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American Revolutions in the Law of Trusts

*Thomas P. Gallanis**

Abstract

American trust law is revolutionary. It departs in fundamental ways from the trust law of other major common-law jurisdictions, such as England, Australia, Canada, the Hong Kong Special Administrative Region, New Zealand, and Singapore. It also differs greatly from the trust law of the major civil-law countries that have adopted the trust, such as mainland China and Japan.

This Article identifies five revolutions in American trust law. Each revolution is examined in its historical context and with regard to its lasting effects. Together, the five revolutions explain American trust law's distinctiveness.

The Article's primary aim is to shape how American trust law is understood, historically and today. The Article's contribution is as fundamental as periodization. We used to teach that the "Roman Empire" was followed by the "Early Middle Ages." This periodization was transformed by the pioneering scholarship of the historian Peter Brown. Professor Brown is credited with creating the field of Late Antiquity,

* Allison and Dorothy Rouse Chair in Law, Antonin Scalia Law School, George Mason University; Visiting Professor of Law and Charles J. Merriam Scholar, University of Chicago Law School; Chair Visiting Professor, KoGuan Law School, Shanghai Jiao Tong University; Allan D. Vestal Chair in Law Emeritus, University of Iowa.

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Disclosure: I serve as the executive director of the Uniform Law Commission's Joint Editorial Board for Uniform Trust and Estates Acts and as a Uniform Law Commissioner, and served as associate reporter for the American Law Institute's Restatement (Third) of Trusts. In this Article, I am speaking in my individual capacity only.

approximately AD 250-750. Analogously, this Article's framework of the five revolutions is designed to shape our understanding of the history and development of America's distinctive trust law.

Part I of the Article identifies and analyzes the five revolutions. Part II offers a personal assessment of American trust law's distinctiveness. A brief conclusion follows.

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> "Legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges; but our dots are not numbered. . . . No major proposition in legal history is ever likely to be final, and any single picture must be a personal one."
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> — S.F.C. Milsom[1]

Introduction

American trust law is revolutionary. It departs in fundamental ways from the trust law of other major common-law jurisdictions, such as England, Australia, Canada, the Hong Kong Special Administrative Region,[2] New Zealand, and Singapore. It also differs greatly from the trust law of the major civil-law countries that have adopted the trust, such as mainland China[3] and Japan.[4]

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1 S.F.C. Milsom, Historical Foundations of the Common Law 8 (Butterworths & Co. 2d ed. 1981).

2 Hong Kong is a special administrative region of the People's Republic of China.

3 The reference is to the People's Republic of China excluding Taiwan and the special administrative regions of Hong Kong and Macau.

4 For a recent taxonomy of trust law in the Asia-Pacific region, see Ying Khai Liew, *Trusts Law in the Asia-Pacific Region: Five Reflections*, 38 Tr. L. Int'l 83 (2024). Professor

This Article identifies five revolutions in American trust law. Each revolution is examined in its historical context and with regard to its lasting effects. Together, the five revolutions explain American trust law's distinctiveness.

The Article's primary aim is to shape how American trust law is understood, historically and today. The Article's contribution is as fundamental as periodization. Periodization is the division of the past into distinct time-periods. It shapes how we understand history. We used to teach that the "Roman Empire" was followed by the "Early Middle Ages." This periodization was transformed by the pioneering scholarship of the historian Peter Brown.[5] Professor Brown is credited with creating the field of Late Antiquity, approximately AD 250-750.[6] Analogously, this Article's framework of the five revolutions is designed to shape our understanding of the history and development of America's distinctive trust law.

Part I of the Article identifies and analyzes the five revolutions. Each revolution occurred at a particular period in American history, though some remain underway, and all have continuing effects. Part II offers a personal assessment of American trust law's distinctiveness. A brief conclusion follows.

Liew divides the countries of the Asia-Pacific region into five groups: (1) countries formerly part of the British Empire whose trust law descends from English decisional law, such as Australia, New Zealand, Hong Kong, and Singapore; (2) countries formerly part of the British Empire whose trust law is based on legislation, such as India, Pakistan, Bangladesh, Myanmar, and Sri Lanka; (3) civil-law countries that introduced the trust by legislation, such as China, Japan, South Korea, and Taiwan; (4) offshore jurisdictions that might otherwise belong in group 1 but for their "aggressive policies of marketing financial services, including the trust, to non-residents," *id.* at 87, such as the Cook Islands, Niue, and Samoa; and (5) countries that do not recognize the trust, such as Indonesia, Vietnam, and Thailand.

[5] Professor Brown, who is Irish, taught in England before moving to Berkeley and then Princeton, where he concluded his career as the Philip and Beulah Rollins Professor of History. *See Peter Brown,* Princeton Univ. Dep't of Hist., https://history.princeton.edu/people/peter-brown [https://perma.cc/HY3K-DZ5H] (last visited May 27, 2026). He used to joke "that he could not come near Harvard without [Harvard President] Derek Bok offering him a job." James Hankins, *Can Harvard Win Back America's Respect?*, L. & Liberty (June 3, 2024), https://lawliberty.org/can-harvard-win-back-americas-respect/ [https://perma.cc/8QWG-9LGC].

[6] *See* Peter Brown, The World of Late Antiquity 7 (1971). The University of Oxford Faculty of History divides European and world history into fourteen periods, the first two of which are "The World of Late Antiquity, 250-650" and "The Early Medieval World, 600-1000." *See European and World History*, Univ. of Oxford, https://www.history.ox.ac.uk/european-and-world-history-fhs [https://perma.cc/3EK7-URE8] (last visited May 27, 2026). Still, the older periodization persists. See, for example, the relevant volumes of the *Short Oxford History of Europe*: Edward Bisham, Roman Europe, 1000 BC-AD 400 (Oxford 2009); Rosamond McKitterick, The Early Middle Ages: Europe 400-1000 (Oxford 2001).

I. The Five Revolutions of American Trust Law

American trust law has undergone five revolutions. We examine them in this Part.

A. The First Revolution: The Laboratory of the States

The first revolution in American trust law traces its origins before the American Revolution. In the colonial period, the American colonies were legally separate.[7] Law, including what trust law there was, was a matter for each colony.[8] Some colonies had distinct courts of equity, for example; others did not.[9] After achieving independence from Great Britain, the American colonies "became sovereign states."[10] The first national constitution was the Articles of Confederation—adopted in 1777, in force from 1781—by which the states "enter[ed] into a firm league of friendship with each other."[11] It was replaced by the Constitution of 1787.[12] The Constitution's Tenth Amendment, ratified in 1791, reserves nondelegated and nonprohibited powers "to the States respectively, or to the people."[13] These documents established a polity in which trust law is reserved to the states; it is not federal law. American federalism made trust law a matter of state law within a federal-state system.

The original American states were the thirteen British colonies in North America as of July 4, 1776: Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia.[14] Three

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7 *See* Lawrence M. Friedman, A History of American Law 3 (4th ed. 2019). A treatment of colonial property law appears in 4 William E. Nelson, The Common Law in Colonial America (Law and the Constitution on the Eve of Independence, 1735-1776) 53-56 (2018).

8 Trusts existed at least in some colonies. *See* Friedman, *supra* note 7, at 30-31 (describing a noncharitable trust created by a Maryland physician in 1664). *See also* 3 William E. Nelson, The Common Law in Colonial America (The Chesapeake and New England, 1660-1750) 37 (2016) (observing that the words "in trust" were used in colonial Virginia, but not giving any additional information about the context in which these words were used).

9 For discussion, see Friedman, *supra* note 7, at 22-23.

10 *Id.* at 78.

11 Articles of Confederation of 1777, art. III (adopted Nov. 15, 1777; in force from Mar. 1, 1781).

12 The text of the Constitution is available at *The Constitution of the United States: A Transcription*, The Nat'l Archives, https://www.archives.gov/founding-docs/constitution-transcript [https://perma.cc/A6JR-KBMB] (last visited May 27, 2026).

13 U.S. Const. amend. X.

14 *See* Samuel Shipley, *List of U.S. States' Dates of Admission to the Union*, Brittanica (Feb. 11, 2020), https://www.britannica.com/place/list-of-US-states-by-date-of-admission-to-the-Union-2130026 [https://perma.cc/KC3N-XC6L].

additional states—Vermont, Kentucky, and Tennessee—joined in the 1790s.[15] The nineteenth and twentieth centuries saw substantial territorial expansion and corresponding increases in the number of American states. By 1900, the nation consisted of forty-five states.[16] The most recent states to be admitted, Alaska and Hawaii, joined in 1959.[17] The total number of jurisdictions within the United States having sovereignty over their trust law is now fifty-one: fifty states plus the District of Columbia.

No other major country has so many "laboratories" of the law.[18] These sub-national jurisdictions inevitably diverge on matters of state law, including trust law. Indeed, the divergences across many fields of state law explain two distinctively American forms of legal literature: megatreatises and Restatements.

Let us begin with megatreatises. England, Australia, Canada, the Hong Kong Special Administrative Region, New Zealand, and Singapore all have treatises on trust law[19] but none with as many volumes as the American megatreatises authored originally by Austin Wakeman Scott or George Gleason Bogert.[20] The reason is that the United States has so many states producing divergent rules of trust law. The same is true for other fields of law for which there are American megatreatises, such as *Williston on Contracts*.[21] Consider the words of Professor John Langbein:

> The size and ambition of the American megatreatises was . . . deeply affected by the great structural difference between English and American law. The English operated a unitary legal system, whose single pyramid of courts usually produced authoritative outcomes even at the frontier of the law. The Americans, by contrast, had fifty-odd legal systems, and on close questions of decisional law, these jurisdictions were bound to split. . . . [T]he Pennsylvania rule would be X, the Illinois rule Y, the California rule Z.[22]

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15 *See id.*

16 Aaron O'Neill, *Total number of US states*, at the end of each year, since the Declaration of Independence in 1776*, STATISTA (July 6, 2020), https://www.statista.com/statistics/1043617/number-us-states-by-year/ [https://perma.cc/6C8Y-7NTM].

17 *Id.*

18 The nomenclature derives from *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

19 *See, e.g.*, *infra* notes 36-37.

20 *See* AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS (1939) (4 vols.); GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES (1935-1955) (9 vols. including vol. 2A).

21 *See* SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920) (4 vols.).

22 John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in PRESSING PROBLEMS IN THE LAW, VOLUME 2: WHAT ARE LAW SCHOOLS FOR? 2 (P.B.H. Birks ed., 1996).

Differences in state law also explain the origin of the Restatements of the Law produced by the American Law Institute (ALI). The ALI was founded in 1923 in response to perceived "uncertainty" and "complexity" in the law.[23] One source of that uncertainty and complexity, although not the only source, was the variation in state law. In the words of the Committee Report that led to the formation of the ALI,

> The fact . . . that the nation is composed of forty-eight states, each of which as well as the Federal Government is an independent source of law, means that the law on any subject in any one jurisdiction may differ from the law of one or more or all of the other jurisdictions. These variations in law are themselves a potent cause of uncertainty and complexity, and because of this and for other reasons do much injury, not only where transactions are carried on in two or more states, but also where transactions are carried on wholly within one state. . . .We are convinced therefore that the specific work which any organization created by the legal profession to improve the law should undertake on its formation is the production of such a "Restatement of the Law."[24]

The aim of the Restatements was "not only . . . to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life."[25] The first Restatement of Trusts was published in 1935;[26] the Restatement (Second) of Trusts was published in 1959;[27] and the Restatement (Third) of Trusts was published from 1992 to 2012.[28]

Divergence in state law—including the law of trusts—is a result of American federalism and the number of American states. This divergence in trust law across the states is a characteristic feature of the American system.

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23 REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE 6 (1923).

24 *Id.* at 8-9, 13.

25 *Id.* at 14. *See also* HERBERT F. GOODRICH & PAUL A. WOLKIN, THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961 (AM. L. INST. 1961); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990).

26 *See* RESTATEMENT OF TRUSTS (AM. LAW INST. 1935).

27 *See* RESTATEMENT (SECOND) OF TRUSTS (AM. LAW INST. 1959).

28 *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (AM. LAW INST. 1992); RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2007); RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2012).

B. The Second Revolution: The Break from England

The second revolution in American trust law occurred in the late nineteenth century. American trust law broke away from England's emphasis on the trust's beneficiaries in favor of a distinctively American approach honoring the intention or presumed intention of the settlor.

During much of the nineteenth century, American lawyers and courts made use of English trust law, albeit with state-by-state variations.[29] English legal treatises were republished and influential. *A Practical Treatise on the Law of Trusts and Trustees* by the English barrister Thomas Lewin, for example, was published in London in 1837[30] and in Philadelphia in 1839.[31] A second American edition was published in Philadelphia in 1858.[32] Perhaps the first comprehensive American-born treatise on trust law—*A Treatise on the Law of Trusts and Trustees* by Jairius Ware Perry, published in Boston in 1872[33]—relied heavily on Lewin's fifth edition and English precedents. Among these English precedents were two cases—*Saunders v. Vautier* (1841)[34] and *Brandon v. Robinson* (1811)[35]—relating to what today in England and other major common-law jurisdictions is known as the beneficiary principle. The beneficiary principle states that, in order for a trust to be valid, there must be a beneficiary capable of enforcing the trust.[36] The trust laws of England and other major common-law jurisdictions are committed to the beneficiary principle.[37] Related to the beneficiary principle is the rule of *Saunders v. Vautier*: If the beneficiaries of a trust are competent to consent and do consent to the trust's premature termination, the trust is terminated without regard to the wishes of the

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29 *See* Friedman, *supra* note 7, at 233-36.

30 *See* Thomas Lewin, A Practical Treatise on the Law of Trusts and Trustees (A. Maxwell 1837).

31 *See* Thomas Lewin, A Practical Treatise on the Law of Trusts and Trustees (John S. Littell 1839).

32 *See* Thomas Lewin, A Practical Treatise on the Law of Trusts and Trustees (T. & J.W. Johnson 2d ed. 1858) (from the 3d London ed.).

33 *See* Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees (Little, Brown & Co. 1872).

34 *See* Cr. & Ph. 240, 4 Beav. 115 (Ch. 1841).

35 *See* 18 Ves. Jun. 429, 34 Eng. Rep. 379 (Ch. 1811).

36 *See, e.g.*, 1 Lynton Tucker et al., Lewin on Trusts § 5-053 (Sweet & Maxwell 20th ed. 2023).

37 *See id.*; G.E. Dal Pont, Equity and Trusts in Australia ¶ 17.95 (Thomson Reuters 8th ed. 2023); Donovan Waters, Lionel Smith & Mark Gillen, Waters' Law of Trusts in Canada § 17.III (Thomson Reuters 5th ed. 2021); Lawrence Ma, Equity and Trusts Law in Hong Kong ¶¶ 14-18 (LexisNexis 5th ed. 2022); Andrew S. Butler, Equity and Trusts in New Zealand ¶ 5.3.4 (Thomson Reuters 3d ed. 2025); Christopher Hare & Vincent Ooi, Singapore Trusts Law ¶¶ 3-1 to 3-3 (LexisNexis 2021).

settlor as expressed in the terms of the trust. [38] The emphasis in England and other major common-law jurisdictions is on the beneficiaries as the equitable owners of the property in trust. Their desire for outright ownership of the trust assets overrides the settlor's desire to keep the property in trust. Also related to the beneficiary principle is the rejection of the spendthrift trust, for example in *Brandon v. Robinson*.[39] The beneficiaries are the equitable owners of the trust property, and the alienation of their interests in the trust cannot be disabled by a spendthrift provision in the terms of the trust. Perry's 1872 treatise cites *Saunders* and *Brandon* approvingly.[40]

American trust law broke away from this English approach, with the break occurring primarily in the late nineteenth century.[41] There were some antecedents in Pennsylvania and New York: Pennsylvania recognized spendthrift trusts as a matter of decisional law;[42] and New York authorized

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38 *See* 1 Tucker et al., *supra* note 36, §§ 22-015 to 22-016. On the rule of *Saunders* as part of the current law in other common-law jurisdictions, see Dal Pont, *supra* note 37, ¶¶ 25.135 to 25.145; Waters, Smith & Gillen, *supra* note 37, § 23.II; Ma, *supra* note 37, ¶ 15-117; Butler, *supra* note 37, at ¶ 6.86; Hare & Ooi, *supra* note 37, ¶¶ 3-17 to 3-20.

39 18 Ves. Jun. 429, 34 Eng. Rep. 379 (Ch. 1811). Instead, trusts in England and other common-law jurisdictions can use forfeiture restraints, rather than disabling restraints, in the form of the "protective trust." *See* Jamie Glister & James Lee, Hanbury & Martin: Modern Equity ch. 8 (23d ed. 2024); Dal Pont, *supra* note 37, ¶¶ 27.125 to 27.130; Waters, Smith & Gillen, *supra* note 37, § 2.IX.C (noting that protective trusts are "not widely used" in Canada); Ma, *supra* note 37, ¶ 14-65 (observing that protective trusts in the Hong Kong Special Administrative Region are "very rare"); Butler, *supra* note 37, ¶ 3.2.7(1) (observing that the "Trusts Act 2019 does not provide for statutory protective trusts, but this does not mean that such trusts cannot be created" under the decisional law). The treatise on Singapore Trusts Law, cited *supra* note 37, does not mention the protective trust.

40 *See* Perry, *supra* note 33, at 353 n.1 (citing *Brandon*), 360 n.5, 566 n.8 (citing *Saunders*).

41 *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 Stan. L. Rev. 1189, 1195-1208 (1985) [hereinafter Alexander, *Dead Hand*]; Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 Iowa L. Rev. 215, 219-223, 226-29 (2011). *See also* Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 Law & Hist. Rev. 303 (1987).

42 *See generally* Nicholas Unkovic, *Spendthrift Trusts in Pennsylvania*, 36 Dick. L. Rev. 45 (1931). Professor John Chipman Gray proffered the explanation that spendthrift trusts were recognized in Pennsylvania because the state had no equity courts in the early nineteenth century, thereby enabling spendthrift trusts to be effective in practice because creditors had no procedure for reaching a beneficiary's interest. *See* John Chipman Gray, Restraints on the Alienation of Property 138 (Charles C. Soule 1883). This also was the view of Dean Erwin Griswold. *See* Erwin N. Griswold, Spendthrift Trusts 21-22 (Matthew Bender & Co. 2d ed. 1947). Dean Griswold observed that "[w]hen, in later years, the Pennsylvania courts gradually acquired equity powers, spendthrift trusts had become firmly established, and an accepted part of the law. Opinion as to their wisdom, however, was not unanimous, even in Pennsylvania." *Id.* at 22. Professor Gray's explanation was criticized by Philadelphia attorney Roland Foulke, who traced the origin of spendthrift trusts in Pennsylvania to dictum in *Fisher v. Taylor*, 2 Rawle 33 (1829). *See* Roland R. Foulke, A Treatise on the Rules Against Perpetuities, Restraints on Alienation and Restraints on Enjoyment as Applicable to Gifts of Property in Pennsylvania 171-73 (George T. Bisel Co. 1909).

spendthrift trusts by statutes enacted in 1828 and 1830.[43] But the real tide turned in the late nineteenth century, after the U.S. Supreme Court in *Nichols v. Eaton* (1875) upheld a provision in a testamentary trust that the beneficiary's interest would cease upon the beneficiary's insolvency or bankruptcy.[44] Among the leading state cases[45] were *Broadway National Bank v. Adams* (1882)[46] and *Claflin v. Claflin* (1889).[47] All American states now follow *Broadway National Bank* in allowing spendthrift trusts,[48] and most American states adopt some form of the *Claflin* rule:[49] The premature termination of a noncharitable irrevocable trust requires more than beneficiary consent; it also requires that the early termination must not defeat a material purpose of the settlor.[50] The core rationale of the American approach is to honor the settlor's intention.[51] The settlor's

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Foulke's explanation finds support in *In re Mehaffey's Estate*, 20 A. 1056, 1056 (Pa. 1891) ("It is well settled by an unbroken line of cases commencing with *Fisher v. Taylor*, 2 Rawle, 33, that, by using apt words, a parent may create a special trust for the benefit of an unfortunate or a spendthrift child, without exposing his bounty to liability for any debts, contracts, or engagements of the beneficiary."). Whatever the explanation, spendthrift trusts were recognized in Pennsylvania as a matter of decisional law.

43 For a discussion of the New York statutes, see Griswold, *supra* note 42, at 46-51.

44 *See* 91 U.S. 716, 718, 721-22, 729 (1875). The contemporary response of Professor Gray is noteworthy: "In 1876, I shared the surprise, common to many lawyers, at the opinion of the Supreme Court in the case of *Nichols v. Eaton*, containing, as it did, much that was contrary to what, both in teaching and in practice, I had hitherto supposed to be settled law." Gray, *supra* note 42, at iii (citation omitted). Writing decades later, Dean Griswold expressed the view that "the dictum in *Nichols v. Eaton* . . . was the greatest single factor in the establishment of spendthrift trusts in the United States." Griswold, *supra* note 42, at 22.

45 *Broadway National Bank* and *Claflin* were swiftly recognized as important cases, for example by Professor James Barr Ames, who featured them in his casebook on trusts. *See* James Barr Ames, A Selection of Cases on the Law of Trusts 397-400 (*Broadway National Bank*), 455-58 (*Claflin*) (Harv. L. Rev. Publ'g Ass'n 2d ed. 1893). The first edition of Ames's casebook was published in 1881-82, before *Broadway National Bank* and *Claflin* were decided. *See* James Barr Ames, A Selection of Cases on the Law of Trusts (John Wilson & Son 1881). Ames added the cases when preparing the second edition. Both cases also were featured in Austin Wakeman Scott, Select Cases and Other Authorities on the Law of Trusts 604-08 (*Broadway National Bank*), 828-31 (*Claflin*) (1919). By 1921, *Broadway National Bank* and *Claflin* represented the majority view among U.S. states. *See* George Gleason Bogert, Handbook of the Law of Trusts 183, 580 (West Publishing Co. 1921).

46 133 Mass. 170 (1882).

47 20 N.E. 454 (Mass. 1889).

48 *See* Austin Wakeman Scott & Mark L. Ascher, Scott and Ascher on Trusts § 15.2.1 (Wolters Kluwer 6th ed. 2019).

49 *See id*. § 34.1.

50 *See* Restatement (Third) of Trusts § 65 (Am. Law Inst. 2003). *See* Unif. Tr. Code § 411(b) (Unif. L. Comm'n). Citations to the Uniform Trust Code are to the current version unless a date is given in parentheses.

51 *See Broadway Nat'l Bank*, 133 Mass. at 174 ("The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to

intention or presumed intention is the paramount concern. In the words of Justice Horace Harmon Lurton of the U.S. Supreme Court in *Shelton v. King* (1913), embracing the doctrine of *Claflin v. Claflin*, "There is no higher duty which rests upon a court than to carry out the intentions of the testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."[52]

What explains this break from England in favoring the wishes of the settlor over those of the beneficiaries? Professor Gregory Alexander describes the break as follows:

> Both sides saw themselves as defenders of individual freedom of alienation, the one protecting the grantor's power of alienation, the other preserving that power for the grantee. This principle of individual freedom of alienation itself was utterly indeterminate, so both sides could appeal to it. An unavoidable trade-off was involved, and the choice between grantor and grantee was ultimately based on a choice between competing social visions . . . .[53]

He argues that the social vision underlying the new trust doctrines was shaped by analogy to the family, with the settlor as *paterfamilias*:

> The family property trust was treated as a surrogate for the family itself. Enforcing the restraints against alienation and anticipation reproduced, in the context of the trust arrangement, the nineteenth century image of the structure of power within the family. Autonomy and freedom of action were as undesirable in the beneficiary as they were in the child. Just as the family was identified as a hierarchical arrangement within which broad discretionary power was conferred on the husband in order to maintain its well-being, so the private trust was made into a structure of power within which the power of beneficiaries was subordinate to that of the settlor.[54]

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the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach."); *Claflin*, 20 N.E. at 456 ("[A] testator has the right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and . . . his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy").

52 Shelton v. King, 229 U.S. 90, 101 (1913).

53 Alexander, *Dead Hand*, *supra* note 41, at 1236-37.

54 *Id.* at 1253.

The description of this social vision accurately captures its emphasis on honoring the settlor's protective purposes toward the trust's beneficiaries, who typically were and are members of the settlor's family, but it does not fully explain the break from England: in other words, why American judges embraced the protective social vision for the law of trusts while English judges did not.

Professor Joshua Getzler explored the American break from English trust law in an article published in 2009 but did not reach any firm conclusions; the "disparities between [these] jurisdictions remain to be explained."[55] He wisely cautioned his readers against "overly simplistic"[56] answers or "neat . . . explanations."[57]

A complete answer awaits the full examination of factors internal and external to the American and English legal systems,[58] but let me offer a partial hypothesis. The hypothesis concerns the relationship between law and equity in America and England in the late nineteenth century. The court in *Broadway National Bank* emphasized a practical distinction between legal and equitable property interests:

> It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. . . . But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.[59]

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55 *See* Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 Theoretical Inquiries in L. 355, 355 (2009). I am grateful to Professor Lionel Smith for this reference.

56 *Id.* at 384. One simplistic explanation rejected by Professor Getzler is that "American property and debt regimes had an overall pro-debtor character"; he observes that "the reality is a good deal more complex." *Id.*

57 *Id.* at 387.

58 On the distinction between internal and external legal history, see Thomas P. Gallanis, *The Evolution of the Common Law*, *in* Studies in Canon Law and Common Law in Honor of R.H. Helmholz 63, 82 (Troy L. Harris ed., Robbins Collection 2015); David Ibbetson, *What is Legal History a History Of?*, *in* Law and History 33, 33-34 (Andrew Lewis & Michael Lobban eds., Oxford 2004).

59 Broadway Nat'l Bank v. Adams, 133 Mass. 170, 171-72 (1882).

The court in *Broadway National Bank* departed from the English precedents forbidding restraints on alienation because the court perceived a practical distinction between property interests at law and property interests in trust. The court in *Claflin*—concerned with the related question of early termination or "anticipation"[60]— concluded that the rule of *Broadway National Bank* applied with equal force to the facts before it: "The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this . . . ."[61] American courts, in short, were comfortable with divergent approaches to legal and equitable interests in property. In contrast, the law of equity in England in the nineteenth century saw a series of attempts at convergence with the common law. This was true during the chancellorship of Lord Eldon (1801-1806, 1807-1827),[62] who decided *Brandon v. Robinson*, and again true in the wake of the Judicature Acts of 1873-1875, which fused the courts of law and equity into a new amalgamated High Court of Justice, with divisions based on the old central courts such as Queen's Bench and Chancery.[63] The complete doctrinal fusion of law and equity was not achieved by the Judicature Acts[64]—although a prior, unsuccessful version of the legislation stated that they should be "blended and united."[65] In such an environment, it is unsurprising that English judges of the late nineteenth and early twentieth centuries did not follow their American counterparts in treating equitable property interests so differently from property interests at common law. In the words of Professor Stuart Anderson:

> English judges did not take the American road. They steered away from policy and adhered to the basic premise that all dispositions must conform to an externally imposed register of property interests. . . . So in England *Brandon v. Robinson* remained orthodox, and although Lord Herschell acknowledged in 1895 that *Saunders v. Vautier* rested more upon assumption than upon decision he and the rest of the House of Lords thought it too deeply entrenched to be open to review.[66]

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60 Alexander, *Dead Hand*, *supra* note 41, at 1202.

61 Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889).

62 *See* Patrick Polden, *The Judicature Acts*, *in* 11 The Oxford History of the Laws of England: Volume XI: 1820-1914 English Legal System 757 (William Cornish et al. eds., 2010).

63 *See id.* at 763-64.

64 *See id.* at 770-73.

65 Stephen Waddams, *Equity in English Contract Law: The Impact of the Judicature Acts (1873–75)*, 33 J. Legal Hist. 185, 186 (2012) (discussing an amended bill).

66 Stuart Anderson, *Trusts and Trustees*, *in* 12 Oxford History of the Laws of England (1820-1914 Private Law) 252 (William Cornish et al. eds., 2010).

The English law of trusts stayed on its path. So did the trust laws of almost all jurisdictions whose laws derive from England. The American law of trusts broke away toward a distinctive approach honoring the settlor's protective intentions.

C. The Third Revolution: Trusts *and* Estates

The third American revolution in trust law started in the 1920s. Trust law became part of the law of "trusts and estates."

This revolution affected how trust law is conceptualized as a field of law. The revolution started in the law schools and spread outward. The teaching of trust law in the United States became allied to the law of succession and was re-conceptualized as part of the law of donative transfers or "trusts and estates."[67]

The American taxonomy is in noticeable contrast to that of other major common-law jurisdictions,[68] where trust law is conceptualized and taught as a part of the law of equity,[69] and to the major civil-law or hybrid-law countries that have adopted the trust,[70] such as mainland China and Japan, where trust law is conceptualized as a part of civil or

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67 For discussion, see Thomas P. Gallanis, *Commercial Trusts in U.S. Legal Thought: Historical Puzzles and Future Directions*, 88 U. Cin. L. Rev. 843 (2020).

68 Excluded from the discussion are countries and territories that are not economically significant in terms of their gross domestic product (GDP), such as the Bahamas, Belize, Bermuda, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, Jersey, and St. Kitts and Nevis; however, these countries and territories do play a role in international estate planning. For GDP data, see *GDP (current US$): All Countries and Economies*, World Bank, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD [https://perma.cc/LUJ2-SBSN] (last visited May 27, 2026). Also excluded from the discussion is India, where trust law is governed by the 1882 Indian Trust Act, which has not been amended since its enactment. *See* Anju Gandhi, Jahnavi Dwarkadas & Avni Gupta, *Developments in Trust Law in India Through the SEBI Lens*, 30 Trusts & Trustees, Feb. 2024, at 3, 3 (also observing that noncharitable trusts in India "are most commonly used for achieving objectives such as consolidation and ring fencing of assets, streamlining succession planning and efficient governance of family businesses, amongst others").

69 For England, see Glister & Lee, *supra* note 39; Graham Virgo, The Principles of Equity and Trusts (Oxford 5th ed. 2023). For Australia, see Dal Pont, *supra* note 37. For Canada, see Waters, Smith & Gillen, *supra* note 37, § 1.II (defining a trust as "the relationship which arises whenever a person . . . is compelled *in equity* to hold property . . . for the benefit of some persons . . . or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust") (emphasis added). For the Hong Kong Special Administrative Region, see Ma, *supra* note 37. For New Zealand, see Butler, *supra* note 37. For Singapore, see Hare & Ooi, *supra* note 37, ch. 1 ("Equity and Trusts in Singapore").

70 Excluded from the discussion are economically important civil-law countries that have "trust-like" devices but not the trust, such as France (*fiducie*) and Germany (*Treuhand*); civil-law countries that recognize the trust by virtue of the Hague Convention on the Law Applicable to Trusts and on their Recognition, such as Italy and Switzerland;

commercial law[71] and where trusts are used primarily for commercial purposes rather than for family wealth transmission.[72]

American law is revolutionary in allying trust law with the law of succession, both of which are conceptualized as components of the law of donative transfers. Emblematic of this alliance of trust law and succession law is the distinctively American category of legal teaching and scholarly writing known as "trusts and estates."[73]

I have explored in a previous law review article the development of "trusts and estates" as a distinctively American category,[74] so only a summary is needed here. In the late nineteenth and early twentieth centuries, American law schools did not combine the teaching of trusts with the teaching of succession. They offered courses on *trusts*. This was reflected in the market for published teaching materials. Professor James Barr Ames of Harvard published his casebook on the law of trusts in 1881-1882,[75] with

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and civil-law countries that are not economically significant in terms of their GDP albeit with trust law relevant to international estate planning, such as Mauritius.

71 Perhaps because of the common-law origins of the trust, the trust statutes in force in mainland China (Trust Law 2001) and Japan (Trust Act 2006) have not been incorporated into the countries' respective civil or commercial codes. For an examination of the relationship between the Chinese Civil Code and the Trust Law 2001, for example, see Jian Qu, *Trusts and the Chinese Civil Code: Toward a New Era of Codification*, 27 Trusts & Trustees, Feb./Mar. 2021, at 82. Nevertheless, it is fair to say that trust law is conceptualized in mainland China and Japan as a part of the civil or commercial law; trusts are not generally viewed as part of the law of succession, although one provision in the "Succession" part of the Chinese Civil Code authorizes the creation of testamentary trusts. *See id.* at 87.

72 For mainland China, see Mi Wang, *Private Trusts in China and Some Lessons from Australia*, 27 Trusts & Trustees, Oct. 2021, at 771, 771 (observing that "nearly all current Chinese trusts are commercial"). For Japan, see Masayuki Tamaruya, *The Transformation of Japanese Trust Law and Practice: Historical Contexts and Future Challenges*, *in* Asia-Pacific Trust Law: Theory and Practice in Context, at 215 (Ying Khai Liew & Matthew Harding eds., Hart 2021) (observing that trusts in Japan have been used "mostly for commercial purposes" since the introduction of comprehensive trust legislation in 1922; the current 2006 Trust Act "was primarily motivated by the desire to increase flexibility of trust law to meet the needs of increasingly complex commercial trust practices" but also "contained several provisions that expressly authorize the use of trusts for succession planning").

73 *See* Gallanis, *supra* note 67, at 846-51. Even in Canada, there typically is a separate course on trusts, rather than a combined course on trusts and succession. *See, e.g.*, *Course List JD Program,* Jackman Law at Univ. of Toronto, https://www.law.utoronto.ca/academic-programs/course-calendar [https://perma.cc/SV2S-269W] (last visited May 27, 2026) (Trusts, taught by Professor Mohammad Fadel); *2024-2025 Course Descriptions*, Peter A. Allard Sch. of L., https://allard.ubc.ca/sites/default/files/2024-09/course_descriptions_2024W_2024-09-17.pdf [https://perma.cc/W84C-HERX] (last visited May 27, 2026) (Trusts, taught by Professors Adam Hofri-Winogradow & Dennis Pavlich).

74 *See, e.g.*, Gallanis, *supra* note 67, at 846-51 (forming the basis for this and the subsequent paragraph without further citation).

75 James Barr Ames, A Selection of Cases on the Law of Trusts (J. Wilson 1881-1882).

a second edition in 1893.[76] Professor Austin Wakeman Scott of Harvard published his casebook on trusts in 1919,[77] with subsequent editions in 1931, 1940, 1951, and 1966.[78] Professor George Gleason Bogert of the University of Chicago published his casebook on trusts in 1939,[79] with subsequent editions published during his lifetime in 1950, 1958, and 1967.[80] These casebooks were used in the classroom in courses on trusts.

The impetus for change can be traced to the Columbia Law School faculty, who in the second half of the 1920s embarked on a large-scale project of reforming the curriculum in order to move away from Harvard Law School's Langdellian model, which focused on appellate case law, and toward a program of legal education that "approach[ed] the study of law in terms of [its] underlying political, economic, and social factors."[81] In charge of reforming the part of Columbia's curriculum relating to the law of property was Professor Richard Powell. Powell reorganized the separate courses on "Wills," "Trusts," and "Future Interests" into a single course called "Trusts and Estates." Here is the account from an official history of the Columbia Law School:

> Perhaps the most radical change in the part of the old curriculum dealing with property was the tour de force executed by Professor Powell in his now famous course, Trusts and Estates, where he combined related parts of the subject matter previously given in separate courses, such as Future Interests, Trusts, and Wills. . . . The combination of materials proved most effective from a teaching point of view, and the course was regarded by the students from the beginning as one of the best offered in the Law School.[82]

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76 James Barr Ames, A Selection of Cases on the Law of Trusts (Harvard Law Review 2d ed. 1893).

77 Scott, *supra* note 45.

78 Austin Wakeman Scott, Select Cases and Other Authorities on the Law of Trusts (self-published 2d ed. 1931); Austin Wakeman Scott, Select Cases and Other Authorities on the Law of Trusts (self-published 3d ed. 1940); Austin Wakeman Scott, Select Cases and Other Authorities on the Law of Trusts (self-published 4th ed. 1951); Austin Wakeman Scott & Austin Wakeman Scott Jr., Select Cases and Other Authorities on the Law of Trusts (Little, Brown & Co. 5th ed. 1966).

79 George Gleason Bogert, Cases on the Law of Trusts (Found. Press 1939).

80 George Gleason Bogert, Cases on the Law of Trusts (Found. Press 2d ed. 1950); George Gleason Bogert, Cases on the Law of Trusts (Found. Press 3d ed. 1958); George Gleason Bogert & Dallin H. Oaks, Cases on the Law of Trusts (Found. Press 4th ed. 1967). Bogert died in 1977. The most recent posthumous edition is George Gleason Bogert et al., Cases and Text on the Law of Trusts (Found. Press 9th ed. 2012).

81 The Found. for Rsch. in Legal Hist., A History of the School of Law [of] Columbia University 312 (Julius Goebel Jr., ed., Columbia Univ. Press 1955).

82 *Id.* at 318-19.

In 1932, Powell published his course materials in a two-volume casebook titled *Cases and Materials on Trusts and Estates*.[83] This was the first published casebook for a combined course. Other casebooks followed. Professor Lewis Simes of the University of Michigan published *Cases and Materials on Trusts and Succession* in 1942.[84] John Ritchie, who spent much of his career at the University of Virginia but was then the dean of the law school at the University of Wisconsin, was the lead author of *Cases and Materials on Decedents' Estates and Trusts*, which appeared in 1955.[85] Professors George Palmer and Richard Wellman of the University of Michigan published *Cases and Materials on Trusts and Succession* in 1960.[86] Professors Eugene Scoles of the University of Illinois and Edward Halbach of the University of California at Berkeley published *Problems and Materials on Decedents' Estates and Trusts* in 1965.[87] Professor Ashbel Green Gulliver of Yale University was the lead author of *Cases and Materials on Gratuitous Transfers*, which appeared in 1967.[88]

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83 Richard R. Powell, Cases and Materials on the Law of Trusts and Estates (1932). In the preface, Powell stated:

> The plan for a single law school course in replacement of the courses heretofore given under the titles of "Trusts," "Future Interests" and "Wills" was conceived some seven years ago [i.e. 1925]. It began in the embarrassments encountered by the editor in teaching Future Interests and, in the years 1926 and 1927, in the constructing of a Case Book for the subject of Future Interests. The boundary walls of Trusts and Wills repeatedly obtruded themselves as barriers to the completion, or to the comprehension, of topics partly studied in the areas of law traditionally known as Future Interests. The usefulness of these separations of subject-matter came to be questioned further because the editor could recollect no such division in his practical experience at the bar. The idea was nourished by the research and self-examination induced by the curricular revision studies constantly present in the Law School of Columbia University since 1927.

Id. at v.

84 Lewis M. Simes, Cases and Materials on Trusts and Succession, at iii (Callaghan & Co. 1942). For earlier mimeographed versions published locally in Ann Arbor, see Lewis M. Simes, Trusts and Estates I: Cases and Materials (1935); Lewis M Simes, Trusts & Estates II: Cases and Materials (1936).

85 John Ritchie et al., Cases and Materials on Decedents' Estates and Trusts (Found. Press 1955).

86 George E. Palmer & Richard V. Wellman, Cases and Materials on Trusts and Succession (Found. Press 1960).

87 Eugene F. Scoles & Edward C. Halbach Jr., Problems and Materials on Decedents' Estates and Trusts (Little, Brown & Co. 1965). A prior temporary edition appeared in 1963. Eugene F. Scoles & Edward C. Halbach Jr., Problems and Materials on Decedents' Estates and Trusts (temp. ed. 1963).

88 Ashbel G. Gulliver et al., Cases and Materials on Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts and Future Interests (West Publishing Co. 1967).

The separate course on trusts disappeared, even at Harvard Law School and the University of Chicago Law School, the academic homes of Scott and Bogert respectively. The last person to teach a separate course on trusts at Harvard Law School was a visiting professor, Tamar Frankel from Boston University, in Spring Semester 1980.[89] The following year, the combined course in "Wills and Trusts" was taught by visiting professor Mary Louise Fellows, then on the faculty of the University of Illinois.[90] At the University of Chicago Law School, Professor John Langbein combined his two prior courses—"The Law of Succession," which covered intestacy, wills, and will substitutes, and "Trusts and Estates," which despite the name covered trusts and trust administration—into a course called "Decedents' Estates and Trusts" starting in Winter Quarter 1976.[91] By the early 1980s, it would be hard to find a course solely on the law of trusts at an American law school. Instead, the course covered the law of "trusts and estates"—the law of donative transfers.

The American emphasis on trusts as mechanisms for donative transfers influences the scope and substance of American trust law. With respect to scope, it is noteworthy that commercial uses of the trust, although present and economically significant in the United States, have no discernible impact on American trust law[92] and are not taught in the typical American law school course on trusts and estates. Similarly, commercial trusts have been excluded from every iteration of the Restatement of the Law of Trusts.[93] With respect to substance, American succession law places an extraordinarily high priority on the grantor's donative freedom, and that priority extends into American trust law, which is a part of the law of donative transfers. In the words of the Restatement (Third) of Property, the grantor's donative freedom is the "organizing principle"[94] of American trusts and estates law.

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89 *See* Gallanis, *supra* note 67, at 850-51.

90 *Id.* at 851 n.47.

91 *See id.* at 850.

92 Observe, however, that American trust law influences *other* parts of American law, such as the laws governing pension funds and charitable corporations.

93 For the current Restatement, see Restatement (Third) of Trusts ch. 1, intro. note (Am. Law Inst. 2003) ("The Restatement of Trusts does not deal with such devices as business trusts, trust used for purposes of security, and many pooled investment arrangements that use a trust concept."). *See also id.*, § 1 cmt. b, § 5 cmt. l. For the first and second Restatements, see Restatement of Trusts § 1 cmt. b (Am. Law Inst. 1935); Restatement (Second) of Trusts § 1 cmt. b (Am. Law Inst. 1959). For discussion, see John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 166, 188 (1997).

94 Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1, cmt. a (Am. Law Inst. 2003).

It would be hard to find another major country where the grantor's donative freedom is so highly prized.[95] England and other major common-law jurisdictions embrace the approach of Testator's Family Maintenance, wherein the terms of a decedent's estate plan can be ignored if the decedent's surviving family members make a sufficient showing of need.[96] In civil-law nations, forced provision typically is made not only for a surviving spouse but also for surviving children; thus, the percentage of a decedent's property that can be transmitted as the decedent wishes is significantly curtailed.[97]

American law—putting aside the law of Louisiana, with its civil-law heritage[98]—rejects these approaches. Instead, American law embraces an exceptionally strong commitment to a grantor's donative freedom. This is reinforced by conceptualizing the law of trusts as part of the law of trusts *and* estates.

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95 For a recent critique of donative freedom at death, published by a leading scholar outside the United States, see Alexandra Braun, *Testamentary Responsibility*, 28 EDINBURGH L. REV. 325, 326 (2024). Scholars within the United States also have critiqued the American emphasis on deathtime donative freedom. For one example out of many, see Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990) (arguing that "all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government," subject to six specified exceptions). *See also* Eric Kades, *Anti Trusts: Reforming an Excessively Flexible Legal Tool*, 47 VT. L. REV. 331, 380 (2023) (arguing that American law should forbid the settlor of a private donative trust from also being a beneficiary of that trust, and that the beneficial interests in private donative trusts should be limited to certain types—"fee simples, life estates, terms of years, or terms conditional on one or more of a small set of contingencies: a birth, a death, a marriage, or a change in disability status.").

96 For England, see Roger Kerridge, *Family Provision in England and Wales*, *in* COMPARATIVE SUCCESSION LAW, VOLUME III: MANDATORY FAMILY PROVISION 384-416 (Kenneth G.C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., 2020). For Australia, see Nicola Peart & Prue Vines, *Family Provision in New Zealand and Australia*, *in id*. at 450-76. For Canada, see Alexandra Popovici & Lionel Smith, *Freedom of Testation and Family Claims in Canada*, *in id*. at 507-33. For the Hong Kong Special Administrative Region, see Freda Lim, Emily Chak & Sasha Allison, *Testamentary Freedom in the Shadow of Cap. 481*, H. K. LAW., Jan. 2020, at 37, 37-38. For Singapore, see Harish Kumar, Marissa Zhao & Low Weng Hong, *Singapore*, *in* INTERNATIONAL SUCCESSION 842-43 (Louis Garb & Richard Norridge eds., 5th ed. 2022).

97 *See* Reinhard Zimmermann, *Mandatory Family Protection in the Civilian Tradition*, in COMPARATIVE SUCCESSION LAW, VOLUME III: MANDATORY FAMILY PROVISION, *supra* note 96, at 648-706. For mainland China's former regime of forced heirship and its current regime of family protection, which protects heirs who are unable to work and have no source of income, see Knut Benjamin Pißler & Timo Kleinwegener, *Necessary Portion in China*, *in id*. at 601-28. For Japan's forced heirship regime, see Tomoki Debari, Akira Tanaka & Yoshiko Nakamura, *Japan*, *in* INTERNATIONAL SUCCESSION, *supra* note 96, at 525, 527-29.

98 For discussion, see Ronald J. Scalise Jr., *Family Protection in the United States of America*, *in* COMPARATIVE SUCCESSION LAW, VOLUME III: MANDATORY FAMILY PROVISION, *supra* note 96, at 534, 554-55.

D. The Fourth Revolution: The Rise of the Revocable Trust

The fourth revolution in American trust law gathered steam in the second half of the twentieth century. American law embraced the revocable trust.

American law validates the revocable trust as a nontestamentary transfer—meaning that the instrument creating the trust need not comply with the formalities required of a will—by what is known as the "present transfer" test, also known as the "present interest" test.[99] An interest in property is deemed to be transferred *inter vivos* from the settlor to the trust's beneficiaries, even though the trust is revocable during the settlor's lifetime and even though the settlor may be the only eligible beneficiary during that period. By satisfying the present transfer test, the transfer is held to be a lifetime transfer, not a deathtime transfer, hence nontestamentary. Professor John Langbein rightly has noted that "the odor of legal fiction hangs over the present-interest test. We see courts straining to reach right results for wrong reasons and insisting that will-like transfers possess gift-like incidents."[100] Nowhere was this more evident than in the leading case of *Farkas v. Williams* (1955), where the justices of the Illinois Supreme Court admitted that "it is difficult to name this interest" allegedly passing to the trust beneficiary but asserted that "nor is there any reason for doing so as long as it passed to him immediately upon the creation of the trust."[101]

The popularity of revocable trusts soared in the United States starting in the 1960s, thanks in large measure to the best-selling book by Norman Dacey, *How to Avoid Probate!*, which first appeared in 1965.[102] The book contained do-it-yourself forms for, among other things, creating a revocable trust.[103] The book was savaged by lawyers and law professors,[104] but it sold

99 *See* Thomas P. Gallanis, Family Property Law: Cases and Materials on Wills, Trusts, and Estates 336 (Found. Press 9th ed. 2024). For the law of the revocable trust as a "branch" of American trust law, see John D. Morley & Robert H. Sitkoff, *Trust Law: Private Ordering and the Branching of American Trust Law*, *in* The Oxford Handbook of the New Private Law 330-33 (Andrew S. Gold et al. eds., 2021).

100 John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1128 (1984).

101 Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955).

102 *See* Norman Dacey, How to Avoid Probate! (Crown 1965).

103 *See id*.

104 *See, e.g.*, Allan B. Muchin, *Dacey: How to Avoid Probate*, 16 DePaul L. Rev. 276, 276 (1966) ("[T]he omissions and inadequacies of this book are frightening."); Robert W. Hallgring, *How to Avoid Probate!, by Norman F. Dacey*, 42 Wash. L. Rev. 311, 318 (1966) ("[D]isaster almost inevitably awaits the intrepid settlor who accepts Mr. Dacey's invitation to plan his own estate.").

two million copies.[105] It also lit a fire under the drafting committee working on the Uniform Probate Code (UPC),[106] which was finalized and approved by the Uniform Law Commission in 1969.[107] The UPC streamlined the probate process, reducing its cost and delay.[108] Still, the revocable trust remains an attractive and appropriate estate planning tool for many grantors.[109]

Revocable trusts are so well-accepted and widely-used today in the United States that Americans can be forgiven for assuming that they must be universal. In fact, the widespread use of the revocable trust is a distinctly American phenomenon. The reasons for this vary depending on the other jurisdiction. In England, the use of a revocable trust would be a disaster from the perspective of inheritance taxation. The assets would be subject to taxation multiple times: at the initial transfer into trust; at periodic intervals during the settlor's lifetime including when distributions are made from the trust; and potentially again at the settlor's death.[110] This helps to explain why a leading English treatise on the law of succession does not mention the revocable trust.[111] In jurisdictions where taxation is not the primary roadblock to the revocable trust, another obstacle is the apparent doctrinal incoherence. Consider the words of a leading Canadian scholar now based at Oxford University:

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105 *See* Richard D. Lyons, *Norman Dacey, 85; Advised His Readers to Avoid Probate*, N.Y. Times, Mar. 14, 1994, https://www.nytimes.com/1994/03/19/nyregion/norman-dacey-85-advised-his-readers-to-avoid-probate.html [https://perma.cc/3EXY-X7XF] (obituary).

106 *See* R. V. Wellman, *The Proposal for a Uniform Probate Code*, 24 J. Mo. Bar 142, 145 (1968) ("Let's use the opportunity which Mr. Dacey has given us to get something that is useful to the profession and the public accomplished."); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 Ind. L.J. 191, 198 (1969) ("[T]he rapidly maturing Uniform Probate Code may provide some answers if it is approved by the Uniform Law Commissioners when they give it final consideration next July.").

107 *See* Unif. Prob. Code (Unif. L. Comm'n 1969).

108 *See* Richard V. Wellman, *The New Uniform Probate Code*, 56 A.B.A. J. 636, 638 (1970); Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70s*, 2 Conn. L. Rev. 453, 467 n.53 (1970).

109 For one perspective on the advantages and disadvantages of the revocable trust, see Bradley E.S. Fogel, *Trust Me? Estate Planning with Revocable Trusts*, 58 St. Louis U. L.J. 805, 822 (2014).

110 *See* Gallanis, *supra* note 67, at 852 n.58; Geoffrey Todd & Amanda Edwards, *The Pitfalls of U.S./U.K. Tax Planning—The U.S. Revocable Trust*, 27 Prob. & Prop., Mar./Apr. 2013, at 60, 63. *See also* Waters, Smith & Gillen, *supra* note 37, § 9.I (noting that the "express reservation to the settlor of the power of revocation, necessarily in inter vivos trusts, is much less familiar today because of the tax implications of such a reservation").

111 Roger Kerridge, Parry and Kerridge: The Law of Succession (Sweet & Maxwell 13th ed. 2016). Nor is there any mention of revocable trusts in Hanbury & Martin: Modern Equity, *supra* note 39. *See also* Dal Pont, *supra* note 37, ¶ 25.125 (observing that "[i]t is unusual for the settlor to be vested with a power to revoke because this is adverse to the reason why a settlor usually creates a trust, which is to vest its subject matter in a trustee for the benefit of specified beneficiaries.").

> On a traditional view, you can't have it both ways: if the other beneficiaries have no interest at all until the settlor's death, then the instrument is testamentary, so that testamentary formalities must be complied with. Alternatively, if the settlor/trustee never intends to comply with the formal terms of the trust, but rather retains full dominion over the property, there is a risk that the trust would be treated as a sham. U.S. law, however, does seem to allow the settlor to have it both ways: the other beneficiaries are understood to have no interest until death, but at the same time the instrument is not testamentary.[112]

American trust law is practical. It focuses on what works in the real world to achieve the grantor's donative intention. It is not fussed about whether the practice is consistent with theory. Like the Queen speaking to Alice in Wonderland, Americans have no difficulty believing six practically useful but theoretically impossible things before breakfast.[113]

Revocable trusts are so widespread in the United States that the Uniform Trust Code (UTC) has reversed the traditional presumption of irrevocability. At common law, a trust was presumed to be irrevocable unless the settlor expressly reserved the power to revoke it.[114] This remains the rule in other major common-law jurisdictions.[115] In the United States, however, Section 602(a) of the UTC provides: "Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust."[116] The official Comment to this Section explains the rationale for the UTC rule: "The Code presumes revocability when

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112 Lionel Smith, *Will-Substitutes and Creditors: Canada and the US*, *in* Passing Wealth on Death: Will-Substitutes in Comparative Perspective 251, 256 (Alexandra Braun & Anne Röthel eds., Hart 2016).

113 *See* Lewis Carroll, Through the Looking-Glass and What Alice Found There 177 (Oxford 2009) (1872) ("Alice laughed. 'There's no use trying,' she said: 'one *can't* believe impossible things.' 'I dare say you haven't had much practice,' said the Queen. 'When I was your age I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'"). For a recent article sounding a related theme, see Lucas Clover-Alcolea, *Policy over Doctrine: A Brief History of U.S. Trust Law*, 49 ACTEC L.J. 127 (2024).

114 *See* Restatement (Second) of Trusts § 330(1) (Am. Law Inst. 1959) ("The settlor has the power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power.").

115 *See* 1 Tucker et al., *supra* note 36, ¶ 33-091; Dal Pont, *supra* note 37, ¶ 25.125; Waters, Scott & Gillen, *supra* note 37, § 9.1; Ma, *supra* note 37, ¶ 14-28; Butler, *supra* note 37, ¶ 3.2.8(2). Revocable trusts are not discussed in Hare & Ooi, *supra* note 37.

116 *Compare* Unif. Tr. Code § 602(a) (Unif. L. Comm'n), *with* Restatement (Third) of Trusts § 63, cmt. c (Am. Law Inst. 2003) (providing a rebuttable presumption that a trust silent on the question of revocability is revocable if the settlor retained an interest in or power of appointment over the trust property).

the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute."[117]

Moreover, and especially remarkable, modern American law takes the position that, while the trust is revocable, the trustee owes *no fiduciary duties* to the beneficiaries. Section 603(b) of the UTC provides: "To the extent a trust is revocable [and the settlor has the capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[118] This is a far cry from the beneficiary principle.[119] Indeed, if the settlor and the trustee of a revocable trust are the same person, as often happens, the only fiduciary duty owed by the settlor-trustee is to *herself*.

Unique in its embrace of the revocable trust, American law takes a distinctive approach to core matters of trust law such as the role of the settlor vis-à-vis the beneficiaries and to whom, if to anyone, the trustee owes fiduciary duties.

E. The Fifth Revolution: The Age of Statutes

The fifth revolution in American trust law accelerated near the end of the twentieth century. The American law of trusts became statutory law.

In contrast to the trust law of other major common-law jurisdictions, American trust law is now heavily statutory. This was not always so. I explored this phenomenon and its consequences in a recent law review article.[120] Here is how I described the history:

> For most of Anglo-American history, trust law was case law. The Anglo-American law of trusts was born and molded in the English Court of Chancery and then, on U.S. shores, re-shaped by the courts of the U.S. states. Trust law, in this respect, stood in sharp contrast to the law of intestacy and wills, where, for centuries, prominent statutes also governed. Examples of such statutes are the Statute of Distribution and the Statute of Frauds, both from the reign of Charles II, and the Wills Act, from the first year of the reign of Victoria. In the U.S., prestigious organizations drafted comprehensive codes of probate law, but not of trust law. The Model Probate Code was published in 1946, thanks to

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117 UNIF. TR. CODE § 602(a) cmt.

118 UNIF. TR. CODE § 603(b).

119 *See* Armitage v. Nurse, [1998] Ch 241 at 253 (Eng.) ("If the beneficiaries have no rights enforceable against the trustees there are no trusts.").

120 *See* Thomas P. Gallanis, *The Dark Side of Codifying U.S. Trust Law*, 49 ACTEC L.J. 283, 283 (2024).

a joint effort by the American Bar Association's Section of Real Property, Probate & Trust Law and the University of Michigan Law School. The Uniform Probate Code was published in 1969 by the Uniform Law Commission.

The feature of trust law as largely decisional law remained true in the U.S. even when I began teaching the law of trusts and estates in 1997. The U.S. law of trusts primarily was to be found in the decisions of state courts and in respected secondary sources digesting and refining the rules from those decisions, such as the American Law Institute's Restatements of the Law of Trusts and the multi-volume treatises on trust law originally authored by Austin Wakeman Scott of the Harvard Law School or George Gleason Bogert of the University of Chicago Law School. To be sure, there were some widely-enacted statutes affecting trust law—for example, the Uniform Principal and Income Act (originally published in 1931), the Uniform Trustees' Powers Act (1964), and the Uniform Prudent Investor Act (1994). Additionally, the states of California, Georgia, Indiana, Louisiana, Oklahoma, Texas, and Washington had codified their states' trust law. In most U.S. states, however, trust law primarily was case law.

