatively inspired, but must be based on correlations between data points and distribution preferences. The data must reflect whether people who are of a certain age, familial status, gender, and level of education do indeed prefer to leave their estate to a particular list of takers. Of course, once the empirical work is done, the law can interfere and infuse the rules with considerations of equality or desert.

The potential of personalized law is clear. Breaking away from the one-size-fits-all paradigm, it provides true diversity of preferences. The typical decedent tends to be middle class, white, and heterosexual.[91] For decedents that have little opportunity to execute a will, personalized law provides an alternative that better reflects their desired distribution. From a comparative law perspective, the potential of personalized law can take yet another form. In American law, testamentary freedom is considered to be a pivotal value, and is often characterized as the regulative principle of the law.[92] However, many other legal systems acknowledge the interests of family members or close relations. For example, in several common law jurisdictions a decedent has an obligation to supply an adequate provision for the proper maintenance of certain persons, mostly her nearest relatives.[93] In addition, most European countries impose heavy limitations on the freedom of testation.[94] In family provision jurisdictions, the court has discretionary power to adjust the provisions of a will if the testator did not provide adequate provision for her relatives.[95] Personalized rules can help

91. *See supra* note 4 and accompanying text.

92. *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

93. E.L.G. TYLER, FAMILY PROVISION (1971); Joseph Laufer, *Flexible Constraints on Testamentary Freedom – A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 283 (1955).

94. For forced heirship systems, see Marie L. Revillard, *France*, *in* EUROPEAN SUCCESSION LAWS 211, 229 (David Hayton ed., 2002); George A. Pelletier, Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323 (1966).

95. *See Lee v. Hearn*, (2005) 11 VR 270 (Austl.); *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, 808 (Can.); *In re Goodchild*, [1997] 3 A.C. 63, 68 (Eng.); *In re Jennings*, [1994] 3 A.C. 27, 33–34 (Eng.); *Williams v. Aucutt* (2000) NZLR 2 CA 479, 495 (N.Z.).

improve the work of the courts, especially in jurisdictions that have an open and flexible list of potential recipients.[96]

A. Inheritance as a Relational Project

Despite these advantages, personalized intestate rules raise considerable concerns, well beyond the scope of other personalized defaults. An important concern involves the relational aspects of inheritance. Personalized law is based on personal attributes, and the methods developed to enlist big data to draft rules are focused on the individual. Personalized negligence focuses on the individual's capability to create and reduce risks, including her cognitive and physical abilities, age and experience.[97] Personalized disclosure is tailored to a person's age, familial status, religious beliefs and patterns of use.[98] Consumer protection laws are equally personalized based on personal characteristics.[99] At first glance, intestate rules follow the same logic, and are to be based on a decedent's personal characteristics. Yet this conclusion is too hasty. It does not consider the relational attributes of inheritance law.

It is well established by now that property supports relationships and facilitates cooperation.[100] Nonetheless, inheritance scholarship has remained surprisingly individual-centered. Scholars have noted the incredibly powerful role of inheritance in establishing narratives and memories, and the ability to transcend one's own mortality through the postmortem transfer of property.[101] But these narratives do not end with the testator. I have previously argued that inheritance is a relational project, and that recipients understand bequests as affirming their belongingness to decedents.[102] Because the decedent understands inheritance as a narrative of immortality and her connection to the

96. *See* Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 541 (2012).

97. Ben-Shahar & Porat, *supra* note 15, at 629–31.

98. Porat & Strahilevitz, *supra* note 14, at 1470–71.

99. *Id*.

100. Carol M. Rose, *Property as Story Telling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 40 (1990); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 658 (1988); Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162, 177 (1991); Gregory Alexander & Eduardo Peñalver, *Properties of Communities*, 10 THEORETICAL INQ. L. 127, 147 (2009); Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

101. Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265 (2016); *see also* Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355 (2013).

102. Kreiczer-Levy, *supra* note 23.

world after her death, potential recipients also perceive the transfer as connecting them to the decedent.[103]

Melanie Leslie supports the relational approach to inheritance, but from a different perspective.[104] Leslie claims that inheritance must be understood as part of a continuous relationship, which is based on reciprocity.[105] People take care of their family members and later expect an inheritance in return. Thus, according to her analysis, an inheritance is a reward for a previous relationship.[106] She further argues that when the testator fails in her obligation to reciprocate, courts must enforce it upon her.[107] Frances Foster, making another relational argument, claims that the best focus for inheritance law is care and support.[108] A relationship of care, dependency or support should be reinforced by inheritance rules, both intestate succession rules and the law of wills. These approaches emphasize the interests of recipients in a stake in the estate, but they can also be read to explain the role of relationships in the institution of inheritance.