U.S. trust law no longer is primarily case law. In 2000, the Uniform Law Commission published the Uniform Trust Code ("UTC"). To date, thirty-five U.S. states and the District of Columbia have enacted enough of the UTC to be counted by the Uniform Law Commission as enacting jurisdictions. The UTC is one of the Uniform Law Commission's successes. By contrast, the Uniform Probate Code has only eighteen enacting jurisdictions. Emboldened by the success of the UTC, the Uniform Law Commission subsequently published additional statutes in the field of trust law. These include the Uniform Trust Decanting Act (2015) and the Uniform Directed Trust Act (2017). The Uniform Law Commission also published statutes in fields of law allied to trusts, for example the Uniform Powers of Appointment Act (2013) and an updated uniform act on principal and income, titled the Uniform Fiduciary Income and Principal Act (2018). U.S. trust law now is heavily statutory.[121]

121 *Id.* at 284-87.

Trust law remains primarily case law in England and in other major common-law jurisdictions.[122] Not so in the United States. American trust law now is primarily statutory law, thanks in large measure to the UTC, published in 2000, and other statutes on trust law, including statutes on the Rule Against Perpetuities,[123] powers of appointment,[124] trust decanting,[125] directed trusts,[126] and spendthrift trusts including asset protection trusts.[127]

The reasons why American trust law became statutory law have been well explored by Professor John Langbein, in an article published in 2007.[128] Here is how I summarized Professor Langbein's findings in my recent article:

> In a law review article published in 2007, when the UTC was much newer and the post-UTC uniform acts in or allied to trust law were not yet envisioned, Professor John Langbein offered an explanation for this shift in the law of trusts from case law to statute law. He pointed to multiple factors including the transformation of the trust's core function from the passive transmission of land to the active management of financial assets, the rise of a national trust management industry seeking modernizing legislation, the Uniform Law Commission's desire to provide such legislation, and the availability of statutory-type language on many topics related to trust law in the Restatements.[129]

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122 This is not to say that there are no relevant statutes. For a discussion of legislative reforms in one common-law jurisdiction, Singapore, see Jeremiah Lau & Kelvin FK Low, *Reforming the Singapore Trust: Pushing or Breaking Boundaries?*, 3 Asia-Pac. Tr. L. (2025).

123 *See, e.g.*, Unif. Statutory Rule Against Perpetuities (Unif. L. Comm'n 1986/1990).

124 *See, e.g.*, Unif. Powers of Appointment Act (Unif. L. Comm'n 2013).

125 *See, e.g.*, Unif. Tr. Decanting Act (Unif. L. Comm'n 2015).

126 *See, e.g.*, Unif. Directed Tr. Act (Unif. L. Comm'n 2017).

127 The Uniform Trust Code rejects the asset protection trust (self-settled spendthrift trust), *see* Unif. Tr. Code § 505(a) (Unif. L. Comm'n), but at least twenty American states have enacted statutes authorizing such trusts. *See* Ala. Code § 19-3E-1 (2025); Alaska Stat. §§ 13.36.310, 34.40.110 (2025); Conn. Gen. Stat. § 45a-487k (2025); Del. Code tit. 12, § 3572 (2025); Haw. Rev. Stat. § 554G-1 (2025); Ind. Code § 30-4-7 (2025); Mich. Comp. Laws § 700.1041 (2025); Miss. Code § 91-9-701 (2025); Mo. Rev. Stat. § 456.5-505 (2025); Nev. Rev. Stat. § 166.010 (2025); N.H. Rev. Stat. § 564-B:5-505 (2025); Ohio Rev. Code § 5816.01 (2025); Okla. Stat tit. 31, § 10 (2025); R.I. Gen. Laws § 18-9.2-1 (2025); S.D. Codified Laws § 55-16-1 (2025); Tenn. Code § 35-16-101 (2025); Utah Code § 25-6-502 (2025); Va. Code § 64.2-745.1 (2025); W. Va. Code § 44D-5-503a (2025); Wyo. Stat. §§ 4-10-504, 4-10-510 (2025).

128 *See* John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 Ala. L. Rev. 1069, 1071, 1081-82 (2007).

129 Gallanis, *supra* note 120, at 287.

Lawmaking by statute is fundamentally different from lawmaking by judicial decision.[130] Transformations that are rare and jurisprudentially challenging at common law—for example, changing a mandatory rule to a default rule[131]—are effortless by statute. The trustee's duty to provide at least some information about the trust to at least some of the trust's beneficiaries was a mandatory duty at American common law.[132] Ditto under the official version of the UTC.[133] Under some American statutes, however, it is a mere default rule.[134] The settlor may modify or waive the duty to inform and thereby create a "silent trust" in which the beneficiaries have limited or no rights to information.

Beyond changing mandatory rules into default rules, statutes can facilitate a much wider range of legal outcomes than would be feasible at common law. For example, it would be nearly impossible to imagine a common-law court re-writing the period of the Rule Against Perpetuities from lives in being plus 21 years to the 90 years of the Uniform Statutory Rule Against Perpetuities—but this was easy to accomplish by legislation.[135] And if the Rule Against Perpetuities can be restated by statute as a 90-year limit, nothing is special about the number 90. Ninety years can become 150 years as in the State of Washington;[136] 300 years as in Texas;[137] 360 years as in Alabama, Georgia, Michigan, Mississippi, and

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130 For discussion, see *id.* at 304-09.

131 For a rare example of such a transformation at common law, see *Doctor v. Hughes*, 122 N.E. 221 (N.Y. 1919), in which Judge Benjamin Cardozo transformed the Doctrine of Worthier Title from a mandatory rule to a default rule.

132 Restatement of Trusts § 173, cmt. c (Am. Law Inst. 1935) ("Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust."). The same rule is articulated in the Second Restatement. *See* Restatement (Second) of Trusts § 173, cmt. c (Am. Law Inst. 1959).

133 Unif. Tr. Code § 105(b)(8)-(9) (Unif. L. Comm'n). In 2004, these provisions were placed in brackets to signal "that uniformity is not expected." Unif. Tr. Code § 105 cmt.

134 Of the thirty-six U.S. jurisdictions enacting all or most of the UTC, seventeen have deleted the duty to furnish information from the UTC's list of mandatory rules. *See* Ark. Code § 28-73-105(b) (2025); 760 Ill. Comp. Stat. 3/105 (2025); Kan. Stat. § 58a-105(b) (2025); Mass. Gen. Laws ch. 203E, § 105(b) (2025); Minn. Stat. § 501C.0105(b) (2025); Mont. Code § 72-38-105(2) (2025); N.C. Gen. Stat. § 36C-1-105(b) (2025); N.D. Cent. Code § 59-09-05(2) (2025); N.H. Rev. Stat. § 565-B:1-105(b) (2025); S.C. Code § 62-7-105(b) (2025); Tenn. Code § 35-15-105(b) (2025); Utah Code § 75-2-105(2) (2025); 14A Vt. Stat. § 105(b) (2025); Va. Code § 64.2-703(B) (2025); W. Va. Code § 44D-1-105(b) (2025); Wis. Stat. § 701.0105(2) (2025); Wyo. Stat. § 4-10-105(b) (2025).

135 *See, e.g.*, Unif. Stat. Rule Against Perpetuities § 1(b) (Unif. L. Comm'n 1986/1990). For the rationale of the Uniform Statutory Rule's 90-year period, *see id.*, cmt.; *see also* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop., Prob. & Tr. J. 569, 575-79 (1986).

136 *See* Wash. Rev. Code § 11.98.130 (2025).

137 *See* Tex. Prop. Code § 112.036 (2025).

Tennessee;[138] 365 years as in Nevada;[139] 500 years as in Arizona;[140] 800 years as in Connecticut;[141] 1,000 years as in Colorado, Florida, Utah, and Wyoming;[142] or forever as in the more than twenty U.S. jurisdictions that by statute allow perpetual trusts.[143] Turning the Rule Against Perpetuities from case law to statute law helped to facilitate the Rule's extension or abolition.[144]

Lawmaking by statute is more democratic than lawmaking by courts: more open to popular sovereignty, yet also more open to the potentially unsavory aspects of the democratic process, such as interest-group lobbying. I explored this in my recent article.[145]

For an example, not discussed in my recent article, of the doctrinal results that are easier to achieve by statute than by decisional law, note the intermediate position taken by American statutes on the question whether a trust is an entity. The traditional view, still fully in force in England and other major common-law jurisdictions,[146] is that a trust is not

138 *See* Ala. Code § 35-4A-5(9) (2025); Ga. Code § 44-6-201(2025); Mich. Comp. Laws § 554.75(2) (2025) (interests governed by the Personal Property Trust Perpetuities Act and created by the exercise of a second power of appointment); Miss. Code § 89-25-9(h) (2025) (trusts of personal property; for trusts of real property the period is 110 years); Tenn. Code § 66-1-202(f) (2025).

139 *See* Nev. Rev. Stat. § 111.1031 (2025).

140 *See* Ariz. Rev. Stat. § 14-2901 (2025).

141 *See* Conn. Gen. Stat. § 45a-491(f) (2025).

142 *See* Colo. Rev. Stat. § 15-11-1102.5 (2025); Fla. Stat. § 689.225(2)(g) (2025); Utah Code § 75-2-1203 (2025); Wyo. Stat. § 34-1-139(b) (2025) (trusts holding "property other than or in addition to interests in real property . . . .").

143 *See, e.g.*, Alaska Stat. §§ 34.27.070, 34.27.100 (2025); 25 Del. Code § 503 (2025) (trusts of personal property); D.C. Code § 19-904(a)(10) (2025); Haw. Rev. Stat. § 525-4(6) (2025); Idaho Code §§ 55-111, 55-111A (2025); 765 Ill. Comp. Stat. §§ 3/1403(c), 3/1404(a)(8) (2025); Ky. Rev. Stat. §§ 381.224, 381.226 (2025); Me. Rev. Stat. tit. 33, § 114(7) (2025); Md. Code, Est. & Trusts § 11-102(b)(5) (2025); Mich. Comp. Laws §§ 554.91-554.94 (2025) (trusts of personal property); Mo. Rev. Stat. § 456.025(1) (2025); Neb. Rev. Stat. § 76-2005(9) (2025); N.H. Rev. Stat. §§ 547:3-k, 564-B:4-402A, 564:24; N.J. Stat. §§ 46:2F-9, 46:2F-10 (2025); Ohio Rev. Stat. § 2131.09(B); 20 Pa. Cons. Stat. § 6107.1(b)(1) (2025); R.I. Gen. Laws § 34-11-38 (2025); S.D. Cod. Laws §§ 43-5-1, 43-5-8 (2025); Va. Code § 55.1-127(A)(8), (B) (2025) (trusts of personal property); Wis. Stat. § 700.16(1)(a). Also worth mentioning is North Dakota, which allows perpetual business trusts. *See* N.D. Cent. Code § 47-02-27.4(7) (2025). Additionally, Oregon allows perpetual stewardship trusts, *see* Or. Rev. Stat. § 105.950 (2025). Some state constitutions speak to prohibitions on perpetuities. *Compare* Ark. Code § 18-3-104(8) (2025), N.C. Gen. Stat. § 41-23(h) (2025), *and* Okla. Stat. tit. 60, § 175.47(A) (2025), *with* Ark. Const. art. 2, § 19 (1874), N.C. Const. art. 1, § 34, *and* Okla. Const. art 2, § 32.

144 For discussion, see Gallanis, *supra* note 120, at 296-300.

145 For discussion, see *id.* at 288-89, 304-09.

146 *See* 1 Tucker et al., *supra* note 36, §§ 1-001 to 1-008; Dal Pont, *supra* note 37, ¶ 16.05; Waters, Smith & Gillen, *supra* note 37, § 1.II; Ma, *supra* note 37, ¶ 13-4; Butler, *supra* note 37, ¶ 3.1.2; Hare & Ooi, *supra* note 37, ¶¶ 1-53 to 1-54.

an entity but instead is a fiduciary relationship with respect to specified property.[147] This means that lawsuits by third parties cannot be brought against "the trust" but must be brought against the trustee personally, who may have a right of indemnification from the trust estate if the trustee acted properly.[148] The UTC rejects the requirement of personal liability while not quite going so far as to say that the trust is an entity. Instead, the UTC takes the intermediate step of enabling a third-party claim to be brought against a trustee in the trustee's "fiduciary capacity."[149] Consider the following illustration.[150] Trustee *A* properly enters into a contract with third party *X*. Later, Trustee *A* properly resigns and is replaced by Trustee *B*.[151] Later still, *X* sues former-Trustee *A* and Trustee *B* for breach of the contract. The facts found in the course of the litigation show that the contract was breached but that it disclosed Trustee *A*'s fiduciary capacity. At common law, former-Trustee *A* cannot transfer the contractual liability to Trustee *B* without the consent of *X*.[152] Under the UTC, however, the contractual liability is transferred automatically. Former-Trustee *A* is not personally liable to *X*, under UTC Section 1010(a),[153] and no longer has a fiduciary capacity. Trustee *B* is liable to *X* but only in Trustee *B*'s fiduciary capacity.[154] A similar result obtains if the liability arises not from a contract but from a tort or from ownership or control of the trust property, such as a liability arising under environmental law. Let us take an example in tort. Suppose that third party *Y* is injured by the negligence of an agent or employee of Trustee *A*. Later, Trustee *A* properly resigns and is succeeded by Trustee *B*. Later still, *Y* sues former-Trustee *A* and

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147 *See*, *e.g.*, Restatement (Second) of Trusts § 2 (Am. Law Inst. 1959). The Third Restatement repeats this orthodox view, see Restatement (Third) of Trusts § 2 (Am. Law Inst. 2003), but notes that "modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal 'entity,' consisting of the trust estate and the fiduciary relation between the trustee and the beneficiaries." *Id.*, § 2, cmt. a; *see also id*. ch. 21 (particularly the introductory note discussing liability to third parties).

148 *See* Restatement (Second) of Trusts § 261 (Am. Law Inst. 1959) ("The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust."); *id.*, §§ 262-65 (on personal liability); *id.*, §§ 246-48 (on indemnification from the trust estate where the trustee incurred the obligation properly or was not at fault).

149 Unif. Tr. Code § 1010(c) (Unif. L. Comm'n). On trustee resignation, see Unif. Tr. Code § 705.

150 I am grateful to Professor Lionel Smith for this illustration.

151 On trustee resignation, see Unif. Tr. Code § 705.

152 *See* Restatement (Second) of Contracts § 280 (Am. Law Inst. 1981) (on novation).

153 *See* Unif. Tr. Code § 1010(a) (Unif. L. Comm'n). This subsection states: "Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering a trust if the trustee in the contract disclosed the fiduciary capacity." *Id.*

154 *See* Unif. Tr. Code § 1010(c); *accord* Restatement (Third) of Trusts § 106, cmt. b(1) (Am. Law Inst. 2012).

Trustee *B* in tort. The facts found in the course of litigation show that former-Trustee *A* was not personally at fault. Former-Trustee *A* is not liable in a personal capacity, under UTC section 1010(b),[155] and no longer has a fiduciary capacity. Trustee *B* is liable to *Y* but only in Trustee *B*'s fiduciary capacity.[156] Modern American trust law does not quite call the trust an entity but treats it as such for these purposes.[157] Statutes adopt an intermediate position that would be unlikely to be adopted by a common-law court.

Another result of the transformation of American trust law from case law to statute law is that the statutes have increased the American disregard for the beneficiary principle. A prime example of this can be seen in the interaction of the statutory extension or abolition of the Rule Against Perpetuities and trust law's requirement that a trust have a definite beneficiary within the perpetuity period.[158] Section 402(b) of the UTC states the definite-beneficiary rule: "A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities."[159] No American state currently has the common-law Rule Against Perpetuities, and more than two-thirds of the states have enacted statutes allowing noncharitable trusts to last perpetually or for multiple centuries. In lengthening the perpetuity period far beyond the 90 years of the Uniform Statutory Rule or the 125 years currently allowed in England,[160] American statutes *also* have lengthened the period in which a noncharitable trust can be valid without an ascertainable beneficiary—and, therefore, without a beneficiary who can enforce the trustee's fiduciary duties.

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155 *See* Unif. Tr. Code § 1010(b) (Unif. L. Comm'n) ("A trustee is personally liable for torts committed in the course of administering a trust . . . only if the trustee is personally at fault.").

156 *See* Unif. Tr. Code § 1010(c); *accord* Restatement (Third) of Trusts § 106, cmt. b(2) (Am. Law Inst. 2012).

157 *See* Restatement (Third) of Trusts intro. note to Ch. 21 (Am. Law Inst. 2012).

158 *See* Unif. Tr. Code § 402(a)(3) (Unif. L. Comm'n) ("A trust is created only if . . . the trust has a definite beneficiary . . . .").

159 Unif. Tr. Code § 402(b). This rule has a long pedigree. *See* Blight v. Hartnoll [1881], 19 Ch 294, 300-01 (Eng.)

160 *See* Perpetuities and Accumulations Act 2009 § 5(1). *See also* Dal Pont, *supra* note 37, ¶ 19.85 (describing the maximum perpetuity period in the various Australian states and territories, typically 80 years); Waters, Smith & Gillen, *supra* note 37, § 8.IV (describing the perpetuity period in the various Canadian provinces as either the common-law formulation of lives in being plus 21 years or, in British Columbia, 80 years); Butler, *supra* note 37, 3.1.4(7) (describing the maximum duration of trusts in New Zealand, which for trusts created on or after January 30, 2021 is 125 years); Hare & Ooi, *supra* note 37, ¶ 2 -122 (100 years). The Hong Kong Special Administrative Region now allows perpetual trusts. *See* Ma, *supra* note 37, ¶ 15-77.

It is true that the UTC authorizes the court to appoint a guardian *ad litem* to represent the interests of unborn or unascertained beneficiaries[161]—but given that American trusts typically involve no court supervision, who will bring an action for the appointment of such a representative? Moreover, even if a guardian *ad litem* is appointed, who will ensure that the guardian vigorously defends the interests of the unborn or unascertained persons he or she represents? A recent case illustrates the problem. In *Matter of Beebe*,[162] the settlor of an irrevocable trust filed a petition for reformation of the trust's terms, arguing that he meant to give the remainder interest only to his own descendants, not to the descendants of all of the current beneficiaries. The trial court appointed a guardian *ad litem* to represent the minor children who descended from the current beneficiaries but not from the settlor. This guardian *ad litem* hardly was a vigorous representative. Here is how the Mississippi Supreme Court described the steps taken by the guardian: He "testified that he had written the parents of the minor children . . . and he largely received no response. He stated that no parent had voiced an objection to the petition. Therefore, . . . he took a neutral position in the case on behalf of the children."[163] *Quis custodiet ipsos custodes*, indeed.[164] As a practical matter, trusts in more than two-thirds of the states can last for multiple centuries or forever without a definite beneficiary—hence, potentially, without fiduciary duties that are meaningfully enforceable.

In contrast to the trust law of other major common-law jurisdictions, the modern American law of trusts is primarily enacted by legislatures, with all of the possibilities and pitfalls of legislative lawmaking.

II. A Personal Assessment

This Part offers a personal assessment of the five revolutions. In doing so, this Part is mindful of the words quoted at the beginning of this Article from Professor S.F.C. Milsom's magisterial book, *Historical Foundations of the Common Law*: "No major proposition in legal history is ever likely to be final, and any single picture must be a personal one."[165] No two

161 *See* Unif. Tr. Code § 305(a) (Unif. L. Comm'n). ("If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown.").

162 *See* 380 So. 3d 905, 905 (Miss. 2024). I am grateful to Professor Charles E. Rounds Jr. for bringing this case to my attention, through a post on LinkedIn.

163 *Id*. at 916.

164 The phrase traditionally is attributed to Juvenal's *Satires* but may be an interpolation.

165 Milsom, *supra* note 1, at 8.

historians are precisely the same in how they join the unnumbered dots. One can hope to succeed in convincing others, as Professor Peter Brown did in creating the field of Late Antiquity. But the historical picture is personal. Also personal is a *normative assessment* of the history. Have the American revolutions in trust law been for good or for ill? There are no universally agreed criteria. A libertarian assesses the history by the effect on individual autonomy.[166] An egalitarian assesses it by the effect on equality—in this case, perhaps, wealth equality.[167] A utilitarian assesses it by the effect on overall welfare.[168] And so forth. There is no shared framework. What follows is a personal assessment, and provisional. "No major proposition in legal history is ever likely to be final. . . ."[169] The same can be said about a normative assessment.[170]

The five American revolutions have created a distinctive body of trust law. American trust law differs markedly from the trust law of other major common-law or civil-law nations.

No body of law is perfect, and we have already noted one potential weakness of modern American trust law: primarily made by legislatures, it is more subject to interest-group lobbying than trust law made by common-law judges.[171] Yet beauty is in the eye of the beholder. Whether one praises or condemns particular legislative outcomes depends on whether one agrees or disagrees with the outcomes.

Before reaching firm conclusions about whether particular legislative outcomes deserve praise or condemnation, one might allow time for results to emerge from the laboratory of the states. As Justice Brandeis observed, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[172] This is one of the positive features of American trust law as state law. We should not expect the trust law of each American state to be uniform. It has not been uniform at any time in American history—as our megatreatises and Restatements attest. Rather, American trust law reflects the differing policy choices of each state.

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166 For a classic statement, see Robert Nozick, Anarchy, State and Utopia 320-21 (Basic Books 1974).

167 There are many forms of egalitarianism. For one influential account, see John Rawls, A Theory of Justice 538 (1971).

168 For a classic account, see John Stuart Mill, Utilitarianism (1863). *See also* Katarzyna de Lazari-Radek & Peter Singer, Utilitarianism: A Very Short Introduction (2017).

169 Milsom, *supra* note 1, at 8.

170 In this vein, readers may wish to know of my forthcoming article: Thomas P. Gallanis, *Trusts and Donative Freedom: What Can We Learn from Law and Economics?*, 33 Geo. Mason L. Rev. (forthcoming 2026).

171 *See* Gallanis, *supra* note 120, at 288-89.

172 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

States that have authorized silent trusts or asset protection trusts or that have abolished or extended the Rule Against Perpetuities are no less within the American tradition than the states choosing to adopt different points on the spectrum of trust law. Some American states emphasize the freedom of the market and of the grantor, rights of private property, comparatively low regulation and taxation, and the accumulation and transmission of private capital. These states have not upended the American law of trusts. They are squarely within its traditions as a matter of history, doctrine, and policy. They are consistent with the five revolutions.

While it is too soon to render final judgment on American trust law—which, in any event, continues to evolve—the five revolutions have provided American trust law with a comparative advantage over the trust law of many competitor nations.[173]

Capital is mobile, and there is competition for trust law and trust services. The competition exists among nations and among U.S. states.

It is impossible to know the total number of trusts in the United States or their aggregate value because many trusts are privately created and managed. However, one estimate is that the value of trust and estate assets in the United States, in 2021, exceeded $5.6 trillion.[174] Why is so much wealth held in trust in the United States? There are many reasons, including confidence in the United States' legal, political, and economic systems, but let me suggest a reason specific to American trust law: it enables settlors to achieve their estate planning goals.

For settlors domiciled in the United States, estate planning can be accomplished without having to use the law of an offshore jurisdiction. This is in contrast to England and some other leading common-law nations, where onshore restrictions necessitate offshore planning. Settlors domiciled in the United States typically do not need offshore planning; trust administration within the United States achieves their objectives.

American law also appeals to settlors domiciled outside the United States. Some of this appeal is the relative financial secrecy offered by the United States compared to other nations. The federal Financial Account Tax Compliance Act (FATCA) requires foreign financial institutions to share data on the overseas accounts of U.S. persons,[175] but there is no similar reporting requirement by which the U.S. accounts of non-U.S.

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173 *See generally* Al W. King III, *Why Are Non-Resident Aliens Attracted to U.S. Trust Situs?*, Tr. & Est., June 2024, at 8, 8-10.

174 *See* Gabriel Zucman, T. Piketty & E. Saez, *Distributional National Accounts: Methods and Estimates for the United States*, tbl. S.B2 (Feb. 2022), available at https://gabriel-zucman.eu/usdina [https://perma.cc/T6D5-94S2].

175 *See* Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010).

persons are reported to the country of citizenship. For example, the U.S. has not joined the Common Reporting Standard (CRS) of the Organization for Economic Co-operation and Development.[176] This makes the U.S. well-situated to provide financial privacy for foreign settlors. Indeed, there is some evidence that funds have flowed from other countries to American financial institutions after the United States implemented FATCA but declined to join the CRS.[177] There also is anecdotal evidence of foreign settlors turning to trusts administered within the United States. For example, Horst Happel of Brazil, who kept his assets in a Bailiwick of Jersey trust for decades, established a South Dakota trust in 2018.[178] Still, it must be remembered that the same financial secrecy regime applies throughout the United States. Foreign settlors have shown a targeted interest in certain American states based on the trust law and tax law of those states. Some trust companies based in the United States tout the particularized benefits of certain states' trust and tax laws.[179] There even are rankings of American states based on their trust and tax laws.[180]

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176 The list of signatories is available at *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, OECD https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf [https://perma.cc/5A35-MQ25] (last visited May 27, 2026).

177 *See*, *e.g*., Lukas Hakelberg & Max Schaub, *The Redistributive Impact of Hypocrisy in International Taxation*, 12 Reg. & Governance 353 (2018); Elisa Casi, Christoph Spengel & Barbara M.B. Stage, *Cross-Border Tax Evasion After the Common Reporting Standard: Game Over?*, 190 J. Pub. Econ. 1, 11 (2020) ("[A]fter the CRS took effect, an unexpected country seems to have begun to attract wealth and related income, namely, the United States"); Petr Janský, Markus Meinzer & Miroslav Palanský, *Is Panama Really Your Tax Haven? Secrecy Jurisdictions and the Countries They Harm*, 16 Reg. & Governance 673, 689 (2022) (finding that the U.S. is the most significant jurisdiction providing financial secrecy for E.U.-based persons).

178 *See* Noam Noked & Zachary Marcone, *The International Response to the U.S. Tax Haven*, 48 Yale J. Int'l L. 177, 198-99 (2023) (recounting information gleaned from the Pandora Papers).

179 *See, e.g.*, *U.S. Trust*, U.S. Tr. Advisory Servs. LLC., http://ustrustadvisory.com/us-trusts/ [https://perma.cc/Z7YT-4N2A] (last visited May 27, 2026) (recommending South Dakota and Delaware generally for international clients, but recommending Wyoming and Nevada for the subset of international clients who want an unlicensed private trust company to serve as trustee).

180 *See, e.g.*, Daniel G. Worthington & Marc Merric, *Which Situs is Best in 2026?*, Tr. & Est., Jan. 2026, at 45 (ranking Alaska, Delaware, Nevada, South Dakota, and Tennessee as "top tier," and Florida, New Hampshire, Ohio, and Wyoming as "second tier"); *see also* International Consortium of Investigative Journalists, *Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, ICIJ, Oct. 3, 2021, https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ [https://perma.cc/N2KD-T4FE] (identifying South Dakota, Florida, Delaware, Texas, and Nevada, in that order descending, as the U.S. states having the most trusts mentioned in the Pandora Papers).

These state trust and tax laws enable settlors to achieve their estate planning objectives.

It is not surprising that American trust law has evolved in a direction that respects the settlor's intentions. There are other examples in legal history of jurisdictions competing to supply law that is favorable to the person best positioned to select the law. In the fifteenth and sixteenth centuries, the Court of King's Bench and the Court of Common Pleas competed to offer law favorable to the plaintiff, who was the party in litigation with the power to decide in which English court a lawsuit would be brought.[181] In the same vein, modern jurisdictions compete to offer trust law favorable to the trust's settlor.

American trust law is shaped by this competition but also by American values. The Declaration of Independence of 1776 reflects the American commitment to two values that are admittedly in tension: liberty and equality.[182] Different American states instantiate these values differently. With respect to trust law, American states diverge on the balance to be struck between honoring the settlor's liberty versus promoting intergenerational wealth equality, for example.

Is the jurisdictional competition for trust law and trust services a "race to the bottom" or a "climb to the top"?[183] As stated earlier, we might be wise to pause for more data from the laboratory of the states before declaring an answer.

Still, there is a functional reason to prefer the American emphasis on the intentions of the trust's settlor over the wishes of the trust's beneficiaries. In the modern era, it is far easier to discern and honor the former than the latter.[184] The intentions of the settlor are determined from the terms of the trust,[185] whereas there is no similarly straightforward source for determining the wishes of all beneficiaries. The modern family trust typically has one or two settlors yet many beneficiaries—some beneficiaries are identified by name, others by class-gift terminology; the beneficiaries of class gifts regularly include unborn or unascertained persons, often across multiple generations, perhaps with significant conflicts of interest; and the beneficial interests created in today's trusts

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181 *See* Sir John Baker, An Introduction to English Legal History 48, 52-54 (Oxford Univ. Press 5th ed. 2019); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. Chi. L. Rev. 1179, 1179 (2007).

182 *See, e.g.*, Alexander Tsesis, For Liberty and Equality: The Life and Times of the Declaration of Independence (Oxford Univ. Press 2012).

183 *See* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913, 920 (1982).

184 I am grateful to Professor M. Todd Henderson for this observation, in a conversation as we walked from the Quadrangle Club to the Law School after a Faculty Roundtable.

185 I use "terms of the trust" in the sense in which it is defined in Unif. Tr. Code § 103(18) (Unif. L. Comm'n).

commonly are discretionary rather than fixed.[186] In such an environment, the settlor's intentions are far more clear-cut than the beneficiaries'. The American emphasis on the settlor has a functional logic.

Conclusion

The fifth revolution continues. The American law of trusts continues to turn from case law into statute law. The Uniform Law Commission is engaged in a multi-year project to write a statute codifying the law of conflict of laws applicable to trusts and estates. The current draft embraces the position, advocated by me in a previous law review article,[187] that the law of conflict of laws should foster the core principles of the relevant substantive law. With respect to American trust and estate law, the core principle is to honor the settlor's donative freedom.[188] That donative freedom includes the ability of out-of-state and foreign settlors to create trusts in a chosen American state, within broad limits, and to select that state's law to govern the administration of the trust. The current draft (as this article goes to press) of the proposed statute provides that, as long as the transfer into trust is not a voidable transfer,[189] questions pertaining to the substantive validity of the trust,[190] other than the settlor's capacity and consent,[191] are determined under "the law of the state designated in the terms of the trust for that purpose, unless: (1) the designated state has no substantial relation to the trust; or (2) the application of the law of the designated state violates a strong public policy of the state with the most significant connection to the trust as to the matter at issue."[192] Questions pertaining to the administration of the trust are governed by "the law of the state designated in the terms of the trust for that purpose, unless

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186 On discretionary trusts, see Gallanis, *supra* note 99, at 577-88.

187 *See* Thomas P. Gallanis, *Trusts and the Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 Tul. L. Rev. 805, 821 (2023).

188 *See* Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1, cmt. a (Am. Law Inst. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition.").

189 For discussion of this issue, see Gallanis, *supra* note 187, at 828. The draft act does not apply to the choice of law governing a "transfer of property to a trustee, other than by decanting." Conflict of Laws in Trusts & Estates Act § 105(1)(A) (Unif. L. Comm'n, Draft, May 29, 2026).

190 Questions of substantive validity include "a restraint on the alienation of a beneficiary's interest in the trust, trust duration, or the rules governing perpetuities, accumulations of income, and suspension of the power of alienation . . . ." Conflict of Laws in Trusts & Estates Act § 203(a).

191 Questions of the settlor's capacity and consent are addressed in Section 202. *See id.* § 202.

192 *Id.* § 203(a).

the designated state has no substantial relation to the trust."[193] Absent an effective designation, a matter of trust administration is governed by "the law of the state of the principal place of administration of the trust . . . ."[194] The principal place of administration largely is for the settlor to control. As the draft statute states,

> [t]he terms of a trust designating the principal place of administration of the trust are controlling if: (1) a trustee's place of business is located in the designated place; (2) a trustee or a trust director resides in the designated place; or (3) all or part of the administration occurs in the designated place.[195]

In sum, the draft statute gives the settlor great latitude to select favorable trust law.

The five revolutions have created a distinctive body of American trust law. Its characteristic features include the laboratory of the states, an exceptionally strong emphasis on the settlor's donative freedom, trusts conceptualized as donative transfers, a distinctively weak adherence to the beneficiary principle and related rules, and lawmaking by legislation. These features provide a foundation for a comparative advantage in trust law vis-à-vis many competitor nations. With modernizing and freedom-enhancing legislation forthcoming on the associated law of conflict of laws, American trust law is poised to retain and even enhance its comparative advantage.

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193 *Id.* § 205(a)(1).
194 *Id.* § 205(a)(2).
195 *Id.* § 206(b).

(Reverse) Piercing the Trust Veil

*Eric Kades**

Table of Contents

Abstract

Emergent doctrine deems trusts legal entities distinct from their trustees and beneficiaries. Venerable doctrine empowers creditors to "pierce the veil" separating entities' and their owners' property to avoid

* Professor, William & Mary Law School. The author thanks Aaron Bruhl, Naomi Cahn, Felix Chang, Bridget Crawford, Evin Criddle, Adam Hofri, Carla Spivak, Allison Tait, Sarah Waldeck, and other comments from participants at the *Inequality and Inheritance* conference hosted by the Drexel Law Review September 27-28, 2024.

inequitable treatment. This article weaves together the new and old to craft a legal roadmap for reversing the ongoing race to the bottom among the states authorizing indefensible self-settled asset protection trusts (SSAPTs) designed solely for the purpose of swindling creditors. As a matter of both policy and doctrine, piercing (more precisely, *reverse* piercing) an entity's veil is ideally suited to empower the creditor of a SSAPT beneficiary to get paid from assets that in substance if not form belong to the debtor. Courts in states licensing SSAPTs almost surely will imply that their enabling legislation does not permit reverse piercing into SSAPTs. In states that have resisted the temptations to authorize SSAPTs, however, creditors can make a strong case for piercing such trusts created under the laws of other jurisdictions: choice of law, personal jurisdiction, and full faith and credit doctrine should not stand in the way. Still, there is room for improvement and this article concludes by suggesting both state and federal legislation to facilitate reverse piercing by creditors of foreign SSAPT beneficiaries.

I. Introduction

Trust law has metastasized beyond its traditionally meritorious roles such as protecting orphans, and even past less poignant but essentially innocuous uses like coddling trust-fund babies who chose their parents wisely. Out of sight of most non-lawyers and perhaps even most lawyers, this growth has not always been benign and in some cases has been downright malignant. Exhibit one in the rogue's gallery of pernicious trusts is one that this article calls the Self-Settled Asset Protection Trust ("SSAPT"). This relatively new device enables anyone to stash all of their personal assets in a legal cloud beyond the reach of their creditors. The settlors and selfsame beneficiaries of SSAPTs can enjoy their homes (primary residence and beach house and NYC pied-a-terre and …), vehicles (Rolls Royce, yacht, private jet, …), unbounded quantities of income-producing stocks and bonds, and everything else, while their creditors of all stripes, from those injured negligently, those injured even intentionally, to those contractually wronged, receive not one thin dime. First authorized in the 1990s, the most recent census of state law reveals that 20 states now permit SSAPTs. Thus, they are a growing problem.

In a seemingly unrelated contemporaneous trust law development, courts and commentators have concluded that trusts are artificial legal persons, just like corporations, LLCs, and other business entities. The recent Restatement Third of Trusts and a growing number of courts have unambiguously embraced this departure from the traditional view of trusts as simply a division of title into legal (managerial) and equitable (beneficial) components. Classifying trusts as legal persons has a number of obvious, inevitable implications, e.g. that trusts can hold property in their own "name," that they can enter into contracts in their own "name," and that they can be parties to lawsuits — all independently of trustees and beneficiaries.

There are, however, subtler implications of trusts as entities that have escaped notice. This article focuses on one important example. It is this article's thesis that the two developments sketched above (invention of SSAPTs; treating trusts as entities) are related, and related in an antipodal manner. Once trusts are classified as entities, it is doctrinally natural for creditors of trust beneficiaries to pursue trust assets if beneficiaries lack personal assets sufficient to cover their debts. One of the primary tools for attaching assets that are owned by entities other than the debtor is veil piercing and its inverse twin, reverse piercing. If creditors can convince courts to reverse pierce, it will give them ready access to assets formally owned by SSAPTs. Reverse piercing could be the death knell of these trusts. Given their socially injurious nature, such a demise is a feature, not a bug, of the doctrine of reverse piercing.

The remainder of this article begins in Part II by documenting the growing consensus that trusts are artificial legal entities like corporations and a host of others. It then shows in Part III that courts have applied piercing and reverse piercing to all newly-created artificial legal persons such as limited liability companies ("LLCs") and limited liability partnerships ("LLPs"). To provide scaffolding for the remainder of the article, Parts IV and V outline piercing doctrine and the policies animating it.

The article then turns to trust law. Surprisingly, a smattering of courts reverse pierced trusts long before the developing consensus that trusts are entities. Though prescient, this is surprising because piercing and reverse piercing doctrine makes no sense when there is only a debtor and no artificial legal entity into which she has tucked away assets.

Focusing in on the particular trust that plays a leading role in this article, Part VII explores the Self-Settled Asset Protection Trust (SSAPT). It begins with the obvious but novel examination of SSAPTs within the broader context of limited liability.[1] The main takeaway, again heretofore unnoted, is that SSAPTs take limited liability to the polar case of *no* liability — a feature that the law has never before conferred on a legal person, natural or artificial. Complete elimination of liability is troubling, and there are good reasons that the law had long steered clear of conferring such a benefit. Both efficiency[2] and fairness[3] arguments weigh heavily against the liability-nullifying SSAPT. The policy arguments against SSAPTs are precisely congruent with the policy reasons for piercing and

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[1] *Infra* Part VII.A.
[2] *See infra* Part VII.B.
[3] *See infra* Part VII.C.

reverse piercing,[4] and the doctrine of reverse piercing works in the context of trusts without any modification.[5] Succinctly stated, the *limited* liability of corporations and other business entities, though not without costs, has significant social benefits. SSAPTs have no such benefits, and greater costs given their complete erasure of all liability.

The last substantive piece of this article assesses the prospects under current law of a creditor reverse piercing into a SSAPT created by her debtor, and suggests legislation that states opposed to SSAPTs and the federal government could enact to combat the mischief enabled by such trusts.[6] Creditors in states endorsing such trusts with claims against in-state debtors will be unable to reverse pierce. If the parties both reside in a state not authorizing SSAPTs, however, the prospects for reverse piercing into the trust are good. Although there a couple of quibbles, choice of law principles easily allow the courts in such states to choose their own law (rejecting SSAPTs) over the law of the state in which the debtor formed her SSAPT.[7] Personal jurisdiction over same-state debtors is no problem, and obtaining jurisdiction over the SSAPT (necessary now because trusts are viewed as distinct legal persons[8]) will also generally pose little difficulty.[9] Finally, the Full Faith and Credit Clause mandates that a state authorizing SSAPTs nonetheless must honor judgments from states that do not.[10] Although this is a powerful tool to facilitate reverse piercing SSAPTs, case law does permit states to use their own time, place, and manner rules when enforcing foreign judgments. This provides creative draftspersons in states embracing SSAPTs with ample opportunity to impose significant hurdles to reverse piercing by foreign creditors, and in fact a number of SSAPT states have enacted just such provisions.

To denude such legal barriers, and more generally to facilitate reverse piercing into SSAPTs by out-of-state creditors, this article suggests that states enact statutory provisions undermining SSAPTs. The first option a state has is to regulate the trusts, by requiring that SSAPTs formed by its citizens under the laws of another state contain clauses waiving any of the entity's rights to parry reverse piercing orders with procedural roadblocks provided by that other state. The second option is to regulate the settlors/beneficiaries of these trusts with rules deeming them on notice that local law does not permit them to use foreign procedures to frustrate reverse piercing orders against their SSAPT. Finally, the federal

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4 *See infra* Part VII.D.
5 *See infra* Part VII.E.
6 *See infra* Part VIII.
7 *See infra* Part VIII.A.1.
8 *See infra* Part II.
9 *See infra* Part VIII.A.2.
10 *See infra* Part VIII.A.3.

government has authority under the Commerce Clause to pass legislation making all SSAPTs subject to reverse piercing, with uniform, national rules governing the details of time, place, and manner of enforcement.

Though creative lawmakers could devise alternative solutions to address the negatives of SSAPTs, reverse piercing is a perfect fit for this task, both doctrinally and as a matter of policy. Especially if enhanced by state or federal legislation, reverse piercing has real promise as a tool for limiting the efficiency and fairness costs of SSAPTs to only citizens of those states that have authorized such a deleterious legal entity. We can conceive of such legislation as a "civil war" against SSAPTs waged by states disavowing them along, perhaps, with the federal government. The result could be a felicitous example of a race to the top among the states, with jurisdictions opposing SSAPTs enabling their creditors to denude these trusts of their toxic no-liability feature.

II. Growing Consensus: Trusts are Legal Entities

To be a *legal* entity (or legal person) means to be treated as an independent unit for legal purposes. The three key practical features of a legal entity are (i) the ability to hold property, (ii) the power to enter into contracts, and (iii) the ability to sue and be sued — all three in its own name/capacity.[11] All adult humans are of course legal entities. They are "natural" legal persons.[12] All other legal entities are referred to as "artificial" and are products of the legislative or judicial imagination. Under Anglo-American law, the first artificial entity was the corporation.[13]

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[11] Cornell Legal Information Institute, Legal Person (June 2023), https://www.law.cornell.edu/wex/legal_person [https://perma.cc/L4JA-AF6S]. The literature on legal personality/legal entities is enormous. For a classic treatment, see Bryant Smith, *Legal Personality*, 37 Yale L.J. 283 (1928).

[12] Cornell Legal Information Institute, Natural Person (July 2023), https://www.law.cornell.edu/wex/natural_person [https://perma.cc/FX8T-GFF7]. Children below the age of capacity and adults with severe disabilities lack the capacity to manage their own affairs and so have guardians (biological parents or someone approved by a court). For a modern survey, see Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347 (1998).

[13] *See, e.g.*, Colin A. Cooke, Corporation Trust and Company: An Essay in Legal History 17-18 (1950); *see also* Ron Harris, *A New Understanding of the History of Limited Liability*, 16 J. Institutional Econ. 643, 645-46 (2020) (describing the corporation, by the late Middle Ages, as a legal person separate from its members). Note that the partnership pre-dates the corporation, but until recently partnerships were not separate entities: partners held an enterprise's assets as tenants in common, and lawsuits with a partnership involved the partners as joint plaintiffs/defendants, not the partnership as a separate, distinct legal actor. *See* Harwell Wells, *The Personification of Partnership*, 74 Vand. L. Rev. 1835 (2021). In a strong parallel to trusts considered in this article, there has been a strong trend toward treating partnerships as artificial entities separate and apart from the persons

Trusts predate corporations and thus were birthed into a world without any notion of artificial legal entities. After centuries remaining outside the orbit of legal entity status, however, things are changing. The recent Restatement Third of Trusts comes decidedly close to classifying trusts as distinct legal entities.

> Technically, the trust is still not generally recognized as a legal "entity," but . . . in this Chapter and elsewhere in this country, the trust is treated as an entity to such an extent that it is no longer inappropriate to refer to claims against or liabilities of a "trust" (as in the title and content of this Chapter) and to the liability or debt of a beneficiary to a "trust" . . . . Increasingly, modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal "entity,'" consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries.[14]

This passage nicely summarizes an underappreciated, ongoing evolution in the law of trusts. For centuries, indeed since their evolution, trusts looked and acted quite a bit like legal entities but were not so classified. Trustees are in substance managers. Beneficiaries are in substance passive owners, enjoying all of the benefits yielded by the trust assets. A trust, then, has always looked an awful lot like a corporation: trustee board members managing corporate assets for the benefit of shareholders. To delineate the roles of trustees (managers) and beneficiaries, judges invented trust law's split title: trustees were deemed to hold *legal* title (the power to use and alienate trust assets) and beneficiaries were given *beneficial* title (the right to income generated by those assets).[15]

It is a bit of a mystery that Anglo-American courts did not discard this rather odd reification and reconceive trusts as distinct legal entities once the notion of an artificial legal person became common with the advent of the corporation. Perhaps the rarity of interactions with the rest of the world made use of the entity concept unnecessary.

In recent decades, however, the proliferation of trusts, in both number and kind, seems to have prodded legislatures and courts to increasingly view trusts as legal persons. This process has been evolutionary rather than revolutionary, a process proceeding by accreting, cumulating steps.

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owning the enterprise, culminating in the Revised Uniform Partnership Act § 201 (Unif. Law Comm'n. amended 1992) ("A partnership is an entity . . . .").

14 Restatement (Third) of Trusts § 2 cmt. a (Am. Law Inst., 2001).

15 *See id.* § 2 ("A trust . . . is a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee.").

What follows is but a sampling of these small steps; it is in no way a comprehensive catalog of this legal revolution.

In a relatively early step, the Colorado legislature in 1977 permitted a trust to "deal with any interest in property in the name of the trust;"[16] traditionally trustees dealt with trust property in their own name as the legal (though not beneficial) owners. In 1996, a Massachusetts court found that a trust, as a separate legal entity, could both hold title to an insurance policy and be the beneficiary of said policy.[17] Two decades later, in 2015, a bankruptcy court followed the Restatement Third whole hog, citing it for the proposition that trusts "are considered a distinct 'legal entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries."[18] Similarly, an Oregon court in 2016 declared that "[a] trust is a distinct legal entity, and a settlor's transfer of property to a trust divests the settlor of its legal interest in that property.[19] A year later the Supreme Court of Rhode Island declared unambiguously that "[a] trust is recognized as a legal entity,"[20] as did a bankruptcy court in 2020.[21]

Although not universal, these sources are consistent with a strong trend, explicitly embraced in the Restatement (Third) quote above,[22] to treat trusts as distinct legal entities holding property in their own right, able to enter into contracts, and proper parties to lawsuits. The next section focuses on a perhaps unintended consequence of treating trusts as entities: the universal practice of disregarding ("piercing") any separation ("veil") between assets of an artificial entity and the entity's owner when respecting said separation would enable unfair or fraudulent acts.

III. Implications of Classifying Trusts as Legal Entities— Including (Reverse) Piercing

Since the advent of the corporation, Anglo-American law has created a growing list of additional artificial legal entities, most prominently:

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16 Colo. Rev. Stat. § 38-30-166 (1977).

17 *See* Tatarian v. Commercial Union Ins. Co., 672 N.E.2d 997, 998, 1000 (Mass. App. Ct. 1996).

18 *In re* Lewiston, 539 B.R. 154, 159 (E.D. Mich. 2015) (citing Restatement (Third) of Trusts § 2 cmt. a).

19 Lake Oswego Pres. Soc'y v. Lake Oswego, 379 P.3d 462, 469 (Or. 2016) (citing Restatement (Third) of Trusts §§ 2 cmt. a, 3 cmt. b).

20 Glassie v. Doucette, 157 A.3d 1092, 1099 (R.I. 2017).

21 *See In re* Lakeview Dev. Corp., 614 B.R. 603, 608 (Bankr. D. Colo. 2020) ("It is true that a trust is a separate legal entity.") (citing Restatement (Third) of Trusts § 2 cmt. a).

22 *See supra* text accompanying note 15.

S corporations,[23] business trusts,[24] limited partnerships,[25] limited liability companies,[26] limited liability partnerships,[27] and limited liability limited partnerships.[28] In addition to the definitional powers to hold property, enter into contracts, and be a party to a lawsuit, all of these legal entities, by virtue of being entities, have additional express and implied rights and obligations.

Some rights and obligations flow directly from the three primary features of a legal person (hold property; enter into contracts; party to lawsuits). The power to hold property includes the power to mortgage that property.[29] The power to contract includes the power to confer the benefits of these contracts on third parties.[30] The power to be a party to a lawsuit includes the obligation to appear, when summoned by the court, as in impleaded or interpleaded party.

Many other rights and responsibilities range far afield from the core features of legal personhood. At birth, all artificial legal entities save simple partnerships must file basic documents with the state,[31] include an

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23 Congress enacted statutory provisions in 1958 that made creating S corporations possible. S corporations, limited to relatively small enterprises, receive partnership tax law's "pass-through" treatment, with no taxes assessed against the entity. *See generally* David Branham, *Has the S–Corp Run Its Course? The Past Successes and Future Possibilities of the S Corporation*, 42 J. Legis. 101, 106-07 (2016) (describing the historical development of the S corporation under Subchapter S).

24 *See, e.g.*, John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Colum. L. Rev. 2145 (2016).

25 Limited partnerships are one of the older business entities, first authorized by New York state in 1822. *See* Eric Hilt & Katharine E. O'Banion, *The Limited Partnership in New York, 1822-1853: Partnerships without Kinship* (Nat'l Bureau of Econ. Rsch., Working Paper No. 14412, 2008) (on file with the Nat'l Bureau of Econ. Rsch.).

26 For a helpful overview of the early development of Limited Liability Companies, see Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 Mich. L. Rev. 393 (1996).

27 *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 Colo. L. Rev. 1065 (1995).

28 For one state's experience with Limited Liability Limited Partnerships (LLLPs), see Carol R. Goforth, *Limited Liability for General Partners in Arkansas LLLPs (Limited Liability Limited Partnerships)*, 2001 Ark. L. Notes 1.

29 *See, e.g.*, Model Bus. Corp. Act § 3.02(g) (Am. Bar Ass'n 2025); Unif. Ltd. Liab. Co. Act § 905(a)(7) (Unif. Law Comm'n amended 2013).

30 *See, e.g.*, H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928) (Cardozo, J.).

31 *See, e.g.*, Model Bus. Corp. Act §§ 1.20-1.29; Unif. Ltd. Liab. Co. Act § 203 ("Signing of Records to be Delivered for Filing to [Secretary of State]"). Partnerships can come into existence, without any formation formalities, when two or more persons conduct a business and share profits. The parties need not even know that they are in a partnership and do not need any sort of partnership agreement to create the entity. This special treatment of partnerships is a vestige of law formed centuries before the advent of statutes authorizing

entity label in their legal name,[32] and designate a place and agent for the delivery of legal process (so that other actors can sue the entity).[33] At the other end of the life cycle, in order to end its existence (in corporate parlance, to "dissolve"), an artificial entity must follow prescribed procedures largely designed to protect creditors.[34]

Circling into the focus of this article, artificial legal entities are eligible for and subject to all legal remedies. Money damages are of course easy: natural persons satisfy judgments out of their personal assets; artificial entities do so out of entity assets (instead of owner assets). Artificial entities are also subject to injunctions. Of course when a court orders, e.g., a corporation, to affirmatively do something, the corporation perforce will rely on natural agents to comply, but this takes nothing away from the fact that it is the entity that will be liable for failure to comply, not the shareholders or any directors, officers, or other agents.

As discussed below, piercing and reverse piercing are nothing more (or less) than another *remedy* for plaintiffs with unsatisfied judgments. This article focuses on the universal right of creditors, under certain conditions, to disregard the distinction between the assets of an artificial legal person and the assets of its owner(s). This is the doctrine of piercing the veil, with the noun "veil" embodying the routine separation of entity and owner assets and the gerund "piercing" flagging exceptional facts that justify ignoring the separation demarcated by the veil. Veil piercing originated with corporations, at a time when they were the only artificial legal persons,[35] but has been extended to each and every subsequently-created type of entity.[36] There are no grounds, in either doctrine or policy, to exclude trusts now that they are entering the pantheon of artificial legal entities.

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the private creation of corporations and then other business entities. *See* John C. Coffee, Jr. et al., Cases and Materials on Corporations 635-37 (9th ed. 2021).

32 For corporations, see Model Bus. Corp Act § 4.01 ("Corporate Name"); Unif. Ltd. Liab. Co. Act § 112 ("Permitted Names").

33 For corporations, see Model Bus. Corp. Act §§ 5.01-5.04 ("Office and Agent"); Unif. Ltd. Liab. Co. Act § 119 ("Service of Process, Notice, or Demand").

34 For corporations, see Model Bus. Corp Act ("Disposition of Assets"); Unif. Ltd. Liab. Co. Act art. 7 ("Member's Disassociation When Business Not Wound Up").

35 *See generally* I. Maurice Wormser, Disregard of the Corporate Fiction and Allied Corporation Problems (1927) (describing the development of veil-piercing doctrine in the corporate context).

36 *See, e.g.*, Kubican v. The Tavern, LLC, 752 S.E.2d 299, 305-06 (W. Va. 2013) (extending corporate veil-piercing to LLCs); Black v. Gigliotti, 514 B.R. 439, 444 (E.D. Pa. 2014) (applying piercing doctrine to LLPs, though declining to pierce on facts of case). Note that veil-piercing is unnecessary for a simple partnership, as all partners' personal assets are available to creditors of the partnership. *See* Unif. P'ship Act § 306(a) (Unif. Law Comm'n amended 2013).

So far we have established that trusts are now largely viewed as legal entities[37] and as such are, along with their owners (beneficiaries), subject to piercing remedies as detailed in this section. At this juncture it is useful to map out the argument of the rest of this article. The next two parts cover the basic structure and doctrine of piercing[38] and the unified policy justifications for piercing.[39] With the burgeoning recognition of trusts as distinct legal entities, it is only natural to apply the ubiquitous doctrine of piercing. Hence Part VI introduces trusts into the conversation, reviewing the checkered and contradictory precedents on piercing the veil in this domain. In the trust context it is important to focus on the two flavors of piercing: "regular" and "reverse." In the regular case, an *entity* creditor seeks to reach the assets of owners. In reverse piercing, the creditor of an *owner* seeks to reach the assets of the entity. In the realm of trusts, Part VII demonstrates that reverse piercing is the relevant category.

IV. The Basics of Piercing & Reverse Piercing Doctrine

Regardless of the entity type involved, piercing has a universal structure and doctrine. This section delineates this common core of piercing *doctrine*, and the next section demonstrates that this commonality extends to the *policy* reasons for piercing.

A. Piercing Doctrine

The structure of piercing doctrine is straightforward. The need for it arises from the formal legal separateness of an entity and its owners. This means that the entity owns one set of assets and the owners' other assets. There are all sorts of pedestrian and legitimate reasons for assets to move back and forth between these legal persons. Owners fund the entity at its creation, and may make further capital contributions. In the other direction, the entity may transfer wealth back to owners in the form of dividends or other distributions. Owners who labor for the entity receive wages and salaries. On dissolution the entity will pay out all of its remaining assets to owners. These transfers are all ordinary and indeed necessary in the ordinary course of business.

The ability to move assets into and out of the artificial legal entity, however, opens a rather capacious door for commercially pernicious behavior by entity owners. One particularly egregious example is when, at the time credit is extended, an owner misleads a creditor into thinking

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37 *See supra* Part II.

38 *See infra* Part IV.

39 *See infra* Part V.

that the entity owns assets that in fact belong to that owner. If the entity becomes insolvent, the creditor will be unpleasantly surprised to then discover that the entity has a far smaller capital cushion than she reasonably expected. This is tantamount to fraud by the owner and is a prime reason to pierce the entity veil and permit the creditor to reach the owner's assets that she thought belonged to the entity.

A closer case arises when owners create a commercial entity likely at some point in the future to face negligence claims and fails to either put aside funds or purchase insurance sufficient to cover the expected tort liability. Although this does not seem to rise to the level of fraud, the tort victims will argue that it is inequitable for owners to have enjoyed years of profits when they knew or should have known that there was a high probability that the enterprise would inflict injuries and attendant tort judgments for which the entity would lack sufficient funds to satisfy.

Creditors (contract, tort, or other) with claims that exceed an entity's assets can invoke the equitable *remedy*[40] of piercing the entity's veil to reach owners' assets. The doctrine of piercing an entity's veil to reach the assets of owners is tailor-made to address the patterns of behavior outlined in the previous paragraphs. Although the precise terminology varies across jurisdictions, it invariably includes two elements.

1) The entity was the alter ego, stooge, dummy (or some other similar synonym)[41] of the owner, essentially meaning that the financial border between the two legal entities' assets was blurred or non-existent.
2) The entity was used to either defraud creditors or subject them to inequitable treatment.[42]

When these two elements are satisfied, the law permits an entity's creditors to pierce the entity veil and satisfy a judgment from owners' personal assets. This remedy vindicates a deeply-rooted doctrinal principle that creditors must be paid in full before debtors can enjoy their assets or gift them to favored persons. Piercing in effect unwinds the moves of owners who play "shell games" by moving assets from their entities to themselves. Piercing is an equitable remedy and, as such, creditors can invoke it only

40 Piercing and reverse piercing are *remedies*. To invoke them, a plaintiff must first obtain a substantive judgment against the defendant and then convince a court that the facts satisfy the elements of veil piercing discussed *infra* Part IV.A-B.