Even if we adopt an entirely individualistic approach to succession law, we must consider relationships simply because decedents are interested in relationships. Empirical studies demonstrate that inheritance decisions often reflect an evaluation of relationships. Joshua Tate, for example, argues on the basis of economic and empirical studies that wills reflect norms of reciprocity that compensate devoted children for the care they provide.[109] Others explain that "will makers conform, by and large, to cultural prescriptions of familial responsibility over generational time."[110] When testators disinherit a relative, they may explain their choice as a response to bad behavior[111] or justify their allocation on the basis of reciprocity.[112]

Relationships are therefore an important part of inheritance jurisprudence. Recipients' behaviors and relationship with the decedent have both a social and personal role. However, the attributes of the

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103. *Id.*

104. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 581–87 (1999).

105. *Id.*

106. *Id.*

107. *Id.* at 587.

108. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199.

109. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 176–80 (2009).

110. MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 4–7 (1970).

111. *See, e.g.*, *Daily v. Wheat*, 681 S.W.2d 747, 753 (Tex. App. 1984); *In re Estate of Willenbrock*, 603 S.W.2d 348 (Tex. Civ. App. 1980).

112. Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2 J.L. FAM. STUD. 1, 28–29 (2000).

relationship are not part of the personalized law calculations. Relationships cannot be captured simply by focusing on personal attributes. The age, gender and wealth of a person may affect her preferences, but the relationships that person has with her loved ones are a crucial, indispensable element in these preferences. Moreover, relationships are dynamic, two-sided projects. They are not dependent only on the decedent. Relationships change over time, mature, evolve, or break down.[113] Foster parents and stepparents may fall out of touch with their children, but they may also develop a stronger relationship with them over time.

The behavior of certain heirs is also missing from the factors calculated by big data, and may also change with time. A relative may be caring and attentive, offering support in old age, or distant and uninterested in the wellbeing of the decedent.[114]

While negligence law and consumer law have strong personal components, the law of inheritance strongly relies on relationships. In order for personalized law to account for relationships and truly capture the relational spirit of the modern family, new tools must be developed. Part IV makes some preliminary suggestions for relational personalized law.

B. The Social Role of Inheritance

Inheritance, whether through a will or intestate succession, carries a social message of belongingness to the family. I have previously argued that inheritance is a legal institution that promotes continuity through property.[115] Continuity combines both the interests of the giver in the continuity of the self through memories, relationships, and property, but also the interests of certain recipients in a connection to their roots. The decedent's estate represents belongingness to a certain group: a family or a community.[116]

When a close relation is disinherited, they feel disowned, as though their status as a daughter, son, parent, or partner has been damaged.[117] It is a social message of discontinuity. The need to open up intestate succession rules to the modern family is not only the interest

113. *Cf.* JUDITH VIORST, NECESSARY LOSSES: THE LOVES, ILLUSIONS, DEPENDENCIES, AND IMPOSSIBLE EXPECTATIONS THAT ALL OF US HAVE TO GIVE UP IN ORDER TO GROW 170–83 (1998).

114. *Cf.* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012).

115. Kreiczer-Levy, *supra* note 23.

116. *Id.* at 109–10.

117. *Id.* at 110.

of the decedent. It is equally about the need of certain loved ones to be considered as the legal family of the deceased.

Because the devolution of property after death carries this potent social message of inclusion in the family, we must be careful in constructing personalized intestate rules. Let us return to the problem of discrimination. Suppose a certain group of decedents wish to disinherit their daughters because of their religious belief or cultural values.[118] If any of these decedents executes a will, effectively disinheriting their daughters in favor of their sons, this would be perfectly valid.[119] Yet its validity fails to consider the effect of disinheritance on these daughters. It is a message of exclusion from the family property, one that leaves women out of a meaningful form of familial continuity.[120]

Discriminatory wills are respected today because testamentary freedom protects the autonomy and free will of testators.[121] However, personalized law does not protect the same values. It mimics preferences based on the compilation of data, and there is no express will to counteract the problematic social message of exclusion.