41 Harry G. Henn & John R. Alexander, Law of Corporations and Other Business Enterprises § 146 n.2 (3d ed. 1991).

42 For an introduction to piercing doctrine, see Coffee, Jr. et al., *supra* note 31, at 216-17.

after they have exhausted all of their *legal* remedies.[43] In particular, they must first make all reasonable efforts to satisfy their claim out of the entity's assets before proceeding against owners.[44]

A critical and difficult question is whether a creditor piercing the veil can reach only the assets of those shareholder(s) who acted fraudulently or inequitably, or can they recover from any and all shareholders? Piercing is essentially impossible against a public corporation with numerous owners,[45] and so in practice piercing applies to entities with relatively few shareholders. It may seem unfair to penalize owners B and C for the fraudulent or inequitable conduct of shareholder A. Courts are sensitive to this concern and permit creditors to reach assets of non-culpable owners only in situations in which such owners financially benefited from the acts of the blameworthy shareholder. Note that this is a non-issue in the quite common situation in which an entity has but a single owner of the entity. In such circumstances recovery by definition is limited to the wrongdoing owner.

B. Reverse Piercing

Just as siphoning off cash from an entity into an owner's accounts can be fraudulent or inequitable, owners can shift funds in the other directions to achieve the same nefarious ends — frustrating legitimate creditors, in this case creditors of owners instead of creditors of the entity. Owners facing judgments may move their attachable assets into an entity solely or primarily to frustrate creditors' collection efforts. In this context, creditors may invoke piercing's mirror- image equitable remedy *reverse* piercing, enabling them to reach assets of the entity to satisfy claims against an owner. The doctrinal elements of reverse piercing are identical to its twin discussed above,[46] and the policy justifications are also identical as shown in the next section.[47]

Reverse piercing, however, poses risks inapplicable in "forward" piercing. As noted above, piercing against all shareholders for the misdeeds

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43 *See* 13 Fletcher Cyclopedia of the Law of Corporations § 6320, Westlaw (database updated Sept. 2025).

44 *See id.*

45 Coffee, Jr.et al., *supra* note 31, at 224.

46 As one commentator has observed, the first prong, "alter ego," doesn't quite make sense in the reverse piercing context. It is at best obtuse to say that a human owner is the alter ego, stooge, or dummy of a corporation that she owns, or that a parent corporation is the alter ego, stooge, or dummy of a subsidiary. *See* Ariella M. Lvov, *Preserving Limited Liability: Mitigating the Inequities of Reverse Veil Piercing with a Comprehensive Framework*, 18 U.C. Davis Bus. L.J. 162, 169-70 (2018).

47 *See id.* at 164 (citing LFC Mktg. Grp., Inc. v. Loomis, 8 P.3d 841, 846 (Nev. 2000)) ("Reverse veil piercing is also consistent 'with traditional piercing in its goal of preventing abuse of the corporate form.'").

of only one or a few of their number is a worry and courts address it on a case-by-case basis. Reverse piercing by its very nature always raises the specter of unfairness to others owning an interest in the entity and to creditors of the entity. If a creditor of one co-owner, A, successfully reverse pierces and attaches entity assets, co-owner B stands by helplessly as the value of her interest in the entity declines and potentially disappears through absolutely no fault of her own.[48] The same holds for a creditor of the co-owned entity, C.[49] What looked like a very safe loan can turn sour based on acts of A that it is impossible for creditors to forecast or detect. Structurally, then, reverse piercing *always* poses a risk to co-owners' interest and so courts should be wary of applying it to entities with multiple holders.[50]

These concerns have led at least one federal appeals court to adopt a *per se* rule against reverse veil piercing.[51] Other courts, however, have taken a more nuanced approach, requiring that "an equitable result is achieved by [reverse] piercing" with a particular focus on prejudice to "innocent shareholders and creditors."[52] Courts "considering reverse veil piercing must weigh the impact [on] innocent [co-owners and also on] innocent secured and unsecured creditors."[53] One commentator has suggested that this more measured approach to reverse piercing in effect adds a third equitable element to the two-pronged standard for regular piercing, requiring courts to consider effects on co-owners and creditors.[54]

The availability of a much more measured and targeted alternative remedy buttresses the case for restraint in using reverse piercing. Creditors of a single shareholder in a corporation with other ("innocent," non-debtor) shareholders can, instead of reverse piercing, simply levy on the shares of their debtor, stepping into her shoes and simply replacing her

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48 *See* Nicholas B. Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, 85 St. John's L. Rev. 1147, 1163-64 (2011).

49 *See* Lvov, *supra* note 46. *See also* Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. Corp. L. 33, 65 (1990) ("If other shareholders do exist, allowance of a reverse pierce would prejudice those shareholders by allowing the outsider to attach assets in which they have an interest. This injustice visited upon non-culpable parties would militate strongly against granting the equitable remedy of corporate disregard.").

50 Note, crucially, that these concerns evaporate entirely if an entity has only one owner, as is invariably the case with the self-settled asset protection trusts considered *infra* Part VII.

51 Cascade Energy & Metals v. Banks, 896 F.2d 1557, 1576-77 (10th Cir. 1990) (emphasizing harms to non-culpable shareholders); *see also* Floyd v. I.R.S., 151 F.3d 1295, 1299-1300 (10th Cir. 1998) (adding concern about harms to creditors).

52 *In re* Phillips, 139 P.3d 639, 646 (Colo. 2006).

53 C.F. Tr. Inc. v. First Flight Ltd. P'ship, 580 S.E.2d 806, 811 (Va. 2003); *see also* LFC Mktg. Grp., Inc. v. Loomis, 8 P.3d 841, 846 (Nev. 2000) (affirming use of reverse piercing based on absence of harm to other shareholders).

54 *See* Lvov, *supra* note 46, at 170.

as a new co-owner.[55] This more traditional remedy creates no new claims against corporate assets and thus precludes any and all unfairness to other shareholders or creditors. Some courts go so far as to reject reverse piercing claims because of the efficacy and fairness of simply levying on the debtor's shares.[56] This neat alternative does not work for simple piercing: corporations do not own shares (or anything else, for that matter) in their shareholders.[57] Unlike reverse piercing, there is no easy, generally applicable alternative to the regular piercing remedy.

This subsection suggests that reverse piercing is an extraordinary remedy for which there is a superior remedy in most cases (attaching debtor's shares). For the legal landscape studied in this article, however, the doctrinal case for reverse piercing is compelling. There are two reasons for this exceptional use. First, this article's ultimate focus[58] is on a special type of trust that invariably has only one beneficial owner and no creditors. This renders inapplicable all concerns about unfairness to other owners or creditors. Second, the creditor's alternative remedy of seizing shares is not feasible for trusts, as there are no shares or other ownership interests to seize. Thus, the domain of single-beneficiary trusts stands out as an atypical case in which reverse piercing (or something that looks a lot like it) may be sensible and (as argued *infra* in Parts VIII and IX) indeed a necessary remedy.

V. The Policy Rationales for Piercing & Reverse Piercing

Like all legal doctrines, the law of piercing and reverse piercing is only as good as the social ends it advances. At the core of these issues is the use and abuse of artificial legal entities. Like any powerful tool, entities are used for both good and ill. Corporations, LLCs, and other business entities, by walling off assets of owners and creditors, encourage entrepreneurship and investment. Trusts enable benefactors to provide for those unable to fend for themselves. Yet all legal entities can be deployed to purely malignant ends. Piercing policy aims to separate wheat from chaff, permitting socially productive use of entities while curbing abusive exploitations. This realm embodies a leading example of substance

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55 "[A]n alternative to reverse piercing is to force parties to attach the shares or ownership interest in the corporation." Michael Richardson, *The Helter Skelter Application of the Reverse Piercing Doctrine*, 79 U. Cin. L. Rev. 1605, 1626 (2011). *See, e.g.*, *Floyd*, 151 F.3d at 1300; Owens & Sons, Inc. v. Guastella East, Inc., 354 So. 2d 571, 572 (La. Ct. App. 1977).

56 *See Owens & Sons, Inc.*, 354 So. 2d at 572.

57 This ignores the unusual case of circular ownership structures, in which a subsidiary corporation owns shares in the parent corporation. *See, e.g.*, Speiser v. Baker, 525 A.2d 1001, 1010 (Del. Ch. 1987).

58 *See infra* Parts VIII and IX.

over form: when clever actors use artificial entities to subvert the purpose of a legal regime, piercing doctrine is a ready tool for courts to prevent subversion of substantive social policies.

Although courts and scholars continue to refine the social goals that piercing serves, it is remarkable just how much of the essence that one of the progenitors of piercing doctrine, Wormser, captured in considering piercing the veil of corporations (essentially the only artificial legal entity in existence at the time he wrote).

> When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web [i.e., veil] of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.[59]

Substance over form is unmistakable here. When social policy (*substance*) demands it, Wormser says that courts will disregard the *form* of the entity and apply legal strictures to the flesh-and- blood persons engaged in skullduggery.

Wormser's list of offending uses proceeds starts with the worst cases. The law's refusal to respect entities formed for criminal purposes (or "knavery," presumably outright fraud and other intentional tortious behavior) is part and parcel of a capacious set of laws denying the worst actors the benefits of otherwise useful legal tools. To give but one example, contracts to perform criminal acts are unenforceable in order to bar anti-social actors from enlisting a useful legal tool to serve illegal ends.[60] Indeed, contracting to commit a crime (perhaps accompanied by an act in furtherance of the contract) is itself a crime, conspiracy.[61]

Proceeding from more to less serious cases in Wormser's list, a contract to fix prices or monopolize a market is a conspiracy as well as either a crime or a civil violation.[62] An entity formed for such purposes in no way insulates the human actors pulling the strings from legal accountability.

Finally, Wormser considers debtors who defraud creditors. This is where matters start to turn from black and shades of gray. Patent lies to

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59 I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496, 517 (1912).

60 *See* Richard A. Posner, Economic Analysis of Law § 4.1 (9th ed. 2014).

61 *See* Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases § 2.08 (rev. ed. 2024).

62 *See* Herbert Hovenkamp, Principles of Antitrust ch. 4 (discussing antitrust policy toward collusion and oligopoly) (2d ed. 2021).

obtain loans never repaid are of course still easy cases: they are likely crimes as well as torts. Short of such premeditated, outright dishonesty, however, things turn to lighter shades of gray. A plaintiff creditor will still have an easy case to make if her debtor gifts funds to family members sufficient to render herself unable to repay the loan. This is a classic case of a fraudulent transfer, and there is a very well- developed, uniform legal regime to void this preference and redirect the funds to the creditor.[63]

What if, however, the debtor makes timely interest payment on the loan for a long stretch while also paying out relatively generous dividends to herself or her family, and defaults on the debt only years after borrowing? This is a close case.[64] It will be an even closer case if the debtor's business suffers a modest downturn. The foreseeability of such a dry patch may determine whether or not the creditor may recover for a fraudulent transfer.

At some point the number of transactions between entity owners and the length of time over which these transactions take place becomes so numerous that trying to mold them into fraudulent transfer law becomes untenable. In a landmark article, Robert Clark characterized piercing as a sort of extension of fraudulent transfer law for these sorts of fact patterns.

> [Piercing is] in large part, [a mode] of overcoming the extraneous limitations of historically received fraudulent conveyance law. Usually, if the outside creditor had knowledge of specific unfair transfers, he would simply bring a fraudulent conveyance action instead of a piercing suit. The number of unfair transactions with insiders may be large and indefinite, and proof of unfairness and the extent of lack of fair consideration in each instance of a transaction may be difficult or extremely costly.[65]

Not only did Clark conjoin piercing with fraudulent transfer law along this dimension; he situated both as tools in service of common, broad policies.[66] He articulated four "simple but potent moral principles

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63 "[C]ourts will disregard the corporate form in order to prevent fraudulent conveyances and preferential transfers." Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99, 101 (2014).

64 *See, e.g.*, Conam Alaska v. Bell Lavalin, Inc., 842 P.2d 148 (Alaska 1992).

65 Robert Charles Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 Harv. L. Rev. 505, 506, 543 (1977); *see also* Franklin Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 Or. L. Rev. 853, 878 (1997) (arguing that piercing obviates the need for "careful transaction-by-transaction scrutiny" of a debtor who engages in a long series of complex transactions to avoid repaying debt); Macey & Mitts, *supra* note 63, at 101 ("[C]ourts will disregard the corporate form in order to prevent fraudulent conveyances and preferential transfers.").

66 In addition to highlighting the similar ends of fraudulent transfer law and piercing the veil, Clark also analogized both to bankruptcy law in general and equitable

governing the conduct of debtors toward their creditors:"[67] (i) anti-fraud, (ii) paying creditors before making gifts ("respect"); (iii) equal treatment of all creditors ("even- handedness"); and (iv) not obstructing creditors' lawful efforts to get repaid ("anti-hindrance").[68]

Though Clark characterized these as "moral" principles, a stronger basis for this quartet is efficiency.[69] The verification, search, and other transaction costs of borrowing would be significantly higher if the background law permitted debtors to (i) lie (with the defense of "caveat lender"); (ii) make gifts (to themselves or others) before repaying creditors; (iii) to favor some creditors and disfavor others; and (iv) to take active measures solely to raise a creditor's costs in attempting to receive her due. Thus, the law infers that most parties to borrowing contracts would opt for these rules to minimize waste and maximize their joint wealth.[70]

For the purposes of this article, it is the last principle, "anti-hindrance," that figures most prominently.[71] The case for this norm is unassailable. Expending resources to frustrate a creditor is pure waste, serving no socially valuable purpose. In addition, creditors negotiating a loan who faced the prospect of later debtor hindrance efforts would of prospective financial necessity demand compensatory terms to guard against this risk — erasing any benefit that a conniving borrower would anticipate and artificially raising the cost of credit to honest ones. We will see, incredibly, that some states authorize trusts that enable, nay *encourage*, such inefficient behavior.[72]

Moving back to the continuum of situations for piercing, perhaps the weakest class of cases in which creditors may still pierce the veil is *undercapitalization*. For example, a manufacturer statistically likely to incur products liability claims of $1 million must either keep a commensurate capital reserve or purchase insurance sufficient to cover this foreseeable cost. A shareholder running an entity that is "organized with capital insufficient to meet liabilities which are certain to arise in the ordinary course

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subordination in particular. Clark, *supra* note 65, at 517-27; *see also* Macey & Mitts, *supra* note 63, at 101 (similarly linking veil piercing to creditor-protection rationales).

67 Clark, *supra* note 65, at 505.

68 *Id*. at 506-07, 513.

69 As discussed *infra* Part VII.B, this article argues that paying creditors before making gifts, Clark's element of "respect," has a natural moral interpretation.

70 Debtors and creditors of course are free to contract around these defaults. It is difficult to imagine a creditor who would agree to make a borrower's false representations inactionable, to pay herself instead of satisfying the terms of the debt, or license efforts to increase collection costs. Parties do contract around the equal treatment of all creditors norm routinely, however: witness the ubiquity of security interests and priority ordering in unsecured debt. *See generally* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 637 n.46 (1997) (discussing an account of secured credit as altering parity among creditors).

71 *See infra* Parts VII.B-VII.C.

72 *See infra* Part VII.A.

of the corporation's business, may be held personally responsible for such liabilities;" i.e. those tort creditors can pierce the corporate veil.[73]

Clark argues that his anti-hindrance principle justifies piercing based on undercapitalization alone, although he concedes that extant case law has not wholly embraced such application of the doctrine.

> [S]ome of the piercing cases can be interpreted as expanding the ideals of Nonhindrance to a new ideal of affirmative support of creditors' interests through the requirement of an adequate capital structure. [T]he thin capitalization cases have experimented with the notion of placing upon business creditors an affirmative duty of cooperation with creditors. As the ambivalence and conflict in the case law suggest, the experiment is certainly not completed.[74]

The importance of each of Clark's four policy principles for piercing (anti-fraud; primacy of creditors over giftees; equal treatment; anti-hindrance) varies with context — in particular when comparing contract versus tort creditors.[75] Contract creditors' case for piercing is particularly strong when the debtor committed fraud to obtain credit.[76] Conversely, the case for piercing is especially weak for contract creditors when the debtor has been entirely open and honest about its finances and prospects. In such cases creditors have every opportunity to consider all the relevant facts in deciding whether to lend and, if so, on what terms.[77]

Tort claims are subtler. Actors who fail to set aside funds to satisfy reasonably foreseeable unintentional tort judgments will take suboptimal precautions to avoid accidents. "Inadequate capitalization externalizes the

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73 Walkovszky v. Carlton, 223 N.E.2d 6, 14 (N.Y. 1966) (Keating, J., dissenting). To highlight just how close cases for piercing based on undercapitalization can be, Keating goes on to say that "[w]here corporate income is not sufficient to cover the cost of insurance premiums above the statutory minimum or where initially adequate finances dwindle under the pressure of competition, bad times or extraordinary and unexpected liability, obviously the shareholder will not be held liable." *Id.*

74 Clark, *supra* note 65, at 547.

75 Although mixed, there is some empirical evidence that decisions follow the guidelines suggested in the text: contract creditors subject to fraud are the most likely to succeed in piercing claims, other contract creditors are least likely to succeed, with tort creditors enjoying a middling success rate. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1041 (1991); Lee C. Hodge & Andrew B. Sacks, Note, *Piercing the Mist: Bringing the Thompson Study into the 1990s*, 43 Wake Forest L. Rev. 341, 345 (2008); Peter B. Oh, *Veil Piercing*, 89 Tex. L. Rev. 81 (2010); Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. Rev. 853, 860 (2010).

76 *See* Macey & Mitts, *supra* note 63, at 123-27.

77 *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479, 503 (2001); Gevurtz, *supra* note 65, at 883.

costs of accidents. This is not simply a matter that, after the accident, the undercapitalized corporation finds itself unable to pay the victim. The more important problem arises before the accident."[78] The key to externalizing expected accident costs is limited liability — metaphorically, the entity veil that this article examines. If the goal is efficiency, the law seems to presume that the benefits of limited liability exceed this cost of externalized accident costs.[79] There is no point to trying to incentivize entities to insure against *unforeseeable* risks, but "[t]he use of limited liability by owners of a closely held business to *deliberately* externalize foreseeable accident costs, however, simply undercuts the goals of tort law."[80] The same insight will apply to trusts created under statutes custom-designed deliberately to avoid the payment of future tort judgments.[81]

Although couched in terms of regular piercing, all the conclusions of the preceding paragraphs apply to reverse piercing as well. Such a remedy should be "equally available . . . to hold the corporation liable for the debts of controlling shareholders where the shareholders have formed or used the corporation to secrete assets and thereby avoid preexisting personal liability."[82] The policy concerns motivating both piercing and reverse piercing are identical: to deter debtors from obscuring asset holdings among legal entities for the sole purpose of dodging creditors.

VI. The Shadowy History of (Reverse) Piercing Trusts

Until the relatively recent classification of trusts as distinct legal entities, all of this law of piercing and reverse piercing business *entity* veils faced a seemingly insurmountable doctrinal hurdle: trusts were not entities. The traditional view of a trust as simply the splitting of ownership into the legal (managerial) title of the trustee and the equitable (beneficial) title of the beneficiaries meant that there was no creation of a new legal person and hence no veil between any entity and its owners.

Indeed, some commentators and at least one judge, quite recently, rejected the new school view of trust as entities and make just this doctrinal case against piercing or reverse piercing the (non-existent) trust veil:

> [b]ecause a trust is not an entity, it is impossible for a trust to be anybody's alter ego. That's because alter ego theory, which is simply one of the grounds to "pierce the corporate veil," is

78 Gevurtz, *supra* note 65, at 887.
79 *See id*.
80 *Id.* (emphasis added).
81 *See infra* Parts VII.A-VII.C.
82 Crespi, *supra* note 49, at 61 (citing Estudios, Proyectos E Inversiones De Centro America, S.A. v. Swiss Bank Corp., 507 So. 2d 1119, 1120 (Fla. Dist. Ct. App. 1987)).

> inescapably linked to the notion that one person or entity exercises undue control over another person or entity. However, a trust's status as a non-entity logically precludes a trust from being an alter ego. . . . [W]hile a corporation, company, or other artificial entity "has no body to kick and no soul to damn," it's nonetheless a separate juridical person, and it therefore makes theoretical sense to talk of a corporation as potentially being somebody else's alter ego. However, it makes no sense to describe a *nonentity like a trust* as an alter-ego.[83]

In a recent concurring opinion, a federal judge echoed precisely these tropes, voicing "discomfort with incorporating veil piercing and alter ego theories into trust law. Both concepts originate in corporate law, and both concepts should stay there."[84] Elaborating, Judge Sutton argued that

> [a] corporation and a trust are not one of a kind. A corporation is a distinct legal entity, with legal rights, obligations, powers, and privileges independent of the natural individuals who created it. A trust isn't an entity at all; it is a fiduciary relationship between multiple people. . . . How could one pierce the veil of a trust? It doesn't have a veil, much less any form to pierce into. And what could it mean for a trust to be a beneficiary's alter ego? An alter ego is simply an entity's second self. As a non-entity, a trust can't be a self of any sort—secondary or otherwise.[85]

Judge Sutton and the trust professionals cited above acknowledge that despite their vehement opinions to the contrary, courts with some regularity have applied (reverse) piercing to trusts.[86] Indeed, Sutton's co-panelists disagreed with him on just this point and I have not seen a single court opinion unambiguously rejecting the application of piercing principles in the context of trusts.

In parsing opinions and other legal sources that permit creditors of trust beneficiaries to reach trust assets, it is important to keep in mind the

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83 Richard W. Nenno & John E. Sullivan, III, *Planning and Defending Domestic Asset-Protection Trusts,* in *Planning Techniques for Large Estates* 1825, 1870-71 (ALI–ABA SR034, Apr. 2010).

84 Church Joint Venture, L.P. v. Blasingame, 947 F.3d 925, 935 (6th Cir. 2020) (Sutton, J., concurring) (citations and quotations omitted). The majority opinion in this case agreed in theory that reverse piercing trusts was doctrinally justifiable (motivating Sutton, who disagreed, to write a concurrence), but determined that controlling Tennessee law permitted reverse piercing only in the case of a parent and a subsidiary corporation. *Id.*

85 *Id.* at 935.

86 *See id.*; *see also* Nenno & Sullivan, *supra* note 83, at 1870 ("This critical distinction, however, does not always keep U.S. courts from applying alter-ego theory to trusts.").

distinction between fraudulent transfers and piercing. Recall the general "division of labor" between these two doctrines: fraudulent transfer law effectively governs factually simpler cases in which a creditor can identify one or a few asset movements by the debtor, over a short time span, that unlawfully placed assets beyond her reach. Piercing is reserved for multiple, messier, more involved asset movements.[87]

The Restatement (Third) of Trusts invalidates trusts when their "purpose is unlawful or its performance calls for the commission of a criminal or tortious act . . ."[88] The phrase "criminal or tortious" includes trusts formed for the express purpose of defrauding creditors.[89] This sounds in fraudulent transfer law: forming a trust for the express purpose of moving specific assets beyond the reach of identifiable creditors. A leading treatise echoes the restatement, declaring that "[a]lthough the terms of the trust in themselves are perfectly lawful, the trust is illegal where the motive of the settlor for creating the trust is to defraud creditors or other persons."[90]

In one case involving a debtor who created a trust and moved personal assets into it to avoid upcoming medical expenses and a likely divorce settlement, the court effectively found that creation of the trust was a key element of an easily identifiable, one-time fraudulent transfer.

> [T]the trusts were shams and fraudulent conveyances. [They] are without economic substance. . . . These facts also indicate the transfers to the trusts were fraudulent. Indeed, [the settlors] testified that the transfer was made with the expressed intent to shelter assets from [creditors]. [T]he trusts were shams and fraudulent conveyances [and] not separate persons apart from the [settlors, who] treated the trust assets as their own. They continued to live in the residence and use the office space; they paid no rent for such use. They made mortgage and insurance payments and collected income from rental property [T]he trusts

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87 *See supra* text accompanying note 65.

88 Restatement (Third) Trusts § 29(a) (Am. Law Inst., 2003).

89 *See id*. cmt. a (deeming a trust unlawful "if it calls for the performance of criminal or tortious acts by the trustee or its purpose is fraudulent . . . ."); *id.* cmt. b (deeming trusts unlawful in "cases in which the settlor's transfer to the trust constitutes a fraudulent transfer under applicable creditors' rights law"); *id.* cmt. d (deeming unlawful cases in which "the owner of property might transfer it to another who agrees to hold it in trust for the transferor or another with the purpose being to conceal the interest of the transferor or other person, not merely for reasons of privacy but in order to mislead the government or others with respect to the true beneficial interests in the property"). The Restatement (Second) of Trusts, § 63(1) (Am. Law Inst., 1959) similarly stated that "a trust is invalid if the purpose of the settlor in creating the trust is to defraud his creditors or other persons."

90 1A William f. Fratcher, Scott on Trusts § 63, at 361 (1987).

> are shells acting as alter egos for the [settlors] and therefore not separate persons.[91]

Fraudulent transfer law suffices for such tidy cases, but is unsuited for more tangled scenarios. For example, *In re Vebeliunas* involved a bankruptcy debtor with multiple pieces of real estate, some mortgaged, which had been placed into trusts at different times and arguably for distinct reasons.[92] Facing such complexity, the court agreed that the creditors could plead reverse veil piercing — though in the end the court held that the bankruptcy trustee had failed to establish the two required elements (alter ego; fraud or wrong).[93]

Vebeliunas is no sort of outlier: over the last 50-odd years a modest handful of courts have reverse pierced trusts.[94] In addition, I could not find a single majority opinion expressly barring reverse piercing into trusts.[95] In a complicated case involving pension benefits owed by two related bankrupt corporations to employees, the court expressly declared that the law of piercing corporations should be applied wholesale to trusts. "The concept of personal liability for the obligations of an entity considered to be an alter ego of an individual is frequently employed in relation to corporations. We see no reason why the alter ego concept should not have the same effect in the case of a trust."[96] In another case involving a trust created by a delinquent taxpayer, the court, without expressing any doubt, assumed "that the same [piercing] standard applied in the corporate context would be applied to trusts."[97] To give one more example, another court stated that although it had "uncovered no precedent analyzing the 'alter ego' theory of property ownership in the context of a trust, cases involving corporate entities provide appropriate guidance."[98]

Courts importing piercing from corporate law into trust cases have generally used it unaltered. In particular, they require the same two

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91 F.P.P. Enterprises v. United States, 830 F.2d 114, 117-18 (8th Cir. 1987). For similarly straightforward facts and holdings, see, for example, *In re* Marriage of Dick, 15 Cal. App. 4th 144, 161 (1993) ("It is well-settled that a trust created for the purpose of defrauding creditors or other persons is illegal and may be disregarded."); Halliburton Co. v. E.H. Owen Fam. Tr., 773 S.W.2d 453, 454, 457 (Ark. Ct. App. 1989).

92 *See In re* Vebeliunas, 332 F.3d 85, 88 (2d Cir. 2003).

93 *See supra* text accompanying note 42.

94 The earliest case that I have identified that arguably applies (reverse) piercing to a trust is Wood v. Elling Corp., 20 Cal. 3d 353, 364-65 (Cal. 1977).

95 One lower court did hold that trusts could not be reverse pierced. *See* Vebeliunas v. Babitt *(In re* Vebeliunas), 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000). This decision, however, was reversed. *See In re* Vebeliunas, 332 F.3d at 89, 94-95.

96 Vaughn v. Sexton, 975 F.2d 498, 504 (8th Cir. 1992).

97 Dean v. United States, 987 F. Supp. 1160, 1165 (W.D. Miss. 1997).

98 William L. Comer Fam. Equity Tr. v. United States, 732 F. Supp. 755, 759 (E.D. Mich. 1990).

basic elements: (i) blurring of the boundaries between the trust and the beneficiary ("alter ego"); and (ii) inequitable or fraudulent effect on creditors. One court said that to reverse pierce into a debtor beneficiary's trust, a creditor must establish "that the Debtor dominated and controlled the . . . Trust [and] . . . that the Debtor used his control of the . . . Trust to commit a wrongful act."[99] Using slightly different verbiage but to much the same effect, another court described the two arms of corporate piercing doctrine to apply as "(1) the owner exercised complete domination of the corporation with respect to the transaction at issue; and (2) the owner used this domination to commit a fraud or wrong against the plaintiff which resulted in injury to the plaintiff."[100] Another court used a three-pronged standard, but the first two together map directly onto the first "alter ego" element of conventional piercing doctrine, and the third onto the usual second element:

> In order to show that an entity is a mere alter ego of Debtor, Trustee must plead that (1) Debtor disregarded the respective corporate entities such as to make them "mere instrumentalit[ies]" for the transaction of Debtor's own affairs; that (2) "there is such unity of interest and ownership that the separate personalities of the corporation and [Debtor] no longer exist;" and that (3) recognizing the corporate entity would "promote injustice or fraud."[101]

Before moving on to consider a setting in which reverse piercing into trusts is particularly important, it is worth reflecting on why, as documented in this section, a smattering of courts over the last few decades have reverse pierced into trusts. As a matter of doctrine, the practitioners and the judge cited at the beginning of this analysis make what seems like an incontestable doctrinal argument under the traditional rule that trusts were not entities. Their case, thumbnailed, is that piercing doctrine at its core always involves two entities and if trusts are not separate legal entities then piercing and trusts simply should not mix.

So why did essentially all courts confronted with the issue decide to pierce trusts in the decades before the relatively recent and novel reconceptualization of trusts as legal persons?

Though there is no proving such things, I suggest that the trust piercing cases were part and parcel of the recent evolution of opinion

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99 *In re* Maghazeh, 310 B.R. 5, 19 (Bankr. E.D.N.Y. 2004).

100 *In re* Yerushalmi, 487 B.R. 98, 109-10 (Bankr. E.D.N.Y. 2012) (citing Morris v. N.Y. State Dep't of Taxation & Fin., 623 N.E.2d 1157 (N.Y. 1993)).

101 *In re* Raymond, 529 B.R. 455, 473 n.16 (Bankr. D. Mass. 2015) (citing Dearth v. Collins, 441 F.3d 931 (11th Cir. 2006)).

culminating in acceptance of the idea that trusts are free-standing legal entities. For the policy purposes of piercing — preventing debtors from hiding assets — there is no distinction between trusts on the one hand and corporations (along with other business entities) on the other. In an admirable example of substance over form and practical common sense, courts recognized the essential identity of the role that business entities and trusts can and do play in hide-the-assets games. Based on this insight, judges in these cases borrowed piercing doctrine wholesale from corporate law, seeming to find the doctrinal fit and the policy parallels too obvious to require extended explication.

VII. An Entity Corrupted: The Self-Settled Asset Protection Trust

Trusts, like corporations and other artificial legal entities, are legal *tools*. Like any tool, they can be used for good or ill, generating social gains or inflicting social losses. Piercing is one important tool to separate wheat from chaff, preventing the use of artificial legal entities to evade creditors' claims, while leaving beneficial uses untouched (e.g., the classic trust for the benefit of an orphan).

Over the last few decades, however, a growing number of states have, perversely, legislatively authorized a new sort of trust completely devoid of redeeming features. Boldly expanding on the already-controversial "spendthrift" trusts dating back over 100 years,[102] many states now permit settlors (foreign or domestic) to transfer some or all of their personal assets for their own exclusive benefit into trusts unreachable by creditors. At least 20 state legislatures have authorized such trusts.[103] Their purpose in licensing such a worrisome device is clear: attracting trust business for in-state financial institutions and professionals. The advertising of these firms makes clear what attracts settlors of these trusts: protection from creditors' judgments.[104] This should astound readers not previously aware

102 For an introduction to *non*-self-settled spendthrift trusts, see Helene S. Shapo, George T. Bogert & George G. Bogert, Bogert's Law Of Trusts And Trustees § 222, Westlaw (databased updated May 2025).

103 *See* Andrew J. Dehan, *These States Allow Domestic Asset Protection Trusts*, Yahoo Finance (June 28, 2023), https://finance.yahoo.com/news/states-allow-domestic-asset-protection-130727898.html [https://perma.cc/NPN6-YRUZ]. As of 2023, the states with statutes authorizing *self-settled* asset protection trusts are: Alabama; Alaska; Connecticut; Delaware; Hawaii; Indiana; Michigan; Mississippi; Missouri; Nevada; New Hampshire; Ohio; Oklahoma; Rhode Island; South Dakota; Tennessee; Utah; Virginia; West Virginia; and Wyoming. *Id.*

104 *See, e.g.*, Blake Harris Law, *What is an Asset Protection Trust? Types, Benefits, Risks, and How to Set One Up*, Blake Harris Law, https://blakeharrislaw.com/blog/what-is-an-asset-protection-trust [https://perma.cc/7MLG-4CDX] (last visited Feb. 17, 2026) ("If you

of these entities. Statutes authorizing SSAPTs bless a practice long considered both illegal and immoral: taking affirmative measures to frustrate the collection efforts of legitimate creditors.

There is no standard name for these trusts; "domestic asset protection trust" seems the most common. I instead suggest the more descriptive sobriquet "Self-Settled Asset Protection Trust" ("SSAPT"). The prefix "self-settled" is critical. There has long been intense controversy and criticism of setting up an asset protection trust for others, the "spendthrift trusts" mentioned above. Though controversial, such trusts have some arguably socially desirable purposes, e.g. protecting addiction-prone adult children from dissipating their inheritance and their health on narcotics.

This section argues that there are no such justifications for SSAPTs — that they are unambiguous social bads.[105] After situating SSAPTs in the dimension of liability limitation devices, this section then shows that there are neither efficiency nor fairness arguments in favor of the SSAPT's maximal liability limitations. Having made the normative case against, this section next demonstrates that the reverse piercing remedy is especially well-suited for abusive use of SSAPTs. The last subsection argues that extant piercing doctrine justifies the use of this remedy to reverse pierce into SSAPTs.

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have possessions you wish to protect in the event of debt collection or a lawsuit where the plaintiff seeks compensation, you can lock certain assets out of reach of creditors or the court."); The Voeller Law Firm, *How do Asset Protection Trusts Work?*, Voeller Law Firm, (Jan. 21, 2022), https://voellerlaw.com/how-do-asset-protection-trusts-work/ [https://perma.cc/9WT8-N4K7] ("Suit protection example: Someone falls on your property. Your household insurance does not cover all the medical bills and the injured person sues you for the rest. The injured person can only attach assets you own, not those protected under the asset protection trust."); Sanjeev Bhatia & David B. Mandell, *Recent Malpractice Verdict Highlights Importance of Asset Protection Planning*, HemOnc today (May 1, 2023), https://www.healio.com/news/hematology-oncology/20230427/recent-malpractice-verdict-highlights-importance-of-asset-protection-planning [https://perma.cc/Z8L7-8RAT] ("The goal of asset protection planning is to position a client's assets in such a way that makes it difficult, and in certain cases nearly impossible, for a future lawsuit plaintiff to gain access to the client."). There are scores if not hundreds of websites expressly marketing SSAPTs as an effective way to avoid paying one's debts.

105 There is of course a *private* benefit to domestic trust companies and professionals, but this is (i) simply a *shifting* of trust business from other states, and, moreover, is (ii) a classic example of rent-seeking via legislation which is deadweight loss to society. For an introduction to the vast literature on rent-seeking, essentially spending resources to shift wealth and opportunities without increasing social output, see James M. Buchanan, Robert D. Tollison, & Gordon Tullock, Toward A Theory of the Rent-Seeking Society (1980).

A. SSAPTs and Limited Liability

Veil piercing, as an exception to limited liability, is deeply rooted in limited liability doctrine. There seems to be a strong social-legal consensus that equity investors in business entities should have no more at risk than the amount that they invest in the enterprise. This is a privilege — a privilege that is subject to abuse. Veil piercing provides entity creditors with an end-run around limited liability when some of an entity's owners have abused the privilege of limited liability.

Surprisingly, to date the literature on SSAPTs has completely failed to analogize this novel trust's asset protection feature to limited liability. As a first cut, statutes authorizing SSAPTs create a veil between a beneficiary and the trust. As noted above, this is a "reverse" veil because it cordons off entity (trust) assets from personal creditors of the trust's beneficiary; the corporate veil does the reverse, protecting investors' assets from claims against the entity's creditors. That said, the important point here is that both piercing and reverse piercing limit liability — the former of entity owners, the latter of entities.

This first take, however, is incomplete. An SSAPT in fact provides even greater protection than corporate limited liability in two respects. First, it enables SSAPT settlors to place assets into an entity *completely* beyond creditors' reach. When a corporate investor buys shares, those shares become assets attachable by her personal creditors. When a person sets up a personal SSAPT, in contrast, she receives no such indicia of ownership and so there is nothing for her personal creditors to attach. The whole point of statutes authorizing SSAPTs is to give individuals license to continue to enjoy the benefits of all of her assets while formally segregating them into an entity (an SSAPT) in which she has no formal ownership interest (e.g., nothing like shares in a corporation), thus keeping beyond creditors' reach what are substantively if not formally her personal assets.

Second, using an SSAPT effectively makes the settlor judgment-proof *as an individual*, separate and apart from any effects of the trust as an entity. A useful entrée into this point is an idea that occurs occasionally to clever and perhaps devious corporate law students when first exposed to the concept of limited liability. You can almost see a light go off in their heads when you define limited liability, followed by a question along the lines of "O.K., so can I then incorporate *myself* and obtain limited liability for all *personal* debts?!" The answer, of course, is "no." Although shareholders have limited liability for corporate debts, the individuals (agents of the corporation) whose acts gave rise to liability (e.g., signing a contract; committing a tort) are personally liable separate and apart from the vicarious liability of the corporate entity or the limited liability of shareholders.[106] This is so whether or not they are also shareholders.[107]

An SSAPT, however, fulfills the fantasy of those clever, devious students. Once a person has created an SSAPT and placed all of her assets in it, she continues to enjoy all of the benefits of those assets, but they are now entirely out of the reach of her creditors. In this regard, SSAPTs do not *limit* liability; rather, they *eliminate* it. For these two reasons, then, the SSAPT is actually a more powerful liability-reducing tool than the corporation and similar business entities offering limited liability for investors.

There are convincing policy reasons for corporate law's limited liability.

> [S]ociety benefits in a variety of ways from [corporate] limited liability. Indeed, there is a widely shared view that limited liability was, and remains, essential to attracting the enormous amount of investment capital necessary for industrial corporations to arise and flourish. One of the great advantages of the large corporate system is that it allows individuals to use small fractions of their savings for various purposes, without risking a disastrous loss if any corporation in which they have invested becomes insolvent.[108]

Given that SSAPTs provide asset protection even more powerful than limited liability, we should expect to see an even more powerful policy justification for them. As the next two subsections demonstrate, however, in fact there is *no* policy case for SSAPTs.

B. The Efficiency Case Against SSAPTs

In assessing the policy pros and cons of liability-limiting doctrines and exceptions like piercing, the literature draws a sharp distinction between contract and tort claims.[109] Contract claims are much more subtle and

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106 This is the doctrine of *respondeat superior*, under which business entities are strictly liable for acts of their agents done on behalf of the corporation. *See, e.g.*, Posner, *supra* note 60, § 6.8.

107 *See* Bainbridge, *supra* note 77, at 481, 516.

108 *Id.* at 495-96 (internal quotations and footnotes omitted).

109 For an extended and sophisticated examination of the issue, the classic treatment is Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879 (1991).

complicated, largely because many contract creditors[110] are on some sort of notice that they cannot recover from shareholders in cases of regular piercing or from the corporation in cases of reverse piercing. Thus, contract plaintiffs trying to pierce or reverse pierce usually must show that the defendant's conduct at least borders on fraud (itself a tort claim).[111]

This "notice" argument against veil piercing of course is inapposite for tort creditors, who only in limited circumstances have notice that a defendant is going to act wrongfully towards them (enabling the defendant to invoke defenses like consent, express waiver, or one of the multiple stripes of assumptions of the risk). In order to make the policy analysis cleaner and clearer, this section and the next consider the benefits and costs of SSAPTs only in the case of tort creditors. This should not be taken to imply that reverse piercing against SSAPTs should never apply to contract creditors, but rather that it is simply more difficult to figure out the net social value of using SSAPTs as protection against contract creditors who knew or should have known that the SSAPT settlor/beneficiary had placed all of her assets in a liability-eliminating entity.

Policy-wise, limited shareholder liability for tort claims has material benefits and costs. On one hand, the limited liability afforded owners of corporations, LLCs, and other business entities encourages both investment and entrepreneurship.[112] On the other hand, this same feature may encourage owners and their agents to take risks without fully accounting for potential costs to others; limited liability licenses businesses to externalize costs onto the public.[113] The policy judgment of business entity law, with limited liability the rule subject to only narrow exceptions (like piercing), seems to be that the benefits of fostering investment and entrepreneurship exceed the costs externalized.

SSAPTs generate none of the entrepreneurial or risk-fostering benefits that limited shareholder liability provides. Those creating SSAPTs to hold all of their assets are not investing in anything risky. They are not engaging in entrepreneurial activity, e.g. reconfiguring the deployment of assets or implementing novel business plans. They are simply moving their assets from a box that their creditors can reach (their personal assets) into a box that enabling statutes deem out of reach (an SSAPT).

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110 Though perhaps not most: small, unsophisticated creditors are unlikely to understand technical (but critical) distinction between legal entities with and without limited liability.

111 *See* Thompson, *supra* note 75, at 1041-42, 1066-67.

112 *See* Hansmann & Kraakman, *supra* note 109, at 1902-07.

113 *See id.*

Moreover, this comes at a material cost: undermining incentives to take due care.[114] This idea has been discussed at length in the corporate law piercing literature.[115] As Gevurtz framed it,

> viewed ex ante, if the controlling shareholder knows he or she can yank assets out of the corporation before tort victims can get or enforce a judgment, there is less incentive to insure and to make sure the costs of the corporation's goods or services fully reflect the likely costs of accidents. At the same time, allowing controlling shareholders untrammeled rights to take corporate property hardly seems necessary in order to achieve the societal goals behind limited liability.[116]

In a word, entities that engage in risky activity without sufficient assets set aside to pay expected tort judgments, or alternatively purchasing sufficient insurance, *externalize* costs on tort victims. "The use of limited liability by owners of a closely held business to deliberately externalize foreseeable accident costs, however, simply undercuts the goals of tort law"[117] — deterring careless behavior and encouraging actors to take cost-justified precautions.

As noted above,[118] business entity law's embrace of limited shareholder liability reflects a consensus that the benefits of limited shareholder liability (risk-taking and entrepreneurship) outweigh the costs of externalizing some accident costs. SSAPTs, coming as they do without such benefits, are an entirely different matter. Without any countervailing benefit, they reduce incentives to take the efficient level of care, with the inevitable result that accidents will occur that could have been prevented at reasonable cost. SSAPTs, like any liability-limiting exception to the Hand Test,[119] result in an inefficiently high number of negligence victims.

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114 Although perhaps rare, having no assets at risk (i.e., being judgment-proof) also erodes incentives to desist from committing *intentional* torts. *See generally* Jonathan Klick & John MacDonald, *Deterrence and Liability for International Torts*, 63 Int'l Rev. L. & Econ. 105926, 4 (2020) (finding offenders are "insensitive to liability changes when wealth and income levels suggest many offenders will be judgment proof").

115 *See* Hansmann & Kraakman, *supra* note 109, at 1920, 1926, 1931-32.

116 Gevurtz, *supra* note 65, at 876.

117 *Id.* at 887.

118 *See supra* text accompanying notes 111-112.

119 The "Hand Test" is negligence law's sweeping formula for liability, encapsulated in the formula B < P*L: a defendant is negligent if she fails to take a precaution with cost/burden B if that precaution costs less than the reduction in *expected* accident costs (probability of accident, P, times size of loss, L). United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

Those running enterprises with capital insufficient to cover expected tort judgments (or failing to fully insure) will not generally take due care and thus will externalize some of the costs of their activities onto unlucky tort victims. Calculating the adequate amount of capital (or insurance) for a particular business, however, is not always easy. Thus, in piercing cases courts struggle to decide at what point inadequate capitalization justifies piercing the veil and holding shareholders liable for company debts. This is at times reflected in overstatements to the effect that "inadequate capitalization, *alone*, is insufficient to justify piercing the corporate veil."[120] To the contrary, however, one court found that "[u]nder California law, inadequate capitalization of a subsidiary may alone be a basis for holding the parent corporation liable for acts of the subsidiary,"[121] and one scholarly review of the caselaw found that "[i]n the application of the doctrine that limited liability may be lost for misuse of the corporate form, courts have increasingly come to insist that gross undercapitalization is the most important factor."[122]

The extent to which undercapitalization alone should justify piercing remains a hotly debated topic.[123] If there is any scenario in which courts should pierce based on undercapitalization alone, however, it is SSAPTs. Whatever the level of capital (or insurance) sufficient to cover expected tort judgments, it is more than zero. Note well, however, that an individual who places all of her assets in an SSAPT is, from the perspective of future tort victims (statistically quantifiable if not specifically identifiable) *insolvent*: she does not a have a dollar to her name (legally/formally) and so will not be able to (or obligated to) pay even the most modest tort judgment. That is a sobering observation: an SSAPT *by design* renders its settlor/beneficiary completely insolvent from the moment the settlor/beneficiary's assets are placed in the newly-formed SSAPT.

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120 *See, e.g.*, Gartner v. Snyder, 607 F.2d 582, 588 (2d Cir. 1979) ("We know of no New York authority that disregards corporate form solely because of inadequate capitalization."); Consumer's Co-Op v. Olsen, 419 N.W.2d 211, 216, 218 (Wis. 1988); Laya v. Erin Homes, Inc., 352 S.E.2d 93, 94, 101 (W. Va. 1986).

121 Slottow v. Am. Cas. Co., 1 F.3d 912, 917 (9th Cir. 1993).

122 William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. Pitt. L. Rev. 837, 885 (1982).

123 *Compare* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148, 166 (1992) ("There must be more involved in eliminating limited liability than just undercapitalization."), *with* Douglas C. Michael, *To Know a Veil*, 26 J. Corp. L. 41, 57 (2000) ("Particularly in the case of tort plaintiffs, . . . [a]lthough it is often said that undercapitalization alone is not enough to pierce, the additional factors can be composed of so much 'make weight' that it is clear to a critical reader of the opinions that it is undercapitalization that matters.").

C. The Fairness Case Against SSAPTs

The inefficiency of giving potential tortfeasors legal license to render themselves insolvent with the express intent to bilk future tort victims is only the first half of the policy case against SSAPTs. The second half is more intuitive and visceral: it is simply unfair for tortfeasors to continue to live the high life while their victims do not recover even one thin dime. For a real life example, consider *U.S. v. Planes*.[124] In the opening words of the opinion, Judge Merryday provides the essential facts: "Despite amassing a $10 million tax delinquency for willfully failing to pay the employment taxes of at least eight businesses and despite vigorous collection effort by the IRS, William Planes, a former CPA, maintains an affluent lifestyle that eludes almost all Americans."[125] The defendant Planes' strategy was simple: he placed all of his assets into an SSAPT.

Unlike economic efficiency, there are many divergent theories and notions of fairness. Still, it is difficult and perhaps impossible to articulate fairness arguments in favor of letting a tortfeasor live the high life while her victims go uncompensated for her negligent (or worse) conduct. Clark seems to have been thinking along these lines when he included "respect" as one of his four "moral" elements supporting veil piercing and fraudulent transfer law.[126] It is bad enough to wrongfully injure some; having the tortfeasor enjoy champagne and caviar while their victim receives no compensation adds insult to injury. To use Clark's language, it is blatantly disrespectful for a wrongdoer to enjoy the trappings of luxury instead of paying the wrongdoer's victim for harm inflicted.

The tandem of rank unfairness and inefficiency make out a strong case that there is no sound policy justification for SSAPTs. J.J. White has argued that, even worse than these demerits, SSAPTs shade over into criminality.

> The [SSAPT] is an unusual mutation. It is the direct descendant of Foreign Asset Protection Trusts in the Cook Islands and elsewhere that seemed to lie on the border of criminality. Before the birth of the domestic variant, such foreign trusts were loudly denounced and often criticized in the academic literature. Settlors of such foreign trusts were sometimes held in contempt and, occasionally, put in jail for a contemptuous failure to bring

124 656 F. Supp. 3d 1302 (M.D. Fla. 2023).

125 *Id.* at 1309-10.

126 *See supra* text accompanying notes 65-70. Note that in this earlier discussion, this article argued that while Clark framed his justification for piercing and allied doctrines as moral, efficiency serves a stronger basis for the case he made. It is, of course, possible for a legal rule to have both efficiency and fairness justifications. *See* Posner, *supra* note 60, § 2.2.

> assets back from the Cook Islands to pay their debts. How then do we explain seventeen states' adoption of local law to permit what was so detestable abroad? How do we explain prominent firms' solicitation of prospective settlors? I am at a loss, but, I, at least, think such trusts of the domestic variety also lie on the border of criminality. The kindest thing that can be said of state legislatures that adopt these acts are the words attributed to Jesus concerning his Roman executioners: "Father, forgive them, for they know not what they do."[127]

Though casting SSAPTs as part of the criminal sphere may seem overwrought, White's argument in fact squares well with conventional policy analysis. Criminal liability, along with its close cousin intentional tort liability, is generally reserved for acts that impose social costs without offsetting social benefits.[128] As this and the prior section have shown, SSAPTs fit this paradigm precisely. Unlike, say, driving, which certainly causes harms but has huge countervailing benefits, SSAPTs impose efficiency and unfairness costs without any redeeming counterweight.

D. Reverse Piercing as an Efficacious Remedy for Creditors of Debtors Abusing SSAPTs

Just because SSAPTs are a problem does not mean that reverse piercing is the solution. As discussed above,[129] reverse piercing in the corporate context has a real problem: it punishes all shareholders (by reducing the assets of the corporation) for the misdeeds of the shareholder subjected to reverse piercing. This fact led Crespi to emphasize the narrow applicability of reverse piercing for corporations. "The proper scope of [reverse piercing], therefore, would appear to be limited to closely held firms in which a single insider, or a small group of insiders acting in concert, holds all or virtually all economic claims."[130] Crespi went on to note that even in such cases a creditor could, as noted above, achieve the same ends "more directly by attaching the insiders' shares . . . ."[131]

Neither of these objections to reverse piercing, however, applies to SSAPTs. There is no "innocent co-owner" problem because SSAPTs are created for the benefit of one and only one person — the settlor who

127 James J. White, *Fraudulent Conveyance Masquerading as Asset Protection*, 47 U.C.C. L. J. 1, 7 (2018) (internal citations omitted).
128 *See* Posner, *supra* note 60, § 7.1.
129 *See supra* Part IV.
130 Crespi, *supra* note 49, at 69.
131 *Id.*

formed the entity for the sole purpose of stashing her personal assets in an artificial legal space beyond her creditors' reach. Second, there are no shares or any other similar indicia of ownership for creditors to attach. That is the whole point of an SSAPT: to formally place assets in a trust not legally owned by the trust's beneficiary. As a matter of substance, then, reverse piercing is a perfectly effective and appropriate tool for defanging SSAPTs and their attendant inefficiencies and inequities.

E. The Doctrinal Fit of Reverse Piercing for SSAPTs

What, however, of form? Importing a doctrine from one legal arena (corporations) and transplanting it in another (trusts) may cause confusion if that doctrine must be distorted to fit in the new legal realm. There are any number of alternatives; here are two. First, lawmakers in jurisdictions that do not authorize SSAPTs could deem SSAPTs created in permissive states nullities in all matters over which its courts have jurisdiction, thus voiding any and all attempts to secrete assets into them. Second, they could recognize SSAPTs as valid trusts but permit any creditor to ignore their asset-protecting feature and attach the assets in the entity without satisfying the elements of piercing.

There is, however, no need for any such makeshift alternative. Reverse piercing works seamlessly for policing abusive SSAPTs. It fits precisely into the two black letter elements of piercing law. First, it is hard to imagine an entity that is a more out-and-out alter ego of a flesh and blood person than a SSAPT. Individuals form these trusts and formally give them legal title to all their assets, but they retain all of the benefits of those assets. The SSAPT exists, quite literally, for the sole purpose of thwarting rightful creditors. It is a special-purpose appendage created for the exclusive benefit of the settlor. If such a device is not an alter ego, what is?

The second basic element of piercing, inequitable or fraudulent use of an entity, applies just as naturally to SSAPTs. Following Clark's influential work,[132] this article uses fraudulent transfer law in general and the Uniform Voidable Transactions Act ("UVTA")[133] as a font for the basic contours of fraudulent debtor behavior. Under the UVTA or any mainstream notion of fairness it is inequitable to secrete assets for the sole and express purpose of frustrating creditors. If a debtor forms an SSAPT *after* a creditor is identifiable, moving assets into such a trust is

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132 *See supra* text accompanying notes 65-73.

133 Unif. Voidable Transactions Act (Unif. Law Comm'n amended 2014) (formerly the Uniform Fraudulent Transfer Act and, even earlier, the Uniform Fraudulent Conveyance Act).

simple fraud.[134] In the more common case of a settlor placing all of her assets in a SSAPT to guard against potential future creditors, the case for fraud is debatable. The Uniform Voidable Transaction Act (UVTA) deems invalid some asset transfers even if a creditor's claims "arose . . . *after* the transfer was incurred . . . ."[135] Such a "future" creditor has two ways to undo a transfer.

First, she can show that the debtor had "*actual intent* to hinder, delay, or defraud any creditor."[136] Alternatively, a creditor can void transfers that leave the debtor with assets "unreasonably small in relation to [her] business" or that she "reasonably should have believed that [she] would incur [] debts beyond [her] ability to pay as they become due."[137]

The drafters of the UVTA replaced "fraudulent" with "voidable" in the act's title to highlight the law's willingness to undo transfers that, while not rising to the level of fraud, are unfair.[138] This again squares directly with the second arm of piercing doctrine, which in many states permits creditors to prevail by proving that the debtor's acts, though not rising to the level of fraud, were inequitable.[139] Moreover, the standard specified in the UVTA covers the formation of a SSAPT by a settlor who is anticipating the likelihood of future claims. The intent of settlors placing assets in such a trust is to "hinder, delay, or defraud . . . creditors" — with the intent to "hinder" or "delay" being self-evident even if the intent to defraud is not.[140] In the alternative and as discussed earlier,[141] SSAPT settlors denude themselves of essentially all of their personal assets, which means that if there is even a modest chance that they will be held liable for tort claims going forward, their "capital" will be "unreasonably small" or that they will "incur [] debts beyond [their] ability to pay."[142]

In making the case for a voidable transfer, creditors can base their claim on one of more of the 11 so-called "badges of fraud."[143] Of these, no fewer than seven apply to SSAPTs as a matter of course:

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[134] *See, e.g.*, White, *supra* note 127, at 4 ("[A] debtor who sets up a trust after a tax lien has been issued or after a malpractice claim has been filed, will be easy prey for the plaintiff.").

[135] Unif. Voidable Transactions Act § 4(a).

[136] *Id.* § 4(a)(1) (emphasis added).

[137] *Id.* § 4(a)(2).

[138] *See id.* Prefatory Notes (2014 Amendments).

[139] *See supra* text accompanying notes 40-44.

[140] *See supra* text accompanying note 136.

[141] *See supra* note 126 and accompanying text.

[142] Unif. Voidable Transactions Act § 4 & Prefatory Note.

[143] Unif. Voidable Transactions Act § 4(b).

1) "the transfer . . . was to an insider"[144] (one's self is the ultimate insider);
2) "the debtor retained possession or control of the property . . . " (inherent aspect of SSAPTs);[145]
3) "the transfer . . . was undisclosed or concealed"[146] (trusts are not generally disclosed);
4) "the transfer was of substantially all of the debtor's assets"[147] (invariably the entire point of creating an SSAPT)
5) "the debtor removed or concealed assets"[148] (assets always removed from debtor when SSAPT created);
6) debtor received reasonable value for assets transferred[149] (debtor of course receives nothing for assets moved into an SSAPT); and
7) "the debtor was insolvent or became insolvent shortly after the transfer . . . "[150] (a settlor who transfers all of her assets into an SSAPT despite expected tort judgments is insolvent).