Note that the problem with such a personalized rule is not inequality per se, but rather the social role of inheritance. Inheritance, and intestate succession as part of it, cannot be reduced to mere preferences. Rather, it encapsulates the decedent's vision of a family, the recipient's expectations of being included in this vision, and the social approval that this inclusion affords.[122] It would be wrong, therefore, to treat intestate succession as mere default rules. There are competing understandings of inheritance that reject the normative stance of the rules and adopt a cost-saving approach to intestate succession rules.[123] Nonetheless, I argue that such an approach flattens the social context of inheritance, its normative function, and the perceptions of testators, relatives, and courts alike.[124]

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118. *See Prakash v. Singh*, 2006 BCSC 1545, paras. 14, 40 (Can.); Shelly Kreiczer-Levy, *Religiously Inspired Gender-Bias Disinheritance: What's the Law Got to Do With It?*, 43 CREIGHTON L. REV. 669 (2010).

119. Kreiczer-Levy & Pinto, *supra* note 25, at 120.

120. *Id.* at 122.

121. For autonomy and life choices, see JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986).

122. Kreiczer-Levy, *supra* note 23.

123. Hirsch, *supra* note 2.

124. MELANIE B. LESLIE & STEWART E. STERK, TRUSTS AND ESTATES 98, 102 (2006); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL. PROP. PROB. & TR. J. 607, 625, 655 (1987); Jeffery P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, *in* INHERITANCE AND WEALTH IN AMERICA 173–74 (Robert K. Miller & Stephan J. McNamee eds., 1998).

In crafting personalized intestate rules, then, the law must account for the familial vision that results from particular distributions. This task requires personalized law to adopt a wider perspective. In this sense, personalized rules must be accompanied by a normative evaluation.

IV. TOWARDS PERSONALIZED INTESTACY: PRELIMINARY GUIDELINES

A. Evaluating Relationships

The main conclusion of the previous Part is that inheritance is not merely a reflection of preferences, but is rather a relational project. Even if we adhere to an individualistic conception of inheritance, relationships are important in determining the decedent's distributive choices. One possible outcome of this conclusion is that big data is just not a good fit for inheritance law. Relationships are personal and dynamic and cannot be captured by huge amounts of aggregated information. Data does not capture relationships. But there is another possible outcome, one that this Part seeks to explore by examining whether we can use big data analysis for relationships. It offers a preliminary discussion and possible guidelines, which will have to be developed in future work.

The main question becomes what sort of data points the law needs, alongside personal attributes that were discussed earlier, in order to assess and reflect relationships. This is a true challenge. Whenever the law has to grapple with informal associations that are not akin to other familial structures, courts also struggle. In Victoria, Australia the family provision requirement is not limited to formal relations. Section 91(2)(c) of the Administration and Probate Act 1958 provides that an eligible person, entitled to a provision out of the estate, can be anyone who was dependent on the decedent and that the deceased had a moral duty to provide for his or her proper maintenance and support.[125] The section further adds that "any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship," must be a consideration.[126] Other factors include maintenance during the lifetime of the deceased and the conduct and character of the dependent. Nonetheless, when courts come to apply this provision to non-related individuals, they find it difficult to evaluate the relationship.

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125. *Administration and Probate Act 1958* (Vic.) s 91(2)(c) (Austl.). This provision can be made whether the decedent died intestate or with a will. *See id.* at s 91(2)(d).

126. *Administration and Probate Act 1958* (Vic.) s 91A(2)(a) (Austl.).

In *Bentley v. Brennan*,[127] the court tried to characterize the relationship among longtime friends. The court describes the relationship and ultimately compares it to more familiar categories of formal affinity:

> It was, in my assessment, a relationship, but not an exclusive one, of mutual friendship and, perhaps, one of mutual love. From time to time it found a sexual expression in the sense which I have described. It was a relationship which was important for the plaintiff, particularly when he was experiencing difficulties in his marriage, his work, his health and in financial matters. It was probably important, too, for the deceased, although the evidence shows that he had other homosexual relationships and that the plaintiff accepted this at the time. It would seem that, as the older and more comfortably off partner, the deceased was the dominant party. Acknowledging the dangers of transposing from the homosexual to the heterosexual, I would liken this relationship to be akin to that between a man and a close woman friend. . . . As will appear, I am not, however satisfied that, from the perspective of the deceased, the relationship was one where he did or ought, in his lifetime, to have assumed a responsibility to provide support for the younger man, having regard to the statutory criteria. *It was not one which can be equated to that of a domestic partner or that of a father to a son, even making allowances for the difference between these relationships and a homosexual relationship*.[128]

The law in Victoria recognizes and supports the modern family, but struggles with its boundaries. Big data can help replace standards and court discretion with more easily processed proxies. I suggest considering three relationship proxies that can be integrated into personalized rules: living together, comingling funds and property, and care. More proxies can be analyzed, debated, and added in future work.