The presence of seven badges of fraud makes a very strong case for fraudulent or inequitable debtor conduct.[151]

Whether transfers done in anticipation of avoiding future debts amount to fraud remains a "much debated point."[152] What is not debatable, however, is that even if forming a SSAPT to dodge reasonably expectable future tort claims is not fraudulent, it is unfair to those creditors and hence SSAPTs are ripe for reverse piercing. Satisfying nearly two-thirds of the badges of fraud in the UVTA section 4(b) arguably *is* fraud, but in any event suffices to prove inequitable conduct. White in no way over-reaches when asserting that "transfers to asset protection trusts are fraudulent conveyances pure and simple."[153]

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144 *Id.* § 4(b)(1).
145 *Id.* § 4(b)(2).
146 *Id.* § 4(b)(3).
147 *Id.* § 4(b)(5).
148 *Id.* § 4(b)(7).
149 *Id.* § 4(b)(8).
150 *Id.* § 4(b)(9).
151 *See* Acequia, Inc. v. Clinton (*In re* Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994) (emphasis omitted) ("The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose.") (quoting Max Sugarman Funeral Home, Inc. v. A.D.B. Invs., 926 F.2d 1248, 1254-55 (1st Cir. 1991)).
152 White, *supra* note 127, at 4.
153 *Id.* at 1.

VIII. Conducting a (Legal) Civil War Against the SSAPT

So much for substantive law. This section examines potential procedural hurdles that tort plaintiffs might face in attempting to reverse pierce defendants' SSAPTs. Success in obtaining a remedy depends critically on the domiciles of the parties and their assets. This section uses South Dakota as the prototypical jurisdiction with a statute authorizing SSAPTs and Vermont as the prototypical opposite that does not permit such trusts.

For a South Dakota victim injured in-state by a negligent South Dakota tortfeasor with all of her assets in a SSAPT, recovery is impossible. There is nothing unconstitutional about SSAPTs, and the South Dakota legislature has clearly empowered the defendant to form one and place all of her assets in the trust and so beyond the reach of domestic creditors like the victim. The state's lawmakers have chosen asset protection over deterrence, compensation, and all other goals of tort law, and that is the final word. To paraphrase Justice Scalia, a law can be both economic folly and legal.[154]

South Dakota, of course, is interested not only in trusts created by its own citizens. It embraced SSAPTs to attract trust business from out-of-staters such as a potential tortfeasor from Vermont. The remainder of this section analyzes potential procedural impediments to reverse piercing an SSAPT when both the defendant and the plaintiff are residents of Vermont and the defendant injures the plaintiff in an accident occurring in Vermont. We assume that the plaintiff has prevailed in her tort claim, and that all of the defendant's assets are formally titled in the name of her South Dakota SSAPT.[155]

A. Current Procedural Landscape

This section considers three levels of procedural law in which the Vermont parties in our hypothetical lawsuit might skirmish: choice of law, personal jurisdiction, and full faith and credit for judgments. The fact

154 The quote paraphrased here is "a law can be both economic folly and constitutional." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring).

155 Another interesting configuration, not considered further, would be when someone residing in a jurisdiction authorizing SSAPTs (like South Dakota) chooses instead to form her trust in another state permitting them (like Delaware). Although it is conceivable that in a suit against the South Dakota settlor/beneficiary who chose to form her SSAPT in Delaware, the South Dakota courts would refuse to respect the asset protection features of the trust, it seems more likely that South Dakota would respect Delaware law for fear that ruling to the contrary would lead other states to similarly disregard its SSAPTs.

that reverse piercing is a remedy rather than a substantive claim plays an important role in this analysis.[156]

1. *Choice of Law*

One prefatory issue that a Vermont court considering the plaintiff's petition to reverse pierce into the defendant's South Dakota SSAPT is choice of law. Under widely-followed choice of law principles, a Vermont court would apply Vermont tort law to our archetypal suit over an accident within the state between two Vermont residents.[157] A tort judgment establishes the *rights* of the victim.

The rub, for the purposes of this article, is the *remedy*, for reverse piercing is a remedy, not a right.[158] Although there is little law on point, at least one court in this context appealed to state policy against asset-hiding to ignore attempts by debtors to choose favorable law by private ordering. "[A debtor] may not unilaterally remove the characterization of property as his simply by incorporating a favorable choice of law provision into a self-settled trust of which he is the primary beneficiary. Equity would not countenance such a practice."[159] Based on this and other authority giving states wide leeway to choose their own law for policy reasons, there really are no constraints on a state like Vermont choosing its own law of remedies. The parties instead will join battle over (i) jurisdiction and (ii) the law honoring foreign judgments (the Full Faith and Credit Clause of the Constitution[160]).

Before moving on to those issues, however, there are three choice of law detours worth exploring. First, the recent trend of treating trusts as legal persons may tempt SSAPT settlors/beneficiaries to look to corporate law for a choice of law defense against reverse piercing. In corporate law, the *internal affairs doctrine* directs courts to choose the law of the state of the incorporation to govern the affairs of the corporation.[161] SSAPT beneficiaries facing judgments will argue that once trusts are treated, like corporations, as legal entities, a similar choice of law should govern all

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156 *See supra* note 40 and accompanying text.

157 *See* Restatement (Second) of Conflict of Laws §§ 6, 145 (Am. Law Inst., 1971) (setting forth general choice-of-law principles and the significant relationship test).

158 *See, e.g.*, McKay v. Longman, 211 A.3d 20, 28, 49-50 (Conn. 2019); *In re* Howland, 516 B.R. 163, 164-71 (Bankr. E.D. Ky. 2014); *In re* Moore, 379 B.R. 284, 293-94, 296 (Bankr. N.D. Tex. 2007).

159 *In re* Portnoy, 201 B.R. 685, 701 (Bankr. S.D.N.Y. 1996).

160 *See* U.S. Const. art. IV, § 1.

161 For a doctrinal and theoretical overview of corporate law's internal affairs doctrine, see Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy*, 115 Harv. L. Rev. 1480, 1480-82 (2002).

matters relating to the trust, including reverse piercing. Thus, the argument would go, the internal affairs doctrine as applied to trusts dictates that South Dakota law should govern. South Dakota law, of course, will reject reverse piercing into an entity designed precisely to fend off such a remedy.

The problem with this argument is that it focuses exclusively on the word *affairs* and ignores the word *internal*. The internal affairs doctrine calls on courts to choose the law of the state of incorporation for the internal affairs of the corporation — essentially relations among shareholders and directors. It does not apply to external actors like creditors.[162] It is almost universally recognized that piercing and reverse piercing are not *internal* affairs, involving as they do parties who are neither owners nor agents of the corporation.[163] The Restatement (Second) of Conflict of Laws, though without referencing corporate law's internal affairs doctrine, clearly rejects the doctrine's application to trusts created to frustrate spousal inheritance rights:

> . . . where the settlor creates a revocable trust in a state other than that of his domicil, in order to avoid the application of the local law of his domicil giving his surviving spouse a forced share of his estate, it may be held that the local law of his domicil is applicable, even though he has designated as controlling the local law of the state in which the trust is created and administered.[164]

Rejecting a settlor's attempt to deem as controlling "the local law of the state in which the trust is created" in effect declares that the rights of a surviving spouse are not "internal to the trust" and hence are not controlled by the law of the state in which the settlor chose to create the trust.

Our second detour into conflicts of law territory, before reaching into jurisdiction and crediting foreign judgments, examines recent decisions and commentary that bode well for reverse piercing SSAPT trusts. Sterk captured the essence of these developments: "the settlor's intent is rarely determinative on the issue of a trust's validity, particularly when parties other than the settlor and the beneficiaries are involved."[165] Note that this observation has faint echoes of the internal affairs doctrine discussed in the preceding paragraphs.

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162 *See* VantagePoint Venture Partners v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) (describing the internal affairs doctrine as governing internal corporate relationships).

163 *See generally* Gevurtz, *supra* note 65, at 93-94 (discussing the applicability of the internal affairs doctrine in veil-piercing cases).

164 Restatement (Second) of Conflict of Laws § 270, cmt. b (Am. Law Inst., 1969).

165 Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L. Rev. 1035, 1084 (2000).

More importantly, the few courts that have considered attempts to deem controlling the law of the state in which the settlor created a trust have uniformly rejected such attempts to choose settlor-favorable law. In an equitable property division dispute between a divorcing Utah couple, the court refused to recognize a provision in a family trust stating that Nevada trust law should apply.[166] Its key finding was that Utah has a strong public policy in effectuating its equitable division of property in divorce, and that applying Nevada trust law would contravene that policy.[167] In a federal bankruptcy case, the Washington district bankruptcy court refused to follow Alaska law for a SSAPT created in that state and instead disregarded the trust because the state of Washington by statute specifically disavows such trusts.[168]

Our third and final choice of law digression is comprised of a federal statute and a model legal provision that reinforce these cases and direct courts to choose the law of the state of a debtor's domicile, as opposed to the state in which she created a SSAPT, to govern disputes with creditors. In a consequential amendment to the bankruptcy code, Congress directed bankruptcy courts to simply disregard a wide class of self-settled trusts clearly including SSAPTs — in effect creating a universal federal choice of law in bankruptcy cases that trumps the law of every state permitting such trusts.[169] In a similar vein, recent amendments to the Uniform Voidable Transactions Act ("UVTA")[170] adopted a broad provision directing courts to choose the law of the debtor's domicile over the law in which the debtor had established any trusts.[171] Though these developments in federal and uniform laws of course are not controlling, they stand as fresh and influential persuasive authority for state courts.

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166 *See* Dahl v. Dahl, 345 P.3d 566, 578 (Utah 2015).

167 *See id.* at 578-79.

168 *See* Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013). For another bankruptcy opinion with dicta suggesting similar disregard for SSAPTs on facts akin to *Huber*, see *In re Zukerkorn*, 484 B.R. 182 (B.A.P. 9th Cir. 2012). Under these precedents and *Dahl*, cited *supra* note 166, a Delaware provision requiring dismissal of an SSAPT's trustee if a foreign court declines to choose Delaware law in litigation against the trust would be found void. *See* Del. Code Ann. tit. 12, § 3572(g) (2026). This crafty provision is obviously designed to force the choice of Delaware law by shape-shifting the identity of the putative defendant, the trustee, if a foreign court applies any other law. Crafty, but perhaps dated: given the modern trend to treat the trust as an entity, the trust itself is a proper defendant regardless of the identity of the trustee.

169 *See* 11 U.S.C. § 548 ("Fraudulent transfers and obligations"); *see also* H.R. Rep. No. 109-31, at 449 (2005) (stating that § 548(e) was enacted to "close the self-settled trust loophole").

170 *See* Unif. Voidable Tr. Act (Unif. Law Comm'n amended 2014). This uniform law was originally called the Uniform Fraudulent Conveyance Act, and later the Uniform Fraudulent Transfer Act, before 2014 amendments adopted the UVTA title. *Id.*

171 *See id.* § 10(b).

2. *Jurisdiction (Personal; in Rem)*

In our archetypal Vermont tort suit, a Vermont court will have no problem establishing personal jurisdiction over the Vermont-domiciled defendant who negligently caused an accident within the state's borders. Once having suffered an adverse judgment, a defendant remains subject to the inherent power of the court to issue orders to satisfy the judgment by making money payment or turning over property. The court can hold refractory defendants in contempt and send them to jail until they comply with the court's orders to satisfy the judgment. In many if not most cases this should suffice to convince the defendant to satisfy the judgment against her, even if she must draw on assets in her South Dakota SSAPT.

In the brave new world in which trusts are legal entities, however, plaintiffs attempting to reverse pierce into a defendant's SSAPT have to clear an additional hurdle: establishing personal jurisdiction over the trust.[172] They are attempting to extend a judgment against the defendant settlor/beneficiary of the trust and apply it to reach assets in a second legal person, the SSAPT. A court must have jurisdiction over a legal person before it can order it to, e.g., transfer assets. As in our archetypal case, the trust is domiciled outside of the forum state and thus the plaintiff must use some other basis if she wishes the court to order the trust to turn over assets.

For some trusts, plaintiffs would have real difficulties establishing personal jurisdiction. Imagine a Vermont defendant found liable who is one of numerous beneficiaries of a (non- SSAPT) South Dakota trust that has no contacts with Vermont other than the fact that the defendant receives a small fraction of the income generated by the trust assets. Such a trust lacks the minimal level of contacts necessary to satisfy Due Process requirements for personal jurisdiction.[173]

SSAPTs, however, are very different animals. Settlors/beneficiaries create them solely for their own self-interest and hold all of their (formerly personal) assets in them. This manifests an SSAPT's deep contacts with the defendant and thus her state of domicile — indeed, much deeper contacts than the trust has with the state under whose law it was created. In our archetypal hypothetical, a South Dakota SSAPT created by a

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[172] As noted *supra* note 55 and accompanying text, plaintiffs with judgments against a shareholder as opposed to a trust beneficiary typically do not need to reverse pierce; they can simply seize the defendant's shares. Trusts of course have no shares; hence the need for reverse piercing or some similar legal device to enable a plaintiff to reach assets that the defendant has shrouded in a trust.

[173] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing the "minimum contacts" requirement for personal jurisdiction); Daimler AG v. Bauman, 571 U.S. 117 (2014); *see infra* note 193 and accompanying text (discussing *Mallory v. Norfolk Southern Railway Co.*, the most recent case in this line).

Vermont citizen would have more than sufficient contacts with Vermont to support personal jurisdiction over the trust.

Some SSAPT statutes attempt an end-run around this threat to the asset protection they are designed to provide by including a provision purporting to place jurisdiction over domestic SSAPTs exclusively in the hands of domestic courts.[174] This of course violates the axiomatic principle that the courts of one jurisdiction cannot diminish the jurisdiction of courts in another jurisdiction,[175] a principle so obvious that an Alaska court expressly refused to apply such a provision in its own legislature's SSAPT statute.[176]

Having established personal jurisdiction over the defendant, obtaining a judgment against her, and then establishing personal jurisdiction over the SSAPT, the Vermont plaintiff can move on to the final stage of litigation: satisfying her judgment against the defendant by attaching assets formally held by the SSAPT. For tangible assets located in Vermont or another state other than South Dakota, there will be no further complications. For tangible assets located in South Dakota, the plaintiff can expect the trustee to resist the execution of her Vermont judgment. For intangible assets, jurisdiction is murky. As opined in a leading treatise, "determining the situs of intangible property, such as notes, bonds, and debts, let alone even more evanescent forms of property, for jurisdictional purposes long has been a source of difficulty and confusion."[177] Without marching into this thicket and the diverse approaches taken in different states,[178] our Vermont plaintiff, as with tangible personal property, will likely encounter difficulties seizing intangible assets only if the forum court deems exclusive situs in South Dakota. In such cases, the plaintiff will invoke the Full Faith and Credit Clause of the U.S. Constitution[179] in order to force the South Dakota court to satisfy her Vermont judgment.

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174 *See, e.g.*, Alaska Stat. § 34.40.110(k).

175 *See* Tennessee Coal, Iron & R. Co. v. George, 233 U.S. 354, 359 (1914) ("a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action."); *see generally* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 Stan. J. Complex Litig. 51 (2012) (discussing constitutional limits on a state's ability to localize jurisdiction).

176 *See* Toni 1 Trust v. Wacker, 413 P.3d 1199 (Alaska 2018).

177 Charles Alan Wright et al., Federal Practice and Procedure § 1071 (4th ed. 2024).

178 For a very useful analysis of the situs of and jurisdiction over intangible property, see Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. Int'l L. & Pol. 259 (2015).

179 *See id.* at 304 (addressing recognition of judgments rendered by courts of other states).

3. *Full Faith & Credit*

Case law construing the Full Faith and Credit Clause generally requires states to give, well, "full faith and credit" to the "public Acts, Records, and judicial Proceedings" of other states.[180] It is applied with greatest vigor to judgments and so is a powerful tool for plaintiffs holding judgments from state A (Vermont) who need to enlist the courts of state B (South Dakota) to satisfy said judgment.[181] There are very few exceptions to state B's duty to enforce the out-of-state judgment. Such external judgments must be enforced even if the judgment makes a clear mistake of law[182] and, unlike choice of law,[183] there is no public policy exception to avoid enforcing judgments from sister states.[184] Although the facts do not involve a SSAPT, the Supreme Court has prominently highlighted the relevance of the Full Faith & Credit clause to creditors dodging judgments: "a debtor . . . [cannot] avoid paying his obligations by removing his property to a State in which his creditor cannot obtain jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid in personam judgment of one State enforceable in all other States."[185]

The Supreme Court, however, has held that although South Dakota must enforce a Vermont judgment, this "does not mean that States must adopt the practices of other States regarding the *time, manner, and mechanisms for enforcing judgments*. Enforcement measures do not travel with the sister state judgment[;] . . . such measures remain subject to the evenhanded control of forum law."[186] Thus, for example, South Dakota may impose shorter filing deadlines, multiple filings, more expensive service of process, and a host of other rules governing the timing and other details of executing a judgment. As long as these rules apply to out-of-state parties exactly as they apply to in-state litigants (the "evenhanded" requirement in the quote above), they satisfy the Full Faith and Credit Clause.

Just as the general line separating substantive law from procedural law can be difficult to specify,[187] so too might it be difficult, in applying the Full

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[180] *See* Peter Hay et al., Conflict of Laws § 24.12 (6th ed. 2018); *see also id*. at 304 n.164 (citing JPMorgan Chase Bank, N.A. v. Motorola, Inc., 846 N.Y.S.2d 171, 182 (App. Div. 2007)).

[181] *See* Lea Brilmayer, *Credit Due Judgments and Credit Due Laws. The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 Iowa L. Rev. 95, 97 (1984).

[182] *See* Fauntleroy v. Lum, 210 U.S. 230, 237 (1908).

[183] *See supra* Part VIII.A.1.

[184] *See* Baker v. General Motors Corp., 522 U.S. 222 (1998).

[185] Shaffer v. Heitner, 433 U.S. 186, 210 (1977) (citations omitted).

[186] Baker, 522 U.S. at 235 (emphasis added) (citations omitted).

[187] For an introduction to the large literature on the elusive line between substance and procedure, see Albert Kocourek, *Substance and Procedure*, 10 Fordham L. Rev. 157,

Faith and Credit Clause, to separate "time, manner and mechanism" rules for enforcing judgments (permitted) from more substantive limitations (barred by the clause). We have already encountered statutes in states authorizing SSAPTs that (unsuccessfully) attempt to monkey with choice of law[188] and jurisdiction.[189]

The Delaware legislature, in aggressive pursuit of SSAPT business, has included provisions that push the boundaries of "time, manner and mechanism" regulations for enforcing judgments against SSAPTs. It attempts to limit judgments against Delaware SSAPTs to cases involving (i) fraudulent transfers, (ii) pre-existing creditors, or (iii) bankruptcy and homestead exemption creditors.[190] There is a pretty good case that so narrowly specifying the class of plaintiffs that may recover from SSAPTs goes well beyond the "time, manner and mechanism" regulations that pass muster under the Full Faith and Credit Clause. The nature of a plaintiff's claim does not seem to involve the timing, manner, or mechanisms of enforcement. The Delaware legislature's scriveners[191] may well not have been as clever as they thought when drafting these provisions.

If, as expected, courts were to find these provisions void, it seems inevitable that the trust industry will hire more artful lawyers to concoct cleverer terms that formally fit within "time, manner and mechanism" yet substantively operate to effectively block the enforcement of foreign judgments against SSAPTs. In anticipation of this inevitable stream of contrivances and in the interest of reducing the costs of enforcing judgments against SSAPTs, the next section suggests that states disavowing SSAPTs and the federal government[192] enact measures limiting the ability of states to insulate assets in their SSAPTs from out-of-state creditors.

157-59, 161 (1941); D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 U.C.L.A. L. Rev. 189, 189-90, 192 (1982).

188 *See* cases cited *supra* notes 166–168 (Utah and Washington courts reject SSAPT statutory provisions purporting to mandate choice of law rules).

189 *See* sources cited *supra* notes 174, 176 (Alaska's own courts deem null and void its legislature's attempt to take away jurisdiction of other state courts to entertain litigation against Alaska SSAPTs).

190 *See* Del. Code Ann. tit. 12, § 3572(g) (2026).

191 There is strong evidence that trust company agents draft the provisions of South Dakota's SSAPT statute. *See* Sean H. Vanatta, *When South Dakota Became the New Cayman Islands for Banks and Finance*, Wash. Post, Oct. 14, 2021, https://www.washingtonpost.com/outlook/2021/10/14/when-south-dakota-became-new- cayman-islands-banks-finance/ [https://perma.cc/BJE5-TEUA]. Perhaps the same holds for Delaware.

192 *See* Sterk, *supra* note 165 (explaining that the federal government has already deemed SSAPTs void in the context of bankruptcy litigation).

B. Legislation to Buttress Suits Against Abusive *SSAPTs*

States combatting their deleterious effects can legislate against SSAPTs in two basic ways. First, they could mimic a device recently blessed by the Supreme Court. In *Mallory v. Norfolk Southern Railway Co.*,[193] the Court permitted state courts to exercise personal jurisdiction over corporations otherwise beyond such powers based solely on a statute stating that any entity that registers to do business in the state thereby consents to its courts' jurisdiction. Importing this same device into the SSAPT domain, states opposing these trusts could enact a statute (i) requiring any entity selling such trusts to its citizens to register with a state agency, and giving notice to these entities that by marketing SSAPTs to its citizens, all trusts formed must contain clauses (a) giving its courts jurisdiction over any claims against the beneficiary of the trust along with concomitant jurisdiction over the trust and the trustee and all property in the trust wherever located, (b) specifying the choice of its laws over those of any other state, and (c) agreeing not to contest in another forum any judgment obtained in-state.

Alternatively or in addition, states opposing SSAPTs could target their own citizens who form such trusts under the laws of another state. The statute would state that any citizen forming such a trust is on notice that state law requires her to concede the jurisdiction of her domicile state if sued by creditors, similarly concede jurisdiction over the trust, agree to the choice of domestic law, and waive any rights to contest any judgments rendered in out-of-state fora. Finally, the statute would require entities marketing such trusts to give settlor/beneficiaries clear notice of these provisions.

Such notice would put a real damper on the demand for SSAPTs. Such statutes would entirely defeat the settlor's attempt to choose an asset sequestering device favored in another state but disfavored in her home state. Armed with this notice that domestic law effectively euthanized the protective features of the foreign SSAPT, who would pay good money to lawyers and trust officers to create such an ineffectual entity?

Whether or not states rejecting SSAPTs choose to enact such legislation, the federal government can also enter the fray. Its Commerce Clause power is clear: South Dakota SSAPTs are marketed to Vermont citizens and when employed undercut tort incentives critical to the safety of everyone in Vermont, citizen or not.[194] Based on such negative external effects, Congress could simply declare the asset protections of SSAPTs

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193 600 U.S. 122, 134-136 (2023).

194 Given the clear "substantial relation" of interstate debt contracts to interstate commerce, congressional power to regulate in this domain is clear even under the recent, more restrictive cases beginning with United States v. Lopez, 514 U.S. 549, 625 (1995).

void in both federal and state lawsuits.[195] More narrowly, and in keeping with the focus of this article, federal legislation could require all states to permit reverse piercing into SSAPTs by out-of-state citizens. In addition to the Commerce Clause, there is an additional, frequently overlooked basis for federal legislation: the second sentence of the Full Faith and Credit Clause declares that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[196] This language forms a solid justification for the statutory innovations suggested here.

Such legislation, state and/or federal, would operate against the grain of the distressing "race to the bottom" since the first SSAPT statutes in the 1990s. LoPucki cited these laws as part of an almost apocalyptic vision of the end of financial accountability — a phenomenon that he labeled "the death of liability."[197] A few years later Sterk opined that the states were in the process of a "race to the bottom" in enacting SSAPT statutes and thus enabling individuals to dodge liability.[198] This famous phrase, coined by Brandeis,[199] was popularized by Carey's article arguing that Delaware was leading a race to the bottom in corporate law, servicing the self-interest of management instead of fortifying the fiduciary duties that directors and officers owe to shareholders.[200]

Whether instead of a race to the bottom the states instead are engaged in a race to the top in corporate law is the subject of a robust and continuing debate.[201] In the province of SSAPTs I was not able to find even a suggestion that we have been witnessing any sort of race to the top; indeed, there appears to be only one law review article with any positive take on SSAPTs.[202] This should come as no surprise. The policy arguments against SSAPTs[203] are robust and there is precious little on the other side of the scale.

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195 As noted above, Congress has already done this in the context of bankruptcy. *See supra* note 169 and accompanying text.

196 U.S. Const. art. IV, § 1.

197 Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 90 (1996).

198 Sterk, *supra* note 165, at 1117.

199 *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

200 *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 705 (1974).

201 For an early contribution citing evidence of a race to the top, see Roberta Romano, *The State Competition Debate in Corporate Law*, 8 Cardozo L. Rev. 709, 752 (1987). For a defense of Carey's race to the bottom thesis, see Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, *The Market for Corporate Law*, 162 J. Inst. & Theoretical Econ. 134, 135, 158 (2006).

202 *See* Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 Cardozo L. Rev. 2685, 2686 (2006). Hirsch quietly ducks the difficult issue of tort creditors. *See id.*

203 *See supra* Parts VII.B-C.

The legal campaign against these trusts advocated in this article raises a sunny riposte to the current race to the bottom. As outlined above, states opposed to SSAPTs, along with the federal government, have the means to turn the tide and foster a race to the top. Statutes defanging SSAPTs of their power to frustrate legitimate claimants from non-SSAPT jurisdictions would greatly reduce the demand for such trusts and so the gains that adopting states expect. If legislatures keep SSAPT statutes in place despite a race to the top that denudes them of their fiscal advantages, it is up to the good citizens of SSAPT states like South Dakota to protect themselves by voting for candidates who place greater value of tort deterrence and compensation than on enabling potential tortfeasors to place all of their wealth beyond the reach of all of their creditors.

IX. Conclusion

In the end it is virtually possible to completely eliminate SSAPTs. They violate no federal or state constitutional clauses, and quite a few states have embraced them as effective trust business attractants. This article's proposed "legal civil war" against them has the less ambitious goal of facilitating creditor use of reverse piercing to limit the costs that they impose. At bottom this is simply the elimination of a negative externality. The costs imposed by SSAPTs almost surely exceed any benefits, but there is not a market or any other institution for opponents to bargain for their elimination from states selfishly enacting them. Legislatures like South Dakota's, with at least the tacit consent of their electorate, have the power to inefficiently impose the attendant efficiency and fairness costs on their own residents. They should not have the power to expand and externalize those costs onto citizens in non-SSAPT states who have not signed on to such folly.

Reverse piercing is the best tool to achieve this end. Current case law robustly fleshes out the doctrine, and it provides precisely the remedy that both creditors and states opposed to SSAPTs need. The fit is snug. Why re-invent the wheel with some newfangled alternative? Further, problems that plague reverse piercing in the law of business entities do not carry over to trusts.[204] It enjoys a relatively modest existence in the corporate realm due to the unjustified harm it can cause innocent co-owners of an enterprise. This, however, is no problem at all in the context of SSAPTs, invariably having but one owner. Following the statutory innovations proposed in Part VIII.B, states and the federal government can initiate a race to the top and eliminate the negative externalities imposed by SSAPTs.

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204 *See supra* Part IV.B.

Uneven Ground: a New Mexico Case Study of Rural Estate Planning and Probate Inequity*

*Sergio Pareja*** & Sophie Rane****

Abstract

While existing scholarship has explored the general access-to-justice gap in rural areas, and other empirical studies have examined estate planning and probate trends at the national or urban level, little research has focused specifically on the intersection of these issues. This grant-funded empirical study takes a step towards addressing that gap. Drawing on a comprehensive dataset of probate and property records across three New Mexico counties, we examine the functions probate serves in rural communities, assess the effects of limited access to estate planning and probate services, and consider potential reforms to promote the effective transfer of wealth for rural community members.

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** Professor Sergio Pareja holds the Henry Weihofen Chair at UNM School of Law. He is also the former dean of the law school, having served in that capacity for seven years from 2015 to 2022. Professor Pareja joined the law faculty at UNM in 2005 after many years in private practice in Colorado and Indiana, primarily focusing on tax and estate planning, most recently as an equity partner at a large Colorado law firm. At UNM School of Law, Professor Pareja primarily teaches courses in the areas of tax and estate planning. He is also the only professor from UNM School of Law to become an ACTEC Academic Fellow.

*** Sophie Rane, Postdoctoral Fellow, University of New Mexico School of Law (J.D., University of New Mexico School of Law, *summa cum laude*, 2024).

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Introduction

Elias Melendez and his wife, Eleanor, raised eight children in Dexter, New Mexico, a town of about 1,000 people.[1] Before his death, Elias told his eldest son that he wanted the children to care for their mother and, upon her passing, to split the couple's remaining property among themselves. Elias died in 2003, followed by Eleanor in 2015—both without leaving wills.

The couple's six surviving children agreed that the eldest son would administer Eleanor's estate. In 2018, he filed for probate of Eleanor's estate in the county probate court. Likely realizing that property thought to have passed to Eleanor had, in fact, remained in Elias's name, he also filed to open probate for his father's estate in 2020—seventeen years after Elias's death.

However, the descendants of one of the couple's two deceased children had not consented to the eldest son's appointment as personal representative. As a result, the county probate court transferred both estates to district court for formal administration. The district court ordered Elias's estate to be divided among eleven heirs, with each receiving between 6.25% and 12.5%. Perhaps due to the complexity of this outcome, probate of Eleanor's estate was abandoned.

Today, a small residential parcel lingers in Elias and Eleanor's names, likely unable to be sold or used as collateral for lending. Meanwhile, the complexity and expense of clearing title will only increase with time.[2]

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1 In the interest of respecting family privacy, all names in case examples discussed through this article have been changed. Except for these changes, all facts are drawn from probate case records or public documents. Further information is available upon request to the authors.

2 Since 2018, another of the Melendez's children has died, himself with three surviving children and one deceased child. To probate the home now would require consent of not only all five of the Melendez's surviving children, but also any surviving descendants of the deceased children. Given that there are twenty-five grandchildren and thirty-five great grandchildren, obtaining consent could quickly become untenable. In the absence

The Melendez family's case encapsulates many of the harms affiliated with lack of access to estate planning and probate in rural communities—harms that will become increasingly common as gaps in rural estate planning continue to grow. Our aim in conducting this study is to examine the intersection of rural and estate planning access issues through an empirical lens, and to consider reforms to better promote testamentary freedom and intergenerational wealth transfer in rural communities.

The statistics on rural access to justice are startling. Over three-quarters of rural residents face at least one legal issue per year, and roughly one-quarter face ten or more.[3] Yet America's lawyers are overwhelmingly—and increasingly—based in urban areas,[4] and ninety-four percent of the civil legal needs of rural residents go inadequately addressed by the legal system.[5]

A complex web of factors contributes to this rural access divide. At the practitioner level, financial constraints,[6] heightened conflict of interest issues,[7] and limited solo practice supports[8] all pose challenges to the

of consent of all required heirs, probate would require increased court supervision, likely requiring attorney assistance and growing prohibitively costly. *See infra* Part III.E.

3 *See* Legal Servs. Corp., The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans 41 (2022).

4 *See, e.g.*, Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. Times (Apr. 9, 2013), https://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html [https://perma.cc/3QPM-C2ZD] (indicating that while nearly twenty percent of the county's population is rural, only two percent of small law practices are based outside urban areas); *see also* Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, 40 Hum. Rts. 15, 15–16 (2014) (summarizing studies finding that rural attorney pools are aging and not being replaced).

5 *See* Legal Servs. Corp., *supra* note 3, at 55.

6 *See, e.g.*, Larry Spain, *The Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 Wm. Mitchell L. Rev. 367, 374 (2001) (describing the "increased expenses associated with travel, outreach, and communication" in rural areas); *see also* Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y. Rev. 15, 122–23 (2018) (discussing law school debt as a common disincentive to rural practice).

7 *See, e.g.*, Spain, *supra* note 6, at 379 (describing the "inherent conflicts of interest created in remote areas, where the few members of the private bar may represent opposing parties or act as a part-time prosecutor or judge"); *see also* Taier Perlman, Gov't Law Ctr. at Albany Law Sch., *A Report on Legal Practice In New York State 9*, 11 (2019) (quoting one rural attorney's belief that ethics rules "show no understanding of small town life when it comes to conflicts," and summarizing survey results indicating that around one-third of rural practitioners report turning clients away due to conflicts).

8 *See, e.g.*, Melissa Kidder, *The Future of Rural Lawyering: How Law Schools Should Embrace a General Practice Legal Clinic Model To Address the Current and Future Legal Needs of Rural and Smaller Communities*, 70 Drake L. Rev. 83, 101 (2021) (summarizing empirical and anecdotal evidence indicating that rural lawyers are more likely to engage in a varied general practice, and suggesting how law schools could better prepare students for this).

recruitment and retention of rural attorneys. At the community level, distance to services,[9] technological barriers,[10] community perceptions of the legal system,[11] and limited recognition of problems as legal[12] all play a role. At the system-wide level, persistent cuts to legal aid funding,[13] limited sources of assistance for moderate income earners,[14] and the dearth of legal education models geared towards— and available to—rural communities are among the most widely cited culprits.[15]

Alongside this well-documented general rural access gap is a growing—if less extensively studied—estate planning gap. While empirical data concerning estate planning behavior are limited,[16] existing studies have repeatedly shown that rates of estate planning use are low and

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9 *See*, *e.g.*, Marilyn Hotch et al., *Rural Access—An Innovative Program in Western Maine*, 9 Me. B.J. 186, 186 (1994) (noting that Maine residents living twenty-five or more miles from needed legal services are six times less likely to receive them).

10 *See, e.g.*, *Access to Justice Is Rural Access*, U.S. Dep't of Just. (2025), https://www.justice.gov/atj/fact-sheet-access-justice-rural-access#_edn11 [https://perma.cc/8YE4-L58Z] (citing FCC statistics indicating that twenty-eight percent of rural residents lack access to fixed high-speed broadband, compared with two percent of urban residents); *see also* Univ. of N.M. Inst. for Soc. Rsch., *Civil Legal Needs of Low Income New Mexicans* 66 (2013) (summarizing reports by focus group members that computer access, internet service issues, gaps in computer literacy, language barriers, and accessibility issues all present barriers to provision of legal information or services over the internet, particularly for older and/or rural community members).

11 *See*, *e.g.*, Michele Statz, Hon. Robert Friday & Jon Bredeson, *"They Had Access, But They Didn't Get Justice": Why Prevailing Access To Justice Initiatives Fail Rural Americans*, 28 Geo. J. on Poverty L. & Pol'y 321, 368–71 (2021) (discussing an entrenched lack of trust in the legal system in rural communities and the sense of shame many rural residents report feeling in asking for legal assistance).

12 *See, e.g.*, Marni von Wilpert, *Medical-Legal Partnerships in Mississippi: A Model to Improve Access to Justice*, 82 Miss. L.J. 199, 205-06 & n. 31 (2013) (citing studies in which significant portions of respondents did not recognize problems as legal).

13 *See, e.g.*, Klaus Sitte, *A Mile Wide and an Inch Deep No More: Achieving Access to Justice in Rural Montana*, 70 Mont. L. Rev. 273, 274–76 (2009) (providing an overview of federal cuts to—and attempts to dismantle—legal aid, beginning in the 1980s).

14 *See*, *e.g.*, Hillary Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 Mont. L. Rev. 225, 238 (2015) (noting that many rural Montana residents are above legal aid income cutoffs, but still unable to pay the market rate for attorney services).

15 *See, e.g.*, Pruitt et al., *supra* note 6, at 145-54 (discussing the "urban-centric" nature of admissions, curriculum, and career placement at most U.S. law schools); *see also* James McGrath & Andrew P. Morriss, *Online Legal Education & Access to Legal Education & The Legal System*, 70 Syracuse L. Rev. 49, 53–59 (2020) (estimating that between 41 and 155 million Americans do not live within "reasonable commuting distance" of a law school, and advocating for wider adoption of online legal education).

16 *See* Russell N. James III, *The Emerging Potential of Longitudinal Empirical Research in Estate Planning: Examples from Charitable Bequests*, 53 U.C. Davis L. Rev. 2397, 2397 (2020) (discussing the limitations of common sources of data on estate planning behavior, including probate and tax records and respondent surveys).

declining.[17] This decline persists despite indications that many, if not most, people want some form of planning.[18] Furthermore, access to planning appears to diverge along fault lines of historical privilege and power.[19]

Threatening to compound existing planning gaps are a rapidly aging national population and a shrinking estate planning Bar. Due to lower birth rates, increased life expectancy, and the aging of the "Baby Boomer" generation, Americans aged sixty-five and older are projected to make up over twenty percent of the United States population by the year 2034, and nearly a quarter by 2060.[20] As a result, we are in the midst of the largest intergenerational wealth transfer in modern history, the management of which will have profound implications for wealth distribution and economic justice.[21] Despite this looming need for more and broader access to planning, fewer attorneys appear to be entering the estate planning field.[22]

Limitations in access to estate planning and probate already contribute to a range of issues that appear to disproportionately interfere with testamentary freedom and effective wealth transfer for rural residents.[23] Yet little attention has been paid to how the growing estate planning gap could further exacerbate these concerns in rural communities.

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17 *See infra* notes 102-03 and accompanying text.

18 *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877, 888–90 (2012) (summarizing empirical evidence indicating that most Americans desire to eventually execute a will). The trends Professor Weisbord noted in 2012 appear to persist today. *See, e.g.*, Consumer Reports, *American Experiences Survey: A Nationally-Representative Multi-Mode Survey* 8 (2022) (indicating that among respondents without a will, nearly half selected "I plan to but I haven't gotten around to it yet" as the primary reason).

19 *See infra* Part I.B.1.

20 *See* Jonathan Vespa, *The Graying of America: More Older Adults Than Kids by 2035*, U.S. Census Bureau (Mar. 13, 2018), https://www.census.gov/library/stories/2018/03/graying-america.html [https://perma.cc/DQG9-QHQK].

21 *See* Talmon Joseph Smith & Karl Russell, *The Greatest Wealth Transfer in History Is Here, With Familiar (Rich) Winners*, N.Y. Times (May 14, 2023), https://www.nytimes.com/2023/05/14/business/economy/wealth-generations.html [https://perma.cc/T928-M9TJ].

22 *See, e.g*, Avi Z. Kestenbaum & Joy Spence, *A Tale of Two Generations: How a Millennial and a Gen Xer View Their Law Practice*, Tr. & Est., Dec. 2018, at 68, 72 (noting that the age demographics of the estate planning field are "skewed towards older practitioners," and that this trend may continue due to increased estate tax exemptions and potential for future estate tax repeal); *see also* Jean Gordon Carter, *Estate Planning in 2015: Less Tax and More People Planning*, *in* Est. Plan. Client Strategies (2015) (discussing how the aging of the Baby Boomer generation and a limited pool of estate planning attorneys, particularly among younger practitioners, will likely cause demand for estate planning services to outpace supply); Margaret G. Lodise, *The Impact of NCBE Dropping Wills and Trusts from the Next Gen Bar Exam*, Daily J. (Nov. 13, 2024) (noting that removal of wills and trusts from the Bar Exam may trigger a "downward trend in the teaching of wills and trusts at a time when skilled trusts and estates attorneys are most needed").

23 *See infra* Part I.B.

In this article, we use three New Mexico counties as a case study to shed further light on the growing rural estate planning gap, and we consider reforms. In Part I, we review existing empirical research examining rural trends in estate planning and probate and discuss why rural access to these services is important. In Part II, we discuss our methodology. In Part III, we present our findings and consider what they reveal about the estate planning and probate needs of rural communities. Finally, In Part IV we consider potential reforms, including methods for (1) expanding rural access to estate planning services and probate supports, (2) improving rural community engagement and trust-building initiatives, and (3) adapting probate and property transfer laws to better meet rural needs.

Our hope is to promote an understanding of the intersecting harms of the rural access and estate planning gaps, and to initiate a conversation about how policymakers can best address them.

I. Rural Estate Planning and Probate

A. Defining "Rurality"

Before discussing rural-urban gaps in estate planning and probate, we must first define "rurality," a notoriously thorny task.[24] There are over twelve federal definitions of rurality, and they capture vastly different segments of the population.[25] To avoid overreliance on a single definition, we incorporated several technical measures of rurality into our selection of study areas.[26]

However, we also acknowledge that any attempt to precisely measure rurality grossly oversimplifies the complexity and diversity of rural communities.[27] For example, Cibola County, New Mexico[28]—a racially diverse community experiencing high rates of poverty—has the same

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24 *See* Daria Fisher Page & Brian R. Farrell, *One Crisis or Two Problems? Disentangling Rural Access to Justice and the Rural Attorney Shortage*, 98 Wash. L. Rev. 849, 858–65 (2023) (discussing the lack of a uniform approach to defining rurality or delineating its boundaries).

25 *See Defining Rural America: The Consequences of How We Count*, Ctr. on Rural Innovation (July 20, 2022), https://ruralinnovation.us/blog/defining-rural-america/ [https://perma.cc/998U-7KPP].

26 *See infra* Part II.B.

27 *See* Pruitt et al., *supra* note 6, at 17–18 ("So long as rural life and its challenges are overgeneralized in public discourse, we lose collective awareness of our nation's wide range of rural experiences. As a consequence, policies seeking to respond to rural needs may fail to address the full spectrum of issues at play."); *see also Defining Rural America*, *supra* note 25 ("If you've seen one rural community, you've seen one rural community.").

28 For a more detailed profile of Cibola County, one of our counties of study, see *infra* Part II.B.2.

score according to the Index of Relative Rurality[29] as Teton County, Wyoming— a wealthy, majority-White enclave that is home to the elite Jackson Hole ski area. As a result, we find it useful to adopt the approach of prior scholars who have identified the particular aspects of rurality that are most relevant to the issue at hand—[30] in our case, the issue of rural access to estate planning and probate.

First, rural communities are older on average than urban counterparts.[31] Because increased age often prompts estate planning efforts[32] and because the likelihood of executing a will increases with age,[33] estate planning demands are likely higher in rural communities. Increased age also makes it more likely that issues of mobility and limited transportation,[34] make estate planning barriers highest among those farthest from estate planning services.

Second, rural communities generally have lower incomes and higher poverty rates than urban counterparts.[35] Lower-income rural

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29 *See* Brigitte Waldorf & Ayoung Kim, *The Index of Relative Rurality (IRR):US County Data for 2000 and 2010*, Purdue Univ. Rsch. Repository, https://purr.purdue.edu/publications/2960/1 (last visited Mar. 26, 2026) [https://perma.cc/7KGV-PNQH]. For a discussion of the Index of Relative Rurality, as well as other common technical measures of rurality, see *infra* note 165 and accompanying text.

30 *See, e.g.*, Page & Farrell, *supra* note 24, at 865 (defining distance to services as the core characteristic underlying rural legal access conversations).

31 *See* Amy Symens Smith & Edward Trevelyan, *In Some States, More Than Half of Older Residents Live In Rural Areas*, U.S. Census Bureau (Oct. 22, 2019), https://www.census.gov/library/stories/2019/10/older-population-in-rural-america.html [https://perma.cc/3PEJ-A88V] (noting that 17.5% of the nation's rural residents are aged sixty-five or older, compared to 13.8% in urban areas, and that rural shares of the older population exceed the national average in thirty-three states).

32 *See, e.g.*, Consumer Reports, *supra* note 18, at 7 (noting that forty-seven percent of testate respondents selected "Realizing I was getting older" as the motivating reason for their decision to obtain a will—twenty-one percentage points higher than the next most commonly cited reason).

33 *See, e.g.*, Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. Davis L. Rev. 2511, 2546 (2020) (finding wills more common among those aged sixty-five and over).

34 *See, e.g.*, Keith Wilkins et al. , Univ. N.M. Ctr. for Applied Rsch. & Analysis, New Mexico Older Needs Assessment—Phase *1* 31–32 (2023), https://isr.unm.edu/reports/2023/new-mexico-older-adult-needs-assessment-phase-1.pdf [https://perma.cc/N7KV-ZNHB] (noting that rural residents were more likely to describe transportation services as "extremely limited or non-existent" and to describe transportation as a "fundamental challenge of survival").

35 *See* Tracey Farrigan et al., U.S. Dep't of Agric., Econ. Rsch. Serv., Rural America at a Glance (2024), https://ers.usda.gov/sites/default/files/_laserfiche/publications/110351/EIB-282.pdf?v=12523 [https://perma.cc/4AHD-LUST] (graph displaying that poverty rates are higher in nonmetro counties across all population age groups). Disparities between rural and urban seniors can be particularly pronounced. In New Mexico, the share of the senior population living below the poverty level is nearly double in rural areas. *See* Wilkins et al., *supra* note 34.

residents face unique challenges regarding estate planning and probate. Stretched-thin legal aid providers must prioritize immediate legal needs, which are less likely to include probate or *ex ante* drafting work.[36] Also, private attorneys have little incentive to represent estate planning clients who cannot pay the market rate, or to provide representation for modest estates if compensation is determined by the estate size.[37] Even the UPC's "reasonable compensation" approach for personal representatives and attorneys[38] fails to address situations where estate assets are illiquid or insufficient.

Finally, patterns of homeownership and land tenure in rural communities create unique issues. Nearly three-quarters of American land is rural,[39] and homeownership rates are markedly higher in rural communities.[40] As a result, rural residents are more likely to hold a home as their primary asset.[41] Additionally, the varied uses of rural land, including for farming and agriculture, recreation, and natural resource production, present specialized planning needs.[42] Real property is generally more difficult to transfer outside of probate than other assets, making rural estate planning and probate access even more important.[43] The harm that arises from limitations in access is discussed in the next section.

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36 *See, e.g.*, von Wilpert, *supra* note 12, at 204 (noting the "emergency-room-triage manner in which LSC organizations are often forced to take clients"); *see also* Taylor Poppe, *supra* note 33, at 2526 (identifying "[i]nequalities in access to ex ante assistance" as a barrier to estate planning).

37 *See* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 Geo. L.J. 605, 616 (2015) (noting that "many bar associations and state legislatures adopted schedules that linked minimum fee awards to the value of the decedent's property").

38 *See* N.M. Stat. Ann. §§ 45-3-719 to -720 (1995).

39 *See* Farrigan et al., *supra* note 35, at 2. It is not clear what percentage of rural land is owned by rural residents.

40 *See* Christopher Mazur, *Rural Residents More Likely to Own Homes Than Urban Residents*, U.S. Census Bureau (Sept. 27, 2017), https://www.census.gov/library/stories/2017/09/rural-home-ownership.html [https://perma.cc/86LL-LGVF] (noting that the homeownership rate among rural residents in 2017 was 81.1%, compared to 59.8% among urban residents); Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 Geo. J. on Poverty L. & Pol'y 33, 43 (2006).

41 *See, e.g.*, Rosser, *supra* note 40, at 43 (noting that land and housing are the "major asset" of many low-income rural individuals and families).

42 *See infra* Part I.B.3.a.

43 *See infra* Part I.B.1.

B. The Role of Estate Planning and Probate in Rural Communities

1. *The Role of Probate and the Growing Probate Avoidance Gap*

The basic purpose of probate is straightforward.[44] The probate process essentially does five things. First, if a will exists, it verifies that it is authentic and valid.[45] Second, it identifies the decedent's assets.[46] Third, it pays creditors and taxes owed.[47] Fourth, it changes title of assets from the decedent's name to the beneficiary's names.[48] Finally, if necessary, it resolves disputes among the beneficiaries or other interested parties.[49]

Probate has a reputation for being costly, invasive, and slow[50]—in other words, it is painted by critics as a "Dickensian nightmare of lawyer fees and court delays."[51] This reputation is not entirely fair, as research demonstrates that probate is more efficient and less likely to consume estate assets than previously believed.[52] Still, a "non-probate revolution" has arisen in response to this perception, and greater amounts of wealth now pass outside of probate.[53]

The primary ways to avoid probate are beneficiary designations and trusts.[54] Beneficiary designations allow for liquid assets, such as bank account funds, stocks, and life insurance or retirement plan proceeds, to be transferred outside probate to the account holder's named beneficiaries.[55]

Trusts are agreements by which legal title to assets is transferred to a fiduciary who manages assets for beneficiaries, who merely hold a

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44 *See The Probate Process*, A.B.A., https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/probate-process/ (last visited July 24, 2025) [https://perma.cc/269W-5BL3].

45 *See id.*

46 *See id.*

47 *See* Horton, *supra* note 37, at 634–37.

48 *See* A.B.A., *supra* note 44.

49 *See* Horton, *supra* note 37, at 628–34.

50 *See id.* at 609–10.

51 Danaya C. Wright, *Trapped Between the URPTODA and the UPHPA: Probate Reforms to Bridge the Gap and Save Heirs Property for Modest-Wealth Decedents*, 127 Penn St. L. Rev. 749, 766 (2023).

52 *See generally* Horton, *supra* note 37 (discussing the efficiency and cost effectiveness of probate).

53 For a discussion of the history of the "non-probate revolution," *see generally* Horton, *supra* note 37 (discussing Langbein's observations in his watershed article).

54 *Id.* at 608.

55 *See, e.g.*, John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12 (2012). If no beneficiary is designated, assets may be subject to probate or may be transferred subject to "terms that function as a plan-specific intestacy scheme," as with most retirement plans. *See id.* at 13.

beneficial interest in the assets.[56] This form of ownership, when done right, allows assets to pass outside of probate, and may also allow for "tax-free accumulation[s] of wealth."[57]

Outside of these non-probate tools, probate is also sometimes avoided through "probate inaction"— situations where survivors simply delay or avoid opening probate.[58] This may be due to confusion or conflict over who should serve as executor.[59] Also, individuals residing in a decedent's home may be hesitant to inform other heirs or creditors to avoid losing their residence.[60] Finally, probate inaction may occur due to the cost or perceived burdensomeness of probate,[61] a lack of awareness of the need for probate,[62] difficulties in accessing legal assistance, or distrust of lawyers and the legal system.[63]

Probate inaction can give rise to "tangled titles," which are situations where the formal legal title to real property remains in the name of someone other than the apparent holder—usually in the name of a deceased prior owner.[64] Tangled titles raise issues ranging from the inconvenient to the devastating. For example, in the absence of an executor, no one

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56 *See, e.g.*, Horton, *supra* note 37*,* at 606.

57 *See generally* Harry S. Margolis, *Is Estate Planning Ethical in an Increasingly Inequitable World?*, 49 ACTEC L.J. 61, 64–65 (2023) (discussing the range of complex trust structures aimed at reducing or avoiding tax liability, including "QPRTs, GRITs, GRATs, charitable remainder trusts, minority discounts, intentionally defective grantor trusts and life insurance trusts").

58 *See generally* Reid Kress Weisbord, *Heirs Property: An Examination of Probate Costs and the Costs of Postmortem Probate Inaction*, 49 ACTEC L.J. 113, 122–23 (2023) (discussing probate processes).

59 Where no executor is nominated by will, state statutes provide default rules of appointment priority. *See* N.M. Stat. Ann. § 45-3-203 (2017). If a class of multiple heirs shares equal priority, all members of the class must typically consent to an appointment. *See* N.M. Stat. Ann. § 45-3-203(c) (2017). In the absence of consent, the court will need to hold formal hearings to appoint an appropriate executor. *See* N.M. Stat. Ann. § 45-3-414 (1975).

60 *See* Weisbord, *supra* note 58, at 124; Wright, *supra* note 51, at 760.

61 *See* Weisbord, *supra* note 58, at 123–24; Wright, *supra* note 51, at 760.

62 *See, e.g.*, Weisbord, *supra* note 58 at 123.

63 *See, e.g.*, Wright, *supra* note 51, at 760.

64 "Tangled title" and "heirs' property" are terms with overlapping but not identical meanings. *See* Pew Charitable Trs., *How 'Tangled Titles' Affect Philadelphia* 1, 3 (2021). At a basic level, "tangled title" means that legal title of the property does not accurately reflect current ownership. *See id.* Tangled titles often arise when title to a deceased owner's property is not cleared at death. *See id.* "Heirs' property," on the other hand, generally refers to property that passes without a will to multiple descendants as tenants-in-common, leading to fractional ownership interests. *See* Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, *in* Heirs' Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment 65, 67 (Cassandra Johnson Gaither et al. eds., 2019). Holders of heirs' property often lack clear title. *See id.* at 80.

may be able to access estate funds for taxes and other expenses, which increases the likelihood of tax or mortgage foreclosure. In turn, without clear title, heirs may not receive notice of proceedings[65] and may not qualify for relief programs.[66]

Additionally, holders of tangled title may be unable to pledge property as collateral for loans for maintenance and repairs,[67] or to obtain U.S. Department of Agriculture (USDA) loans allowing for the productive use of agricultural lands.[68] They also may be unable to secure hazard insurance and Federal Emergency Management Agency (FEMA) assistance in the event of disaster.[69] In addition, they may not be eligible for tax exemptions, such as for farmland and homesteads.[70] Tangled title properties can become "mired in generations of uncertain title," rendering them unmarketable and leading to property loss.[71] For residential property, the result may be reduced housing quality or forced homelessness.[72]

Barriers to probate grow more pronounced with time.[73] As heirs of an original decedent pass away, the number of required probate proceedings—and the number of potential heirs—often multiplies.[74] Probate costs may quickly consume much of an estate's value, particularly for

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65 *See Consumer and Industry Advocates Outline Reforms to Property Tax Foreclosure Laws to Promote Sustainable Homeownership*, AM. LAND TITLE ASS'N, https://www.alta.org/news-and-publications/press-release/Consumer-and-Industry-Advocates-Outline-Reforms-to-Property-Tax-Foreclosure-Laws-to-Promote-Sustainable-Homeownership (last visited Feb. 16, 2026) [https://perma.cc/9EY9-RQ74].

66 *See* Weisbord, *supra* note 58, at 117.

67 *See id.*

68 *See* Lizzie Presser, *Kicked Off the Land*, NEW YORKER (July 5, 2019), https://www.newyorker.com/magazine/2019/07/22/kicked-off-the-land [https://perma.cc/VQJ6-HS8Y]. The 2018 Farm Bill took steps to address this issue, including providing for the use of alternative documentation for owners with unclear title, though the full force of the provisions is limited to states that have adopted the UPHPA. *See* Brenda D. Gibson, *The Heirs' Property Problem: Racial Caste Origins and Systemic Effects in the Black Community*, 26 CUNY L. REV. 172, 208 (2023).

69 *See* Gibson, *supra* note 68, at 195. FEMA has made changes allowing alternate forms of ownership in recent years, though those without clear title still face additional delays or obstacles. *See* Wright, *supra* note 51, at 755 n.13; Coalition for Fire Fund Fairness, *Mora is Burning Screening,* YouTube (Apr. 15, 2024), https://www.youtube.com/watch?v=78RlAm9o9KA [https://perma.cc/CLM8-JVXV] (comments by an audience member impacted by wildfires in Mora, New Mexico describing inability to provide documentation that was burned along with their home).

70 *See* Gibson, *supra* note 68, at 195.

71 Desiree C. Hensley, *Property Law and the Intestacy Entitlement*, 85 ALB. L. REV. 557, 558–59 (2022).

72 *See, e.g.*, Sean Doolittle, *The Lurking Dangers of Heirs' Property*, BC LAW (May 28, 2024), https://lawmagazine.bc.edu/2024/05/the-lurking-dangers-of-heirs-property/ [https://perma.cc/2Z7W-CRC7].

73 *See, e.g.*, Wright, *supra* note 51, at 761.

74 *See, e.g.*, Weisbord, *supra* note 58, at 122–23.

small-value estates.[75] Private attorneys may have little incentive to clear title in complex cases.[76]

Probate avoidance appears to be most common at opposite ends of the wealth spectrum, though by starkly different means and with starkly different results. The wealthy, who are disproportionately White, commonly avoid probate through beneficiary designations and complex trust planning,[77] resulting in tax benefits and increased generational wealth.[78] The poor, who are disproportionately non-White, are more likely to avoid probate through probate inaction.[79]

There appears to be a rural-urban probate avoidance gap as well. To begin with, existing systems of property transfer preference urban wealth. While most liquid financial assets—which account for a greater share of wealth for urban residents[80]—can be transferred very simply by beneficiary designation, there has historically been no equivalent simple procedure for non-probate transfers of real property[81]—a greater share of rural wealth.[82] Moreover, while most states offer summary probate administration or transfer-by-affidavit procedures for lower value assets, real property is usually excluded from these procedures regardless of its value.[83] Additionally, while little prior research has focused explicitly on the question of rural-urban difference in trust use, there is some indication

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75 *See id*. at 118. One Pew study found that for the average "simple" case involving a residential property, the cost of clearing a tangled title would exceed ten percent of the property's assessed value. *See id*. at 122. The cost-to-value ratio is likely even higher in the case of small, non-residential parcels, which were common among tangled titles in our research. *See infra* Part III.E.