The first proxy is cohabitation, with or without sexual relations. When people live together for long periods of time, and their joint living is committed and other-regarding, cohabitation can be a proxy

127. [2006] VSC 113 (Austl.).

128. *Id.* paras 27–28 (emphasis added). Another example is *Iwasivka v. State Trustees Ltd.*, [2005] VSC 323 (Austl.).

for their relationship.[129] Living with others creates intimacy and familiarity,[130] and it may also develop interdependency. Consider, for example, the *Frambach v. Dunihue* case.[131] Mr. Dunihue, a widower with seven children, and the Frambachs, a couple with four children, lived together in the Frambachs' home for nineteen years.[132] During that period, Mr. Dunihue made some improvements to the house, which was small and had no indoor plumbing.[133] The three shopped together for clothes, furniture, and automobiles and paid their bills together. The arrangement ended abruptly when the Frambachs asked Mr. Dunihue to move out immediately.[134] Mr. Dunihue argued that he had been promised a place to live for the rest of his life and requested that an equitable lien be imposed on the property, but he was ultimately denied relief.[135] This case provides a vivid example of a modern family relationship that involves long-term, committed home-sharing.

However, it is important to distinguish among forms of living together. People can live together casually as roommates, and they may have a committed, long-term, stable relationship.[136] We can create categories of living together based on the length of cohabitation and the nature of collaboration in the home.[137]

A second proxy involves the economic family.[138] Instead of focusing on the home, this proxy highlights the economic household. When people share resources, pool their labor and income to support each other, they become interdependent.[139] The proxy then is designed to reflect whether the decedent and the potential recipient supported each other financially, shared resources and provided a source of security. This proxy may include elderly supporting or supported by their children or grandchildren, friends and caretakers.

A third proxy identifies care as an important component of familial life. In a world with insufficient state welfare support, caring for dependents such as the elderly, children, and the mentally or physically

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129. Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449 (2016).

130. VIVIANA ZELIZER, THE PURCHASE OF INTIMACY 213–14 (2007).

131. 419 So. 2d 1115 (Fla. Dist. Ct. App. 1982).

132. *Id.* at 1116.

133. *Id.*

134. *Id.*

135. *Id.* at 1116–17.

136. Shelly Kreiczer-Levy, *Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127 (2014).

137. *Id.* at 143–44.

138. Janet Halley, *After Gender: Tools for Progressivism in a Shift for Sexual Domination to the Economic Family*, 31 PACE L. REV. 887 (2011); Alicia Brokars Kelly, *Better Equity for Elders: Basing Economic Relations Law on Sharing and Caring*, 21 TEMPLE POL. & C.R. L. REV. 387 (2012).

139. Halley, *supra* note 138, at 900–01.

disabled is considered the role of the family.[140] Consider the Illinois statute that encourages care of family members by acknowledging a claim against the estate of the decedent.[141] Family members who lived with the deceased and cared for him or her for three consecutive years can recover the "additional opportunity and emotional costs of committing their lives to disabled relatives."[142] The provision rewards them for "often unseen and intangible sacrifices made, and opportunities forgone"[143] when a family member commits his life to "making the lives of disabled persons better."[144]

Although this provision only recognizes care by a spouse, parent, brother, sister, or child, it does underscore the importance of care in assessing commitment. A proxy could use long-term, committed care even without formal affinity as a proxy for familial relations in inheritance.[145]

None of these three proxies stands on its own. They open up the discussion to assessing relationships outside traditional familial relations, and should be combined with the personal characteristics of the decedents, and with the data we have on preferences in formal relations such as spouses and children. More normative and empirical work is needed to develop other proxies and categories of takers.