76 *See* Weisbord, *supra* note 58, at 118; Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2 Wis. L. Rev. 295, 299 (2019) (noting that it can take ". . . hundreds of hours of legal time" to clear a single tangled title).

77 *See, e.g.*, Allison Anna Tait, *Inheriting Privilege*, 106 Minn. L. Rev. 1959, 2000–01 (2022).

78 *See, e.g.*, Margolis, *supra* note 57, at 63–64.

79 *See, e.g.*, Weisbord, *supra* note 18, at 898.

80 *See* Emp. Benefit Rsch. Inst., *How the Finances of Rural and Urban Americans Differ* (2022), https://www.ebri.org/docs/default-source/infographics/81_ig-ruralurban-5may22.pdf?sfvrsn=66c43b2f_2 [https://perma.cc/FXA5-8X4Y].

81 *See, e.g.*, Danaya C. Wright, *Trapped Between the URPTODA and the UPHPA: Probate Reforms to Bridge the Gap and Save Heirs Property for Modest-Wealth Decedents*, 127 Penn St. L. Rev. 749, 803 (2023) ("It is ironic that we allow an individual to change a beneficiary designation on a multimillion-dollar investment account simply by signing into the institution's website and making the change, but creating a process for smooth transmission of a $75,000 home takes a revocable trust in many states."). This is changing somewhat with the increasingly widespread adoption of the transfer-on-death ("TOD") deed, although preparing a TOD deed remains more complex than simply making a beneficiary change on an institution's website. *See infra* Part IV.

82 *See* Emp. Benefit Rsch. Inst., *supra* note 80.

83 Joseph N. Blumberg, *51 Flavors: A Survey of Small Estate Procedures Across the Country*, Prob. & Prop., July/Aug. 2014, at 33. *See, e.g.,* N.M. Stat. Ann. § 45-3-1201 (2012)

that use of trust-based planning may be less common in rural areas with limited access to specialized services.[84]

2. *Testamentary Freedom and the Potential Impacts of Intestacy*

Testamentary freedom—the right to control distribution of one's property at death—is upheld as the "polestar of American inheritance law."[85] With respect to probate assets, execution of a will during life is the sole means of exercising testamentary freedom to deviate from a state's intestacy statute.

Testamentary freedom is not just an abstract financial right. There are "psychological benefits" of planning to the testator.[86] "[T]estators feel a sense of relief when they get their affairs in order," and executing a will provides a "cathartic" opportunity to speak one's mind.[87] Wills allow the individuality of a decedent to be recognized, "giv[ing] permanent voice to the testator's wants."[88] On the other hand, intestacy "impose[s] a set of values on silent individuals regardless of whether they embraced these values during life."[89]

For survivors, a will provides certainty that can ease "emotional turmoil and grief."[90] One study found that survivors expressed appreciation when *any* planning was in place—regardless of their agreement with a

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(allowing transfer of property by affidavit for values up to $50,000 but excluding real property of any value).

84 *See* Taier Perlman, Government Law Center at Albany Law School, *A Report on Legal Practice in New York State*, at 3 (2019) (survey of rural practitioners in New York State in which 62% reported engaging in general practice while 38% were specialists); 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, 379 (2017) (finding that decedents in more urban county were almost twice as likely to have a trust than decedents from a county with a larger rural population, despite lower average income in the more urban county).

85 Weisbord, *supra* note 18, at 877–78.

86 *See* David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 Stan. L. Rev. Online 18, 20 (2020); *see also* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 Quinnipiac Prob. L.J. 36, 61 (2009) (noting that wills empower individuals by giving them control over property distribution).

87 Horton & Weisbord, *supra* note 86, at 20; DiRusso, *supra* note 86, at 61.

88 DiRusso, *supra* note 86, at 61.

89 *Id.*

90 Weisbord, *supra* note 18, at 895. *See also* Reetu Pepoff, *The Intersection of Racial Inequities and Estate Planning*, 47 ACTEC L.J. 87, 89 (2021) ("[L]ack of estate planning . . . has a profound impact on the grieving family members who are left to sort out the decedent's estate . . . .").

decedent's preferences—while a lack of planning caused confusion and increased conflict.[91]

While it is possible for a state's intestate scheme to align with a person's testamentary goals, there are still problems with not having a will. In the absence of a will, disputes are more likely to arise over who should serve as executor.[92] Disputes increase probate's complexity and cost[93] or even lead to avoidance of probate altogether.[94] Where heirs include minors, intestacy can lead to "costly and burdensome guardianship proceedings."[95] If an intestate decedent leaves minor children with no surviving guardian, a court will appoint a guardian "without express direction from the child's deceased parent."[96]

Because intestate heirs of the same class inherit equal undivided shares of real property as tenants-in-common,[97] intestacy contributes to fractionation—where ownership is divided to the point of impeding meaningful use of the property.[98] While tenancy-in-common can be advantageous in some contexts, fractionated tenancy-in-common arising by intestacy—known as "heirs' property"—can leave owners who have "little actual connection to one another" geographically scattered and with conflicting views regarding the property.[99] Uncertainty or conflict over financial responsibilities can lead to property loss through foreclosure

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91 *See* Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 Elder L.J. 325, 339 (2015).

92 *See* Horton, *supra* note 37, at 632 (finding that disputes over administrator appointments arose in over six percent of intestate probate cases). In the absence of a will, statutes mirroring intestate schemes assign priority for appointment as executor of a decedent's estate but generally do not provide guidance in instances where multiple heirs share equal priority. *See id;* N.M. Stat. Ann. § 45-3-203 (2017).

93 In New Mexico, for example, contested appointment proceedings require formal district court oversight, increasing court costs and making it more likely that survivors will require attorney assistance. *See* N.M. Stat. Ann. § 45-3-414 (1978).

94 For a discussion of the harms of probate delay and avoidance, see *supra* Part I.B.1.

95 DiRusso, *supra* note 86, at 58; *see also* Wright, *supra* note 76, at 299-300 (discussing the procedural burdens and guardianship complications that may arise when minors inherit through intestacy).

96 Weisbord, *supra* note 18, at 895.

97 In a tenancy-in-common, each co-tenant has the right to use and enjoyment of the whole, subject only to the rights of other co-tenants. *See* Jesse J. Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?,* 45 Real Est. L.J. 507, 517–18 (2017). Each owner must typically obtain consent from all others to make decisions about sale or management of the property. Weisbord, *supra* note 18, at 895–98.

98 Weisbord, *supra* note 18, at 895–98.

99 Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505, 517–18 (2001).

or through a tax sale.[100] Heirs' properties are also vulnerable to loss through a partition sale.[101]

Studies indicate that most Americans do not have a will[102] and that testacy rates are declining.[103] Additionally, there is some indication that intestacy is more likely in rural areas; for example, one study found a negative correlation between having a will and living in the West Census region,[104] and a study of probate records from one county in Florida found that the homes of intestate decedents were more likely to be located in rural parts of the county.[105] However, modern studies of probate appear to have been undertaken largely in urban areas in high-population states,[106]

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100 *See, e.g.*, Gibson, *supra* note 68, at 200 (noting that fractionated tenancy-in-common ownership often results in a "loss in communication about who is responsible for certain property-related tasks").

101 Traditionally, a single co-tenant could petition for sale of the entire property, no matter how small their interest. *See* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 Ala. L. Rev. 1, 10 (2014). While the law of most states prefers physical division of the property—or partition in kind—in reality such division is typically deemed infeasible and partition by sale is the most common outcome. *See, e.g.*, Richardson, *supra* note 97, at 522–23.

102 *See, e.g.*, Jeffery M. Jones, *Majority in U.S. Do Not Have a Will*, Gallup (May 18, 2016), https://news.gallup.com/poll/191651/majority-not.aspx [https://perma.cc/SM62-AZKS] (forty-four percent of respondents reported having a will); Consumer Reports, *supra* note 18, at 6 (thirty-three percent of respondents). Some individuals dying intestate may do so out of an understanding that the intestate rules align with their preferences, see David Horton, *Wills Law on the Ground*, 62 UCLA L. Rev. 1094, 1126 (2015). True "informed consent" to intestacy is likely uncommon. *See* Weisbord, *supra* note 18, at 889–90 (summarizing research indicating that surveyed individuals largely lack understanding of how intestate rules will be applied, and do not identify approval of intestate rules as a reason for not having a will).

103 *See, e.g.*, James, *supra* note 16, at 2419–20 (reviewing evidence from the Health and Retirement Study indicating that the share of individuals aged fifty-five and over who reported having a will decreased each year between 1998 and 2016, and that decline occurred across age, educational level, wealth, marital status, gender, racial and ethnic groups). Part of this decline is due to growth in the use of trust planning and other non-probate transfers, but empirical evidence suggests this does not fully explain the decline in will use. *See supra* Part I.B.1; James, *supra* note 16, at 2420.

104 *See* James, *supra* note 16, at 2418 n.120 (citing Shinae Choi et al., *Do Older Adults with Alzheimer's Disease Engage in Estate Planning and Advance Care Planning Preparation?, 23* Aging & Mental Health 872, 875–76 (2019)).

105 *See* Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. Davis L. Rev. 2603, 2627 (2020).

106 For example, studies have been conducted in counties categorized as "metro" by the Office of Management and Budget. *See* Horton, *supra* note 37, at 626 (Alameda County, California); Wright, *supra* note 105, at 625 (Alachua County, Florida); Wright & Sterner, *supra* note 84 (Escambia County, Florida); *see also Rural-Urban Continuum Codes*, U.S. Dep't of Agric. Econ. Rsch. Serv., https://www.ers.usda.gov/data-products/rural-urban-continuum-codes/documentation [https://perma.cc/V83B-JHGE] (last updated Jan. 7, 2025) (2023 Rural-Urban Continuum Codes tables).

with scholars commenting on the need for increased inquiry into the "vast darkness of probate."[107] Our study results provide additional evidence of the existence of a rural-urban testacy gap.[108]

The harm affiliated with intestacy has an outsized impact in rural communities. First, rural wealth is inherently more vulnerable to fractionation and heirs' property issues. Compared to urban areas, where people commonly hold easily divisible liquid wealth, rural residents commonly hold wealth in forms more vulnerable to fractionation—such as real property, vehicles, or business assets.[109]

Also, heirs' property is more common in rural places—one study estimated that two-thirds of heirs' property parcels are in rural areas.[110] In particular, fractionated ownership and heirs' property are acute problems in the rural South,[111] Appalachia,[112] Hispanic communities of the Southwest,[113] and Native American communities.[114]

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107 *See* Horton, *supra* note 102, at 1122.

108 *See infra* Part III.C.

109 *See* Emp. Benefit Rsch. Inst., *supra* note 80.

110 *See* Hous. Assistance Council, A Methodological Approach to Estimate Residential Heirs' Property in the United States 27 (2023).

111 Fractionated ownership and heirs' property have been particularly well-studied in the rural South, where a legacy of exploitative land speculation, combined with fractionation driven in part by low rates of testacy, have combined to cause massive loss of Black-owned land. *See* Mitchell, *supra* note 99, at 517–19. The Uniform Partition of Heirs Property Act (UPHPA) was drafted in response to the problem of Black land loss in the rural South. *See infra* Part IV.D.1.

112 Existing regional studies specific to Appalachia, while less numerous than in the rural South, have suggested that both tenancies-in-common and heirs' properties are prevalent, and that the instability of these ownership forms has contributed to vast amounts of the region's natural resource wealth being accumulated by remote and corporate speculators. *See* B. James Deaton, *Land "in Heirs": Building a Hypothesis Concerning Tenancy in Common and the Persistence of Poverty in Central Appalachia*, 11 J. Appalachian Stud. 83, 85–89 (2005).

113 In the Southwest, it is estimated that 1.6 million acres of land were lost through speculation by forced partition sale after the federal government improperly converted communally held Mexican-American lands into tenancies-in-common. *See* David Benavides & Ryan Golten, *Righting the Record: A Response to the Gao's 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, 48 Nat. Res. J. 857, 906 (2008). Furthermore, it has been suggested that low rates of will making among rural *colonia* communities of the Southwest may be contributing to a high rate of "heirs' properties in the making." *See* Cassandra Johnson Gaither, U.S. Dep't of Agric. Forest Serv. S. Rsch. Station, *Heirs' Property in the Southern United States* 27 (2016).

114 In Indian Country, forced allotment policies and federal mismanagement have created a devastating and intractable fractionation problem. *See generally* Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729 (2003).

In addition to individual- and family-level impacts, intestacy contributes to community-level harms in rural areas. For example, heirs' properties commonly fall into disrepair or are abandoned,[115] which can drive down the value of surrounding properties and reduce community safety.[116] Rural properties sold at a tax sale or through forced partition are also more likely to be purchased below market value by remote speculators who may be unlikely to invest in maintenance, funneling wealth out of the community and increasing poverty.[117]

Similarly, rural communities are more likely to turn to private enforcement of tax delinquency, "funnel[ing] foreclosure related revenues out of the community."[118] Further, the limitations on land use and development associated with fractionation and heirs' property[119] result in reduced local tax revenue,[120] exacerbating existing rural-urban disparities in available resources.[121]

Finally, while greater research is needed into rural-urban wealth divides,[122] addressing inheritance inequality would help to address racial wealth gaps overall, given that fourteen million Black, Hispanic or Latino, Asian, Native, and multiracial people live in rural areas—[123] amounting to

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115 *See* Ann M. Eisenberg, *Rural Blight*, 13 Harv. L. & Pol'y Rev. 187, 215 (2018); Pew Charitable Trs., *supra* note 64, at 11.

116 *See*, *e.g.*, Pew Charitable Trs., *supra* note 64, at 11; Richardson, *supra* note 97, at 558.

117 *See* Eisenberg, *supra* note 115, at 213–17 (discussing the practical challenges associated with managing a property from afar, and noting that distant landowners may be less invested in the community); *see also* Gaither, *supra* note 113, at 17–19 (discussing scholarship indicating that absentee ownership, often by corporations taxed at lower rates, has contributed to persistent poverty and underfunded public services in rural Appalachia).

118 Eisenberg, *supra* note 115, at 214.

119 *See supra* Part I.B.2.

120 *See* Richardson, *supra* note 97, at 513.

121 *See* Eisenberg, *supra* note 115, at 191–92 (discussing how resources such as private capital, community organizations, and land banks are more available in urban areas).

122 *See* Rebecca Chenevert et al., *Where the Wealth Is: The Geographic Distribution of Wealth in the United States*, U.S. Census Bureau (Apr. 2017), https://www.census.gov/library/working-papers/2017/demo/FY2016-129.html [https://perma.cc/C7V6-NPGC] (noting that "household wealth is a difficult concept to measure," including across "subnational geographies"). Limited existing research suggests that rural-urban wealth gaps are pronounced among higher income brackets, while net wealth among low-income individuals may be higher in rural areas. *See* Emp. Benefit Rsch. Inst., *supra* note 80.

123 *See Who Lives in Rural America? The Geography of Rural Race and Ethnicity*, Ctr. On Rural Innovation (Jan. 12, 2023), https://ruralinnovation.us/blog/who-lives-in-rural-america-part-2/ [https://perma.cc/6N35-AAZV].

approximately 21.5% of Native Americans,[124] 9.9% of Black Americans,[125] and 6.7% of Hispanic or Latino Americans.[126] Additionally, Hispanic/Latino rural populations are increasing in nearly every state while rural populations as a whole are declining.[127]

3. *Estate Planning Issues Common to Rural Communities*

In addition to the potential harms of intestacy, there are numerous planning challenges that are more likely to arise in rural communities, and which may be exacerbated by limited access to lawyers. Although a comprehensive treatment of these issues is beyond the scope of this Article, we briefly highlight several examples to illustrate the pressing need for specialized rural services.

a. Farm and Ranch Succession Planning

The presence of farm or ranch interests in an estate can introduce additional planning complexities.[128] First, farms and ranches are businesses, and business succession planning is uniquely complicated. It involves questions about the best form of business entity as well as questions about who will run the business as the owners age and pass away.[129] Naturally, this type of planning also raises questions about the personalities of the people involved in the business and whether they are suited

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124 Some have argued that traditionally used Census data overestimate the share of Native people living in urban areas. *See* Sarah Dewees & Benjamin Marks, First Nations Dev. Inst., Twice Invisible: Understanding Rural America 3 (2017). One study found that when very small towns were included in the analysis, the share of the Native population living outside of urban areas jumped to over fifty-four percent. *See id.* at 4.

125 The rural Black population is more concentrated than for any other racial group, with over eighty percent of the Black rural population residing in the South. Ctr. On Rural Innovation, *supra* note 123.

126 *See* Makada Henry-Nickie & Regina Seo, Brookings Inst., Creating Community-Determined Rural Policies: How Native Women Transform Challenges into Impactful Social Entrepreneurship 9 (2022).

127 *See* Ctr. On Rural Innovation, *supra* note 123 (noting that Hispanic rural populations have increased in every state but Arizona, with particularly pronounced increase in California and Texas).

128 *See, e.g.*, Tanya E. Feinleib, *Estate Planning for Ranch Owners*, 15 Est. Plan. & Cmty. Prop. L.J. 1 (2022) (discussing succession planning, special valuation tax issues, natural resource leases, and liability issues connected to recreational land as among the planning issues relevant to ranch owners).

129 *See* Edward F. Koren, *Preserving the Patriarch's Patrimony for the Prodigal and Other Paranormal (or Normal) Progeny: Non-tax Considerations in Family Business Succession Planning*, *in* 31st Annual Philip E. Heckerling Inst. on Est. Plan. ch. 12 (Univ. of Miami Sch. of Law 2025).

to run it.[130] Farms and ranches are also particularly complicated because they ultimately involve the transfer of unique assets, such as large land holdings, farm equipment, and livestock.

Second, there are unique tax issues applicable to farms and ranches. For example, Internal Revenue Code Section 2032A allows for the special use valuation of this property for estate tax purposes.[131] In addition, Internal Revenue Code Section 6166 allows for the payment of these taxes over ten years if the beneficiaries continue to operate the property as a farm or ranch.[132] Accordingly, specialized planning is often key to securing the best outcomes for farm and ranch owners and their heirs.

b. Manufactured Housing

Due to a combination of factors, including high building costs, limited affordable housing, and less restrictive zoning rules, manufactured homes[133] are an "especially important" component of rural housing stock.[134] Half of all owner-occupied manufactured housing units are in rural areas, and manufactured housing comprises roughly thirteen percent of all owner-occupied units in rural and small town communities—over twice the national rate.[135]

The property status of manufactured housing is a difficult issue. By default, manufactured housing is usually considered to be personal property separate from the land it is located on.[136] Personal property, including

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130 *See id.* ¶ 1202.3.

131 I.R.C. § 2032A.

132 I.R.C. § 6166.

133 The terms "manufactured home" and "mobile home" are often used interchangeably, though they have different legal meanings. Under federal law, a manufactured home is a factory-built dwelling that was constructed after June 15, 1976, subjecting it to uniform national safety and quality standards under the HUD Code, while a mobile home technically refers to units constructed prior to 1976. NeighborWorks Program, An Examination of Manufactured Housing as a Community-and Asset-Building Strategy 2 (2002). Under New Mexico law, "manufactured home" is an umbrella term includes any "movable or portable housing structure" designed for human occupancy and meeting certain size and construction qualifications. N.M. Stat. Ann. § 66-1-4.11(B) (2023). For the purposes of this discussion, we will use "manufactured home" in this broader sense of the term, as many of the financing and transfer considerations we discuss may apply regardless of the date of construction.

134 NeighborWorks Program, *supra* note 133, at 6.

135 *See* Hous. Assistance Council, Manufactured Housing in Rural America 1–2 (2020), https://ruralhome.org/wp-content/uploads/2021/05/Manufactured_Housing_RRB.pdf. [https://perma.cc/XU66-BCEY].

136 *See* Nat'l Consumer Law Ctr., Manufactured Housing Resource Guide: Titling Homes as Real Property 1 (2014), https://www.nclc.org/wp-content/uploads/2022/09/cfed-titling-homes.pdf. [https://perma.cc/G294-L9BP].

manufactured housing, is generally ineligible for conventional mortgage lending, limiting owners to financing through less favorable "chattel loans," with shorter terms and higher interest rates.[137] The problem is exacerbated by predatory lending practices.[138] In the absence of "affordable means to finance the purchase, repair, finance, and replacement of their homes," many owners of manufactured housing cannot build equity.[139]

More than three-quarters of states have laws allowing for the conversion of manufactured housing to real property, but the requirements can be cumbersome and may require attorney assistance.[140] In many states, conversion is available only where the homeowner also owns the underlying land.[141] Additionally, the process often requires owners to undergo numerous procedural steps, including filing affidavits of affixture, securing inspections, paying additional taxes or fees, and surrendering vehicle titles to state motor vehicle departments—all of which can be burdensome or cost-prohibitive.[142] In rural areas where legal and financial services are limited, these hurdles are even more daunting, and most manufactured housing remains classified as personal property.[143]

The "incongruous"[144] nature of property laws governing manufactured housing complicates postmortem transfers. Absent real-property classification, manufactured housing may not qualify for homestead or spousal protections.[145] Additionally, in situations where the homeowner also owns the underlying land,[146] the options available to transfer title to each component may differ, increasing administrative burdens for owners and heirs. In New Mexico, for example, the land underlying a manufactured home can be transferred through a transfer-on-death (TOD) deed

137 NeighborWorks Program, *supra* note 133, at 4.

138 *See id.*

139 *Id.* at 11.

140 *See Policy Brief: Titling Homes as Real Property*, Nat'l Consumer Law Ctr. (Oct. 14, 2015), https://www.nclc.org/resources/policy-brief-titling-homes-as-real-property/ [https://perma.cc/MWM7-2KF3].

141 *See* Hous. Assistance Council, *supra* note 136, at 3.

142 *See* Nat'l Consumer Law Ctr., *supra* note 136, at 8–12; N.M. Admin. Code tit. 3, § 6.5.33 (2004); Roosevelt County Assessor's Office, Understanding Taxation of Manufactured/Mobile Homes in New Mexico, https://www.rooseveltcounty.com/wp-content/uploads/2018/01/Understanding-Taxation-Of-Manufactured-Mobile-Homes-In-New-Mexico.pdf [https://perma.cc/WK7Z-SHX2].

143 *See* Nat'l Consumer Law Ctr., *supra* note 136.

144 Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 St. Louis U. Pub. L. Rev. 113, 149 (2009).

145 Nat'l Consumer Law Ctr., *supra* note 133, at 6–7.

146 The share of manufactured homes located on owned land has risen steadily over the past four decades, with a majority of newly-placed units located on owned land. *See* NeighborWorks Program, *supra* note 133, at 7.

executed before death,[147] while the attached manufactured home cannot unless the owner has gone through the procedures to convert the home to real property.

c. Gun Transfer Planning

According to one 2017 study, nearly half of rural Americans report owning a gun, compared to less than one-third of suburban or urban residents.[148] Additionally, rural gun owners are more likely than their urban counterparts to own more than one firearm.[149] As a result, many rural residents need to navigate the complex interplay of state and federal gun regulations and probate laws, which varies widely depending on the state and the type of firearm.[150] Specialized assistance in this area may be particularly important, as violations of state or federal rules regarding firearm transfer may result in criminal liability for heirs or fiduciaries.[151]

In the coming sections, we discuss the methodology and results of our study of probate and estate planning trends in three rural counties, including discussion of what they indicate about access to specialized services in rural communities.

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147 *See* Uniform Real Property Transfer on Death Act, N.M. Stat. Ann. § 45-6-401 to -417 (2014).

148 *See* Ruth Igielnik, *Rural and Urban Gun Owners Have Different Experiences, Views on Gun Policy*, Pew Rsch. Ctr. (July 10, 2017), https://www.pewresearch.org/short-reads/2017/07/10/rural-and-urban-gun-owners-have-different-experiences-views-on-gun-policy/ [https://perma.cc/MD6R-EH9K]. Twenty-eight percent of those living in the suburbs and nineteen percent of urban residents reported owning a gun. *See id*.

149 *See id.*

150 *See generally* Ryan M. Holmes & Thomas Fabbri, *Estate Planning for Gun Owners*, Est. Plan., Oct. 2021, at 3, 4.

151 *See generally* Nathan G. Rawling, *A Testamentary Gift of Felony: Avoiding Criminal Penalties from Estate Firearms*, 23 Quinnipiac Prob. L.J. 286, 289 (2010). Under state law, felony liability might arise for transferring a firearm to a devisee or heir known to be a felon. *See, e.g.*, N.M. Stat. Ann. § 30-7-7.2 (2023). An executor who is themselves a "prohibited person" might face felony liability for possession of estate firearms prior to transfer. *See, e.g.*, N.M. Stat. Ann. § 30-7-16 (2022). Additionally, an estate executor who sells a weapon to a third party without conducting a background check could face misdemeanor liability. *See, e.g.*, N.M. Stat. Ann. § 30-7-7.1 (2019); Cal. Penal Code § 27590 (2024) (providing for misdemeanor or felony liability for violation of state laws regarding sale, lease, or transfer of firearms). Specialized advice and assistance may help avoid these outcomes. *See, e.g.*, *Managing Guns in Your Estate*, ACTEC, https://www.actec.org/resource-center/video/managing-guns-in-your-estate/ (last visited Feb. 10, 2026) [https://perma.cc/9UMA-SW3V] (discussing the need to ensure that executors are qualified to possess and transfer weapons, as well as reviewing the potential benefits of gun trusts); Rawling, *supra*, at 306, 310 (discussing the need for owners to carefully consider whether beneficiaries are entitled to possess weapons, and for drafters to provide for the possibility that there will be no qualified beneficiaries at the time of distribution).

II. Methodology

A. Study Design

To move towards addressing the limited empirical research focused on probate and estate planning trends in rural (or "nonmetro" areas),[152] we designed a county-level study of probate, heirs' property, and postmortem property loss across three New Mexico counties. Our methodology borrows aspects from prior studies, with some key differences.

Using probate records, obituaries, Medicaid records, and other public data sources, we assembled as comprehensive a dataset as possible of all individuals who died in the year 2015 while domiciled in one of our counties of study. We selected the year 2015 for two reasons: (1) to avoid possible sample bias or anomalous results affiliated with the COVID-19 pandemic,[153] and (2) to allow time for probate cases to proceed through the system[154] and for property loss mechanisms to be visible in the dataset,[155] while still providing a recent enough sample to guide consideration of current needs and possible reforms.

For each decedent in the dataset, we gathered basic demographic information including age, marital status, and family structure. From there, we turned to county probate and district court[156] records to determine whether a state-law probate was opened for each decedent between the date of death and the last day of 2024.[157]

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152 *See supra* notes 106-07 and accompanying text.

153 *See* Amanda Spishak-Thomas, *Medicaid Enrollment and Intergenerational Transfers of Wealth Among Older Adults*, 64 Gerontologist, no. 7, at 2 (2024), https://academic.oup.com/gerontologist/article/64/7/gnae074/7690817 [https://perma.cc/8MZT-R7SZ] (selecting a study period prior to the COVID-19 pandemic to minimize bias).

154 Prior studies have indicated that the probate cases can vary broadly in length, from well under a year to several years. *See* Horton, *supra* note 37, at 648–52. Additionally, there is often a significant delay between the date of death and the opening of probate, which can present its own challenges. *See infra* Part III.E.

155 In New Mexico, a lien may be placed by the taxation and revenue department on real properties for which tax payments have been delinquent for a period of two years, and sale of the property must generally occur within three and four years of the property falling into delinquent status. *See* N.M. Stat. Ann. §§ 7-38-61 to -65 (2025).

156 In New Mexico, probates governed by state law may be filed either in one of thirteen district courts, which have exclusive jurisdiction in certain types of cases, or one of thirty-three informal county probate courts. *See* N.M. Stat. Ann. § 34-7-1 (2023); N.M. Stat. Ann. § 45-3-201 (1978); N.M. Stat. Ann. § 45-3-402 (1975). Venue is determined by either the decedent's domicile at the date of death or the situs of property requiring probate. N.M. Stat. Ann. § 45-3-301 (1975).

157 The Department of the Interior has exclusive probate jurisdiction over a decedent's interests in federal trust property, and individual tribes hold exclusive jurisdiction over the property of tribal members residing in Indian Country. *See* Cohen's Handbook of Federal Indian Law § 18.03[6][a] (Nell Jessup Newton & Kevin K. Washburn, eds.,

For each probate case identified, we collected data on a wide range of variables, including: (1) whether the personal representative proceeded *pro se* or with an attorney, (2) whether a will was filed, and (3) if there was a will, its source and overall scheme. We also used directory information published by the New Mexico State Bar to gather data on the attorneys providing probate representation or will drafting services to individuals in our dataset, including the attorney's (1) primary county of practice, (2) practice areas, (3) number of years in practice, and (4) current licensure status.

We also used deed records from county clerks' offices, current property ownership and tax information from county assessors' and treasurers' offices, tax sale notices issued by the state taxation and revenue department, and records of foreclosure actions to determine: (1) whether any real property in the study county remained in the decedent's name (tangled title), and (2) whether each estate experienced property loss through a state tax sale or foreclosure before title to property was cleared from the decedent's name. As with probates, we looked for tax sales and foreclosures occurring between January 1, 2015, and December 31, 2024.

The comprehensive and time-consuming nature of this research required us to limit our geographic reach, and we acknowledge that our results cannot be fully generalized across all rural places. Our aim is to contribute a "pinprick of light"[158] to a growing conversation about rural estate planning and probate.

New Mexico is a fitting place to undertake this type of study for several reasons. First, much of New Mexico is rural in nature. Twenty-six of New Mexico's thirty-three counties are classified as "non-metropolitan."[159]

2024). As a result, distribution of a tribal member's property at death may be governed by federal law, state law, tribal law, or some combination of the three, *see, e.g.*, Douglass Nash, Director, Center for Indian Law and Policy, Prepared statement, *in* The American Indian Probate Reform Act: Empowering Indian Landowners, Hearing before the Comm on Indian Aff., 112th Cong. 23 (Aug. 4, 2011), potentially making legal advice and assistance particularly needed. At the same time, providers with the requisite knowledge of the complex and overlapping systems of law at play are few and far between. *See, e.g.*, David Gipp, Vice President, Great Plains Region, National Congress of American Indians, Prepared statement, *in* The American Indian Probate Reform Act: Empowering Indian Landowners, Hearing before the Comm. on Indian Aff., 112th Cong. 23 (Aug. 4, 2011), ("[T]he private bar has almost no experience or expertise in working with these issues and will not gain it in the future because there is no money in it."). We focused on state probate records for the purposes of this study due to the increased difficulty of accessing federal and tribal probate records. With respect to Cibola County in particular, interpretation of our results should keep in mind the role of federal and tribal probate processes for tribal members. *See infra* notes 184-188 and accompanying text.

158 Horton, *supra* note 102, at 1122.

159 *See Rural-Urban Continuum Codes*, *supra* note 106. *See supra* Part I.A.

New Mexico is the fifth largest state by land area[160] but has the thirty-seventh largest population,[161] making its overall population density among the lowest in the nation.[162] These characteristics allow us to examine how attorney access and distance-to-services issues may surface in estate planning and probate.[163]

B. Counties of Study

To narrow to a feasible scope of research, we first narrowed our pool of possible study counties to those defined as "non-metropolitan." From there, we sought to identify counties from different geographic regions of the state and with varied racial and economic demographics. We also utilized various intra-county measures of rurality to compare the rurality "profiles" of possible study counties. For example, we considered the distribution of Frontier and Remote (FAR) codes[164] within each county, the county's score according to the Index of Relative Rurality,[165] and whether each county was home to any Census Urban Areas.[166] Finally, we considered access to records and prioritized counties where records could be accessed efficiently.

This matrix of considerations led us to a set of three New Mexico counties: Chaves County, Cibola County, and Colfax County. All three of our counties fall within the range of 0.55 and 0.60 on the Index of Relative

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160 *New Mexico State Profile,* U.S. Census Bureau, https://data.census.gov/profile/New_Mexico?g=040XX00US35 (last visited Feb. 7, 2026) [https://perma.cc/LVB6-XSGG].

161 *List of U.S. States and Territories by Population*, Wikipedia, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (last visited Feb. 7, 2026) [https://perma.cc/94XR-Q6FM].

162 *See List of States and Territories of the United States by Population Density*, Wikipedia, https://en.wikipedia.org/wiki/List_of_states_and_territories_of_the_United_States_by_population_density (last visited Feb. 15, 2026) [https://perma.cc/32EH-BCYW].

163 *See infra* Part III.B.

164 *See Frontier and Remote Area Codes*, U.S. Dep't of Agric. Econ. Rsch. Serv. (May 8, 2025), https://www.ers.usda.gov/data-products/frontier-and-remote-area-codes [https://perma.cc/KAJ6-QP2Y].The USDA's Frontier and Remote (FAR) Area Codes classify zip codes based on travel time to urban areas, ranging from Level 0 (least remote, representing areas of up to 50,000 people less than 60 minutes from a larger urban area) to Level 4 (most remote, representing areas that are 15 minutes or more away from an urban area of at least 2,500 people, where people may find it hard to access even "low order" goods and services). *See id.*

165 *See* Waldorf & Kim, *supra* note 29. The Index of Relative Rurality (IRR) assigns a rurality score between 0 (least rural) to 1 (most rural) based on four "dimensions" of rurality: population size, density, remoteness, and built-up area. *See id.*

166 *See Urban and Rural*, U.S. Census Bureau (Dec. 16, 2024), https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html [https://perma.cc/9KHX-ZWLB] (list of 2020 Census Urban Areas).

Rurality,[167] indicating a high-moderate level of rurality.[168] As such, our results may be most generalizable to small towns and low-density communities that are not extremely remote, but where residents may nonetheless need to travel for specialized services. A profile of each county follows.

1. *Chaves County*

Chaves is the largest of our county studies by land mass, with a total area of just over 6,000 square miles.[169] Its sole Census Urban Area is the town of Roswell, with a population of about 48,000 people.[170] Over sixty percent of zip codes within Chaves County have been assigned a FAR Code level of 1, indicating an area where residents live sixty minutes or more from larger urban areas of 50,000 or more people, which are more likely to offer "higher order" goods and services.[171] The remaining zip codes have a FAR Code of 2 or higher, indicating substantial distance even from smaller urban areas.[172] The county as a whole is categorized as Level 5 under the Rural Urban Continuum Codes, indicating that while it has a substantial urban population, the county as a whole is categorized as "non-metropolitan" and is not adjacent to a metropolitan area.[173]

Nearly sixty percent of Chaves County residents identify as Hispanic/ Latino, and around one-third identify as Non-Hispanic White.[174] Also,

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167 *See* Waldorf & Kim, *supra* note 29 (click "Download Bundle" to access county-level data tables).

168 Brigitte Waldorf & Ayoung Kim, Defining and Measuring Rurality in the US: From Typologies to Continuous Indices 14 (2015) (noting that high levels of rurality begin around 0.6, and that "extreme rurality" is associated with an IRR of greater than 0.7); Purdue Univ. Ctr. for Reg'l Dev., *Geographic Classifications*, Rural Ind. Stats., https://pcrd.purdue.edu/ruralindianastats/geographic-classifications.php (last visited Mar. 4, 2026) [https://perma.cc/L49U-2JWX] (describing the IRR range of 0.4 to 0.6 as representing "moderate levels of rurality").

169 *Chaves County, New Mexico County Profile*, U.S. Census Bureau, https://data.census.gov/profile/Chaves_County,_New_Mexico?g=050XX00US35005 (last visited Mar. 4, 2026) [https://perma.cc/A3ZN-PBGZ].

170 *See* U.S. Census Bureau, *supra* note 166.

171 U.S. Dep't of Agric. Econ. Rsch. Serv., *supra* note 164 (zip-code level tables). Zip code analyses were completed using zip codes associated with the target county by Zillow.com. *See, e.g.*, *ZIP Codes in Chaves County NM*, Zillow, https://www.zillow.com/browse/homes/nm/chaves-county/ (last visited Mar. 4, 2026) [https://perma.cc/KAJ6-QP2Y].

172 U.S. Dep't of Agric. Econ. Rsch. Serv., *supra* note 164 (zip-code level tables).

173 *See* U.S. Dep't of Agric. Econ. Rsch. Serv., *supra* note 106.

174 *See Quick Facts: Chaves County, New Mexico*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/chavescountynewmexico/PST045224 (last visited Mar. 5, 2026) [https://perma.cc/EKB7-Q37V].

11.3% of residents are foreign-born.[175] The median age of Chaves County is slightly lower than state and national averages.[176] The county's poverty rate is nearly double the national average, and the percentage of seniors living in poverty is substantially higher than the national average.[177]

Chaves County is conservative politically.[178] Agriculture, oil and gas drilling, and aerospace and defense operations are all significant economic forces, as well as a significant tourism sector driven by the 1947 Roswell UFO Incident.[179]

2. *Cibola County*

Unlike Chaves or Colfax County, Cibola is classified as adjacent to a metropolitan area.[180] The county seat of Grants, a Census Urban Area of roughly 9,000 people,[181] is about one hour outside of Albuquerque. Driven by this proximity, approximately sixty percent of zip codes in

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175 U.S. Census Bureau, *supra* note 166. While our review of wills in our study counties did not raise clear citizenship issues, citizenship questions make specialized planning even more essential when non-citizens are involved. Whereas there is generally an unlimited marital deduction from the Federal Estate Tax, that deduction does not exist at all if the surviving spouse is not a U.S. citizen unless the property is left to the spouse in a qualified domestic trust. I.R.C. § 2056(a), (d)(1), (d)(2)(A). Also, the unlimited gift tax deduction does not exist, and the annual exclusion is currently $190,000 for transfers to non-citizen spouses. I.R.C. § 2523(i). Furthermore, if the non-citizen decedent is a non-resident of the U.S., which arguably could include non-green card holders, the estate tax exemption is only $60,000, potentially leaving many estates subject to the Federal Estate Tax. I.R.C. § 6018(a)(2).

176 U.S. Census Bureau, *supra* note 166; *see* U.S. Census Bureau, *supra* note 31 and accompanying text (noting the national average).

177 U.S. Census Bureau, *supra* note 166; *see* U.S. Census Bureau, *supra* note 174 and accompanying text.

178 *Chaves County*, N.M. Counties., https://www.nmcounties.org/counties/chaves-county/ (last visited Mar. 5, 2026) [https://perma.cc/W8FP-7S3L] ("Chaves County is a republican stronghold meaning no democratic candidate has won office in Chaves County since Lyndon Johnson's victory in 1964."); *2025 Voter Registration Data*, N.M. Sec'y of State, https://www.sos.nm.gov/voting-and-elections/data-and-maps/voter-registration-statistics/2025-voter-registration-data/ (last visited Mar. 5, 2026) [https://perma.cc/2H6A-2FF5] (February 2025 voter registration tables by county precinct) (indicating that 51% of voters in Chaves County are registered Republican, compared to 24% registered Democratic and 23% registered independent or no affiliation).

179 *See Roswell & Chaves County, New Mexico*, Roswell-Chaves Cnty. Econ. Dev. Corp., https://www.chavescounty.net/ (last visited Feb. 7, 2026) [https://perma.cc/WT3T-B92Y].

180 *See* U.S. Dep't of Agric. Econ. Rsch. Serv., *supra* note 106. Cibola has a Rural Urban Continuum Code score of 6, indicating a county with an urban population of 5,000 to 10,000 that is adjacent to a metropolitan area. *See id.*

181 *See* U.S. Census Bureau, *supra* note 166.

Cibola County have a FAR Code level of 0 (least remote).[182] However, a full quarter of the remaining zip codes have a FAR Code of 4 (most remote), indicating areas where most residents are some distance from any urban area and face substantial commutes to larger cities.[183]

Nearly half of Cibola County residents are Native American, another one-third are Hispanic/Latino, and roughly twenty percent identify as Non-Hispanic White.[184] Three Pueblo groups, the Laguna, Acoma, and Zuni, have tribal lands falling fully or partially within county borders.[185] Additionally, the Ramah and To'hajiilee Navajo both control tribal lands within the county.[186] All four tribal lands are home to federal trust and/or restricted fee interests subject to probate by the Department of the Interior.[187] Additionally, all four tribal groups have their own probate codes under which tribal courts hold jurisdiction over certain probate matters.[188]

Cibola County has the lowest average household income and highest poverty rate of our study counties, with over twenty-five percent of all residents and roughly nineteen percent of seniors living below the federal poverty line.[189] The county median age is roughly equivalent to the national average,[190] while the homeownership rate is higher than both state and national averages.[191]

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182 *See* U.S. Dep't of Agric. Econ. Rsch. Serv., *supra* note 164.

183 *See id.*

184 *Quick Facts: Cibola County, New Mexico*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/cibolacountynewmexico/PST045224 (last visited Mar. 5, 2026) [https://perma.cc/9ADM-V5JQ]. Like many rural communities, Cibola County has grown less White in recent decades. *See id.*

185 *See Cibola County*, N.M. Counties, https://www.nmcounties.org/counties/cibola-county/ (last visited Mar. 5, 2026) [https://perma.cc/QFH3-GVVU].

186 *See id.*

187 *See generally supra* note 157 and accompanying text.

188 *See* Pueblo of Acoma Code § 4-7-4 (2019) (providing that tribal courts may hear petitions regarding non-trust property of any Pueblo of Acoma member whose estate remains in dispute following decisions of family elders and Tribal Sheriffs); Pueblo of Laguna Code § 7-7-2 (2019) (providing for jurisdiction over non-trust estates of tribal members living on tribal lands, as well as any non-trust property that is within tribal lands and owned by a tribal member); Navajo Nation Code Ann. tit. 8 § 1 (2010) (providing that Family Court of Navajo Nation possesses original jurisdiction over any non-trust property that is held by a deceased tribal member and located within the territorial jurisdiction of the court); Zuni Tribal Code § 15-1-1 (2022) (tribal court has jurisdiction over "estates of any member of the Zuni Tribe with respect to non-trust personal property and nonrestricted or non-trust real property located on the Reservation"); *See generally supra* note 157 and accompanying text.

189 U.S. Census Bureau, *supra* note 184.

190 I*d.*; *see* Smith & Trevelyan, *supra* note 31.

191 U.S. Census Bureau, *supra* note 184; *see* Smith & Trevelyan, *supra* note 31.

Cibola County leans liberal politically.[192] Mining, agriculture, and tourism and recreation all play a significant role in Cibola County's economy.[193]

3. *Colfax County*

Colfax, located along the northeastern border of New Mexico, is the most "rural" of our counties by most measures. It has the smallest urban population, with a single Census Urban Area, Raton, of approximately 5,000 people.[194] Over eighty percent of Colfax zip codes have a FAR Code value of 4 (most remote).[195]

Like many rural areas across the country, Colfax County has experienced pronounced population loss over the past two decades. The county population declined seventeen percent between 2000 and 2020,[196] and is projected to decline by another twenty-six percent between 2020 and 2040.[197]

Colfax is older, Whiter, and more affluent than our other study counties. The median age in Colfax is 49.1 years, over nine years higher than the national average.[198] Approximately forty-seven percent of the population is White, with another forty-seven percent identifying as Hispanic/Latino, and just under four percent as Native American.[199] The overall poverty rate in Colfax County, while higher than the national average, is significantly

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192 N.M. Sec'y of State, *supra* note 178 (county precinct tables for February 2025 indicating that 51% of voters in Cibola are registered Democratic, compared to 25.9% registered Republican and 21% registered independent or no affiliation).

193 *See* N.M. Counties, *supra* note 185.

194 *See* Waldorf & Kim, *supra* note 29.

195 *See supra* Part II.B.3.

196 *See* N.M. Legis. Fin. Comm., *State Population Trends* (2021), https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Policy%20Spotlight%20-%20State%20Population%20Trends.pdf [https://perma.cc/64QD-QRM5]. Both Cibola and Chaves counties experienced population gain between 2000 and 2010, followed by moderate population loss over the following decade. *See id.*

197 *See New Mexico Population Projections*, Univ. of N.M.: Geospatial & Population Stud. at 27, https://gps.unm.edu/assets/documents/census/gpsprojectionslides_v2024.pdf (last visited Mar. 6, 2026) [https://perma.cc/3XTL-52Z2].

198 *See Colfax County, New Mexico County Profile*, U.S. Census Bureau, https://data.census.gov/profile/Colfax_County,_New_Mexico?g=050XX00US35007 (last visited Mar. 6, 2026) [https://perma.cc/B4E7-PR99]; *United States Profile,* U.S. Census Bureau, https://data.census.gov/profile/United_States?g=010XX00US (last visited Mar. 6, 2026) [https://perma.cc/HP2Z-W6GL].

199 *Quick Facts: Colfax County, New Mexico*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/colfaxcountynewmexico/PST045223 (last visited Mar. 6, 2026) [https://perma.cc/6FBX-D4J5].

lower than in Chaves or Cibola.[200] Colfax has a homeownership rate about seven percentage points higher than the national average.[201]

Colfax County is the most politically "purple" of our study counties, with roughly equal rates of registered Democratic and Republican voters.[202] It is home to several historic railroad towns, and ranching, mining, and outdoor recreation are all central to the county's economy.[203]

Demographic Comparison Across Study Counties

	Chaves County	**Cibola County**	**Colfax County**
Size (sq mi)[204]	6,067.2	4,540.0	3,758.0
Total population[205]	65,157	27,172	12,387
Census Urban Areas[206]	1 (Roswell, population 47,596)	1 (Grants, population 8,996)	1 (Raton, population 5,978)
FAR Codes[207]	0—0.0% 1—62.5% 2—25.0% 3—0.0% 4—12.5%	0—62.5% 1—0.0% 2—12.5% 3—0.0% 4—25.0%	0—0.0% 1—0.0% 2—0.0% 3—16.6% 4—83.3%
Index of Relative Rurality[208]	0.55	0.57	0.55

200 *See* U.S. Census Bureau, *supra* note 198.

201 *Id.*

202 N.M. Sec'y of State, *supra* note 178 (county precinct tables for February 2025 indicating that 39% of voters were registered Democrats, 37% were registered Republicans, and 24% registered independent or no affiliation).

203 *See About Colfax County*, Colfax County, New Mexico, https://www.co.colfax.nm.us/community/about_colfax_county.php (last visited Mar. 10, 2026) [https://perma.cc/9MXR-7XSW].

204 *See* U.S. Census Bureau, *supra* note 174; U.S. Census Bureau, *supra* note 184; U.S. Census Bureau, *supra* note 198.

205 *See* U.S. Census Bureau, *supra* note 174; U.S. Census Bureau, *supra* note 184; U.S. Census Bureau, *supra* note 198.

206 *See* U.S. Census Bureau, *supra* note 174; U.S. Census Bureau, *supra* note 184; U.S. Census Bureau, *supra* note 198.

207 See U.S. Dep't of Agric. Econ. Rsch. Serv., supra note 164. There is no definitive list of zip codes provided by the United States Postal Service. The figures provided here are based on zip codes included in the 2010 FAR code data tables, which exclude "point" zip codes such as those associated with commercial post offices rather than land area. E-mail from Elizabeth Dobis, Rsch. Agric. Economist, U.S. Dep't of Agric. Econ. Rsch. Serv., to author (Aug. 28, 2025, 10:18 AM) (on file with authors). The 2010 Far code tables also exclude certain zip codes associated with federal or tribal lands but are nonetheless designed to ensure that all land areas in the United States are covered. *Id.*

208 *See supra* note 165; *see also* Waldorf & Kim, *supra* note 29 (referencing the Index of Relative Rurality).

Racial Demographics[209]	Hispanic or Latino—59.5% White, not Hispanic or Latino—35.6% American Indian/Alaska Native—2.8% Black—2.8% Asian—1.5% Two or More Races—2.0%	American Indian/Alaska Native—48.0% Hispanic or Latino—33.2% White, not Hispanic or Latino—19.4% Black—1.8% Asian—0.8% Two or More Races—2.7%	White, Not Hispanic or Latino—46.8% Hispanic or Latino—48.4% American Indian/Alaska Native—4.7% Black—1.4% Asian—0.9% Two or More Races—2.4%
Foreign-born population[210]	11.3%	2.2%	4.3%
Median household income[211]	$52,938	$50,759	$53,554
Poverty Rate[212]	21.6%	25.9%	17.9%
Median age[213]	36.9	38.4	49.1
Poverty Rate, Age 65 and Over[214]	16.5%	18.9%	8.3%
Homeownership rate[215]	68.7%	70.5%	72.0%

209 *QuickFacts Chaves County, New Mexico*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/chavescountynewmexico/RHI725224#RHI725224 (last visited Mar. 24, 2026) [https://perma.cc/EKB7-Q37V]; *QuickFacts Cibola County, New Mexico,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/cibolacountynewmexico/PST045224 (last visited Mar. 24, 2026) [https://perma.cc/9ADM-V5JQ]; *QuickFacts Colfax County, New Mexico,* U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/colfaxcountynewmexico/PST045224 (last visited Mar. 24, 2026) [https://perma.cc/6FBX-D4J5].

210 *Chaves County, supra* note 209 (data for 2020-2024); *Cibola County, supra* note 209 (data for 2020-2024); *Colfax County*, *supra* note 209 (data for 2020-2024).

211 *Chaves County, supra* note 209 (data for 2020-2024 in 2024 dollars); *Cibola County, supra* note 209 (data for 2020-2024 in 2024 dollars); *Colfax County*, *supra* note 209 (data for 2020-2024 in 2024 dollars).

212 *Chaves County, supra* note 209; *Cibola County, supra* note 209; *Colfax County*, *supra* note 209.

213 *Chaves County, supra* note 209; *Cibola County, supra* note 209; *Colfax County*, *supra* note 209.

214 *Chaves County, supra* note 209; *Cibola County, supra* note 209; *Colfax County*, *supra* note 209.

215 *Chaves County, supra* note 209; *Cibola County, supra* note 209; *Colfax County*, *supra* note 209.

C. Limitations

Limitations in publicly available data place a few constraints on our analysis. In New Mexico, death certificates are sealed for a period of fifty years,[216] which prevented us from using official death records to identify decedents domiciled within each county.[217]

Using other public sources, we erred on the side of under-inclusion and looked for strong indicators of domicile in a study county before including a decedent in our dataset. Specifically, we included decedents for whom we were able to locate one or more of the following: (1) a statement of county residence in an obituary, (2) a domiciliary probate filed in the study county, (3) an obituary published in a local source combined with a matching death date and county address in Lexis public records, or (4) a Medicaid Estate Recovery claim opened based on care provided in the study county, combined with at least one other indicator of domicile.

Using these methods, we identified over eighty percent of 2015 decedents across our study counties overall—between sixty-three and ninety percent of decedents within each county. A county summary table of our results follows.

County	**Reported Deaths**[218]	**Decedents Identified**	**Percentage of Decedents Identified**
Chaves	614	549	89.4%
Cibola	262	166	63.4%
Colfax	149	126	84.6%
Total	1,025	843	82.0%

We were also unable to collect individual-level data on the race or ethnicity of each decedent, due to both the confidentiality of death certificates and the fact that New Mexico does not routinely collect these demographics through court filings. As a result, we are not able to directly compare probate or testacy patterns across racial or ethnic groups.

Similarly, New Mexico, which has largely adopted the Uniform Probate Code (UPC), allows executors in most cases to choose whether to

216 *See* N.M. Stat. Ann. § 24-14-27 (2025).

217 Public records law regarding death certificates varies, and some studies in states where death certificates become public more quickly have used them as sources of additional demographic information. *See, e.g.*, Wright & Sterner, *supra* note 84, at 358.

218 N.M. Dep't of Health, New Mexico Selected Health Statistics Annual Report 2015 50 (2015), https://www.nmhealth.org/data/view/vital/2095/ [https://perma.cc/C9SU-FA2Q].

file an inventory with the court—[219] and most opt not to. As a result, we were unable to collect comprehensive data on the value of each decedent's probate estate.[220]

Finally, we focus on probate, wills, and real property not because they are more important than other aspects of estate planning, but because they are the most visible in the public record. There are a number of estate planning tools, such as trusts, whose value stems in no small part from their private nature—a boon to the individual but a bane to the researcher. We can draw some limited conclusions about trust use in our study counties based on property records and analysis of wills,[221] but there are likely decedents who used trust structures without leaving any trace in the public record.

Similarly, planning tools such as powers of attorney and advance directives, which we are unable to track here, are useful in part because they are private and can avoid costly and public protective proceedings.[222] Empirical research indicates a strong correlation between (1) the presence of a will and (2) the use of other advance planning documents.[223] As a result, the patterns we observe may be of some use in this regard. Still, further research is needed on regional and rural/urban differences in use of the full range of estate planning tools.

III. Results

A. Probate Use

Our results suggest that residents of rural communities are more likely to leave an estate requiring probate administration than those in

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219 N.M. Stat. Ann. § 45-3-706 (1983). New Mexico has additionally loosened the inventory requirement by modifying the U.P.C. to require listing of the "estimated value" of each item rather than the "fair market value," reducing the need for costly appraisal services. *Compare id. with* Unif. Prob. Code § 3-706 (Unif. Law Comm'n amended 2019).

220 Even if we had collected such data, probate inventories are imperfect measures of a decedent's true wealth. *See* Horton, *supra* note 37, at 626-27.

221 *See infra* Parts III.D and III.E.

222 *See, e.g.*, *Schiavo Case Sparks Interest in Living Wills*, PBS (Mar. 22, 2005, 12:00 AM) https://www.pbs.org/newshour/show/schiavo-case-sparks-interest-in-living-wills [https://perma.cc/UA2U-LF8L].

223 *See, e.g.*, Taylor Poppe, *supra* note 33, at 2554 (finding that the presence of a complete estate plan, including a will, revocable trust, and medical and financial powers of attorney was the second most common estate planning pattern, behind having no estate planning documents in place); Catheryn S. Koss & Tamara A. Baker, *Where There's a Will: The Link Between Estate Planning and Disparities in Advance Care Planning by White and Black Older Adults*, 40 Res. on Aging 281, 292 (2018) (empirical analysis finding that "[h]aving executed a will and/or trust increased the odds of having an advance directive sevenfold").

urban areas. Roughly one-quarter of all people who died in one of our study counties in the year 2015 left an estate that proceeded to probate by the end of 2024.[224] This overall probate rate is slightly higher than that found in the more mixed-suburban county of Alachua County, Florida, in 2013, where the probate-to-death ratio was 22.7%.[225] However, in two of our counties, Chaves and Colfax, the difference was more pronounced, with over a quarter to nearly one-third of decedents leaving a probate estate. In the remaining county, Cibola, the lower rate of probate is likely due in part to the fact that the estates of some tribal members were subject to federal or tribal—rather than state law—probate.[226] Moreover, all of our counties experienced probate rates that were markedly higher than found in the urban area of Alameda County, California, in 2007, where the ratio of probate estates to reported deaths was just seven percent.[227] A summary of our results follows.

County	**Number of Reported Deaths**	**Probate Estates Opened**	**Ratio of Probates to Reported Deaths**
Overall	1,025	254	24.8%
Chaves	614	160	26.1%
Cibola	262	47	17.9%
Colfax	149	47	31.5%

Variations in state probate processes can impact probate rates. For example, California's broad spousal-property-petition procedure may prevent many married decedents from appearing in public probate records,[228] likely explaining some of the discrepancy in rates between Alameda County and our study counties.

However, variations across our study counties suggest that probate rates are also impacted by differences in level and form of wealth. For example, Colfax County—which has the highest rate of homeownership, highest median incomes, and lowest rates of poverty in our study—also had the highest probate rate. This suggests that where a greater share of wealth is held in real property, as in rural communities, the limited options

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224 *See* N.M. Dep't of Health, *supra* note 218, at 50. This figure is based on the total number of reported deaths across counties as reported by the New Mexico Department of Health. *See id.* We did not include incidence of tribal or federal probate proceedings in this statistic, as these figures are more difficult to track.

225 Wright, *supra* note 105, at 2613.

226 *See supra* notes 184-88 and accompanying text.

227 *See* Horton, *supra* note 37, at 627.

228 *See id.* at 626.

for transferring real property outside of probate may make probate more likely.

Our results also indicate that probate will play a more central role where trusts are less common. Using the incidence of "pour-over wills"[229] as an indicator of the frequency of trust planning, as prior studies have done,[230] trust use seems lower across our study counties than in past research. While seventeen percent of wills probated in Alameda County, California, in 2007 used a pour-over scheme, the rate of pour-over will use in our study was only between ten and twelve percent. While the true rate is likely higher,[231] this finding suggests that the higher rates of probate we observed may be partly due to lower rates of trust use, which is likely linked at least somewhat to limitations in access to specialized planning assistance.[232]

B. Sources of Probate and Planning Assistance

To examine trends in access to legal assistance with estate planning and probate, we collected data on the sources of will drafting assistance used by testate decedents, as well as whether survivors proceeded through probate *pro se* or with attorney representation. When attorney assistance was identified, we used State Bar directory information to collect basic information about the practitioners, including their practice location, fields of practice, and number of years in practice.

Unsurprisingly, our results indicate that the presence of local attorneys engaging in probate and estate planning work plays a critical role in determining whether rural community members will access assistance in these areas. Additionally, our findings support the conclusion that assistance with planning and probate by attorneys who dedicate a significant percentage of their practice to the field is more limited in rural areas.

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229 *See id.* at 628. Pour-over wills, which operate to channel lingering probate assets into an existing trust, are a "safety net" planning tool for those whose estate planning framework is primarily trust-based. *See id.*

230 *See id.*

231 *See id.*

232 *See* Tait, *supra* note 77 and accompanying text. *But see* David Horton, Reid Kress Weisbord & Christopher J. Ryan, Jr., *The Trust Transfer Problem*, 104 N.C. L. Rev. 2, 8-9 (2025) (noting that grantors often fail to successfully transfer property into their revocable trusts during life, forcing trustees after their death to invoke a special type of proceeding to establish the trust as owner or forcing the probating of their pour-over will).

1. *Estate Planning Assistance*

We turned to wills filed in testate probate cases to examine trends in estate planning assistance across study counties.[233] When we encountered a will in a probate case, we collected data on whether the will (1) was attorney- or law firm-drafted,[234] (2) was generated through a standardized form or other self-help resource,[235] or (3) came from an unclear source. A substantial portion of wills across all three counties did not have a clearly identifiable source, particularly in Cibola County, where we identified less than forty percent of will sources. As a result, we place more focus on data gathered in Chaves County and Colfax County.

Examination of the wills in our dataset suggests that the preference for attorney assistance with estate planning indicated by prior national research[236] also holds true in our study's rural communities, as over half of the wills we reviewed were drafted by a lawyer. A summary table is provided below.

Rate of Will Sources as a Percentage of all Wills

Source	**All Counties**	**Chaves**	**Cibola**	**Colfax**
Attorney-Drafted	53.6%	58.9%	33.3%	55.2%
Form/Online Will	9.3%	11.6%	3.7%	6.9%
Source Unclear[237]	37.1%	29.5%	63.0%	37.9%

Our study results also indicate that local attorneys are a primary estate planning resource for our study communities. Across all study counties, a substantial majority of attorney-drafted wills came from a local attorney. In Chaves and Colfax counties, over eighty percent of attorney-drafted wills came from an attorney in the county. Our results also demonstrate the impact a single local practitioner or small firm can have on

233 This data presents only part of the picture, as some decedents may have executed wills that were never submitted to probate, and decedents may have executed other planning documents that would not appear in probate records.

234 In some cases, an attorney or firm was directly identified by the will, such as by a coversheet or document footer. However, we also identified wills as attorney-drafted where one of the signing witnesses was a New Mexico attorney as identified through the State Bar directory.

235 We counted a will as coming from a self-help resource when that source was clearly identified, such as where a will was labeled as generated by Legal Zoom or Nolo.com, or where the will was of a fill-in-the blank format partially completed in handwriting.

236 *See, e.g.*, Taylor Poppe, *supra* note 33, at 2545 (finding attorney drafting to be the most common source of all planning documents studied, with over half of respondents with wills reporting that the will was drafted by a lawyer).

237 These figures include the under 2% of all wills that were executed in a state outside of New Mexico.

access. In Colfax County, a single two-person firm accounted for 24.1% of all wills observed in the dataset, while in Chaves County, over twenty-five percent of all wills were drafted by one local attorney. This may indicate that rates of intestacy will increase in rural communities if even one local practitioner is not replaced upon retiring.

In addition to demonstrating the importance of local providers, our findings indicate that estate planning assistance by attorneys dedicating a significant percentage of their time to estate planning is highly limited in rural communities. When using the most-commonly-applied definition of a legal "specialist," there appear to be virtually no estate planning specialists in the state of New Mexico, let alone within our counties of study. Designation as a specialist typically requires accreditation by an organization approved by the American Bar Association (ABA) or the local Bar.[238] The New Mexico State Bar adopted a statewide legal specialization program in 2022,[239] but communications between the authors and the State Bar confirm that no attorneys have completed the certification requirements. The ABA has approved two organizations to certify attorneys as specialists in the areas of estate planning and elder law: (1) the National Association of Estate Planners & Councils (NAEPC) and (2) the National Elder Law Foundation (NELF).[240] Only one New Mexico attorney, located in Albuquerque, is certified as an Accredited Estate Planner (AEP) by the NAEPC.[241] There is not a single attorney in

238 *See* Model Rules of Pro. Conduct r. 7.4(d)(1) (A.B.A. 2018).

239 *See* State Bar of N.M., State Bar of New Mexico Legal Specialization Program Policies and Procedures 5-6 (2022). New Mexico's specialization program allows for the establishment of specialty committees to be tasked with developing specific criteria for certification in a given area, or for any individual attorney to apply as a legal specialist based on meeting general program requirements and providing evidence of certification by another ABA-accredited program. *See id.*

240 *See Private Organizations with ABA Accredited Lawyer Certification Programs*, A.B.A, https://www.americanbar.org/groups/specialization/organizations-with-aba-accredited-lawyer-certification-programs/ [https://perma.cc/DAK4-HHNE] (last visited Mar. 8, 2026). Elder law is a distinct field dealing with a broad range of issues, but elder law attorneys tend to have significant training in estate planning. We would maintain that a third organization, the American College of Trust and Estate Counsel (ACTEC), is so well established as a screener of estate planning practitioners that its members, while not certified as "specialists" by the state bar, are in fact specialists under the commonly-understood meaning of the term. Of the seventeen ACTEC Fellows in New Mexico, sixteen are located in metropolitan areas, leaving most rural areas of New Mexico at a great distance from any ACTEC Fellow. *See Find an ACTEC Fellow*, ACTEC, https://www.actec.org/find-a-lawyer/fellow-search-results/?address_state=New%20Mexico&practice_areas#/results [https://perma.cc/6KPW-ADJM] (last visited Mar. 8, 2026).

241 *See Search Accredited Estate Planner Designees*, Nat'l Ass'n of Est. Planners & Councils, https://www.naepc.org/designations/estate-planners/search#members/all/NM// [https://perma.cc/JL8S-JRQN] (last visited Mar. 8, 2026). There are six non-lawyer AEPs in New Mexico in addition to the single attorney AEP. *See id.* To be certified as an

the state who has been certified through the NELF's Certified Elder Law Attorney (CELA) program.[242]

Nonetheless, we recognize that there are many skilled attorneys who devote most or all of their time to estate planning work without belonging to the above-mentioned organizations or going through the state certification process. For this reason, we wanted to understand the extent to which the practitioners appearing in our dataset were "dedicated" attorneys, which we defined as those who represented themselves to the community as engaging in three or fewer primary practice areas, one of which was estate planning or probate.[243] Even when using this much lighter standard of *self-designation* as an estate planner, rather than the screening process and focused training typically required to be a "specialist," "dedicated" estate planners across our study counties appeared to be the exception rather than the norm. Roughly forty percent of attorney-drafted wills appearing in our dataset were drafted by "dedicated" estate planners—with just a quarter of attorney-drafted wills in Colfax County and none in Cibola County being drafted by dedicated planners.

By presenting these findings, our intent is not to criticize rural general practitioners. Quite the opposite is true. We celebrate lawyers who provide access to critical services in communities where they are often extremely limited and are likely to need to engage in a wider variety of practice areas. Our intent is to consider the ways in which limitations in access to focused expertise might impact people seeking estate planning assistance. The following chart summarizes rates of planning assistance by local and "dedicated" practitioners.

AEP, attorneys or other professionals must spend at least one-third of their time engaged in estate planning activities, in addition to other standards of education and experience. Accredited Estate Planner Designation, NAT'L ASS'N OF EST. PLANNERS & COUNCILS, https://www.naepc.org/designations/estate-planners [https://perma.cc/CSZ6-E2SU] (last visited Mar. 8, 2026).

242 *See Certified Elder Law Attorney Directory Search*, NAT'L ELDER L. FOUND., https://www.nelf.org/attorney-directory-search [https://perma.cc/X9KK-KU4B](last visited Mar. 8, 2026). To become certified as a CELA, attorneys must average sixteen hours per week engaged in elder law activities over at least sixty different elder law matters over a three-year period, in addition passing an exam and meeting other requirements. *See Preparing for the Exam*, NELF, https://www.nelf.org/qualifications [https://perma.cc/V6TW-8TK2] (last visited Mar. 8, 2026).

243 For attorneys remaining actively licensed, we utilized practice areas self-reported by the attorney to the New Mexico State Bar, which allows attorneys to select from a list of practice areas, one of which is "Estate Planning/Taxation/Probate/Wills." For inactive attorneys who did not have specialty areas indicated in the directory, we used other online attorney listings, such as Martindale.com.

Rates of Local and "Dedicated" Planning Assistance as a Percentage of Attorney-Drafted Wills[244]

Source	**All Counties**	**Chaves**	**Cibola**	**Colfax**
Local Drafter	85.0%	89.3%	62.5%	81.3%
"Dedicated" Drafter	41.6%	52.8%	0.0%	25.0%

As we discuss in the following section, the patterns we found with regard to rates of local and "dedicated" estate planner assistance with will drafting also applied to probate representation.

2. *Probate Assistance*

With respect to trends in probate assistance, we first examined the extent to which the estates of decedents retained probate counsel versus proceeding *pro se*. High overall rates of self-representation across our study counties in comparison to prior studies provide some indication of a rural-urban difference in accessibility to probate assistance.

We found significantly higher overall rates of *pro se* representation in probate cases than observed in prior research. In our study, 46.9% of probate estates proceeded *pro se*,[245] compared to just twelve percent in a study of probates in Alameda County, California, in 2007.[246] Of course, this difference may be explained by factors not limited to geography alone. For example, the higher rate of self-representation in our study may be partially due to the relatively streamlined New Mexico probate process,[247] and may indicate a perception that probate is navigable on one's own.

Economic factors also undoubtedly play a role, as Alameda County has a much higher median income and lower rate of poverty than our study counties.[248] Additionally, rates of self-representation were much

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244 These figures exclude wills drafted by attorneys whose practice address or fields of practice could not be determined.

245 This figure represents only parties who appeared *pro se* for the duration of a proceeding. There were numerous additional parties who began a case *pro se* and then hired counsel, or who continued *pro se* after an attorney withdrew.

246 *See* Horton, *supra* note 37, at 640.

247 *See* N.M. Stat. Ann. § 45-3-301(1975). Under the UPC approach, which New Mexico has adopted, probate may proceed informally unless formal probate is requested or required by the court—which can be the case where a will or appointment of a personal representative is challenged, determination of heirs is needed, or more than three years have passed since the decedent's death. Informal probate does not require court approval for most actions and does not require filing of an inventory or accounting with the court. *See id.*

248 *See* Horton, *supra* note 37, at 625.

higher—over sixty percent—in Cibola County, which has the highest poverty rate of our three counties.[249] Nonetheless, the higher rates of self-representation we observed in comparison to urban research provides some evidence that rural communities face limitations in access to probate assistance.

As with sources of estate planning, the likelihood of obtaining legal assistance with probate appears to be tied to the availability of local attorneys. In addition to gathering data on rates of *pro se* probate, we created a dataset of all attorney-client pairings in probate case records, including information on attorneys retained by those petitioning to open probate as well by other parties such as will contestants or interested heirs.[250]

We consistently found that use of local attorneys in probate matters was high, and *pro se* rates were lower, where there was a significant pool of local attorneys. For example, 95.2% of attorney-client pairings in Chaves County involved a local attorney, with a total of thirty local attorneys appearing in the dataset. On the other hand, under half of attorney-client pairings in Cibola County involved a local attorney, with only four local attorneys appearing in the dataset. Accordingly, *pro se* rates in probate matters were higher in Cibola County despite the fact that Cibola is closer to a major metropolitan area.[251] Colfax County fell somewhere in the middle, with seven local attorneys appearing in the dataset and roughly sixty-five percent of attorney-client pairings involving one of these attorneys. These results suggest that a shortage of local attorneys can serve as a significant access to justice barrier, even in communities that are relatively close to metropolitan areas.

In addition, as we found with respect to planning assistance, assistance with probate by a "dedicated" probate practitioner appears to be relatively uncommon in rural communities. Across all study counties, just twenty-eight percent of all attorney-client pairings involved a "dedicated" probate attorney.[252] These findings suggest that, as with estate planning services, probate assistance in rural areas is likely to be provided by generalists.

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249 *See supra* note 189 and accompanying text.

250 *See infra* Part III.B.2. In some cases, a single party had more than one attorney-client pairing, such as when an attorney withdrew from a case and new counsel was retained.

251 *See supra* Part II.B.2.

252 *See supra* note 243 and accompanying text.

The table below summarizes rates of *pro se* representation and assistance by local and dedicated attorneys.

Representation Status and Attorney Type Among Probate Estates

	All Counties	**Chaves**	**Cibola**	**Colfax**
Representation Status (as a percentage of all probates)[253]				
Pro Se	46.9%	42.5%	61.7%	46.8%
Attorney Representation	53.1%	57.5%	38.3%	53.2%
Attorney Type (as a percentage of all attorney-client pairings)[254]				
Local Attorney	81.8%	95.2%	41.7%	65.4%
"Dedicated" Attorney	28.0%	28.1%	33.3%	21.7%

In addition to highlighting the central role of local attorneys and the relative infrequency of more specialized probate assistance, our data provide some indication that the number of local attorneys engaging in probate work is in decline. We collected data on whether each attorney in our dataset remained actively licensed according to the State Bar directory. Additionally, we collected data on each attorney's number of years in practice as an indicator of their age.[255]

Across all study counties, nearly thirty percent of attorneys who provided probate representation in connection with at least one estate in our dataset are no longer actively licensed in New Mexico. An additional fifteen percent remain licensed but appear to have moved out of the community or out of private practice.[256]

Additionally, the median number of years in practice among all local attorneys in our dataset was 24.3, over three years greater than

253 Estates were categorized as *pro se* where the personal representative proceeded entirely without representation. Estates were categorized as having representation if an attorney entered an appearance for any portion of the administration.

254 Excluding instances of representation by attorneys whose practice address or fields of practice could not be determined.

255 Age information is not publicly available. Median years in practice was calculated based on the time between the attorney's date of admission (as indicated in the State Bar) and the first day of 2015, our year of study. We did not analyze this information for drafting attorneys because wills are often drafted a significant time before death, making it more difficult to draw conclusions based on the years in practice or licensure status of attorneys providing drafting assistance.

256 This includes attorneys whose website profiles indicate they have retired, those who have moved to other counties or states according to firm websites or State Bar directory information, or those who have moved into non-private practice roles such as working with prosecutor's offices or for town governments.

for non-local probate attorneys and five years greater than prior survey research regarding New Mexico attorneys overall.[257] Further, in both Chaves and Cibola counties, there were stark divides in the median number of years in practice between local and non-local attorneys—a difference of roughly ten years in Cibola County and fourteen years in Chaves County.[258]

These discrepancies support a conclusion that attorneys in our study are not being replaced at the same rate as elsewhere.

Licensure Status and Median Years in Practice Among Probate Attorneys

	All Counties	**Chaves**	**Cibola**	**Colfax**
Licensure status (as a percentage of all probate attorneys)				
Active	70.8%	74.3%	64.3%	68.8%
Inactive	29.2%	25.7%	35.7%	31.3%
Median Years in Practice[259]				
Local Attorney	24.3	24.0	27.3	27.3
Non-Local Attorney	21.2	10.0	16.2	28.3

C. Testacy

Our study findings suggest that limitations in access to probate and estate planning assistance, in combination with other issues of rural access, leave rural residents more likely to die intestate. The average rate of testacy across all probate estates in our dataset was 58.1%. This result is slightly lower than the rate observed in urban Alameda County in 2007, where the overall rate of testacy was sixty percent,[260] and significantly lower than observed in 2013 in Alachua County, Florida, home to the University of Florida, where 71.8% of probate decedents were testate.[261]

257 *See* Rsch. & Polling, Inc., The Economics of Law Practice in New Mexico 5 (2017). According to a statewide survey of New Mexico attorneys conducted in 2017, the median number of years in practice across all attorneys statewide was 19. *See id.*

258 In Colfax County, the median number of years in practice was slightly higher among non-local attorneys. This may be partially explained by the fact that non-local attorneys serving residents of Colfax County may be likely to come from rural communities themselves. There is further discussion of this in the following paragraph. *See infra* tbl. Licensure Status and Median Years in Practice Among Probate Attorneys.

259 As of the first day of the year of study (Jan. 1, 2015).

260 *See* Horton, *supra* note 37, at 627.

261 *See* Wright, *supra* note 105, at 2625. Because probate-based will studies such as ours and the others cited in this paragraph tend to underrepresent low-value estates and overrepresent older individuals, they likely underestimate true rates of testacy in the population. *See* Emily S. Taylor Poppe, *The Future is Bright Complicated: AI, Apps, and Access to Justice*, 72 Okla. L. Rev. 185, 197 (2019).

While our data do not allow us to isolate the impact of geography, they nonetheless provide evidence of a correlation between rurality and likelihood of intestacy.

As in prior studies, testacy among our decedents was correlated with increased age,[262] being female,[263] having children,[264] and being widowed.[265] Additionally, results across our study counties are consistent with prior research indicating that testacy is positively associated with greater wealth and with being White.[266] Within our study, testacy was highest in Colfax County, which has the highest median income, lowest poverty rates, and largest share of White residents of our counties. At the same time, rates of testacy across counties were quite similar overall despite significant demographic differences between counties, potentially indicating that rurality mediates disparities in testacy that might otherwise be more pronounced. A summary table of rates of testacy is provided below.

Rates of Testacy (as a Percentage of Probate Estates)[267]

	All Counties	**Chaves**	**Cibola**	**Colfax**
Testate	58.1%	57.9%	55.3%	61.7%
Intestate	41.9%	42.1%	44.7%	38.3%

As we discuss in later sections, intestacy among decedents in our dataset was correlated with numerous harms including a higher likelihood of

262 *See, e.g.*, Wright, *supra* note 76, at 308–11.

263 *See, e.g.*, *id.* at 315–20. Prior research has suggested that the relationship between being female and being testate may be largely or even fully explained by correlation with co-variables such as age and marital status. *See, e.g.*, Taylor Poppe, *supra* note 33, at 2546–49.

264 *See, e.g.*, Taylor Poppe, *supra* note 33, at 2547–52 (finding that parental status, including presence of biological, adopted, or stepchildren was positively correlated with testacy, including after adjustment for co-variates). Testacy among those with stepchildren (either in addition to biological children or in isolation) appeared higher in our study than among those with only biological children or with no children or stepchildren. This finding makes some intuitive sense given indication in our study and prior studies that many individuals may want to provide for stepchildren in their estate planning. *See* Wright & Sterner, *supra* note 84, at 377 (noting that eighty-two percent of decedents with stepchildren chose to leave some property to those children). However, this finding is very preliminary, as sample sizes of those identifiable as having stepchildren were small across our study.

265 *See, e.g.*, Wright, *supra* note 76, at 320–21. Studies have consistently found high rates of testacy among widowed decedents and that rates of testacy are lower for never-married decedents than married counterparts, but patterns of testacy among divorced or separated individuals have been more varied across studies. *See* Taylor Poppe, *supra* note 33, at 2533–34 (2020). Rates of testacy were generally higher for divorced decedents in our dataset than married decedents, but sample sizes were small. Additionally, in the absence of access to death certificates our identification of divorced decedents was mostly limited to instances where former spouses were clearly identified in obituaries or wills.

266 For a discussion of issues with intestacy, see *supra* Part I.B.2.

267 Excluding a single probate estate in which the decedent's testacy status was unclear.

probate delay or inaction, increased incidence of tangled property titles, and greater risk of postmortem property loss.[268]

D. Planning Pitfalls

Our findings suggest that limitations in dedicated estate planning assistance in rural communities are associated with higher incidence of planning problems that may ultimately defeat the decedent's wishes and create an increased likelihood of conflict.

We closely reviewed[269] all 144 wills accessible in probate estates within our dataset—most of which were attorney-drafted[270]—and noted potential drafting concerns. We do not contend that dedicated practitioners will not make mistakes, or that there is a single "right" way to handle a given estate plan. However, we found that many of the wills we reviewed contained what we would consider to be "core" problems—issues that deviate from widely accepted best practices and norms of the estate planning field, and that we assume would be unlikely to be made by dedicated estate planning attorneys. Approximately one-third of the wills in our dataset contained this type of core issue. We do not present these findings to criticize rural attorneys providing essential services to their community, and for that reason we do not identify any testators or attorneys by name. Rather, our intent is to consider the impact of more limited access to specialized planning assistance for rural residents.

One of the most common core issues we observed was a failure to clarify the decedent's intent with respect to anti-lapse provisions. Approximately eight percent of the wills we reviewed did not demonstrate awareness of potential applicability of an anti-lapse statute, and did not effectively specify whether the decedent desired to opt out of the statute's provisions. Drafting with an awareness of anti-lapse statutes is simple, as all that is necessary in New Mexico is to state if survivorship is required to inherit and, if so, who takes if that beneficiary does not survive. Failure to do that creates the potential for a will contest.

Another eight percent of wills contained drafting issues with respect to disinheritance. Overall, disinheritance was quite common among the wills in our dataset, particularly in Cibola County.[271] Disinheritance

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268 *See infra* Part III.E.

269 To ensure an experienced eye, wills in our study were reviewed by Sergio Pareja based on his decades of experience practicing, teaching, and writing in the area of trusts and estates law and selection as an ACTEC Academic Fellow.

270 *See supra* Part III.B.1.

271 There are many potential explanations for the high incidence of disinheritance we observed. Poverty levels across our study counties are quite high, which could be correlated with increased rates of disinheritance tied to incarceration, disappearance, or addiction.

itself is not a problem, but careful drafting is required. For example, the will should make it clear whether the decedent wishes to exclude all descendants of a disinherited individual, which the wills we reviewed frequently did not do. Outside of questions of disinheritance, over seven percent of wills reviewed contained other material ambiguities, such as failing to define key terms such as "heirs."

We also frequently observed potential drafting issues with relation to multiple marriages and stepchildren. The most common example occurred when the testator had, say, three children, one of whom was from a prior marriage. If the testator's spouse predeceased the testator, then all property would pass equally to the testator's three children. If the spouse survived, however, the testator's entire estate would go outright to the spouse, who could disinherit the testator's child from a previous marriage, even inadvertently through intestacy. Drafting issues relating to inheritance or disinheritance by stepchildren were observed in over seven percent of wills.

Drafting for disposition of firearms was another area of concern. Nearly five percent of wills contained bequests of firearms but failed to name contingent takers if a named beneficiary was not qualified to possess a firearm, creating potential liabilities for beneficiaries or risking loss of the firearms from the estate.[272]

In roughly four percent of wills, there appeared to be omissions with respect to specifying the form of title to real estate. Specifically, wills rarely specified that property left jointly to two or more beneficiaries should take the form of a joint tenancy, even where the testator appeared to desire rights of survivorship to attach. In the absence of explicit language, the default rule of tenancy-in-common would take effect.

Approximately three percent of wills contained potentially problematic precatory language, usually in the form of noting a testator's "desire" or "wish" for a certain person to be allowed to live in a residence for a set period of time, without the residence being formally devised to that person or to a trustee. These provisions are particularly prone to contest, as they create ambiguity as to whether a trust, life estate, or term of years has been created—or whether the testator's preference is entirely non-binding. Additionally, they create a high likelihood of dispute over who will pay maintenance expenses and property taxes.

Outside of these commonly observed problems, there were a range of "core" drafting issues that appeared once or twice in our dataset. These included attempts to control non-probate assets that would pass outside

Another possibility is that in estates where real property is the only significant asset, testators may choose to avoid fractionation of that property by devising it solely to children living locally.

272 *See supra* Part I.B.3.a.

of the will by operation of law, failure to include a residuary provision governing control of assets not specifically mentioned in the will, flaws in execution or will formalities, and ineffective attempts at complex A/B trust planning. We also saw a surprising number of wills that were not self-executing. While not technically wrong, including a self-executing affidavit is a widely accepted best practice in the field, and the absence of one can increase the complexity of probate by raising the need for formal probate proceedings requiring witness testimony or affidavits of authenticity.

The high frequency of fundamental drafting issues observed in our dataset demonstrates how limitations in access—not only to legal services broadly but to specialized planning assistance—may interfere with testamentary freedom and complicate wealth transfer for rural community members. Addressing this imbalance will require creative policy solutions.[273]

E. Probate Inaction and Tangled Title

As mentioned, only one-quarter of decedents in our dataset left a probated estate. This does not necessarily indicate a problem. Some decedents likely transferred all assets through non-probate means, or left few simple assets that were distributed informally. However, in other cases—often those involving real property not transferred through non-probate means—a delay in probate or the failure to open probate can have serious implications, including tangled title issues and increased vulnerability to property deterioration and loss.[274] In this section, we discuss our findings regarding probate timing and probate inaction, including their relationship to postmortem property issues.

To explore trends in probate timing in our study counties, we calculated the "probate delay" associated with each probate estate, defined as the number of days between the date of death and the initial filing to open probate. Our results suggest a greater likelihood of delayed probate in rural areas. The timing of probate varied widely, with the timeliest heir filing on the decedent's date of death, and the most delayed filing occurring over eight years after death.[275] However, the median probate delay across all counties was 75.5 days. Further, in nearly one-quarter of estates, the opening of probate occurred a year or more after death. Significantly,

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[273] *See infra* Part IV.

[274] *See* Pew Charitable Trs., *supra* note 64; Mitchell, *supra* note 64 and accompanying text.

[275] Our results capture only those for whom probate had been filed by the close of 2024. For others, probate delay is ongoing.

the median probate delay in Colfax County, the most remote and least populous of our counties, was nearly twice that of Chaves County.

Our findings also showed a correlation between intestacy and increased probate delay: the median probate delay in intestate estates was nearly three times that of testate estates. We also found that the presence of legal assistance was correlated with a decreased delay. The median probate delay among petitioners with attorney representation was under two months, compared to nearly half a year for those proceeding *pro se*. A summary table is provided below.

Probate Delay

	All Counties	**Chaves**	**Cibola**	**Colfax**
Median Probate Delay (in days)				
All Probate Decedents	75.5	66.5	79	120
Median Probate Delay (in days) by Testacy				
Testate	57.0	46.5	59.5	92
Intestate	146.5	149	144.0	142
Median Probate Delay (in days) by Representation Status[276]				
Pro Se	177.0	199.5	98.0	170.5
Attorney Assistance	59.0	46.5	77.0	92

The results of our study also indicate that probate inaction is a significant concern. The primary indicator of probate inaction observable in our study was the presence of tangled title remaining in a decedent's estate. We used property records from county assessors' and treasurers' offices to determine whether any real property interests remained in each decedent's estate as of December 31, 2024. We categorized properties as tangled titles where they were either: (1) held in the sole name of a decedent with no affiliated TOD deed (including joint tenancies where all co-tenants had predeceased), or (2) held by a decedent as a tenancy-in-common along with one or more co-owners.[277] We also tracked the share of estates retaining unclear title to manufactured homes not technically classified as real property, though the implications of holding this type of

276 These numbers reflect the representation status of the party filing the probate case. For an additional discussion of rates of self-representation and sources of legal assistance, see *supra* Part III.B.2.

277 We excluded situations where nominal title remained in the decedent's estate, but no probate would be necessary to clear title, such as where a decedent's name remained on joint tenancy property co-owned by a surviving joint tenant or where the decedent executed a TOD deed prior to death but formal transfer of title had not yet been completed as set out in the deed.

title and the procedures for clearing it differ from true real property.[278] We additionally used obituaries and Lexis records to confirm that tangled titles found were truly associated with a decedent in our dataset — rather than somebody with a similar name—and excluded any properties where the connection to a decedent was unclear. As a result, the figures presented are likely underestimates of the true proportion of decedents' estates retaining at least one tangled title.

Overall, roughly six percent of all decedents retained at least one tangled title, with approximately one-quarter of those involving interests in manufactured homes not technically classified as real property.[279] Tangled title properties ranged from low-value land parcels to modest-value family homes. Nearly half of the properties were in tax delinquent status at the time of our study, which in some cases likely reflects situations where heirs were unaware of a decedent's ownership interest or lacked incentive to maintain properties seen as limited in value. However, there are many reasons why heirs might fail to clear title even where they are motivated to maintain possession, from lack of knowledge of probate's functions to family or community attitudes towards property ownership.[280]

Additionally, our findings provide support for the idea that intestacy plays an important role in the development of tangled title. For example, in both Chaves and Colfax counties, tangled titles were more than twice as common among intestate estates.[281] In some cases, intestacy laws may have made the probate process seem prohibitively complicated, even where heirs wanted to clear title. The case of Elias and Eleanor Melendez,[282] in which intestate rules complicated executor appointment and division of assets where a large class of intestate heirs was present, provides a fine example of this. In other cases, heirs appear to have deferred probate to avoid losing their home. We found multiple cases where one surviving family member was paying taxes and property-related costs—suggesting they were potentially living in the property—while intestate rules would have distributed the home among a broader class of heirs.[283]

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278 *See supra* Part I.B.3.b.

279 Only three of the seventy-three tangled titles we identified were associated with property records containing key terms such as "estate" or "heirs" that have been used to estimate rates of tangled title or heirs' property in prior studies. *See, e.g.*, Hous. Assistance Council, *supra* note 110, at 16. Our findings therefore suggest that rates of these title issues may be significantly higher than previously estimated.

280 *See supra* notes 59-64 and accompanying text.

281 Interestingly, the pattern of higher rates of heirs' property among intestate decedents did not hold in Cibola County, where rates of heirs' property were slightly higher among testate decedents.

282 *See supra* Introduction.

283 For example, a home remaining in Gavin Cooper's name after his death became the subject of a foreclosure action at which one of Mr. Cooper's surviving children stated to the court that he did not want to lose his home. That son ultimately paid thousands of

Tangled titles in our study also appeared to be tied to confusion regarding ownership forms. For example, there was no language of joint tenancy with rights of survivorship in the original 1973 deed of a home to Jose Martes and his wife, resulting in a tenancy-in-common. Jose died in 2015, and his wife executed a TOD deed at that time, leaving her interest in the family home to one daughter. Mrs. Martes died two years later, likely believing that the home had passed solely to her upon Jose's death and that the TOD deed would convey full ownership to her daughter. In fact, Jose's one-half interest in the home remained in his estate and was unaffected by the TOD.[284] This pattern arose several times in our study.

The table below provides a breakdown of rates of tangled title among decedents as well as the value of tangled title properties and rate of tax delinquency.

Rates of Tangled Title and Characteristics of Tangled Title Properties

	All Counties	**Chaves**	**Cibola**	**Colfax**
Share of Estates Retaining Tangled Title				
All Decedents	5.8%	3.8%	8.4%	11.1%
Probate Decedents	11.0%	6.9%	17.0%	19.1%
Non-Probate Decedents	3.6%	2.6%	5.0%	6.3%
Testate Decedents	7.3%	4.2%	18.5%	6.9%
Intestate Decedents	15.2%	10.3%	11.5%	38.9%
Actual Value (for Property Tax Purposes) of Tangled Title Properties				
Minimum Actual Value	$500	$500	$1,980	$3,081
Maximum Actual Value	$180,260	$145,346	$73,195	$180,260
Median Actual Value	$8,686.50	$6,756	$14,899	$34,879
Tax Status of Tangled Title Properties				
% of Parcels in Tax Delinquent Status	47.2%	59.0%	47.1%	18.8%

dollars to settle the foreclosure case, yet formal title remains in Gavin's name, presumably to avoid distribution of the property to all three of the decedent's surviving children, who are his intestate heirs.

[284] Assuming Mr. Martes and his spouse died intestate, Mr. Martes's one-half interest in the community property would fall to his spouse, likely making probate of both spouse's estates necessary to clear title. Further, following the death of the surviving spouse, Mr. Martes's uncleared interest would flow through her estate to the couple's five surviving children, defeating Mrs. Martes's apparent intentions and possibly leaving a daughter residing in the home vulnerable to loss of a residence.

F. Postmortem Property Issues

In addition to examining rates of tangled title, we tracked the number of decedents whose estates included real property that was either listed for a tax sale or subject to a foreclosure action after death while remaining titled in the decedent's name.[285] Our results suggest that intestacy and barriers to probate increase the likelihood of these outcomes.

Twenty-four decedents—approximately three percent—experienced one or both of these postmortem property issues.[286] In some cases, properties lost through foreclosure or tax sale were likely overlooked or intentionally abandoned by heirs. For example, nearly half of properties listed for property tax sale were valued for property tax purposes at under $5,000, and some heirs likely determined it best to simply let lower-value properties be dispensed with through tax sale proceedings.[287] This may be particularly common in cases of intestacy, where division of an already modest-value property interest among multiple heirs could mean that no individual heir has sufficient incentive to invest in maintaining the property.[288]

However, in other cases, tax liens or foreclosure proceedings arose where heirs wanted to keep property. Specifically, in over half of tax sale listings and over a quarter of foreclosure actions, successors ultimately paid the amounts required to stop the sale, either maintaining ownership within the family or transferring to third parties outside of the tax sale proceedings. In these cases, probate inaction may have initially made properties more vulnerable to tax sale or foreclosure. Tax sale listings and foreclosure actions were both more common among decedents for whom no probate estate was opened. In the absence of probate, heirs may have lacked notice of outstanding costs or recovery proceedings or may have had no means of accessing estate funds to pay those costs.

Notably, we found at least two cases where a surviving child, in one case a child living in the home, ultimately paid outstanding tax- or mortgage-related costs but nonetheless left title in the decedent's name. In one of these cases, no probate was opened, and in another an intestate

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285 As for other variables, we collected data through the end of 2024.

286 This figure includes property issues connected to both true tangled titles, where the decedent either held property solely or held a tenancy-in-common interest, and properties where the decedent held an extinguished joint tenancy interest not yet formally cleared.

287 One decedent expressly authorized their personal representative to stop paying taxes on certain parcels so that they could be disposed of by tax sale.

288 For example, Rory Berg, a re-married widower, died owning a land parcel valued for property tax purposes at $3,800, which was sold at tax auction in 2020. Mr. Berg had no probate estate opened, and state intestacy rules would have distributed one quarter of the parcel to his second wife and the remaining three-quarters between his two surviving children from his first marriage.

probate was opened and later abandoned. In both cases, intestacy laws would have divided the home among multiple heirs.

Small sample sizes make it difficult to draw reliable comparisons regarding trends in postmortem property issues across counties and subgroups. However, it is interesting to note that rates of both postmortem tax sale listings and foreclosures were significantly higher in Colfax County, which also experienced the highest rate of tangled titles. This provides some support for the notion that where property ownership rates are high and local legal resources are limited, people are disproportionately adversely impacted by intestacy and probate inaction.

A summary table of the share of estates experiencing postmortem tax sale listing or foreclosure is provided below.

Rate of Postmortem Property Issues

	All Counties	**Chaves**	**Cibola**	**Colfax**
Share of Estates Experiencing Postmortem Tax Sale Listing				
All Decedents	1.55%	1.28%	0.60%	4.0%
Probate Decedents	1.18%	0.63%	2.13%	2.13%
Non-Probate Decedents	1.70%	1.54%	0.00%	5.06%
Share of Estates Experiencing Postmortem Foreclosure Action				
All Decedents	1.66%	1.82%	0.00%	3.2%
Probate Decedents	1.57%	2.50%	0.00%	0.00%
Non-Probate Decedents	1.70%	1.54%	0.00%	5.06%

IV. No Silver Bullet: A Mixed-Methods Approach to Reform

A. Overview

While further research is needed, the results of our study suggest that probate continues to play an important title-clearing function in rural communities, that access to assistance with estate planning and probate, particularly more specialized assistance, is increasingly limited in rural communities, and that these trends contribute to issues of tangled title and property loss. We now turn to a review of proposed solutions for expanding access to estate planning and probate services and improving pathways for effective intergenerational wealth transfer in rural areas.

We group our discussion of reforms, some of which are novel and some of which have been explored by other scholars, into three categories. First, we focus on ways to improve rural access to legal services. Second, we look at ways to improve outreach and education. Finally, we look at potential statutory and procedural reforms, including discussion of reforms that have been adopted in some but not all jurisdictions.

B. Access to Legal Services

1. *Rural Recruitment and Retention*

While this is perhaps the most obvious solution, one way to deal with a shortage of local estate planning lawyers is simply to recruit more lawyers to rural areas. There are excellent proposals from other scholars that merit revisiting, and we hope to add to that conversation. They generally involve a combination of efforts that include (1) attracting relatively new law school graduates to rural areas, (2) providing more focused training opportunities for current rural practitioners, (3) having urban estate planning lawyers travel to rural areas regularly to meet with clients, and (4) utilizing technology to either support current rural practitioners or to allow urban practitioners to practice in rural settings without physically traveling there. We explore each idea in turn.

First, what can be done to attract relatively new law school graduates to rural areas? This can be achieved both through direct recruitment of law students and by recruiting prelaw rural residents to attend law school in the hope that they will return after graduation.

Direct recruitment of law students to rural areas involves, in part, targeted financial incentives for practicing there, such as loan forgiveness programs, stipends, and increased compensation for rural court appointments. This requires a legislative financial commitment. Some studies have shown that financial incentives alone, however, often do not lead to a long-term commitment to stay.[289] That said, rural recruitment incubator programs utilizing financial incentives are starting to materialize, including models in South Dakota, Iowa, and Arkansas.[290]

Apart from the financial incentives, other support for new rural practitioners is needed. This includes focused experiential training in rural communities as well as practice management training, support, and mentorship.[291] Apprenticeship programs and law schools offering more

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289 *See, e.g.*, Wendy N. Davis, *No Country for Rural Lawyers: Despite Incentives, Small-Town Attorneys Still Find it Hard to Thrive*, 106 A.B.A. J. 32, 35 (2020).

290 *See id.; Rural Attorney Recruitment Program*, S.D. Unified Jud. Sys., https://ujs.sd.gov/Attorneys/RuralRecruitment.aspx [https://perma.cc/66FE-WACG] (last visited Feb. 7, 2026); *Rural Practice Incubator Project*, Univ. of Ark., https://ualr.edu/law/clinical-programs/rural-practice-incubator-project/ [https://perma.cc/C77R-AD34] (last visited Feb. 13, 2026).

291 For an interesting article on ways to attract lawyers to practice in rural areas see Conf. of State Ct. Adm'rs, Courts Need to Enhance Access to Justice in Rural

classes on practice management and rural practice, including through focused clinical education, would help.[292] Law schools also could learn a lot from efforts by medical schools to increase the pool of rural medical practitioners, including the Targeted Rural Underserved Track, or TRUST, program which is a "four-year curriculum centered on a required four-year clinical longitudinal continuity experience with students repeatedly returning to a single site located in a rural community or small city."[293] Of course, providing sufficient opportunity for students to learn trusts and estates fundamentals in law school is also important to rural estate planning access—and many believe such opportunities will likely decline should the subject area be removed from the Bar exam.[294]

The other way to attract relatively new law graduates to rural areas is to recruit future law students from those areas, knowing that people with family and cultural ties are more likely to return. Our study suggests that people generally prefer to work with local attorneys,[295] and the presence of attorneys with strong roots in the community may be particularly important in the area of estate planning, where client relationship building is critical. To recruit from rural areas, law schools should consider (1) partnerships with rural high schools and colleges and (2) ways to make law school attendance easier for rural residents. As to (2), some schools have already begun to open branch campuses closer to rural areas and opportunities for students to take classes online.[296]

America 18-23 (2018). For an example of a model mentorship program, see Starting Out Solo, https://www.startingoutsolo.com/ [https://perma.cc/6ZK8-GQNL] (last visited Feb. 13, 2026).

[292] *See* Hotch et al., *supra* note 9, at 188; *see also* Expanding Access to Justice in Rural Maine Through Maine Law's Rural Practice Clinic, Univ. of Me. Sch. of L. (2024) (describing a practice clinic model placing law students in underserved areas to expand access to legal services).

[293] Hillary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 Mont. L. Rev. 235, 263 (2016).

[294] *See, e.g.*, Dana G. Fitzsimons, *The NextGen Bar Exam Threat to Wills and Trusts*, ACTEC (July 2024), https://actecfoundation.org/podcasts/nextgen-bar-exam-threat-to-wills-trusts/ [https://perma.cc/RJG2-CAZB].

[295] *See supra* Parts III.B.1 and 2.

[296] *See, e.g.*, *Rural Law Opportunities Program*, Univ. of Neb. Coll. of L., https://law.unl.edu/RLOP/ [https://perma.cc/4CC4-H7GA] (last visited Feb. 13, 2026) (creating pipeline to law school for students with connections to rural Nebraska); Conf. of State Ct. Adm'rs, *supra* note 291 (seeking to increase the recruitment of law students from rural areas and to provide online classes for rural clinic students); *J.D. Enrollment Options*, Mitchell Hamline Sch. of L., https://mitchellhamline.edu/academics/j-d-enrollment-options/ [https://perma.cc/W9HG-4TRT] (last visited Feb. 6, 2026) (hybrid/online program that allows students to study in the community that they hope to work in); *see also* McGrath & Morriss, *supra* note 15; Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev. 466, 478, 526–28 (2014) (noting Canadian efforts to open law schools in rural areas and Australian efforts to expand online

Second, it is important to retain and support attorneys already providing estate planning and probate services in rural areas, including through specialized continuing legal education opportunities developed in collaboration with rural practitioners and responsive to the planning issues encountered in their communities.[297]

Third, for communities where there simply are not enough dedicated estate planners, we need incentives for urban estate planners to travel to those communities on a regular basis to take on clients or to work with local practitioners to provide those services. This entails funding support for transportation and billing (*i.e.*, a subsidy) from the state or from the State Bar so that urban lawyers can charge rural clients the lower fees that are manageable in the community.

Some efforts are already being made to have students and faculty in law clinics travel to rural areas. The University of New Mexico School of Law's Clinic, for example, received legislative funding for the purchase of a van to bring legal services out of metropolitan Albuquerque.[298] The idea of a "justice bus," where law students and practitioners travel to rural areas to provide legal services is not a new idea; in fact, we know of an estate planning version of this in California called "Wills on Wheels."[299] That model should be considered elsewhere.

Finally, technology has the potential to improve rural access to estate planning services. Direct online client representation is one possibility, though there are obstacles that would need to be overcome. Significantly, will formalities, such as witness requirements, would need to be modified.[300] More limited broadband access in rural areas also poses a barrier, though gaps are narrowing.[301] Additionally, remote access booths—which are often found in libraries and are an increasingly popular means of conducting medical consultations in rural areas—provide one example

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education); Report of the Ohio State Bar Association Rural Practice Gap Task Force, Ohio Bar (2024) (describing Ohio's efforts build a pipeline from rural high schools to law school, the creation of a state bar staff position to coordinate rural practice support, and efforts at mentorship and support for rural practitioners).

297 *See supra* Part III.B.

298 *See UNM Law Clinic Van*, Univ. of N.M. Sch. of L. (Nov. 17, 2023), https://lawschool.unm.edu/news/2023/11/unm-law-clinic-van.html [https://perma.cc/3MZ6-FYGM].

299 *See* Cal. Comm'n on Access to Just., Improving Civil Justice in Rural California 46 (2010). Wills on Wheels was an initiative by a Los Angeles legal services provider to organize urban volunteer attorneys to provide estate planning services to those in a remote part of Los Angeles County. *See id.*

300 *See infra* notes 381-83 and accompanying text.

301 *See, e.g.*, Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban, and Suburban America*, Pew Rsch. Ctr. (Aug. 19, 2021), https://www.pewresearch.org/short-reads/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/ [https://perma.cc/G4JF-Q7TX].

of how technological barriers could be mediated to allow broader access to online services.[302]

The legal field could also borrow from Project ECHO, a program that uses online systems to allow specialty providers to provide guidance and mentorship to rural practitioners.[303] In the context of estate planning, this might include an option for rural practitioners to have planning documents "peer reviewed" by specialists through an online portal. ACTEC Fellows, for example, could be retained for the limited role of highlighting areas of concern that the generalist may not have considered. Of course, there are some obstacles to this approach, such as questions of client confidentiality, provider liability, and attorney compensation, but they are not insurmountable. The State Bar and Supreme Court of the state could likely establish ground rules adequately addressing these issues, particularly given the success of Project ECHO in the medical context where patient confidentiality is also strongly protected.

Finally, artificial intelligence, or AI, may provide means of automating, at least in part, the drafting or review of estate planning documents, though challenges based on the unauthorized practice of law are more likely for technologies offering a high degree of customization.[304]

2. *Legal Paraprofessionals*

In 2012, Washington piloted an initiative allowing non-lawyers meeting training requirements to provide certain legal services.[305] While Washington's program has sunsetted,[306] other states have introduced similar programs allowing paraprofessionals to perform some legal tasks. Some of these programs allow qualified non-lawyer professionals to practice law independently,[307] while others require attorney supervision.[308] For

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[302] *See* Nakayla McClelland, *UNMH Expands Rural Health Care Accessibility with Telehealth Booths*, Albuquerque J. (June 22, 2025), https://www.abqjournal.com/lifestyle/health-and-fitness/article_cf0c0001-a2d9-4e80-9497-8db9b65a604a.html [https://perma.cc/9QU3-VT7U].

[303] *See Project Echo,* Univ. of N.M. Health Sciences., https://projectecho.unm.edu/ [https://perma.cc/HDV3-9CLG] (last visited Aug. 7, 2025).

[304] *See* Taylor Poppe, *supra* note 261, at 186, 191.

[305] Jason Solomon & Noelle Smith, *The Surprising Success of Washington State's Limited License Legal Technician Program*, Stanford L. Sch., 4 (Apr. 2021).

[306] *See id.*

[307] *See, e.g.*, *Licensed Paralegal Practitioner*, Utah State Cts., https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html [https://perma.cc/UBJ8-C226] (last visited Mar. 11, 2026).

[308] *See, e.g.*, *Legal Paraprofessional Program*, Minn. Jud. Branch, https://mncourts.gov/help-topics/Legal-Paraprofessional-Program [https://perma.cc/9GAH-K9SQ] (last visited Mar. 11, 2026).

example, Alaska's Community Justice Worker program provides training to enable community providers already embedded in remote areas, such as social workers, to provide certain types of legal services.[309] Paraprofessional programs have focused on high-need civil legal areas where self-representation is common,[310] often including landlord-tenant and family law.

Recently, several states have recognized estate and probate work as a high-need area where alternative legal providers could play an important role. For example, Minnesota's Legal Paraprofessional Program was expanded in 2024 to allow paraprofessionals with two years of relevant experience to provide advice and appear in court in cases involving small, uncontested estates with no real property.[311] In recommending this change, the Program's Standing Committee cited the "cost-prohibitive" nature of attorney services in small estates, and noted that legal paraprofessionals are often routinely involved in small estate cases in larger firms.[312]

Similarly, in 2024, after legal aid providers identified probate as a high-need area in which requests for assistance were frequently turned away,[313] the Texas Supreme Court issued preliminary rules that would allow qualified paraprofessionals to provide certain estate and probate services (though the rules had yet to formally go into effect at the time of this writing).[314] Allowing paraprofessionals to complete simple estate matters also has been proposed in South Carolina.[315]

Allowing paraprofessionals to practice law raises important questions, including whether non-lawyer professionals will be able to provide

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309 *See Community Justice Worker Program*, Alaska Legal Servs. Corp., https://www.alsc-law.org/cjw/ [https://perma.cc/DMU6-AX6X] (last visited Mar. 11, 2026). A similar model is being rolled out in Arizona. *See* Natalie Robbins, *Arizona Supreme Court Approves Program to Allow Non-Lawyers to Give Legal Advice*, Tucson Sentinel (Apr. 1, 2025), https://www.tucsonsentinel.com/local/report/040125_community_justice_workers/arizona-supreme-court-approves-program-allow-non-lawyers-give-legal-advice/ [https://perma.cc/2PTX-L69F].

310 *See, e.g.*, *Legal Paraprofessional Program*, *supra* note 308.

311 *See* Order Amending Rules Governing Legal Paraprofessional Pilot Project, No. ADM19-8002, at 8 (Minn. Sept. 16, 2024).

312 Standing Comm. for Legal Paraprofessional Pilot Project, Final Rep. and Recommendations to the Minn. Supreme Ct., ADM19-8002, at 18 (2024).

313 Working Grp. on Access to Legal Servs., Tex. Access to Just. Comm'n, Meeting Minutes, https://texasatj.org/wp-content/uploads/2025/03/Meeting-Materials-Access-to-Legal-Services-Working-Group-4.26.2023.pdf [https://perma.cc/QN3M-25NV] (minutes of Apr. 26, 2023, meeting of Scope of Practice Subcommittee).

314 *See* Otto Nicli, *New Rules for Legal Paraprofessionals Delayed*, Tex. Bar Prac. Blog (Jan. 8, 2025), https://blog.texasbarpractice.com/new-rules-paralegals-legal-services [https://perma.cc/WPB2-ATA7].

315 *See* Elizabeth Chambliss, *Three Strategies for Improving Access to Civil Legal Assistance in South Carolina*, 74 S.C. L. Rev. 773, 797 (2023).

services at sufficiently reduced cost,[316] whether enough paraprofessionals would practice in rural areas,[317] and whether the approach could lead to separate tiers of service quality based on income.[318] However, given that in many cases—particularly in rural areas—the alternative to nonlawyer services may be no services at all,[319] these valid concerns should not become "a barrier to exploration and evolution."[320] Further, there are options for addressing commonly raised concerns.

Cost concerns could be limited through legislative caps on fees for basic services, or by enabling providers already embedded in other organizations to provide advice and basic document preparation, as with the Community Justice Worker model. With respect to estate planning and probate services, healthcare providers and social workers in senior centers or assisted living facilities may already have significant knowledge with respect to some estate planning measures, such as healthcare directives and powers of attorney, and could be natural fits to become licensed as paraprofessionals in these areas. This justice worker model could also mediate the need to recruit new paraprofessionals to rural areas, which could be further mediated through provision of telehealth services by paraprofessionals in more urban areas.

With respect to concerns of tiered service quality, evidence from legal systems with less restrictions on the practice of law indicates that the quality of services provided by nonlawyers can match or outpace that of lawyers in many cases, and that consumers often prefer non-lawyer services.[321] With sufficient specialized training, such as continuing education through a reputable estate planning organization, a paraprofessional focused on estate and probate work may even avoid mistakes more effectively than a general legal practitioner.[322] Ongoing training could be provided remotely, as has been done in the healthcare domain.[323]

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316 *See* Stephen Daniels & James Bowers, *Alternative Legal Professionals and Access to Justice: Failure, Success, and the Evolving Influence of the Washington State LLLT Program* (*The Genie is Out of the Bottle*), 71 DePaul L. Rev. 227, 263 (2021).

317 *See, e.g.*, Darcy Meals & Leah Ritter, *A Prescription for Increased Access to Justice: Lessons from Healthcare*, 2022 U. Ill. L. Rev Online 45, 50 (2022).

318 *See id.*

319 *See Nonlawyer Services: A 'Harbinger of the Future' to Close the Justice Gap?*, A.B.A. (Feb. 01, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/non-lawyer-services-close-justice-gap/ [https://perma.cc/MS6A-V5VV].

320 *See* Daniels & Bowers, *supra* note 316, at 277.

321 *See generally* Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 Stan. J. C.R. & C.L. 283 (2020) (observing demand for nonlawyer legal services).

322 *See id.* at 305.

323 *See, e.g.*, *Project ECHO: Bringing Specialty Care to Rural New Mexico*, Agency for Healthcare Rsch. & Quality, https://digital.ahrq.gov/ahrq-funded-projects/

The high rates of probate use and self-representation observed in our study,[324] as well as considerable incidence of probate inaction and its associated harms,[325] provides support for increased consideration of paraprofessional delivery models, including with respect to estate and probate cases.[326] These models offer a promising avenue for narrowing persistent service gaps in rural communities.

3. *Legislative Funding to Clear Tangled Titles*

As mentioned, a failure to transfer property through probate often leaves families with tangled titles and heirs' property that impede their ability to use the property and potentially result in property loss.[327] As Professor Reid Weisbord also correctly notes, "[H]eirs' property is responsible for diluting the value of inherited wealth for generations of Americans and . . . minorities already negatively impacted by the racial wealth gap are disproportionately affected by this problem."[328] Apart from our proposed changes aimed at reducing the likelihood of future issues with heirs' property, action needs to be taken to clean up presently-existing tangled titles.

One of the biggest obstacles to clearing tangled titles is cost, as attorney fees, probate and recording fees, and transfer taxes can quickly consume a large portion of the property's value.[329] For example, one study in Philadelphia found that among the two percent of the city's homes estimated to be in tangled title status, the median home value was $88,800, with most homes located in low-income areas. Without any public assistance, fee waivers, or subsidized legal fees, the cost of remedying the average tangled titled was estimated to be approximately $9,200—over ten percent of the median value.[330]

State and local governments can take action here to help clear up titles. For example, Philadelphia has introduced a Probate Deferment Initiative that delays probate fees until a property is sold.[331] Additionally, the city has established a need-based Tangled Title Fund that provides assistance

past-initiatives/transforming-healthcare-quality-through-health-it/project-echo-bringing [https://perma.cc/F3A4-WCW5] (last visited Mar. 11, 2026).

324 *See supra* Part III.A.

325 *See supra* Part III.E.

326 *See* Daniels & Bowers, *supra* note 316, at 268–69. New Mexico previously convened a working group to consider paraprofessional service delivery models, ultimately concluding that further research was needed. *See id.*

327 *See supra* note 64 and accompanying text.

328 Weisbord, *supra* note 58, at 114.

329 *See id.* at 122.

330 *See id.*

331 *See* Pew Charitable Trusts, *supra* note 64, at 15.

with costs that cannot be deferred or waived.[332] States might also consider waiving deed-recording fees or probate fees altogether in certain cases,[333] or increasing legislative funding allowing legal aid organizations to accept more tangled title cases. While such reforms would require upfront investment, they could ultimately pay for themselves given the community-level economic impacts of entrenched title problems.[334]

Of course, reducing financial barriers will not address situations where heirs have non-economic incentives to avoid clearing title, as when heirs who reside on the property do not want to clear title because it could force them to share possession with non-possessory heirs. Possible reforms targeting this situation are discussed below.[335]

4. *Probate Court Accessibility*

Our study demonstrates that many people who appear in probate court are self-represented—perhaps more so in rural areas—making it important to ensure that probate processes are straightforward and accessible.

Some courts are working to enhance accessibility by leveraging technology, streamlining internal processes, and revising court forms to eliminate legal jargon.[336] Others are adopting interactive, self-guided tools that utilize flowchart-based logic to assist litigants.[337] States such as Michigan provide document assembly software—akin to TurboTax—which collects user responses and generates completed legal forms.[338] Some courts are transitioning from static PDF forms to dynamic guided interview platforms, such as *LawHelp Interactive* (a free nonprofit tool) or commercial options like *TurboCourt*, which may charge a user fee.[339]

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332 *See id*. at 2.

333 *See, e.g.*, Eisenberg, *supra* note 115, at 234.

334 *See supra* notes 115-117 and accompanying text.

335 *See infra* Part D.2.d.

336 *See* Susan Drisko Zago, *Riding Circuit: Bringing the Law to Those Who Need It*, 12 Fla. A & M U. L. Rev. 1, 17 (2016); *see, e.g.*, Md. Access to Just. Comm'n, Writing for Self-Represented Litigants (2012); *Resources for Self-Represented Litigants and Court Personnel*, Md. Judiciary, https://online.flippingbook.com/view/600581228/ [https://perma.cc/2UNN-FY8V] (last visited Mar. 11, 2026) (providing instructions and resources for pro se litigants in multiple languages).

337 *See, e.g.*, Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's "DIY" Forms*, 41 Fordham Urb. L.J. 1189, 1193 (2014).