B. Guiding Principles

The next step is to define the legal status of personalized intestacy. Personalized rules represent a middle ground between wills and intestacy, and therefore raise several legal issues. First, will decedents actively choose personalized law or will it become a default option? In other words, we need to decide whether personalized law requires people to opt-in or opt-out of the rules. An opt-in approach respects the autonomy of decedents, allowing them to choose between standard rules and a more personalized yet less predictable outcome. Decedents that have nontraditional families may choose personalized law, while others will choose the strict version of intestate rules. As compelling as this approach may be, it aggravates the initial problem of intestate rules. People who do not execute wills will probably not opt in to a choice of

140. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835 (2014) (arguing that the underlying reason for legal recognition of family is to encourage private family support).

141. 755 ILL. COMP. STAT. 5/18-1.1 (2015). For a discussion of the provision, see Heather M. Fossen Forrest, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 401–07 (2003).

142. *In re Estate of Jolliff*, 771 N.E.2d 346, 351 (Ill. 2002).

143. *Id* at 350.

144. *Id*.

145. *See* Gary, *supra* note 29, at 823.

personalized rules. Opting-in requires familiarity with the law and the opportunity and resources to exercise this choice. If the purpose of personalized intestacy is to provide a tailored solution for diverse families, then personalized law has to apply as a default. Nonetheless, the law must preserve the option of opting out for decedents who prefer strict, predictable rules. Opting-out has to be a fairly easy procedure so as to respect decedents' choices.

A second legal issue concerns the normative limits of personalized law. In Part III, I discussed the problem of discriminating preferences. Personalized law is law, and it is bound by the requirements of equal treatment. Testators who prefer to discriminate among their relatives based on gender, race or sexual orientation have to execute wills.[146]

Finally, there is the problem of disappointed relatives. If a relative is disappointed by a testamentary distribution, he or she can contest the will in court.[147] Will disappointed relatives be allowed to contest personalized intestate rules and claim that these rules do not truly reflect the wishes of the decedent? Will relatives be able to ask for strict rules to replace personalized law? Because personalized law presents a middle-ground solution, it has some of the characteristics of both wills and intestate rules. On the one hand, it provides a better fit for the modern family and the decedent's preferences than strict intestate rules, but on the other hand, the decedent did not actually opt in and choose these rules.

Nonetheless, allowing relatives to contest personalized law is problematic in two significant ways. The grounds for contesting wills, such as undue influence or capacity to make a will, are simply ill-suited to the context of personalized law. More importantly, if the ground for contest is that the distributive outcome does not fit the true wishes of the decedent, then courts will have to make an impossible determination of postmortem preferences. Such an option will result in enormous costs of litigation.[148]

However, relatives can contest intestate succession rules on constitutional grounds and can also argue for a different interpretation of the law.[149] Similarly, relatives should be able to claim against some of the factors or proxies that personalized law considers, and argue that they are unconstitutional or that they represent a bias that distorts the wishes of decedents. In other words, instead of contesting a particular

146. *Cf*. Kreiczer-Levy & Pinto, *supra* note 25 (arguing that discriminatory wills should be invalidated).

147. Schoenblum, *supra* note 124; Stephen C. Simpson, *Avoiding a Will Contest: Estate Planning and a Legislative Solution*, 37 HOUS. LAW. 36 (1999).

148. *Cf*. Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 MICH. J.L. REFORM 855, 881–82 (2012).

149. *Trimble v. Gordon*, 430 U.S. 762, 763–65 (1977).

distribution, relatives will be able to make a larger claim against the factors employed by personalized law.

CONCLUSION

Families are rapidly changing, and inheritance law has yet to catch up. The reason for this gap is not just a lack of available resources or the slow reaction of legal institutions. Inheritance law is struggling to catch up because of the fluidity of the changes: there are simply no good, one-size-fits-all rules. Real change often requires expanding the role of judicial discretion, with all its faults and limitations. This Article has explored personalized intestate succession rules as a possible solution for this gap. It acknowledges their potential to truly support freedom of association and diverse lifestyles, and to push the formal boundaries of the traditional family. The Article also recognizes the practical and jurisprudential problems in personalized law, and in its fit to intestate rules. Considering both the promise and the concerns, the Article has argued that personalized intestate succession rules have to include a relational component in addition to the personal characteristics. Although the Article does not end with a full endorsement of personalized rules, it does offer a normative analysis of the solution and preliminary guidelines for its implementation.