338 *See* John M. Greacen, Resources to Assist Self-Represented Litigants: A Fifty State Review of the "State of the Art" 22–23 (2011).

339 *See id.* at 21–22.

Courts often pilot these tools in less complex legal matters, such as uncontested divorces without custody disputes, guardianships, or small claims.[340] While such forms can be sufficient in straightforward cases, more complex matters may require supplemental video resources or in-person assistance to ensure litigants receive adequate support.

While it is critical to provide online access to court forms and do-it-yourself tools, we must recognize the limitations of these efforts. Significantly, many people simply will not be comfortable with using online resources. According to a 2013 study by the Pew Research Center, "15% of Americans do not use the internet at all, and another 9% of adults use the internet but not at home."[341] This may be particularly true in some rural communities.[342] Online resources that are not mobile-friendly will pose additional barriers, as "[s]even percent of Americans are 'smartphone-dependent' . . . , among them a disproportionate share who are young, poor, and non-[W]hite."[343]

To address current challenges, it's important to recognize that people often prefer some level of human support when using technology to access courts.[344] In the 1990s, some courthouses introduced computer kiosks to help self-represented individuals access information and forms.[345] However, studies showed that these kiosks were rarely used when left unattended,[346] but they were used when staffed by people who could assist users.[347] One possibility for providing more direct human support to *pro se* parties in probate court would be to adopt a "lawyer of the day" model in which experienced attorneys from in or outside the community volunteer to be present, either in person or remotely, to answer questions and provide basic advice.[348]

Of course, probate is somewhat unique in that cases often proceed in local informal courts rather than in formal state courts.[349] Dedicated

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340 *See*, *e.g.*, N.Y. State Cts. Access to Just., New York State Courts Access to Justice Program 2014 Report, 13–14 (2014) (discussing launch of document prep program for uncontested divorce).

341 Kathryn Zickuhr, *Who's Not Online and Why*, Pew Rsch. Ctr., http://www.pewinternet.org/2013/09/25/whos-not-online-and-why [https://perma.cc/FZ3E-QLQP] (last visited Mar. 11, 2026).

342 *See, e.g.*, Wilkins et al., *supra* note 34, at 21–22 (finding that rural focus group respondents expressed a stronger preference for non-digital information sources).

343 Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. Ark. Little Rock L. Rev. 721, 740 (2015).

344 *See id.* at 739.

345 *See id.*

346 *See id.*

347 *See id.*

348 *See, e.g.*, Chambliss, *supra* note 315, at 790.

349 Among decedents in our study, the vast majority of *pro se* estates and a significant minority of those with representation were filed in the local county probate court rather than in state court.

probate courts may be physically closer and easier to navigate for some litigants, and they may face fewer delays than busy state courts. At the same time, local courts may have more limited staff and hours and more limited digital infrastructure,[350] and procedures may vary across jurisdictions even within the same state. As a result, ensuring probate court accessibility may require targeted legislative funding and guidance for local courts, which could include resources for replication of state court initiatives or for separate initiatives unique to probate.

C. Community Outreach and Education

One takeaway from our research is that many people simply are not aware of the consequences of different forms of property ownership (such as joint tenancies versus tenancies in common), as well as the risks associated with failing to plan for or probate property. Accordingly, improving rural estate planning and probate access will require efforts aimed at increasing public awareness.

One way to do that is to build on the idea of "co-location," which aims "to deliver professional services to members of the public who may not realize that their problem could benefit from a given kind of professional help."[351] Examples of locations for this include medical clinics and faith groups, such as churches, mosques, and synagogues.[352] Those locations can be used to educate the public and to connect people with attorneys.

Apart from identifying "co-locations," we also should use key moments in time to educate people. For example, the purchase of real estate is a logical time to educate. Realtors and title companies should be required to inform buyers of the effect of different title options. Buyers are accustomed to seeing mandatory disclosure forms. It would be easy to add to these forms a state-specific form-of-title disclosure for buyers to sign and initial. The form would make it clear, for example, that joint tenancy property will pass at the first death to the surviving joint tenant regardless of anything to the contrary in that first joint tenant's will. Similarly, the disclosure could highlight tax advantages, notably the double stepped-up basis at death, that are gained by owning real estate as community property.[353]

Outreach in rural areas should be individualized to the community, and might include advertising not only digitally but through more

[350] For example, in several of our counties of study probate courts are open several days a week at reduced hours and recommend or require appointments to be made in advance.

[351] Sandefur, *supra* note 343, at 731.

[352] *See id.*

[353] *See* I.R.C. § 1014 and accompanying Treasury Regulations.

traditional formats including newspaper, radio, and traditional public service announcements—preferably in multiple languages.[354] Existing efforts to expand outreach to tribal communities in the wake of the Cobell Settlement[355] and passage of the American Indian Probate Reform Act,[356] as well as outreach to Black heirs' property holders in the rural South,[357] can provide meaningful models.

We also should consider Professor Diane Klein's thought-provoking proposal to lighten the prohibition on in-person solicitation by lawyers, such as face-to-face conversations or live phone calls.[358] The restriction on solicitation is outlined in ABA Model Rule 7.3, which most states have adopted.[359] While recent updates to the rules now allow for electronic communications, traditional in-person outreach remains off-limits—even though such contact could be more meaningful for many potential clients.[360] Solicitation rules are designed to avoid exploitation in legal areas more centered around litigation, and in-person solicitation may be more appropriate for transactional areas where trust is critical.[361]

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354 *See, e.g.*, WILKINS ET AL., *supra* note 34, at 22 (reporting that older New Mexicans strongly prefer traditional media in rural areas compared to urban areas); *see also* Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33 (2008) (observing that attorneys underuse permissible marketing strategies); Sandefur, *supra* note 343, at 734–35 (discussing the power of public service announcements and their undertested potential in the access to justice space).

355 *See generally* U.S. DEP'T OF JUST., *Indian Country Accomplishments of the Justice Department*, https://www.justice.gov/archives/tribal/accomplishments [https://perma.cc/3PYS-79FM] (describing federal outreach efforts tailored to tribal communities).

356 *See* INDIAN LAND TENURE FOUNDATION, ESTATE PLANNING SERVICES PILOT OF THE AMERICAN INDIAN PROBATE REFORM ACT IMPLEMENTATION PROJECT FINAL REPORT (2007), https://iltf.org/wpcontent/uploads/2016/11/DOI_estate_planning_services_pilot_project_2007.pdf [https://perma.cc/2CWU-H66H] (discussing community meetings, newspaper articles, flyers, posters, and word of mouth as means of sharing information about AIPRA's passage and impact and the importance of will-making); U.S. DEP'T OF THE INTERIOR, TEN YEARS OF RESTORING LAND AND BUILDING TRUST 2012-2022: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS (2023), https://www.doi.gov/sites/default/files/doi-lbb.pdf [https://perma.cc/W3AJ-M3WA] (describing use of a call center, media coverage, active phone calls, postcards, events, and online materials to communicate buyback offers and information to landowners).

357 *See generally* Jennie L. Stephens, *The Struggle for Black Land: Preserving Heirs' Property by Building Trust*, NONPROFIT QUARTERLY (JUNE 22, 2022), https://nonprofitquarterly.org/the-struggle-for-black-land-preserving-heirs-property-by-building-trust/?fbclid=IwAR0tKY0KqaCJNcmIYG2yeZXo4l7qu7A7UWSaL5Wbf2epO_RzI8L4CPM1c2s [https://perma.cc/RN8B-3DW7] (discussion by director of the Center for Heirs' Property Preservation of the need for trust-building in community initiatives to address heirs' property, given the history of violence and "legal chicanery" at the core of the issue).

358 *See* Diane J. Klein, *Knocking on Heaven's Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-to-Person Solicitation*, 44 J. LEGAL PROF. 3 (2019).

359 See *id.*at 5.

360 *See id.*

361 *See id.*

D. Statutory and Procedural Reforms

In addition to educating the public about existing processes, there are a range of statutory and procedural reforms that might better protect individual testamentary freedoms and promote more effective transfer of wealth, particularly for rural residents. In this section, we review reforms that have been adopted in some, but not all, jurisdictions, as well as more novel reforms.

1. *Existing Reforms*

a. *Transfer on Death Deeds*

A transfer on death (TOD) deed allows a real property owner to name a beneficiary who will receive the property upon the owner's death, bypassing probate; however, during the owner's lifetime, the beneficiary has no rights to the property, and the owner can freely revoke or change the designation.[362] TOD deeds are a cost-effective way to avoid probate.[363]

While TOD deeds are certainly a step in the direction of reducing the need for probate, they are not a silver bullet solution for several reasons. As we saw several times in our research, in the absence of proper advisement TODs may be executed without clear understanding of how they will operate in their specific context, such as where the transferred property is held in joint tenancy. Additionally, it remains far easier to change the beneficiary designations of a bank or brokerage account, a life insurance policy, or retirement plan assets than it is to change TOD beneficiaries. We should consider whether further reforms should be adopted to better equalize their treatment. In addition, the idea should be expanded to allow TOD designations for manufactured homes not classified as real property.[364]

b. *Affidavit Procedures*

Many states have small estate affidavit procedures to transfer property to heirs without opening a probate estate, but it is common, including in New Mexico and under the UPC, to not allow such procedures to transfer real estate.[365] Where states do permit transfer of real estate through

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362 *See* Stephanie Emrick, *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game*, 70 Fla. L. Rev. 469, 474 (2018).

363 *See id.*

364 *See, e.g.*, Tex. Est. Code § 1201.2135 (2025) (providing transfer on death process for manufactured homes).

365 *See* Blumberg, *supra* note 83, at 32.

affidavit procedures, they typically limit use to properties of very limited value[366]—though this is beginning to change in some states.[367] To avoid placing a greater burden on those whose wealth is primarily held in real property—including many rural residents—all states should allow these procedures to apply to real estate, and dollar caps should be increased to include a modest primary residence as permissible property to transfer.[368]

c. *The Uniform Partition of Heirs Property Act*

The Uniform Partition of Heirs Property Act (UPHPA), introduced by the Uniform Law Commission in 2010 at the request of the American Bar Association, was created to help prevent the exploitation of Black landowners by unethical developers and reduce the loss of inherited property.[369] The Act gives co-tenants a right of first refusal when partition of heirs' property occurs and requires commercially reasonable sale supervised by the court.[370] As Professor Danaya Wright notes, while the UPHPA helps heirs protect farmland from developers, it offers little support for families with modest homes, where disputes often arise among heirs—especially when one heir bears the costs while others seek a payout and may force a sale if not bought out.[371] Professor Wright suggests that legislatures provide funding to address these issues.[372]

2. *Proposed Reforms*

a. *Intestacy Reform*

As mentioned, the goal of intestacy is generally identified as attempting to carry out a decedent's likely intent. This is a challenging endeavor in light of the increasing complexity and variety of family structures.[373]

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366 *See, e.g.*, CAL. PROB. CODE § 13200 (West 2025); JUD. COUNCIL OF CAL., *Affidavit Re: Real Property of Small Value*, Form DE-305, https://courts.ca.gov/sites/default/files/courts/default/2024-11/de305.pdf [https://perma.cc/MJ94-RU6C] (providing affidavit transfer procedure for real property valued at up to $69,625).

367 *See, e.g.*, 2025 Ariz. Legis. Serv. Ch. 24 (H.B. 2116) (West) (amending small estate affidavit law to allow transfer of real property valued at up to $300,000).

368 *See* Blumberg, *supra* note 83, at 33.

369 *See* Gibson, *supra* note 68, at 206.

370 *See Partition of Heirs Property Act*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=50724584-e808-4255-bc5d-8ea4e588371d [https://perma.cc/W3X3-B24G] (last visited Mar. 18, 2026).

371 *See* Wright, *supra* note 51, at 769.

372 *See id.*

373 *See generally* Wright & Sterner, *supra* note 84 (analyzing probate data on distribution patterns in testate estates).

For example, existing research suggests that default intestate rules may be most in need of reform with respect to treatment of stepchildren.[374] Further research is needed into how other relationship structures—such as cohabitating romantic partnerships—impact testamentary preference.

Rather than a blanket approach to intestacy, we might consider allowing probate courts to look to beneficiary designations as evidence of probable intent.[375] Another relatively simple reform would be to allow people to identify their desired intestate heirs on their state income tax returns.[376]

In addition to reforming the rules relating to intestate takers, we could also consider streamlining rules of executor appointment in intestate cases. Rather than requiring an intestate heir seeking informal appointment to secure documentation of concurrence from all those of equal priority, we could allow any heir to request appointment so long as appropriate notice is provided. This would make the process less onerous in intestate cases that may involve numerous and potentially hard-to-locate intestate heirs, and appointment could still be formally contested in the event of a conflict.

b. Data Collection and Transparency

Once people are educated regarding the impact that form of title can have on their property, the logical next step is for those people to want to know exactly how their property is titled. However, in many places this is vastly more complicated than it needs to be. For example, in places like West Virginia, some property records are digitized, but many are still offline and hard to interpret.[377] Where basic records are difficult to access, people may feel the need to hire an attorney to answer what should be a simple question, or they may simply proceed under a mistaken understanding of the nature of their property. For example, in our research we frequently encountered instances where decedents appeared to believe rights of survivorship attached to property when in fact they did not. We need easier access to records at the state and local level,[378] including tax records, verifying how property is titled, the potential for designating

374 *See id.* at 368-89 (discussing results of study finding that "a majority of decedents with stepchildren left at least some property to their stepchildren").

375 *See id.* at 352-53 (discussing prior research indicating that beneficiary designations may provide evidence of testamentary intent in some circumstances, particularly where the beneficiary designees are not intestate heirs and the intestate takers are remote).

376 This is similar to Professor Reid Weisbord's proposal for incorporation of a "testamentary schedule" into state tax returns. *See* Weisbord, *supra* note 18, at 880.

377 *See id.*

378 *See* Eisenberg, *supra* note 115, at 234.

beneficiaries of real property online, and more coordination between department of health and county property records, including a notation of tangled titles in county records when decedents pass away.[379]

c. Default Ownership Forms

As mentioned, tenancy-in-common is commonly a default form of ownership when property is transferred to two or more people without specifying otherwise. While this has merits, such as treating all recipients equally, this focus on egalitarianism in inheritance has led to significant loss of wealth among low-income families, and we should reconsider the applicability of this default rule.

Native Americans have dealt with issues of fractionation of tribal property for many years, and the American Indian Probate Reform Act makes joint tenants with rights of survivorship a default form of ownership in some contexts to reverse the trend toward fractionation.[380] We may want to consider similar changes outside the context of tribal lands. Our findings support a middle ground approach where property held by spouses is presumed to have rights of survivorship unless express language indicates otherwise.

d. Reforming Co-Tenancy Rules

Professor Danaya Wright proposed some thought-provoking reform ideas with respect to transfers to heirs as tenants-in-common, especially when it happens by default such as through intestacy.[381] Specifically, she suggests that states change their laws to (1) enforce oral agreements about the disposition of real property at death, (2) let heirs-in-possession claim adverse possession with respect to non-possessory heirs, (3) expand marketable title acts make heirs-in-possession titleholders after six years, (4) give heirs credit for payment of property taxes so that their ownership share of the tenancy increases by those payments, and (5) reduce fractionation and the number of un-probated estates by requiring inheritors

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379 While an owner should have unfettered easy access to their own records, we acknowledge that some limitations on access may need to be put into place to keep people safe and to protect their privacy interests. *See generally* Reid Kress Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 Notre Dame L. Rev. 507 (2022) (describing the evolution of deed recording systems and public accessibility of records).

380 *See* American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (2004).

381 *See* Wright, *supra* note 51, at 769–800.

to survive the date of distribution.[382] Additionally, we could allow a majority of the co-tenants to make decisions about management.

e. Loosening Will Formalities

While we are not revisiting every proposal for simplifying will execution, it is worth mentioning some ideas from other scholars. In their excellent article suggesting changes during the COVID-19 pandemic, Professors Horton and Weisbord suggested addressing transportation and distance to service barriers by allowing e-wills as well as expanding the use of holographic wills, which are not allowed in New Mexico, as well as a harmless error approach to will formalities.[383] These ideas are equally as relevant outside the pandemic context when we consider reforms to improve rural estate planning access.

Another possible reform idea involves removing the witness requirement altogether. While we can often change beneficiary designations of brokerage accounts and life insurance policies worth much more than real estate holdings without witnesses, all states have strict rules regarding the presence of witnesses, other than in very limited circumstances, for wills to be valid. These rules may no longer be needed, as they are burdensome for testators, can be exploited by "disappointed heirs," and were designed to prevent forms of fraud and undue influence that have grown much less common.[384]

V. Conclusion

This study attempts to bridge two distinct bodies of research—one focusing on rural access-to-justice concerns and the other on empirical trends in estate planning and probate. Our results suggest that probate may play a particularly important role in wealth transfer in rural communities, as well as illustrating some of the harms affiliated with limitations in access to estate planning and probate supports. In response, we consider potential approaches to expanding planning access and revising probate and succession procedures to better serve rural communities.

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382 *See id.*
383 *See* Horton & Weisbord, *supra* note 86.
384 Weisbord, *supra* note 18, at 913-15.

Fiduciary Standards

*James Toomey**

Abstract

"Fiduciary" law is, notoriously, all over the place. Many doubt it hangs together—that anything beyond the label "fiduciary" unites corporate directors and physicians. Others offer theories of the conditions under which the law refers to a relationship as "fiduciary"—to compensate for power dynamics, where legal power is exercised for another, in money management. What's missing is a theory of the standards guiding fiduciaries' exercise of legal power—what it means to be a fiduciary.

This Article argues that in making sense of fiduciary standards, we can turn to a longstanding debate in a particular fiduciary context—surrogate medical decision-making. There, two contested standards apply—"best interests," which asks the decision-maker to pursue the "objectively best" decision, and "substituted judgment," which seeks the decision the patient would have made. I argue that these standards offer a framework for organizing fiduciary decision-making generally. Some fiduciaries, like trustees, make decisions in the best interests of their beneficiaries. Others, like agents, make the decision their principal would have made. Most fiduciaries do some blend of both.

Moreover, the law allocates aspects of best interests and substituted judgment based on its views of the purpose of a given fiduciary relationship. Substituted judgment applies where the beneficiary is treated as an individual personal identity. Best interests applies where for some reason—efficiency, expertise, or because the beneficiary doesn't have one—the beneficiary is not treated as an individual personal identity. This account offers a new picture of fiduciary law, structured around agency

* Associate Professor of Law, University of Iowa College of Law. Thanks to Aditi Bagchi, Alexander Boni-Saenz, Sam Bray, Felix Chang, I. Glenn Cohen, Deborah DeMott, Thomas Gallanis, Adam Hofri-Winogradow, Andrew Jordon, Ela Lesham, Sheldon Lyke, Rachel Sachs, Ronald Scalise, Seanna Shiffrin, Robert Sitkoff, Henry Smith, Lionel Smith, Jeffrey Stake, Stewert Sterk, Emily Stolzenberg, and Danaya Wright for helpful discussions and comments, as well as the Health Law, Policy, Bioethics, and Biotechnology Workshop at Harvard Law School, the Trust Law and Succession Workshop at the George Mason Antonin Scalia School of Law, supported by the ACTEC Foundation, the North American Workshop on Private Law Theory (NAWPLT XI) at Berkeley Law School, and the Faculty Workshop at the University of Iowa College of Law.

and trust, and suggests how the law might consider allocating the best interests and substituted judgment frames.

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Introduction

There is a good chance that at some point you will occupy a role the law calls "fiduciary." After all, lawyers are "fiduciaries" of their clients.[1] Or perhaps you will serve as the executor of an estate;[2] a guardian, attorney-in-fact under a durable power of attorney, trustee, or healthcare proxy for a family member;[3] or maybe even a director of a corporation or

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1 *See, e.g.*, Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 724 (2d ed. 2024) ("Lawyers are fiduciaries to their clients . . . .").

2 *See, e.g.*, 15 N.C. Index 4th Executors and Administrators § 57 ("Executors have fiduciary duties to legatees, including a duty not to engage in self-dealing.").

3 *See, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 2 (2001) (describing durable powers of attorney as creating "a unique fiduciary relationship"); Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in The Oxford Handbook of Fiduciary Law 249, 251 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019) ("Upon appointment and acceptance,

non-profit.[4] These roles, and many more—including perhaps parents, spouses, and government officials[5]—are all referred to as "fiduciary" relationships in Anglo-American legal discourse. In undertaking any of these roles, you will be bound by a package of legal duties called "fiduciary duties."[6]

Despite its ubiquity, "fiduciary" has always been an odd word. Unlike, say, the concept of "promise" in contract law,[7] or even an intuitive sense of "ownership" that may be related to property,[8] the word "fiduciary" has no apparent correlate in ordinary speech—laypeople have no idea what it means, and the "fiduciary" concept appears exclusively legal.[9] Even the legal use of the word is largely reflexive and unreflective—applied to trustees, corporate directors, agents, lawyers, partners, guardians; sometimes physicians, parents, government officials, and more.[10] But despite a century of theorizing, what unites this category—what the word "fiduciary" *means*—if anything, remains elusive.[11] The possible answer "nothing"—that fiduciary law is just an ad hoc chain of analogies,[12] expressivist

a guardian or conservator immediately enters into a fiduciary relationship with the individual subject to guardianship or conservatorship.").

4 *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L.J. 879, 908 (1988) ("Paradigms of [fiduciary] relationships include agent-principal, director-corporation, guardian-ward, lawyer-client, partner-fellow partner, and trustee-trust beneficiary relationships.").

5 *See, e.g.*, Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in The Oxford Handbook of Fiduciary Law, *supra* note 3, at 227, 227 (discussing family members as fiduciaries).

6 *See, e.g.*, Paul B. Miller, *Justifying Fiduciary Duties*, 58 McGill L.J. 969, 971 (2013) (describing legal fiduciary duties as emerging from fiduciary relationships).

7 *See, e.g.*, Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 Harv. L. Rev. 708, 709 (2007) ("[T]o make a contract, one must make a promise.").

8 *See, e.g.*, James Toomey, *Property's Boundaries*, 109 Va. L. Rev. 131, 135 (2023) (arguing that an ordinary concept of ownership organizes and legitimizes property law).

9 *See, e.g.*, Gerry W. Beyer, 1 Revocable Trusts 5th § 3:3 (5th ed.) ("The term 'fiduciary' appears to come from the Latin fiducia, referring to ideas of trust or confidence."); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2180–81 (2019) (surveying the recent and peculiarly legal history of the concept "fiduciary").

10 *See, e.g.*, Andrew S. Gold & Paul B. Miller, *Introduction*, in Philosophical Foundations of Fiduciary Law 2–3 (Andrew S. Gold & Paul B. Miller, eds., 2014) ("Most relationships considered to be fiduciary are treated as such as a matter of convention.").

11 *See* Ethan J. Leib, *Friends as Fiduciaries*, 86 Wash. U. L. Rev. 665, 669 (2009) ("[T]he fiduciary concept is still very much contested . . . ."); Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in Philosophical Foundations of Fiduciary Law, *supra* note 10, at 39 (noting that courts "cannot quite agree on how [fiduciary] law should operate"); DeMott, *supra* note 4, at 879 ("Fiduciary law is one of the most elusive concepts in Anglo-American law.").

12 *See, e.g.*, Robert Hockett, *Are Bank Fiduciaries Special?*, 68 Ala. L. Rev. 1073, 1096 (2017) ("We have a rough idea as to what statuses are considered at least to be more or

exhortation,[13] or an arcane way to refer to a kind of implied contract[14]—is a live one.

At the same time, it is hard to shake the legal intuition that there is *something* here—that lawyers aren't entirely out to lunch when they use the term.[15] There is some persistent sense that the set of relationships called "fiduciary" involve legal action in some sense "on behalf of" or affecting someone else—the exercise of "discretionary power over the significant practical interests of another."[16] And it is true that the decisions of all "fiduciaries" must be—the law insists—guided by something called the "duty of loyalty."[17] Entirely discretionary power is not "fiduciary."[18] What any of this actually *means*, however, is the sticking point, as the substantive content of the "duty of loyalty" across relationships is nearly as diverse as those relationships themselves.[19]

This Article offers a novel theory of the standards by which fiduciaries must exercise the powers with which the law has entrusted them. In the particular fiduciary context of healthcare decision-making on behalf of incapacitated patients, a longstanding debate has pitted two alternative decision-making frameworks against one another—the so-called "best interests" and "substituted judgment" standards.[20] The best interests standard asks the surrogate to make the "objectively best" decision

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less fiduciary in nature—trustees, corporate officers and directors, business partners, lawyers, accountants, etc."); Paul B. Miller & Charles Weijer, *Fiduciary Obligation in Clinical Research*, 34 J.L. Med. & Ethics 424, 425 (2006) ("[C]ourts currently largely identify relationships as fiduciary simply in consideration of lists of recognized categories of fiduciary relationships.").

13 *See, e.g.*, Boxx, *supra* note 3, at 36 (arguing that the "crux" of the fiduciary relationship is "whether there is a moral overtone to judgment of the wrongdoer").

14 *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & Econ. 425, 427 (1993) (arguing that fiduciary obligations are a species of implied contract); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 671 (1995) (same in the trust context).

15 *See, e.g.*, Paul B. Miller, *The Fiduciary Relationship*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 63, 69 ("Lawyers and judges reason and act as though the fiduciary relationship is a distinctive form or kind of legal relationship.").

16 *See* Miller, *supra* note 6, at 1011 (2013); *infra* Part I.B.

17 *See, e.g.*, Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 176, 190 ("Fiduciary relationships require a legal duty of loyalty, full stop.").

18 *See, e.g.*, *id.* at 72 ("[I]t is also an essential characteristic of fiduciary power that it is *specified*."); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L. Q. Rev. 51, 75 (1981) (arguing that grant of fiduciary power is conditional).

19 *See, e.g.*, Gold, *supra* note 17, at 177–84 (summarizing the content of the duty of loyalty across fiduciary relationships).

20 *See infra* Part II.A.

under the circumstances.[21] In contrast, substituted judgment asks the surrogate to do what *the patient* would have done if capacitated.[22] My claim is that these two decision-making standards can systematize the content of obligations across the domain of fiduciary relationships. That is, *all*—or at least most—fiduciary standards, even those that have nothing to do with healthcare, can be fruitfully thought of in terms of best interests and substituted judgment.[23]

From this perspective, in some fiduciary relationships—paradigmatically the classic common law trust—the fiduciary is expected to do what is in the objective best interests of the beneficiary, enforced through generalized, objective rules.[24] At the other end of the spectrum—in the paradigmatic agency relationship—fiduciaries are asked to make substituted judgments on behalf of their beneficiaries; an agent is to do what their principal *would have* done.[25] Between these poles, the standards governing most fiduciary relationships borrow some aspects of best interests and some aspects of substituted judgment.[26] Consider attorneys-in-fact acting under durable powers of attorney, who are generally to make substituted judgments, but have best interests decision-making as a fallback where substituted judgment would harm the principal or others.[27]

Moreover, the balance between best interests and substituted judgment as decision-making modes across fiduciary relationships varies with the purposes of the relationship. Substituted judgment is, by its nature, a mode of decision-making that treats another person as an *individual, ongoing personal identity*.[28] The law deploys it in relationships, like agency, that are thought to be interpersonal in an individualized sense. In contrast, the law applies the best interests framework, with its objective generalizations about what is optimal, in circumstances, like trust,

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[21] *See, e.g.*, Steven M. Richard, *Someone Make Up My Mind: The Troubling Right to Die Issues Presented by Incompetent Patients With No Prior Expression of a Treatment Preference*, 64 Notre Dame L. Rev. 394, 407–08 (1989) ("Under [the best interests] approach, the surrogate evaluates the patient's best interests based upon objective socially shared criteria.").

[22] *See, e.g.*, Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 Notre Dame J. L. Ethics & Pub. Pol. 307, 338 (2020) ("The equitable doctrine of substituted judgment . . . requires the court to give effect to what the incapable individual would have wanted if she was capable.").

[23] *See infra* Part II.B. Whether this framework captures the standards governing *all* fiduciaries, of course, depends in part on what relationships are, in fact, fiduciary. Here, I focus on uncontroversial cases, without taking a definitive view on more controversial cases such as parents, spouses, and government officials. *See infra* Part I.B.

[24] *See infra* notes 151–59 and accompanying text.

[25] *See infra* notes 160–69 and accompanying text.

[26] *See infra* Part II.B.

[27] *See infra* notes 183–85 and accompanying text.

[28] *See infra* Part III.A.

where for reasons of efficiency, morality, or, indeed, metaphysics (because a beneficiary is *not* an individual, ongoing personal identity), the legal relationship does not involve a posture towards another person *qua* individual personal identity.[29] From corporate directors to guardians, the law sees different fiduciary relationships as blending these individualized and de-individualized postures in different ways, and correspondingly applies different mixes of the substituted judgment and best interests frames in their standards of decision.[30]

This account—and the novel picture of fiduciary law it offers—has several implications, for both theory and practice. In fiduciary theory, it supports the notion that, as legal philosopher Carl Wellman and others have suggested, what we call "fiduciary law" is organized around *two* distinct paradigms—rather than just trust, as is often thought, this body of law is a spectrum organized around the poles of trust *and* agency.[31] Similarly, the account offers novel ways to think about the contested relationship between fiduciary law and contract law—fiduciary law is organized around two ways of deciding on behalf of another, whereas contract is a mode of deciding according to the content of an agreement. More broadly, the picture offered here emphasizes the significance of personal identity to any robust account of private law.[32] Finally, and more practically, the framework offers guidance on when the substituted judgment and best interests standards might be best deployed—in health law, where we started, and in other, even novel, legal relationships.[33]

The argument has four parts. In Part I, I outline the architecture of fiduciary law, along with efforts to make sense of its domain and content. Building on increasingly accepted views in private law theory, I suggest that all fiduciary relationships involve one person deciding (in some sense) "on behalf of" another, constrained by some standard, which we refer to at least with the phrase "duty of loyalty." But a unifying theory of that standard has not been forthcoming.

Next, in Part II, I turn to the debate between best interests and substituted judgment as standards for making medical decisions for the incapacitated, and explain how, descriptively, these standards can illuminate fiduciary law. At the poles of fiduciary's domain, trust is governed

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29 *See infra* Part III.B.

30 *See infra* Part III.C.

31 *See infra* Part IV.A; *see also* Carl Wellman, Real Rights 114–18 (1995) (distinguishing between "the representation of agency" through agency-like relationships and "the representation of interests" in trust-like arrangements); Shepherd, *supra* note 18, at 51 ("Fiduciary relationships are children of the forced marriage of agency law and trust law . . . .").

32 *See infra* Part IV.C; *see also* James Toomey, *Love, Liberalism, Substituted Judgment*, 99 Ind. L.J. 1289, 1316–17 (2024) (discussing the role of personal identity in private law).

33 *See infra* Part IV.D.

by something like best interests reasoning, while agency something like substituted judgment. Between them, different fiduciary relationships mix different aspects of each decision-making paradigm.

In Part III, I offer an account of why that might be—why substituted judgment applies in some fiduciary contexts, and best interests in others. I suggest that substituted judgment is a mode of deciding literally on behalf of another person *qua* their individualized, ongoing personal identity, and applies in legal relationships where that is the aspiration. In contrast, best interests applies in contexts where, for a variety of reasons, a fiduciary is acting in some other mode.

Finally, in Part IV, I sketch the implications of this view—in fiduciary theory, private law theory, and for practical questions of legal design.

I. The Architecture of Fiduciary Law

"Fiduciary" comes from Latin—*fiducia*; trust or confidence.[34] But the word has had an odd genealogy. It is used in its legal sense today predominately by Anglophones—though we got it from Latin, derivatives of *fiducia* play a less prominent role in civil law regimes.[35] Moreover, the word is used overwhelmingly by Anglophone *lawyers*—"fiduciary" is a word of legal English, not English simpliciter. If "fiduciary" refers to anything, then, it is presumably to a common law legal concept.[36] And yet, even as a term of art in Anglo-American legal discourse, it has never been clear what the word is thought to mean, vulnerable to the persistent worry that there is no distinctive concept there at all.[37]

In theorizing about fiduciary law, it may be helpful to distinguish two kinds of theory. First are theories of fiduciary's *domain*—the kinds of factual circumstances or relationships to which the law applies the label "fiduciary." Second are theories of fiduciary *content*—what *follows*, legally, from the law's conclusion that a particular relationship is a fiduciary one.

This Part surveys the architecture of fiduciary law and extant theories of its character. First, I lay the groundwork with uncontroversial facts

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34 *See, e.g.*, Hon. James Edelman, *The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 21, 23.

35 *See, e.g.*, Lionel Smith, The Law of Loyalty 27 (2023) ("[I]n the modern world, it is a fact that the ideas of 'fiduciary obligations' and 'fiduciary relationships' are often seen as alien to the civilian tradition.").

36 *See supra* note 9.

37 *See* Hockett, *supra* note 12, at 1096 ("[F]ew of us seem to find time to develop any particular general account of the fiduciary relations and the form of obligation to which it gives rise."); LAC Minerals Ltd. v. Int'l Corona Ltd., 61 D.L.R. (4th) 14, 643-44 (Can. 1989) ("There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.").

about the use of the word "fiduciary" in legal discourse—the relationships to which it is applied and the content it is thought to carry. Next, I show that there has been some rough theoretical convergence on fiduciary's *domain*—fiduciary relationships are those that involve (roughly) one person making legally effective decisions (in some sense) "on behalf of" another, guided by some standard. At the same time, there has been less progress on theories of the *content* of fiduciary standards—we can say that fiduciary decision-making is governed by *some* standard, called the "duty of loyalty," but diversity in what that means has foreclosed our saying much more.

A. "Fiduciary" in Law

Given longstanding doubts about the conceptual coherence of fiduciary law, most accounts start with the word's admittedly scattered extension—the set of relationships to which the law uncontroversially applies the label "fiduciary."[38] This Section follows suit.

The relationship between a trustee and beneficiary of a trust is generally taken to be the "paradigmatic" fiduciary relationship from which, as a historical matter, the body of law we call "fiduciary" arose.[39] In a trust (created by a "settlor," an owner of property who conveys it into trust), a "trustee" holds legal title and legal decision-making powers over property the "equitable title" of which is held by a "beneficiary," giving the beneficiary the right of enjoyment of the property (and a cause of action against the trustee for breach).[40] In other words, a trust involves legal management and control of a beneficiary's property by a trustee.

In exercising these legal decision-making powers, trustees are constrained by "fiduciary duties"—classically, the "duty of loyalty" and "duty of prudence" (in trust law; its correlate is often called the "duty of care" in

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38 *See supra* note 10.

39 *See, e.g.*, Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 Stan. L. Rev. 565, 575 (2018) (describing "trusts, estates, corporations, partnerships and so on" as "the quintessential fiduciaries"); Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in Oxford Handbook of Fiduciary Law, *supra* note 3, at 41 ("A trust is the quintessential fiduciary relationship."); *see also* Miller & Weijer, *supra* note 12, at 425 ("Taking the relationship between the trustee and beneficiary of an express trust as paradigmatic, courts have, over time, recognized certain other kinds of relationships to be sufficiently similar to warrant recognition as fiduciary.").

40 *See, e.g.*, Robert H. Sitkoff & Jesse Dukeminier, Wills, Trust and Estates 375 (11th ed. 2022) (describing the structure of trusts); Restatement (Third) of Trusts (Am. Law Inst., 2003) § 2 ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . . .").

other fiduciary relationships).[41] The trustee's duty of loyalty requires that they manage trust assets "solely in the interests of the beneficiaries."[42] Practically speaking, this forbids self-dealing with trust assets, alongside various other conflicts of interest, at the risk of automatic disgorgement and other remedies.[43] The trustee's duty of prudence requires them to manage the property broadly as a reasonable investor would, and encompasses a number of subsidiary duties, such as duties of accounting and disclosure.[44] The duty of prudence can largely be disclaimed or modified by the settlor, while the duty of loyalty cannot—leading many commentators to take the duty of loyalty to be fundamental to the trust relationship.[45]

The basic structure of a trust, in which a "fiduciary" has certain legal powers over the property of another, constrained by duties that prohibit conflicts of interest and demand some basic standard of reasonable conduct, can be found in a number of other fiduciary relationships. For instance, corporate directors are uncontroversially thought to be fiduciaries of the "corporation and its shareholders."[46] Directors have legal decision-making powers over the corporation's property, which is "owned" by the shareholders.[47] As with trusts, directors owe a "duty of loyalty" to the corporation and shareholders, which requires them to avoid self-dealing and other conflicts at risk of disgorgement, though less strictly enforced than in trust.[48] Like trustees, directors owe a duty to care

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41 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 599 (summarizing the fiduciary duties of trustees).

42 Restatement (Third) of Trusts § 78 cmt. b; Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in The Oxford Handbook of Fiduciary Law, *supra* note 3, at 44 ("The trust fiduciary law *duty of loyalty* requires undivided loyalty from a trustee.").

43 *See, e.g.*, Restatement (Third) of Trusts § 78 ("[T]he trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."); Sitkoff, *supra* note 39, at 44 ("The trust law *sole interest rule* of undivided loyalty is implemented by a categorical prohibition, enforced by a *no further inquiry rule* . . . .").

44 *See, e.g.*, Restatement (Third) of Trusts § 90 ("The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.").

45 *See infra* Part I.B.

46 *See, e.g.*, North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders."); Julian Velasco, *Fiduciary Principles in Corporate Law*, in The Oxford Handbook of Fiduciary Law, *supra* note 3, at 60 ("Corporate law is a venerable fiduciary law field, with roots in trust fiduciary law.").

47 *See, e.g.*, Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property 112–16 (rev. ed. 1991) (discussing the separation of ownership and control as the essence of the corporate form).

48 *See, e.g.*, Avi Z. Kestenbaum, *Duties and Liabilities of Nonprofit Directors and Officers*, 31 Estate Planning 218, 220 (2004) ("Directors and officers must avoid self-dealing activities and must act in the best interest of the organization under the duty of loyalty.");

to act reasonably in their decision-making—although in this context only with minimally reasonable business judgment.[49]

Similar dynamics apply in a variety of other fiduciary relationships—partnerships,[50] joint venturers,[51] lawyers holding funds for clients,[52] retirement plan administrators,[53] and so on. In each of these contexts, which the law calls "fiduciary," an individual exercises legal decision-making authority over property that is (in some sense) owned by another, guided by a "duty of loyalty" that requires the decision-maker to avoid conflicts of interest and exercise prudence or care.[54]

But not all fiduciary relationships involve entrustment and management of property in this way. For example, the relationship between a principal and an agent is a fiduciary one.[55] In an agency relationship, a "principal" grants an "agent" the power to make specified legal decisions on their behalf—which may, but need not, include powers over the principal's property; it could just as well include the power to enter into contracts, represent the principal in legal proceedings, or passively receive information.[56] Like other fiduciaries, agents owe a "duty of loyalty" to their

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RESTATEMENT OF CORPORATE GOVERNANCE § 5.01 cmt. d (AM. LAW INST., Tentative Draft No. 1 2022) ("The law does not prohibit transactions where there is a conflict of interest, but, absent an appropriate cleansing act, it subjects such transactions to the heightened scrutiny of an entire fairness review.").

49 *See, e.g.*, Michael Bradley and Cindy A. Schipani, *The Relevancy of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1, 17–19 (1989) ("Directors are required to exercise that degree of care ordinarily prudent persons would exercise under similar circumstances.").

50 *See, e.g.*, Rev. Uniform Partnership Act § 404 ("The only fiduciary duties a partner owes to the partnership and other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)).

51 *See, e.g.*, 46 AM. JUR. 2d *Joint Ventures* § 28 ("[T]he relationship between joint venturers is fiduciary in character.").

52 *See, e.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 56 (AM. LAW INST., 2000) ("A lawyer must take reasonable steps to safeguard funds and other property in the lawyer's possession belonging to a client or third person to whom the lawyer owes fiduciary duties or in which a client or such a third person claims an interest.").

53 *See, e.g.*, 1 Reg. of Invest. Mgmt. & Fiduciary Serv. § 13:12 ("A fiduciary includes any person who has discretionary authority or discretionary responsibility in the plan administration.").

54 *See supra* notes 50–53.

55 *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 559 (2015) ("[A]gents are . . . fiduciaries . . . ."); Deborah A. DeMott, *Fiduciary Principles in Agency Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 23, 24 (2019) (characterizing agency relationships as fiduciary relationships).

56 *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST., 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests asset to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

principals, alongside duties of care and competence.[57] An agent's duty of loyalty requires that they avoid certain conflicts and self-dealing, at the risk of disgorgement, while exercising their decision-making authority, in some sense, in the best interests of the principal.[58]

But with agents, the fiduciary duty of loyalty has different content than with trustees—agents owe a duty of *obedience* to the principal, often considered subsidiary to the duty of loyalty (and sometimes taken as a distinct, but equally fiduciary, duty).[59] Moreover, an agent's duty of loyalty requires them to interpret the principal's instructions reasonably in light of the principal's goals, and, if the principal is unavailable and the agent must decide, to make a reasonable effort to decide as the principal would have wanted, had they been available to consult.[60]

Lawyers are in some ways in a similar boat to agents—they are fiduciaries of their clients, and owe duties of loyalty and care.[61] Like trustees and corporate directors, attorneys' duty of loyalty requires them to avoid conflicts, and like agents, they have a duty to follow clients' instructions.[62] Lawyers are, however, also officers of the court and are hired because they have a body of expertise that clients do not, meaning that lawyers are not strictly agents of their clients—lawyers have discretion to draw on their expertise in pursuing their clients' goals, and "[t]here are situations in which the lawyer simply has to say no to the client."[63] A number of other professionals, including physicians, are fiduciaries with

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57 *See, e.g.*, 2A C.J.S. *Agency* § 266 ("The principal-agency relationship imposes upon the agent a duty of loyalty and good faith."); Restatement (Third) Of Agency § 8.08 ("Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.").

58 *See, e.g.*, 2A C.J.S. *Agency* § 270 ("An agent is under a strict duty to avoid any conflict between their self-interest and that of the principal to even the slightest extent.").

59 *See, e.g.*, Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. Corp. L. 43, 47–48 (2008) (arguing that the duty of obedience is an aspect of the duty of loyalty in fiduciary relationships); Miller & Gold, *supra* note 55, at 559 ("[F]ollowing instructions is frequently viewed as an element of loyalty.").

60 *See, e.g.*, Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 2 ("The fiduciary benchmark does not permit the agent to exploit gaps or arguable ambiguities in the principal's instructions . . . .").

61 *See, e.g.*, Richard W. Painter, *Fiduciary Principles in Legal Representation*, in The Oxford Handbook of Fiduciary Law 265, 285 (Paul B. Miller & Robert H. Sitkoff eds., Oxford Univ. Press 2019) (describing lawyers as fiduciaries of their clients).

62 *See, e.g.*, Sande Buhai, *Lawyers as Fiduciaries*, 53 St. Louis U. L.J. 553, 554–555 (2009) (discussing implications of lawyers' fiduciary status on their duties); Benjamin P. Cooper, *When Clients Sue Their Lawyers For Failing to Report Their Own Malpractice*, 44 Hofstra L. Rev. 441, 443 (2015) (discussing enforcement of lawyers' fiduciary duties).

63 Painter, *supra* note 61, at 278.

complex duties of loyalty much like lawyers.[64] Physicians are generally said to be fiduciaries of their patients, with corresponding duties of loyalty and care.[65] Their duty of loyalty, like agents, requires them to follow patient instructions,[66] and, like trustees, forbids certain financial conflicts.[67] Like lawyers, however, doctors have duties to pursue the goals of their patients consistent with their expertise and the norms of the profession.[68]

Next, the broad category of those charged with making decisions for adults without legal capacity—guardians, conservators, attorneys-in-fact under durable powers of attorney, and more—are fiduciaries.[69] All of these roles are subject to a duty of loyalty, including the obligation to avoid conflicts and self-dealing, and a duty of care requiring reasonable property management.[70] Unlike agents, this duty of loyalty does not require these sorts of fiduciaries to follow contemporaneous instructions from the individual for whom they act—that person, by hypothesis, lacks the legal capacity to make their own decisions.[71] But a guardian's duty of loyalty usually requires that they make decisions based on a reasonable belief of what the person would have wanted under the circumstances—a standard similar to that of agents unable to reach their principal.[72]

64 *See, e.g.*, Thomas L. Hafemeister & Selina Spinos, *Lean On Me: A Physician's Fiduciary Duty to Disclose an Emergent Medical Risk to the Patient*, 86 WASH. U. L. REV. 1167, 1199–1200 (2009) (discussing physicians' duty of loyalty); Mary Anne Bobinski, *Law and Power in Health Care: Challenge to Physician Control*, 67 BUFF. L. REV. 595, 638 (2019) (describing physicians' "duty of loyalty" as "oft-mentioned").

65 *See id.*

66 *See, e.g.*, John C.P. Goldberg, *The Duty of Care,* in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 3, at 405, 414 (observing that the duty of loyalty requires that a "physician embrace the 'intersubjectivity of the physician-patient relationship—i.e., that she *work with each patient* toward the goal of the patient's good health.").

67 *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483–84 (Cal. 1990) (holding that physicians have a fiduciary duty to disclose financial conflicts to their patients).

68 *See id.* at 483, 485.

69 *See, e.g.*, Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1157, 1184–85 (2012) ("Some, but not all, states include conservators in the definition of a fiduciary . . . ."); *supra* note 3 and accompanying text.

70 *See, e.g.*, Chen, *supra* note 22, at 317 ("[T]he duty of loyalty prohibits the guardian or agent from acting in any way other than in the *sole* interest of the incapable individual."); Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1218 (2012) (observing that the Uniform Guardianship Act "requires that the guardian follow the Prudent Person Rule and the Prudent Investor Rule when investing the ward's assets").

71 *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1076 (2022) ("If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decision will not be acknowledged by the legal system.").

72 *See, e.g.*, Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 86 (2007) ("The ultimate result was not only the creation of advance health-care directives and statutorily designated proxies, but a redefining of the proper role of

Executors of estates, too, are fiduciaries.[73] They owe a duty of loyalty to the beneficiaries of the will to avoid conflicts and exercise reasonable prudence in administering their bequests, just as a trustee would.[74] More like agents, executors also have a duty to comply with instructions in the will.[75] Indeed, executors' duties of obedience to the content of the will are stricter than agents'—executors must fulfill its written language, regardless of whether they reasonably believe the testator would have changed their mind under the circumstances.[76]

Beyond these core, uncontroversial fiduciary relationships, there are a few legal relationships that are sometimes, but not always, called "fiduciary." For instance, parents are sometimes (and controversially) referred to as fiduciaries of their minor children.[77] Either way, because "enforcement of these duties . . . is largely accomplished through informal bonding and monitoring mechanisms," the law on parents as fiduciaries is thin.[78] Similarly, there has been recent, mostly academic, interest in the possibility that government officials are fiduciaries of their constituents.[79] But because, if government officials are in fact properly called fiduciaries, their duties would primarily be enforced politically, the law on the question is thin, and the question remains open.[80]

Finally, just as we can say something about what the word "fiduciary" is understood to refer to and entail, there are some things it is thought

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a guardian—from being a representative of the court to being more akin to a judicially appointed agent of the ward."); *see also* Boxx & Hammond, *supra* note 70, at 1215 (observing that the Uniform Guardianship Act generally requires a guardian to decide "what the ward would have decided if asked when competent").

73 *See, e.g.*, 15 N.C. Index 4th *Executors and Administrators* § 57 ("Executors have fiduciary duties to legatees, including a duty not to engage in self-dealing.").

74 *See, e.g.*, 31 Am. Jur. 2d *Executors and Administrators* § 407 ("In fulfilling his or her fiduciary duty to the beneficiaries of a will, a personal representative must not engage in self-dealing.").

75 *See, e.g.*, Peck v. Botsford, 7 Conn. 172, 175 (1828) ("An executor stands in the place of his testator."); Richard F. Storrow, *Wills and Survival*, 34 Quinnipiac. L. Rev. 447, 479 (2016) ("In essence . . . the will is a set of directions to an agent . . . ."); *see also* James Toomey, *Executor Discretion*, 110 Iowa L. Rev. 1323, 1359 (2025) ("[E]xecutors have long been recognized to be *something like* an agent of the testator and estate.").

76 *See, e.g.*, Toomey, *supra* note 75, at 1358-59 (noting this distinction).

77 *See, e.g.*, Scott & Chen, *supra* note 5, at 227 ("The relationship between parents and minor children fits intrinsically into a fiduciary framework."); Miller, *Justifying Fiduciary Duties*, *supra* note 6, at 971 ("Parents and guardians are fiduciaries of their children and wards.").

78 Scott & Chen, *supra* note 5, at 227.

79 *See, e.g.*, Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, *in* Philosophical Foundations of Fiduciary Law 404 (Andrew S. Gold & Paul B. Miller, eds., 2014) (arguing that states are fiduciaries of the populations they govern).

80 *See id.*

not to cover. The concept of the fiduciary relationship is most frequently bounded by *contractual* relationships—contract partners are not fiduciaries.[81] Indeed, the most famous (if famously cryptic) dictum of fiduciary law insists that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties."[82] Similarly (although less discussed, for obvious reasons), people with no legal relationship to one another—strangers on the street, say—are in no fiduciary relationship with one another; whatever the content of their legal duties, it is provided by tort and criminal law, not fiduciary law.

In sum, a broad range of legal relationships—from trustees and corporate directors to agents and executors—are described as fiduciary, governed by polysemous standards of "loyalty" and "care," and set against contract partners and people who have never met.

B. Fiduciary's Domain

With this set of relationships in mind, many theories of the *domain* of fiduciary law—the contexts to which it applies—have been offered over the years. Most have turned out to be descriptively inadequate in some way, either suggesting that some relationships we don't call "fiduciary" ought to be, or vice versa.

Some theorists, for instance, start with trust and corporation as paradigmatic and suggest that fiduciary relationships are those in which one person exercises decision-making powers over the *property* of another.[83] As we've already seen, however, many fiduciary relationships—from agency to the physician-patient relationship—do not (or do not necessarily) involve powers over property.[84] So other theorists have suggested more catholicly that the fiduciary framework is applied where there is a

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[81] *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1412 n.49 (2002) ("Fiduciary duties do not arise only in contractual relationships."); Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (distinguishing between contract partners and fiduciaries).

[82] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[83] *See* Miller, *supra* note 6, at 987 (noting that a "popular reductivist argument holds that fiduciary duties are a kind of private property right or are necessarily incidental to private property rights"); Shepherd, *supra* note 18, at 63 ("This traditional view of fiduciary relationships can be simply stated as follows: a fiduciary relationship exists where one person has legal title and/or control over property or other advantage, and another is the beneficial owner thereof.").

[84] *See, e.g.*, Yifat Naftali Ben Zion, *The Underlying Conceptions of Fiduciary Law in* III Oxford Studies in Private Law Theory 143, 152 (Paul B. Miller & John Oberdiek, eds., Oxford Univ. Press 2025) ("[T]he relations between lawyers and clients, which do not necessarily involve such direct control [over property], are also unquestionably fiduciary.");

significant power imbalance or factual or legal vulnerability on the part of the beneficiary.[85] But where a property theory would jettison core fiduciary relationships like agency, a power-imbalance account would expand fiduciary's domain—many contractual relationships are characterized by power imbalances or vulnerability, but are not thought to be fiduciary.[86]

As a result of these difficulties, many scholars have argued that there *is* nothing distinctive about the fiduciary label, and that "fiduciary duties" are (at best) simply shorthand for a set of implied contractual duties, based on the anticipated intent of the parties in incomplete contracts.[87] To its credit, this account can explain the diversity of applications of the fiduciary label—but it is not entirely clear how it could be falsified.[88] And it is black letter law that fiduciary duties are not contractual,[89] many fiduciary relationships (such as guardianships) arise in the absence of anything resembling contract,[90] and the core content of fiduciary duties, particularly the duty of loyalty, cannot be substantially modified by agreement.[91]

Boxx, *supra* note 3, at 3 (observing that durable powers of attorney "generally arise[] in a non-commercial setting").

85 *See* DeMott, *supra* note 4, at 910 ("According to this view, courts impose fiduciary constraints whenever one person's discretion ought to be controlled because of characteristics of that person's relationship with another."); Gold & Miller, *supra* note 10, at 1 ("Fiduciary law governs relationships marked by asymmetries of power.").

86 *See, e.g.*, Shepherd, *supra* note 18, at 62 (making this argument).

87 *See* Austin Scott, *The Fiduciary Principle*, 37 Cal. L. Rev. 539, 540-41 (1949) (outlining a theory of fiduciary law as implied contract); *see also* Miller, *supra* note 6, at 980 (noting that the "most prominent reductivist argument" of fiduciary's domain is "from contract").

88 *See, e.g.*, Seana Valentine Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 Va. L. Rev. 159, 171–72 (2012) ("Given these issues, why not think that the better interpretive strategy is to look at what people actually said (and perhaps what they think they said), rather than at what the model suggests they should have said?").

89 *See, e.g.*, Restatement (Second) of Trusts § 169 cmt. c (Am. Law Inst., 1957) (trustee's duties "are not contractual in nature"); *see also* DeMott, *supra* note 4, at 880 ("[D]escriptions drawn exclusively from contract principles are surely mistaken.").

90 *See* Miller, *supra* note 6, at 982 ("Fiduciary relationships may alternatively be established by non-contractual agreement, but unilateral undertaking, or by legislative or judicial decree."); Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 Wash. L. Rev. 581, 587 (2016) (summarizing the process of guardianship appointment).

91 *See, e.g.*, Lucian Ayre Bebchuck & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 Nw. U. L. Rev. 489, 496 n.16 (2002) (observing the duty of loyalty for corporate directors as an example of non-waivable, mandatory corporate governance); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 Geo. L.J. 67, 69 (2005) ("[T]rustees' fiduciary duties are not, and never have been, completely waivable.").

Before surrendering fiduciary to contract's empire, there *is*, we have recently seen, an alternative—a set of theories that account, at least roughly, for the relationships that the law calls "fiduciary." For example, the most prominent account in recent years has been Paul Miller's—"[a] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."[92] Similarly, J.C. Shepherd had previously suggested that "[a] fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power."[93] And Lionel Smith theorizes from the set of relationships "in which a person has been authorized and empowered to carry out a mission, an assignment, a function, a task, a charge for or on behalf of someone else."[94]

Theories in this vein plausibly cover the field of fiduciary law—all of the relationships discussed above involve (at least) one person making legally effective decisions (in some sense) "on behalf" of another.[95] At the same time, these accounts exclude, at least *prima facie*,

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92 Miller, *supra* note 15, at 69.

93 Shepherd, *supra* note 18, at 75.

94 Smith, *supra* note 35, at 3.

95 The divergent senses in which one might read "on behalf of" will turn out to be significant. *See, e.g.*, Wellman, *supra* note 31, at 114 ("[T]he expression 'to act for' is ambiguous; it can mean either 'to act in place of' or 'to act in the interest of.'"). Moreover, there are a handful of relationships called "fiduciary" in which *who the other is* on behalf of whom a fiduciary decides is importantly, and difficultly, ambiguous. Consider a three-member business partnership. The law says that each partner owes fiduciary duties to the other partners and the partnership. *See, e.g.*, Rev. Unif. P'ship Act § 404(a) (describing business partners as fiduciaries of "the partnership and the other partners"). The ambiguity in these sorts of cases is whether partners, in exercising their legal powers, are deciding "on behalf of" (1) each partner, (2) the partnership as an entity distinct from each partner, or (3) in some way on behalf of the partnership's joint decision-making in a way distinct from each partner but that also does not treat the partnership as an entity in its own right. The difficulty for our purposes is that resolving which of these is the right way to think about partnership decision-making turns on difficult and controversial questions of the metaphysical status of collective identity and intentionality that I am setting aside here. *See generally* David P. Schweikard & Hans Bernhard Schmid, *Collective Intentionality*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta, ed., 2021) (discussing the history and different theories of collective identity and intentionality). Finally, there are some roles often called fiduciary that do not fit this preliminary account, most prominently advisory roles, where one person offers advice and expertise to another, but does not have the power to make legally effective decisions. Because the focus here is not which relationships are properly called fiduciary, I set these sorts of roles aside. If the preliminary theory of the boundaries of the fiduciary concept offered here ends up adequately bounding the concept, then these relationships are not, in fact, "fiduciary" ones. If on a revised account of fiduciary's boundaries they qualify, further work is required to consider whether and how they fit in the account of fiduciary standards offered below.

contractual relationships and relationships between strangers. In particular, these accounts focus our attention on an important aspect of fiduciary relationships—they are essentially *other-regarding*; in making a decision (in some sense) "on behalf of" another, the fiduciary's posture is oriented towards someone else in a significant respect.[96] In contrast, in discharging one's contractual obligations, one's primary posture is towards the *content of the agreement*, not the *partner* on behalf of whom one has no power to make decisions.[97]

So let's start here—with a preliminary theory of the domain of fiduciary relationships as those that involve one person's legally effective decision-making (in some sense) "on behalf of" another. This is an account of the domain of fiduciary law, but it doesn't tell us much, if anything, about its content. That is the question to which we now turn.

C. Fiduciary's Content

Fiduciary relationships involve a fiduciary making legally effective decisions (in some sense) "on behalf of" a beneficiary. To that end, the law necessarily recognizes that fiduciaries have discretion in their decision-making—if they didn't, it wouldn't be the *fiduciary* deciding; but rather, say, the beneficiary or the court.[98] At the same time, however, fiduciary discretion is not unbounded—fiduciaries have discretion, but they can't use it however they want.[99] If the law granted decision-makers *unlimited*

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96 *See, e.g.*, Chen, *supra* note 22, at 335-36 (describing fiduciary relationships as "other-regarding"); Smith, *supra* note 35, at 19 ("More recent common law scholarship has increasingly placed other-regarding power at the heart of the fiduciary relationship.").

97 *See, e.g.*, Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 209 (observing that contractual implementation "takes the terms of the contract as its lodestar," rather than the contract partner); D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 Ohio St. L.J. 609, 618 (2014) ("[T]he duty of good faith and fair dealing is unlike a fiduciary duty because the former requires fidelity to the deal, while the latter demands fidelity to the beneficiary of the duty."); Smith, *supra* note 35, at 107 ("[W]e do not need a concept of loyalty to regulate contractual performance, because the question whether the contract was performed or not is answered objectively.").

98 *See, e.g.*, Toomey, *supra* note 75, at 1371 ("[D]iscretion entails deference."); Smith & Lee, *supra* note 97, at 632 (noting that "courts applying fiduciary law should respect the grant of discretion to the fiduciary, rather than attempting to displace that discretion with judicial mandate"); Smith, *supra* note 35, at 88 ("[I]f there was always a legally determined correct course of action—then there would not be a discretionary power.").

99 *See, e.g.*, Boxx, *supra* note 3, at 44 ("While the general nature of fiduciary responsibilities assumes that the fiduciary's role is open-ended and unspecified, thus requiring fiduciary duties to put limits on that discretion . . . .").

discretion, that wouldn't be a fiduciary relationship.[100] Indeed, the law nowhere recognizes unlimited discretion over another's person,[101] and with respect to property, the law calls unlimited discretion ownership in fee simple, not any sort of fiduciary relationship.[102]

Fiduciary relationships, in other words, are not just those in which one person decides in a legally effective way (in some sense) "on behalf of" another—they are those where the fiduciary exercises discretion *subject to some standard*.[103] Compared to efforts to organize fiduciary's domain, less work has been done theorizing the content of fiduciary standards.[104] As a first step, we have seen that fiduciary conduct is universally governed by something called the "duty of loyalty;"[105] often thought to entail that the fiduciary act in the "best" or "sole" interests of the beneficiary.[106] Indeed, unlike the other "fiduciary" duties, the duty of loyalty cannot generally be modified by agreement, making it plausibly essential to the concept.[107] It is true that everywhere the law finds a fiduciary relationship, it finds a non-waivable set of duties it refers to as the "duty of loyalty."[108]

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100 *See, e.g.*, Miller, *supra* note 15, at 72 ("[I]t is also an essential characteristic of fiduciary power that it is *specified*.").

101 *See, e.g.*, Lon L. Fuller, The Morality of Law (rev. ed., 1969) (arguing that stability is a conceptual necessity of lawfulness).

102 *See, e.g.*, Tamar Frankel, *Watering Down Fiduciary Duties*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 242, 246 ("The absence of these conditions converts a possible fiduciary relationship into a gift.").

103 *See, e.g.*, Smith & Lee, *supra* note 97, at 621 ("The fiduciary duty of loyalty constrains . . . discretion by proscribing certain forms of self-interested behavior by fiduciaries."). In theorizing the content of fiduciary standards, it is worth setting aside for the moment whether they must be enforceable by private lawsuit—some theorists hold that it is essential to the concept. *See, e.g.*, Toomey, *supra* note 75, at 1364-66 (summarizing this argument). Others do not. *See, e.g.*, Velasco, *supra* note 46, at 63 (observing that in corporate fiduciary law the standard of conduct and the extent to which it is enforceable diverge). In the end, of course, either conclusion would have to be argued for.

104 *See, e.g.*, Edelman, *supra* note 34, at 22 (describing the different ways in which the law refers to fiduciary standards as motivated by "loyalty" or "best interests").

105 *See, e.g.*, Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 Mo. L. Rev. 279, 280 (2002) ("The duty of loyalty has been called 'the essence of the fiduciary relationship' and even has been considered an expression synonymous with fiduciary.").

106 *See* Shepherd, *supra* note 18, at 75 (describing the essence of fiduciary relationships as one person's exercise of power in the best interests of another); Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 St. Mary's J. Legal Mal & Ethics 298, 312 (2019) ("The essence of fiduciary duty is loyalty—loyalty to the interests of the person who is the beneficiary of the relationship.").

107 *See* Smith, *supra* note 35, at 30 ("A great deal of judicial and academic writing on fiduciary law . . . treats loyalty as the central organizing concept . . . .").

108 *See, e.g.*, Gold & Miller, *supra* note 10, at 1 ("There is little doubt that fiduciary relationships generate at least one distinctive legal duty, the duty of loyalty.").

From this perspective, theories that describe fiduciary standards in terms of the duty of loyalty are true as far as they go.[109] But if the best we can say about the content of fiduciary standards is that they require a "duty of loyalty," it isn't very *helpful*.[110] As we've seen, the "duty of loyalty" means different things in different fiduciary relationships—sometimes it just requires conflict avoidance enforced with bright-line rules; sometimes it asks fiduciaries to make inferences about what their beneficiary would have wanted; sometimes both, or something else.[111] Defining the content of fiduciary relationships in terms of the "duty of loyalty" pushes the theorizing to another level—it demands a theory of the "duty of loyalty."

Thus far, theories of the unified conceptual content of the duty of loyalty have not been forthcoming. For example, Andrew Gold has suggested that the best that can be said about fiduciary standards is that they "require a legal duty of loyalty, full-stop. There is no particular conception of what loyalty is that will fit all fiduciary relationships . . . ."[112] If this is indeed all there is, it's still fair to wonder whether there is any theoretical coherence to the content of fiduciary standards.[113] We can *call* anything we want "loyalty"—what we need under this account is a theory of what counts as a conception of fiduciary loyalty, once again punting the theorizing elsewhere in pursuit of coherence.

Similarly, Lionel Smith has argued that the standards that guide fiduciary decision-making are derived from the purpose or mission for which the fiduciary was granted legal powers—"a person who is granted a power for the pursuit of an other-regarding mission can only rightly use the power for that purpose."[114] Like an account that relies on bounded polysemy in the duty of loyalty, this view can explain the diversity of obligations the law imposes on fiduciaries.[115] But also like that account, it pushes the theorizing to another level—demanding theories of the different purposes of fiduciary roles.[116]

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109 *See, e.g.*, DeMott, *supra* note 4, at 882 ("If a person in a particular relationship with another is subject to a fiduciary obligation, that person (the fiduciary) must be loyal to the interests of the other person (the beneficiary).").

110 *See, e.g.*, Boxx, *supra* note 3, at 17 (describing the duty of loyalty as "impossible to define with precision").

111 *See supra* Part I.A; *see also* Shepherd, *supra* note 18, at 51 ("[T]he problem is constantly arising of the extent or scope of the duty of loyalty that arises from the fiduciary relationship"); Gold, *supra* note 17, at 190 (discussing the diversity of content in the fiduciary relationships duty of loyalty); SMITH, *supra* note 35, at 79–80 ("There is little consensus, however, as to what precisely [the duty of loyalty] means.").

112 Gold, *supra* note 17, at 190.

113 *See, e.g.*, SMITH, *supra* note 35, at 30 ("[Loyalty] has so many meanings that some would suggest that it cannot usefully serve as an organizing concept in this field of law.").

114 *Id.* at 15.

115 *See id.* at 46 (discussing different fiduciary roles and corresponding obligations).

116 *See id.*

As we've seen, the question of the purpose of fiduciary relationships in general has proven difficult—theories of fiduciary's domain bounded by a unified purpose, whether intent implementation, correcting power imbalances, or facilitating money management have proven unsatisfactory.[117] Our best preliminary theory of fiduciary's domain—fiduciaries are those legally empowered to make decisions (in some sense) "on behalf of" others—suggests that the fiduciary framework might be allocated for a wide range of purposes.[118] But if there *is* some coherence to the standards governing fiduciary decision-making, that would suggest coherence in the purposes of fiduciary relationships. By theorizing about the standards governing fiduciary decision-making, then, we might end up shedding light on the purposes of different fiduciary relationships.[119]

In short, while we can grant that fiduciary relationships involve one person's legally effective decision-making (in some sense) "on behalf of" another, subject to some standard, little progress has been made on theorizing the content of that standard or standards. We know that it is *called* the "duty of loyalty," but have little insight into what that *means*. In beginning that project, let's turn to health law.

II. Best Interests and Substituted Judgment in Fiduciary Law

Fiduciary relationships involve one person's making legally effective decisions (in some sense) "on behalf of" another, subject to some standard called the "duty of loyalty." Our project is to theorize the content of that standard. In principle, it could be almost anything—the "duty of loyalty" could mean that fiduciaries must decide based on what they think is best for society overall, or what they think is best aesthetically.[120]

Most of the infinite possible standards are obviously theoretical non-starters. In getting a grip on fiduciary standards, it would be useful to start with standards that actually guide fiduciary decision-making in some concrete legal context. That is what this Part does. In the fiduciary sub-field of deciding on behalf of incapacitated patients, a vast literature and thorough legal apparatus debates two decision-making standards- "best interests"

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117 *See supra* Part I.B.

118 *See supra* Part I.B.

119 *See infra* Part III (offering an account of the law's view of different purposes in different fiduciary relationships, derived from differences in the standards governing fiduciary decision-making).

120 *See* Toomey, *supra* note 32, at 1290, 1299 (describing possible alternative decision-standards); Frolik, *supra* note 72, at 61 (listing conceivable standards that could guide surrogate decision-making).

and "substituted judgment"—that might offer a lens on the standards of fiduciary decision-making generally.

This Part first discusses the structure of, and debate between, the best interests and substituted judgment standards in healthcare decision-making. It then turns to fiduciary law generally, arguing that these two standards can be seen to organize and systematize the standards by which other fiduciaries must decide.

A. Surrogate Decision-Making in Healthcare

Although there are many domains in which decisions have to be made for people who cannot decide for themselves, healthcare decision-making has generated the most substantial literature—perhaps because of its stakes, and the frequency with which it occurs.[121] When a patient is unconscious or otherwise incapacitated to make their own medical decisions, the law enables another person—called a "surrogate decision-maker"—to decide on the patient's behalf. From surrogates selected by the patient, by durable power of attorney or healthcare proxy, to those selected by default, like a statutory surrogate or guardian, medical surrogate roles are generally understood to be fiduciary relationships, with the legal power to make healthcare decisions on behalf of the beneficiary patient vested in the fiduciary surrogate.[122]

In the voluminous literature discussing the standards by which these fiduciaries ought to decide, two alternatives have dominated—"best interests" and "substituted judgment."[123] Under the "best interests" standard, a surrogate is directed to make what is "objectively" the best all-things-considered decision for the patient.[124] The test is "objective" insofar as it

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121 *See* Alexander A. Boni-Saenz, *Personal Delegations*, 78 Brook. L. Rev. 1231, 1254 (2013) (describing a "sizable literature" on this topic); *see also* Kohn, *supra* note 3, at 249 ("[N]early half of older adults who are admitted into a hospital have at least some of their treatment decisions made for them by a surrogate decision-maker.").

122 *See* Kohn, *supra* note 3, at 255 ("A surrogate decision maker, regardless of type, has a duty of loyalty to the principal."); *In re* Elizabeth R. D'Arcy, 19 Quinnipiac Prob. L.J. 40, 45-46 (2005) (describing a decision-maker under a healthcare power of attorney as a fiduciary).

123 *See* Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 Ind. L.J. 1619, 1632 (2008) (describing "fierce" and "familiar" debate "between those who support a best interests test and those who support a substituted judgment test"); Joan H. Krause, *Can Health Law Truly Become Patient Centered?*, 45 Wake Forest L. Rev. 1489, 1500 n.37 (2010) (referencing the "long-standing debate over whether surrogate decision-makers should be expected to act in accordance with a best-interests or a substituted-judgment standard").

124 *See* Richard, *supra* note 21, at 407–08 ("Under [the best interests] approach, the surrogate evaluates the patient's best interests based upon objective socially shared criteria.").

takes into account the objective circumstances facing the patient alongside general social understandings of what the interests of the patient are and how they might be best promoted.[125] To that end, best interests decision-making considers factors like quality of life, likelihood of success of a given course of treatment and associated risks, and available alternatives—the sorts of things reasonable patients tend to care about.[126] Moreover, the best interests standard is generally understood to consider only (or be overwhelmingly focused on) the patient's best interests now, rather than some broader sense of a person's lifelong "interests."[127]

Given its aspiration—making the "objectively best" decision for the patient—the best interests standard is agnostic to the values, preferences, and longer-term life story of the individual patient. Indeed, it treats the patient as a placeholder reasonable patient who would want what a reasonable person would want, rather than as a *particular* person who might decide something other than what is "objectively best," and be entitled to respect.[128] Indeed, best interests' agnosticism towards the broader identity of the patient is part of its appeal in the bioethical debate—the standard is often endorsed on the hypothesis that certain kinds of incapacitated patients may indeed no longer be the person they were previously, and might be a new person about whom we know little, or not a person at all but some other sort of entity to which we have moral obligations.[129]

In short, best interests reasoning is distinguished by the *impersonal*, or *de*-personalized, posture according to which it asks fiduciaries to decide—it decides for the patient as though they were a placeholder of a reasonable person, rather than any*one* in particular.[130] In the language

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125 *See* Stewart G. Pollack, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 Rutgers L. Rev. 505, 524 (1989) (noting that the best interest test "[m]easure[s] by a standard of objective reasonableness . . . as viewed by a reasonable person"); *see also* Smith & Lee, *supra* note 97, at 627 (observing that "reasonableness" "cannot be understood and applied without reference to social norms.").

126 *See, e.g.*, Kim Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 Utah L. Rev. 1329, 1362–63 (2012) (describing factors under the best interest test).

127 *See, e.g.*, Rebecca Dresser, *Missing Persons: Legal Perceptions of Incompetent Patients*, 46 Rutgers L. Rev. 609, 636 (1994) ("'Best interests' is traditionally invoked as shorthand for treatment decision making centered on protecting the incompetent patient's contemporaneous welfare.").

128 *See, e.g.*, Norman L. Cantor, *The Real Ethic of Death and Dying*, 94 Mich. L. Rev. 1718, 1733 (1996) ("[T]he best-interests standard assumes that the patient would want the same treatment that the average person in same circumstances would want."); Richard, *supra* note 21, at 408 (observing that the best interest test is not justified by reference to the patient's autonomy).

129 *See, e.g.*, Rebecca S. Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 Ariz. L. Rev. 373, 393-94 (1986) (making this argument).

130 *See* Richard, *supra* note 21, at 419.

of bioethics, the test is justified by "beneficence"—acting for the objective benefit of the patient.[131] Where it applies in law governing healthcare decision-making, best interests is typically operationalized through a multi-factorial balancing test.[132] But the same impersonal posture could conceivably justify prophylactic rules, rules of thumb, or heuristics—that, say, any illness that can be treated without side effects ought to be.[133]

Arrayed against this approach is the substituted judgment standard. Substituted judgment asks surrogate decision-makers to make the decision the patient would have made if they were able.[134] Indeed, a surrogate is to make the decision the patient would have made even if the surrogate thinks some other decision would be in their objective best interest.[135] Rather than considering the treatment options from an objective, third-person perspective, the substituted judgment standard directs a surrogate to what is known about what the *patient* would have done, subjectively; treated as a unique individual.[136] To make this sort of a decision, surrogates look to written evidence of treatment preferences, as well as to general knowledge of the patient's values, aspirations, and perspectives on medical treatment.[137]

In contrast to best interests, the substituted judgment standard takes into account a broader time-horizon—considering the patient's life and

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131 *See, e.g.*, Pollack, *supra* note 125, at 524-25 (describing the best interests test as rooted in beneficence rather than autonomy); Janet L. Dolgin, *Medical Disputes and Conflicting Values: Is There a "Right to Die" Later?*, 2020 BYU L. Rev. 95, 110 (same, and noting that beneficence and autonomy may conflict).

132 *See, e.g.*, Cantor, *supra* note 128, at 1733 (listing factors relevant to best interests analysis); Chen, *supra* note 22, at 350-51 (describing the best interests test as multifactorial).

133 *Cf.* Jennifer S. Blumenthal-Barby, Good Ethics and Bad Choices: The Relevance of Behavioral Economics for Medical Ethics (2021) (arguing that behavioral economics may justify heuristic nudges towards decisions generally in people's objective best interests in medical decision-making).

134 *See, e.g.*, Chen, *supra* note 22, at 338 ("The equitable doctrine of substituted judgment . . . requires the court to give effect to what the incapable individual would have wanted if she was capable."); Boni-Saenz, *supra* note 121, at 1255 (describing substituted judgment as a "subjective test").

135 *See, e.g.*, Michael P. Combs et al., *Substituted Judgment in Principle and Practice: A National Physician Survey*, 88 Mayo Clinic Proc. 666, 666 (2013) (noting that substituted judgment requires physicians to do what the patient would have wanted, not what the surrogate thinks is best).

136 *See, e.g.*, Toomey, *supra* note 32, at 1298 ("[T]he law asks surrogate decision-makers to do what the person would have done, based on their knowledge of and inferences about the person before their incapacity.").

137 *See, e.g.*, Eric Virgil, *Substituted Judgment—How Do You Prove What an Incapacitated Person Would Want?*, 46 ACTEC L.J. 119, 122, 124 (2020) (discussing proof that a proffered substitute judgment is indeed what the patient would have wanted).

story rather than their interests at the time of decision.[138] Where best interests is, by design, agnostic to the patient's broader personal identity,[139] substituted judgment is focused on just that—and is instead agnostic to "objective," generalized social views about whether the decision is a good one. In bioethical terms, substituted judgment is justified with reference to "autonomy" over "beneficence."[140]

Although the debate is generally framed with best interests and substituted judgment as oppositional paradigms—and clearly the *postures* they ask fiduciaries to adopt are—scholars have pointed out that in implementation these standards can be blended in complex ways.[141] Indeed, when considering the "best interests" of a *person*, it is hard to disregard *their* interests.[142] And, indeed, many statutory formulations of the best interests test ask decision-makers to at least take into account the patient's values and known preferences, blending substituted judgment into best interests.[143] At the same time, since most people aspire to make decisions in their own best interests, substituted judgment can look a lot like best interest reasoning in practice.[144]

Moreover, while the debate between these standards has largely taken place in the pages of law reviews and philosophy journals, it has not been confined to academia—both standards have a long history of legal application. Indeed, their legal history is intertwined. Long before being applied to healthcare decision-making in the twentieth century,

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138 *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM 192, 199 (1993) (arguing that substituted judgment is an appropriate standard by virtue of considering an individual's life as a whole).

139 *See supra* note 128 and accompanying text.

140 *See, e.g.*, Boni-Saenz, *supra* note 121, at 1255 (arguing that substituted judgment "safeguards the ward's autonomy"); Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death with Dignity*, 81 TEX. L. REV. 1823, 1827 (2003) ("Scholars defending the authority of advance directives assign a high value to autonomy . . . .").

141 *See, e.g.*, Daniel P. Sulmasy & Lois Snyder, *Substituted Interests and Best Judgments: An Integrated Model of Surrogate Decision Making*, 304 JAMA 1946, 1946 (2010) (observing that the bifurcation of substituted judgments and best interests "does not always reflect clinical reality"); Pollack, *supra* note 125, at 529 n.123 (noting that "substituted judgment and best interests test[s] may sometimes overlap").

142 *See, e.g.*, Helen J. Taylor, *What Are "Best Interests"? A Critical Evaluation of "Best Interests" Decision-Making in Clinical Practice*, 24 MED. L. REV. 176, 176 (2016) (arguing that objective best medical interests is not the way to understand the best interests of persons).

143 *See, e.g.*, Alisa Balderas, *The Variability of Schizophrenia and its Effects on Procreational Autonomy*, 28 S. CAL. INTERDISC. L.J. 473, 485 (2019) (discussing California's approach, described as "essentially a hybrid approach of the best interest and substituted judgment standards").

144 *See, e.g.*, Thomas G. Gutheil & Paul S. Appelbaum, *Substituted Judgment: Best Interests in Disguise*, 13 HASTINGS CTR. REP. 8, 8 (1983) (arguing that substituted judgment bleeds into best interest analysis).

both the best interests and substituted judgment standards were developed in equity—the domain from which fiduciary law emerged—to make financial decisions for the incapacitated.[145] In the twentieth century, the law's interest in these standards, and the debate between them, drifted into healthcare, partially driven by a handful of high-profile cases—Karen Quinlan; Nancy Cruzan.[146]

Today, although the debate between best interests and substituted judgment continues to rage in bioethics,[147] as a *legal* matter, the issue is largely settled in healthcare decision-making—substituted judgment won.[148] After drifting from guardianship law into healthcare decision-making in the mid-twentieth century, substituted judgment rapidly gained favor and was endorsed by the Supreme Court of the United States in *Cruzan*.[149] And after gaining traction in healthcare decision-making, substituted judgment has returned as the first choice decision-making standard to the fiduciary domain of its origins—financial decision-making on behalf of the incapacitated—endorsed by the Uniform Probate, Power of Attorney, and Guardianship Codes.[150]

In sum, with respect to fiduciary healthcare decision-making on behalf of incapacitated patients, there is robust literature and legal experience debating between two alternative standards—best interests (objective, de-personalized, perhaps easier, less likely to impose the values of no-longer-existent person on a new morally-significant entity) and substituted judgment (attuned to the personal identity of the patient). Let's now return to the broader domain of fiduciary law, and see how these two standards might be thought to organize fiduciary decision-making standards more generally.

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145 *See, e.g.*, Dresser, *supra* note 127, at 636–37 (observing that "best interests" was "[i]mported from the English law governing management of the 'lunatic's' estate, as well as disputes over child custody . . . ."); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale L.J. 1, 16–30 (1990) (describing the origins of the substituted judgment test in the equity courts).

146 *See, e.g.*, Harmon, *supra* note 145, at 30–41 (summarizing this history).

147 *See, e.g.*, Samuel Dale, *Personhood, Critical Interests, and the Moral Imperative of Advance Directives in Alzheimer's Cases*, 7 Voices in Bioethics 2 (2021) (summarizing the state of the debate).

148 *See, e.g.*, Toomey, *supra* note 32, at 1299 ("[B]est interests has fallen broadly into disfavor as compared to substituted judgment.").

149 Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261, 262 (1990) (holding that a state may demand clear and convincing evidence of a patient's preference to enforce a substituted judgment based on it).

150 *See, e.g.*, Mark R. Caldwell, J. Brian Thomas & Marisol Trottier, *Ensure Powers of Attorney Fulfill Intended Purposes*, 45 Est. Plan. 3, 4 (2018) (observing that the Uniform Power of Attorney Act endorsed substituted judgment); Boxx & Hammond, *supra* note 70, at 1215 (noting the same for the Uniform Guardianship Act).

B. Fiduciary Standards from Trustee to Agent

Fiduciaries are, we have seen, individuals who make legally effective decisions (in some sense) "on behalf of" another, guided by some standard. Best interests and substituted judgment are decision-making standards applied to fiduciaries making healthcare decisions for the incapacitated. As we'll see, these paradigms offer a lens through which to organize fiduciary standards across fiduciary's domain. Indeed, we might say that a fiduciary is a person making legally effective decisions (in some sense) "on behalf of" another, guided by the standards of best interests, substituted judgment, or some combination of the two.

Let's start with classic common law trust. Through the lens of healthcare decision-making, the duties that trustees owe beneficiaries look a lot like the best interests standard. Indeed, trustees' overriding duty is to maximize the value and longevity of the trust corpus, while making distributions as provided in the terms of the trust.[151] All of the fiduciary duties governing trustee behavior are tailored towards this end in one way or another. Self-dealing, for instance, raises too great risk of loss, too difficult to police by lay beneficiaries, and is banned outright, while other conflicts raise similar difficulties and are tightly regulated.[152] The trustee, similarly, has a duty to invest the corpus as a prudent investor would, to keep records and account to beneficiaries to shed light on any mismanagement.[153]

This is best interests reasoning. Like best interests reasoning in healthcare, the question that guides trustees is not about what the beneficiaries want as individuals—indeed, trustees have no general duty to concern themselves with the beneficiary's goals for the trust corpus.[154] To be

151 *See, e.g.*, Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 390 (2010) (discussing the trustee's duty to maximize trust corpus against their duty to follow the terms of the trust); Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 Notre Dame L. Rev. 1, 37 (2012) (discussing the same).

152 *See, e.g.*, Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 Wm. & Mary L. Rev. 1007, 1071 (2018) ("This 'no-further-inquiry' rule establishes a prophylactic standard designed to bar deals involving a high risk of abuse."); Deborah S. Gordon, *Trusting Trust*, 63 Kan. L. Rev. 497, 507–08 (2015) (describing the no further inquiry rule as a "strong prophylactic rule designed to counter-balance the potential for misappropriation"); Smith, *supra* note 35, at 34 ("Conflicts of interest create a universal danger when judgment must be exercised unselfishly, because power can be improperly used entirely unconsciously.").

153 *See, e.g.*, Unif. Prudent Inv. Act § 2 (Unif. Law Comm'n 1994) ("A trustee shall invest and manage trust assets as a prudent investor would . . . ."); Boxx & Hammond, *supra* note 70, at 1218 (describing the Prudent Investor Rule as comprised of "standards").

154 *See, e.g.*, Miller & Gold, *supra* note 55, at 559 ("A paternalistic form of fiduciary loyalty is arguably prominent in trust law, in which trustees have independent discretion to make choices that beneficiaries may disagree with.").

sure, in making distributions, the trustee has a duty to follow the terms of the trust, and thus has to be concerned with the role of the money among *someone's* life projects—but that someone is the settlor, who set up the trust and wrote its terms, not the beneficiaries.[155] Beyond that, trustees' duties are to act in a way thought to maximize the value and longevity of the trust corpus, while minimizing the risk of loss.[156] Maximizing the value and duration of property is, of course, what is in the objective, impersonal best interests of property owners.[157]

To be sure, unlike in health law, the fiduciary duties that guide trustee decision-making are paradigmatically strict rules rather than all-thing-considered balancing tests. But just as we can imagine heuristics crystallizing in best interests decision-making in healthcare—for example, a rule to treat anything easily treated with antibiotics—presumably the law has concluded that self-dealing is inconsistent with the objective best interests of beneficiaries *consistently enough* to justify a prophylactic rule.[158] Moreover, many of the standards governing trustee behavior *are* all-things-considered balancing tests under which the trustee must show that a decision is in the beneficiary's objective best interests, just as best interests is implemented in healthcare—from a trustee seeking prior court approval for a conflict to one claiming that their level of diversification was adequate.[159]

Contrast all this with the fiduciary duties of an agent. The distinctive duty of agency is, of course, the duty of obedience, which has no correlate in the relationship between trustee and beneficiary.[160] The duty

155 *See, e.g.*, Unif. Prudent Inv. Act § 3 *see also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1118 (2004) ("The deviation doctrine is meant to be intent-serving, on an imputed intent standard (what the settlor would have wanted done had he or she known of the changed circumstances).").

156 *See* Restatement (Third) of Trusts § 90 (Am. Law Inst., 2007).

157 *See, e.g.*, Smith, *supra* note 35, at 111 ("Generally when the mission is to look after the financial or pecuniary affairs of another person or persons, what loyalty requires in the exercise of powers is that the powers be used to promote the interests of that other person or persons.").

158 *See, e.g.*, Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573–74 (2003) ("The underlying assumption is that in the trust law context these deals are so frequently undesirable that the costs of extirpating the entire class of transaction (a rule) are less than the costs of case-by-case adjudication (the fairness standard)."); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor Langbein*, 47 Wm. & Mary L. Rev. 541, 565 (2005) (defending this assumption in the context of trust law).

159 *See* Restatement (Third) of Trusts § 78 cmt. c(3); Sitkoff & Dukeminier, *supra* note 40, at 611 (describing *a priori* judicial approval of conflicts in the beneficiary's best interest).

160 *See* Atkinson, *supra* note 59; Miller & Gold, *supra* note 55.

of obedience is a duty to do as the principal instructs.[161] This is a form of substituted judgment. In some cases, what agency calls the "duty of obedience" just *is* decision-making according to the substituted judgment standard—where an agent cannot get in touch with the principal, they are to do what they reasonably believe the principal would have done.[162] That is the same standard as surrogates making healthcare decisions for incapacitated patients, where it is explicitly called "substituted judgment."[163]

But there is a broader point here, perhaps obscured by a focus on incapacitated or unavailable principals in health law—agency is *always* substituted judgment, or at least universally *justified* by substituted judgment-like reasoning.[164] It is true that where an agent for a capacitated principal has recently received explicit instructions, the law does not tell the agent to make what it calls a "substituted judgment"—the agent is simply to reasonably interpret the instructions and follow them.[165] But just as with trust, it is important to distinguish the justificatory *frame* the law is asking a fiduciary to adopt from the rules it prescribes to *implement* that frame—the distinction between the no-conflicts rules of trust and the best interests decision-making frame that justifies them, for example.[166]

Asking an agent to follow a principal's instructions (as opposed to deciding in their best interests, or according to any other conceivable standard) is ultimately only justifiable if what the law is *trying to do* is implement what the principal wants—otherwise there is no reason to care about what they said; we care about what people *say* because we presume, in general, it is a pretty good indication of what they *think*.[167] The inference that what a capacitated principal said recently is what they want is

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161 *See* Atkinson, *supra* note 59 Miller & Gold, *supra* note 55.

162 *See, e.g.*, DeMott, *supra* note 60, at 7–8 (summarizing older cases demonstrating this dynamic).

163 *See, e.g.*, Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. Mich. J. L. Reform 739, 749 (2012) (noting that substituted judgment "may justify rejection of a previously stated preference when it is likely that the incapacitated person would make a different decision if able to comprehend the new circumstances").

164 *See, e.g.*, DeMott, *supra* note 60, at 33 ("Agency doctrine, in contrast, focuses an agent's interpretation on the principal's expressed or cognizable wishes at the time the agent determines how to act.").

165 *See, e.g.*, Restatement (Third) of Agency § 2.01 (Am. Law Inst., 2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.").

166 *See* Sitkoff, *supra* note 158; Leslie, *supra* note 158.

167 *See, e.g.*, Lawrence M. Solan, *Contract as Agreement*, 83 Notre Dame L. Rev. 353, 357, 379 (2007) ("Actual agreement matters in the law of contracts."); Toomey, *supra* note 75, at 1335-36 ("[S]olicitude for objective intents could not justify a scheme of freedom of testation because objective intents do not exist."); *see also* DeMott, *supra* note 60, at 3 ("How the agent should understand the principal's instructions is contingent on circumstances

strong—much stronger than cases where an incapacitated principal made vague statements decades ago—and we might worry about principals later fraudulently claiming they did not mean what they said.[168] These sorts of considerations plausibly justify a rule directing agents to act according to a reasonable interpretation of the principal's instructions—but that rule is only coherent if the broader goal is for the agent to do what the principal would have wanted substituted judgment.[169]

Best interests and substituted judgment, then, give us two poles of fiduciary standards—paradigmatically, a trustee's duty of loyalty is a form of best interests reasoning; agents' duties are a form of substituted judgment. And just as these standards blend into one another in health-care decision-making, the standards by which other fiduciaries act blend some aspects of best interests with some aspects of substituted judgment. Indeed, as we'll see, even in some cases involving trustees or agents, the lines are not so clean as they are at these polar exemplars.

Take corporate directors. Directors' duties to shareholders are, in general, close to the best interests pole.[170] Their overwhelming duty is to *maximize shareholder value*; the *monetary* returns on the shareholder's investments.[171] This is in the objective best interests of shareholders, and has nothing to do with them as individual persons—particularly clearly in publicly-traded corporations, where the identity of shareholders is literally interchangeable, and might be entirely different at two points in time, while the directors' duties remain constant. Through this lens, then, while

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when the agent must determine the action to take and on an honest assessment of what the principal would then wish the agent to do.").

168 *See, e.g.*, Toomey, *supra* note 75, at 20 ("If you're trying to determine whether something I said reflects my intent now, your best heuristic might be *when* I said it."); Solan, *supra* note 167, at 379 ("[N]otwithstanding the enormous amount of attention it has received, the 'objective theory of contracts' appears to be a simple—and sensible enough—rule of evidence . . . designed to prevent litigating parties from relying upon testimony of an earlier state of mind without evidence."); *see also* DeMott, *supra* note 60, at 4 ("[A]cting as the principal's extension, the agent's duty is one of faithful interpretation, aimed at accurate replication of how the principal would have acted at the time the agent determines what to do.").

169 *Cf.* Toomey, *supra* note 75, at 17-19 (explaining the plain meaning rule in will interpretation on evidentiary grounds); Solan, *supra* note 167, at 379 (explaining the same in contracts).

170 *See, e.g.*, Miller & Gold, *supra* note 55, at 559 ("[D]irectors may act contrary to their shareholders' known desires when executing their mandate.").

171 *See, e.g.*, *In re* Rural Metro Corp., 88 A.3d 54, 80 (Del. Ch. 2014) ("In substance, the directors' fiduciary duties require that they seek to promote the value of the corporation for the benefit of its stockholders.") (citation modified).

directors are often called "agents" of the shareholders,[172] the standards governing their conduct is closer to those of trustees.[173]

However, the directors' decision-making standards do sometimes integrate aspects of substituted judgment. Directors owe duties to follow a corporation's charter or bylaws—which, especially in closely-held corporations, may involve some religious or social end, say, or a commitment to a particular line of business.[174] And the corporation's charter and bylaws are ultimately crafted and amended by the shareholders.[175] Directors for purposive corporations engage in something like substituted judgment—whether making inferences about the collective personal wishes of the shareholders as enshrined in the charter or (on stronger views of the realism of corporations) perhaps a substituted judgment on behalf of the corporation as an entity.[176]

A more thorough, if more complex, blend of the best interests and substituted judgment frames governs the behavior of fiduciary professionals like lawyers and physicians. Lawyers and physicians, of course, have a duty of obedience towards their clients and patients and are not to do anything the client or patient wouldn't do—they are to that extent frequently thought of as agents.[177] At the same time, lawyers and physicians don't just do what the client or patient would do themselves—a doctor

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172 *See, e.g.*, John C. Carter, *The Fiduciary Rights of Shareholders*, 29 Wm. & Mary L. Rev. 823, 826 (1988) (describing corporate directors as agents); Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & Bus. 63, 64–65 (2009) (arguing that the law's understanding of corporate directors has shifted towards an agency model).

173 *See, e.g.*, Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 Stetson L. Rev. 27, 34 (1998) ("[T]he idea that managers and directors are 'agents' of 'shareholders' has always been at odds with the way corporation law actually works."); Deborah A. DeMott, *Disloyal Agents*, 58 Ala. L. Rev. 1049, 1051 (2007) ("[W]ithin U.S. corporate law, a corporation's shareholders do not have a relationship of common law agency with the corporation's directors."); Smith, *supra* note 35, at 5 ("Although [directors of business corporations] are sometimes described as agents or mandataries, this is a mistake in both common law and civil law.").

174 *See, e.g.*, 18 C.J.S. *Corporations* § 167 ("[B]ylaws have the same force and effect as provisions of a corporation's charter or articles of incorporation and must be obeyed by its directors, officers, and shareholders.").

175 *See, e.g.*, Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 Yale J. on Reg. 1124, 1132 (2021) ("The charter can be amended only if both the board and a majority of shareholders vote to approve the amendment.").

176 *See* Andrew S. Gold, *Purposive Loyalty*, 74 Wash. & Lee L. Rev. 881, 888 (2017) ("[B]eing true is not always the same thing as acting in someone's best interests."); Miller & Gold, *supra* note 55, at 560 ("[O]ne may . . . be loyal to a beneficiary by advancing the purposes underlying the beneficiary or benefactor's directives.").

177 *See, e.g.*, Deborah A. DeMott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301, 301-02 (1998) (observing that the law of agency governs a variety of aspects of the attorney-client relationship).

or lawyer *can* do things, and *knows what* to do, in ways that an ordinary person does not.[178] So, in pursuing the goals of their client (a substituted judgment lens) professional fiduciaries adopt a best interests stance in making decisions about how best, objectively—in the professional's view, given their expertise and professional obligations—to accomplish those goals.[179] To be sure, best interests reasoning plays a larger role in the behavior of lawyers than doctors—consider the tactical choices that lawyers make in litigation, a prerogative the law encourages in a variety of ways.[180] Litigators get their client's goals in the exercise of substituted judgment, but use the best interests frame on the way.

In contrast, physicians are closer to the substituted judgment end of the spectrum—health law used to apply more of a best interests frame to the relationship between doctor and patient, but over the course of the twentieth century the model has moved more towards thorough-going substituted judgment.[181] There is still, however, a residuary best interests frame in some contexts, including narrow exceptions to informed consent, which allow physicians to make choices in the objective best interests of patients under some conditions, regardless of what the patient would have wanted.[182]

With professional fiduciaries somewhere in the middle, guardians and attorneys-in-fact for incapacitated adults are closer to the substituted judgment end of the spectrum. It is black-letter law that these sorts of fiduciaries exercise substituted judgment where possible—close

178 *See, e.g.*, Richard R.W. Brooks, *Knowledge in Fiduciary Relationships*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 228 ("Fiduciaries are almost always hired for some skill, expertise, or technical knowledge . . . .").

179 *See, e.g.*, Richard W. Painter, *Fiduciary Principles in Legal Representation*, *in* The Oxford Handbook of Fiduciary Law 265, 285 ("Lawyers . . . are also professionals and like other professionals are obligated to practice their profession according to its own values and rules.").

180 *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'"); *see also* DeMott, *supra* note 177, at 303 ("Many lawyers, especially in litigation settings, make decisions with significant consequences for the client without the client's knowledge or assent.").

181 *See, e.g.*, Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 Iowa L. Rev. 261, 268 (1999) ("Until the mid-twentieth century, medical decision making was guided by the principle of beneficence . . . ."); Schloendorff v. Soc'y N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (holding, for the first time, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.").

182 *See, e.g.*, George P. Smith, II, *The Vagaries of Informed Consent*, 1 Ind. Health L. Rev. 109, 118 n.47 (2004) (observing that "[a] therapeutic privilege exists to withhold information from a patient if it is either considered potentially harmful or it would cause any counter-therapeutic deterioration . . . .").

to paradigmatic agency.[183] Unlike paradigmatic agency, however, the law governing fiduciaries for the incapacitated offers the best interests frame as something of a backstop—available where there is no evidence of what the incapacitated person would have done, or the substituted judgment would cause objective harm to that person or others.[184] Capacitated principals, in contrast, *are* allowed to make decisions that harm them.[185]

Finally, it is worth briefly returning to our paradigms of trust-as-best-interest and agency-as-substituted-judgment, to note that, in practice, both of these roles can be more complicated than the emblematic cases suggest. Trustees *do* occasionally exercise substituted judgment, but not with respect to the beneficiaries, with whom the law *says* they are in a fiduciary relationship, but with respect to the *settlor*, with whom the law says they are not. Trustees are bound by instructions of settlors, whether or not those instructions are in the objective best interests of the beneficiaries, and any modifications to the trust must be consistent with the settlor's purposes and aspirations.[186]

The law does not call these duties "fiduciary," and indeed says that there is no legal relationship between trustees and settlors—and they are,

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183 *See supra* note 72 and accompanying text; *see also* Kohn, *supra* note 3, at 255 (describing the guardian's duty of loyalty to "require[] the surrogate to prefer actions that are consistent with the principal's instructions, values, and wishes"); Frolik, *supra* note 72, at 65 (describing guardians as "perhaps even more closely bound to the preferences of the ward than an agent is to the principal").

184 *See, e.g.*, Chen, *supra* note 22, at 322 ("If the individual's wishes are not known, or if giving effect to her wishes would unreasonably harm or endanger her, then the guardian owes a duty to act in her best interest."); Boxx, *supra* note 3, at 57 ("[T]he attorney-in-fact must be able to interject his or her own judgment when the principal's choices are potentially damaging.").

185 *See, e.g.*, Boxx, *supra* note 3, at 50 ("Where the principal is competent, the attorney-in-fact can, except in extreme circumstances, follow the principal's direction, since the principal's desires are the defining fiduciary purpose in agencies."); DeMott, *supra* note 60, at 18 ("[E]ven well-motivated departures from P's known preferences are inconsistent with A's position as P's representative.").

186 *See, e.g.*, Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, ACTEC L.J. 469, 483 (2011) (noting trustees' duty to follow the terms of the trust); Unif. Tr. Code § 814(a) (Unif. Law Comm'n amended 2018) ("Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust . . . the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."). There is an important divergence on this point between American trust law and the trust law in the Commonwealth—where settlors have less continuing power over the decision-making of beneficiaries. *See* Smith, *supra* note 35, at 73 (noting the common law rule, which does not apply in the United States, that "[i] f the beneficiaries of the trust are all fully capacitated and in agreement, they can override the terms of the trust . . . ."). From the perspective offered here, American trust law creates something more like an agency relationship between settlor and trustee than elsewhere, while the general common law approach integrates some aspects of the agency frame into the relationship between trustee and beneficiary.

it's true, the beneficiaries' duties to enforce.[187] But it is odd to characterize them as duties *to* the beneficiaries, when complying with them might be *contrary* to the beneficiary's best interests (suppose a vindictive settlor who provided for nominal annual distributions to their child from a large corpus).[188] On the account suggested here, we might rather think that trustees are in *two distinct* fiduciary-style relationships—something like an *agency-type* fiduciary relationship with the settlor, governed by the substituted judgment standard, alongside a *trustee-type* relationship with the beneficiaries, guided by best interests.[189]

From this perspective, the fiduciary status of a trustee resembles that of an executor.[190] Executors have duties, enforceable by beneficiaries, to follow the text of a will.[191] This is an application of the substituted judgment frame towards the testator—once again, solicitude towards the testator's words can only ultimately be justified by solicitude for what the testator wanted.[192] The executor's stricter duty to follow the ordinary meaning of their instructions compared to ordinary agents is plausibly justified by their much more difficult epistemic position—executors can't call up the testator and ask what they *really* want.[193] At the same time,

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187 *See, e.g.*, Bogert's The Law of Trusts and Trustees § 42 ("After a settlor has completed the creation of a trust, the settlor is not . . . in any legal relationship with the beneficiaries or the trustee . . . .").

188 The Uniform Trust Code introduced a controversial, mandatory principle that a "trust and its terms be for the benefit of its beneficiaries." Unif. Tr. Code § 404; *see also* Mary P. O'Reilly & Lee-ford Tritt, *Benefit-of-the-Beneficiary Rule*, 34 Probate & Property 24, 25 (2020) (discussing the "benefit-of-the-beneficiary rule."). From the perspective of the account offered here, what is at stake in the debate over the "benefit-of-the-beneficiary rule" is how to conceptualize the balance between the agent-type relationship between settlor and trustee and the trust-type relationship between trustee and beneficiary in trust law. *Id.*

189 *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1241 ("A trustee has a duty to carry out the terms of the trust as set up by the trustor . . . ."); Miller & Gold, *supra* note 55, at 542 ("In cases like this, the fiduciary relationship is formed by the benefactor and fiduciary to facilitate a mediated benefaction to the beneficiaries."); *see also* Smith *supra* note 35 (discussing the divergence between American trust law and that governing in the Commonwealth on the allocation of these frames).

190 *See, e.g.*, Toomey, *supra* note 75, at 1369 (describing the fiduciary status of executors); *see also* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1109 (1984) (arguing for "a unified law of succession").

191 *See, e.g.*, *In re* Karavidas, 999 N.E. 296, 316 (Ill. 2013) (upholding finding of breach of fiduciary duty to the estate for failure to follow the will); Prignano v. Prignano, 934 N.E. 2d 89, 101 (Ill. App. Ct. 2010) (observing that the executor's fiduciary duties "included the duty to properly carry out the provisions of the will").

192 *See, e.g.*, Toomey, *supra* note 75, at 17 ("[O]n any plausible theory of freedom of disposition, the law's fundamental concern must be the actual intent of testators.").

193 *See, e.g.*, John H. Langbein, *Will Contests*, 103 Yale L.J. 2039, 2044 (1994) (describing as the "worst evidence problem" the phenomenon that probate courts are trying to discern the intent of a dead person); Kent Greenawalt, *A Pluralist Approach to Interpretation:*

the executor owes some duties directly to beneficiaries—not to self-deal with the estate, for instance.[194] We might say that executors, then, much like trustees, owe agent-type fiduciary duties to the testator, guided by a variant of substituted judgment justified by their peculiar evidentiary circumstances, and trustee-type fiduciary duties to the beneficiaries.[195]

And finally, agency law too occasionally integrates aspects of the best interests frame. For instance, courts sometimes ratify agents who "depart from instructions, well understanding what the principal wished to be done under the immediate circumstances, because the agent believes that the principal's instruction was misguided"[196]—retroactive endorsement of best interests reasoning. Similarly, in some cases, courts seem to transform an agent's posture to that of a trustee—a line of older cases holds that stranded ships' captains, unable to reach the owner, ought to act in the owner's objective best interests.[197] Through the lens offered here, this is the law substituting a trust-type fiduciary frame in a particular agency context.

In short, the decision standards of best interests and substituted judgment from health law offer a lens to organize and systematize fiduciary standards generally. The domain of fiduciary law, from this perspective, is organized around two archetypes—trust, and the best interests decision-making standard it asks of trustees, and agency, with its standard of substituted judgment.[198] Between these poles, different fiduciary relationships prescribe different blends of best interests and substituted judgment.

III. Fiduciary Law and Personal Identity

That fiduciary law can be organized around the decision-making frameworks of best interests and substituted judgment is one thing. But without some theory of *when* the law looks to aspects of one frame rather than the other, and *why* it might be justified in doing so, the account might not be more than a novelty. But, indeed, the law calls on

Wills and Contracts, 42 San Diego L. Rev. 533, 550 (2005) ("When courts construe wills, their writers are not available to say what they were trying to do (or how their wishes might have changed by the time they died).").

194 *See, e.g.*, DeNatalie v. Mazza, 145 A.D 2d 404, 405 (N.Y. App. Div. 1988) (executor owes a "fiduciary duty to the estate beneficiaries to account for the assets of the decedent).

195 *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1241 ("[A]n executor has a duty to carry out the intentions of the testator, and an agent has a duty to follow the instructions of the principal.").

196 DeMott, *supra* note 60, at 9.

197 *See, e.g.*, Evan Fox-Decent, *Fiduciary Authority and the Service Conception*, *in* Philosophical Foundations of Fiduciary Law 363, 380 (summarizing these cases).

198 *See infra* Part IV.A.

best interests and substituted judgments in consistent ways across the domain of fiduciary law.[199] Where a fiduciary is deciding on behalf of another person *qua* their *individual personal identity*, the law applies something more like substituted judgment. Where a fiduciary is deciding for something else or in any other capacity, the law turns to best interests. This makes sense—substituted judgment is a mode of decision-making that treats another person *as* an individual person, while best interests is a mode of treating some entity as a placeholder or generalization.

This Part analyzes the contexts in which the law deploys each fiduciary standard in terms of the nature of the personality the relationship presupposes, and its relationship to the structure of substituted judgment and best interests. First, I discuss the relationship between agency and personal identity, before turning to the more impersonal structure of trust, and, once again, the spectrum of fiduciary relationships between these poles.

A. Personal Identity and Agency

Let's start, this time, with agency and its intimate relationship to the concept of personal identity. Agency, in its basic structure, grants another person the power to act on one's behalf *in a literal* sense—the power to act "in my name," or "as" me for legal purposes.[200] This relationship presupposes that the grantor of the power has the power themselves so to act—agency authorizes a *representation* of a person's legal powers, it does not create them.[201] To have legal powers is to be a legal person.[202] Thus, the concept of agency *presupposes the principal's personhood*.[203]

199 *See, e.g.*, Chen, *supra* note 22, at 360 ("[F]iduciary law ought to regulate different guardianships and agency relationships differently.").

200 *See, e.g.*, Adolf Reinach, *The Apriori Foundations of the Civil Law*, 3 Aletheia Int'l J. of Phil. 1, 83 (1983) ("[S]ocial acts can be performed 'for' or 'in the name of' another person . . . ."); DeMott, *supra* note 60, at 30 ("[A]n agency relationship [is] an extension of the principal throughout its duration."); James Penner, *Understanding the Rules of Attribution in Private Law*, in Interstitial Private Law 203, 206 (2024) ("[T]he agent's acts . . . are attributed to their principal . . . .").

201 *See, e.g.*, Reinach, *supra* note 200, at 86 ("There is only one person who can grant [agency], namely the person in whom the legal effects are supposed to come about."); Wellman, *supra* note 31, at 114 (observing that in agency relationships, "the agent is representing the agency of the principal").

202 *See, e.g.*, John Chipman Gray, The Nature and Sources of the Law 27 (1897) ("[T]he technical meaning [of 'person' in legal discourse] is a subject of legal rights and duties.").

203 *Cf.* Wellman, *supra* note 31, at 120 (arguing that agency presupposes the autonomy of the principal).

Indeed, legal fiduciary agency is arguably the law's recognition of an ordinary social concept that exists outside of it—the way in which we ubiquitously grant other people the power to represent us. "If you see her, say hello,"[204] and so on. Both the ordinary concept and the legal one presuppose the personhood of the principal. "I represent my dog in this matter," is a ridiculous thing to say, alongside "I am at present acting on behalf of a rock." (It is not ridiculous to describe oneself as an agent of an abstract cause or movement, about which more below).[205]

In short, if one is an agent, one is necessarily acting on behalf of a person *as* a person; it is impossible to be an agent for anything else. But, more than that, agency does not just presuppose that the principal is *any* person—it is a structure by which one person represents another *as* the *individual* person that they are; it is their principal's judgments they must substitute, not anyone else's.[206] An individual's "personal identity" is what makes them the individual person that they are, as distinct from anyone else.[207] From this perspective, agency is a relationship essentially directed towards a principal's personal identity, not merely their status as *a* person. And, indeed, as an agency relationship goes on, it evolves with the changing identity of the principal; the agent's actions must be tied to who the principal is *now*, as that changes.[208]

Given this basic structure of agency law, then, we might expect the characteristic fiduciary standard for agents to be one that acknowledges the necessarily inter*personal* relationship of agency, tied to the principal's personal identity. Substituted judgment is just that. The hallmark of substituted judgment, as has already been alluded to, is its focal solicitude for an individual's personal identity.[209] It takes account of someone *as* an individual person—after all, to treat someone *as a person* is to follow the decisions they make for themselves, and that is what substituted judgment

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204 Bob Dylan, *If you See Her, Say Hello* on BLOOD ON THE TRACKS (Columbia Records 1975).

205 *See infra* Part III.D.

206 *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. LAW INST., 2006) ("An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal."); Frolik, *supra* note 72, at 65 (describing guardians as bound to "channel" "what the ward would have done").

207 *See, e.g.*, MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 68–93 (1996) (noting a sense of personal identity as the question of "which beliefs, values, desires, and other psychological features make someone the person she is").

208 *See, e.g.*, DeMott, *supra* note 173, at 1051 (describing a principal's continuing control over the agent as essential to agency).

209 *See, e.g.*, Toomey, *supra* note 32, at 1311–15 (describing the relationship between substituted judgment and personal identity); *see also* Boni-Saenz, *supra* note 121, at 1257 (noting the relationship between substituted judgment and personal identity).

does.[210] Substituted judgment, in other words, is the standard one would use in deciding for someone else *while trying to treat them as an individual person*. This is the basic structure of agency law—granting to another person the power to act "on behalf of" (in a strict sense) or "as" the principal; substituted judgment implements decision-making that *is* strictly "on behalf of" or "as" the principal. [211]

Incidentally, it is this characteristic of substituted judgment—that it is sensitive to the individual personal identity of the person for whom the decision is made—that largely explains its popularity in contexts where the law aspires to treat a beneficiary as an individual person.[212] The push towards substituted judgment as the governing standard in healthcare was supported by many people with deeply held or idiosyncratic convictions worried about how they might be treated after losing capacity.[213] From this perspective, the adoption of substituted judgment in deciding for the incapacitated may be based on growing recognition that many individuals with cognitive disabilities remain individual persons with personal identities, and indeed, the *same* personal identity they have always had.[214] And while applying substituted judgment on behalf of young children or those with severe lifelong cognitive impairments has been ridiculed as

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210 *See, e.g.*, Rebecca Morgan & Barbara Harty-Golder, *Constitutional Development of Judicial Criteria in Right-to-Die Cases: From Brain Dead to Persistent Vegetative State*, 23 Wake Forest L. Rev. 721, 742 (1988) ("[Substituted judgment] is limited entirely by the individuality of the patient . . . .").

211 *See, e.g.*, Alan Meisel, *Antecedent Law and Ethics of Aid in Dying*, 34 Quinnipiac L. Rev. 609, 615 (2016) (arguing that substituted judgment "places the surrogate in the patients shoes . . . .").

212 *See, e.g.*, Dworkin, *supra* note 138, at 190–96 ("When we consider how the fate of a demented person can affect the character of his life, we consider the patient's whole life, not just its sad final stages, and we consider his future in terms of how it affects the character of the whole."); Frolik & Whitton, *supra* note 163, at 740 (describing substituted judgment as a "recognition of an adult's self-determination interests").

213 *See, e.g.*, Charles Perez Golbert, *Health Care Surrogate Decision Making and Bioethics: Case Studies from the Files of the Office of the Cook County Public Guardian*, 6 NAELA J. 155, 174–75 (2010) (discussing the role of religion in substituted judgment); Naomi Cahn & Amy Ziettlow, *Religion and End-of-Life Decision-Making*, 2016 U. Ill. L. Rev. 1713, 1736 (2016) ("Protecting the personal religious beliefs and practices of those patients and families will be tantamount to ensuring they have access to a critical source of guidance and encouragement during those liminal times between life and death.").

214 *See, e.g.*, Tom Kitwood, Dementia Reconsidered, Revisited: The Person Still Comes First (2d ed. 2019) (arguing that persons with dementia are still persons); *see also* Convention on the Rights of Persons with Disabilities art. 12, Dec. 13, 2006, 2515 U.N.T.S. 4 ("States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law").

incoherent,[215] we might understand it as a laudable (if, in some cases, silly) effort to affirm their individual personality.[216]

In short, the structure of agency involves the representation of another person *as an individual person*. Substituted judgment is a decision standard that takes its object as an individual person. It therefore makes sense that substituted judgment would provide agency's guiding standard.

B. Trust's Impersonality

Contrast agency, once again, with trust. To be the beneficiary of a trust, you need not be any*one* in particular—the trust is agnostic to you *as an individual person*.[217] From the trustee's perspective, "as well him as another."[218] Granted, to be the beneficiary of a trust, you have to be *identifiable*—maybe some spare sense of personal identity as numerical identity—the trustee has to be able make sure they are making distributions to the entity the settlor had in mind.[219] And, the trustee may have an obligation to inquire into *some* particulars of your life—your income, profligacy, "station in life"—*if the terms of the trust so provide*.[220] These sorts of duties are therefore about interpreting the *settlor's* intent—treating the *settlor* as an individual person—not anything about the beneficiary.[221]

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215 *See, e.g.*, Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. Legal Med. 155, 158 (2005) ("[T]he bulk of commentators and courts have rejected application of the substituted judgment standard . . . in the context of a never-competent person."); Allen E. Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 UCLA L. Rev. 386, 396–97 (1981) (describing as "nonsensical" applying substituted judgment to those with lifelong incapacity).

216 *Cf.* Boni-Saenz, *supra* note 121, at 1251 ("As a symbolic matter, this is disconcerting because it sends the message that those with cognitive impairment are not worthy of the capabilities that inhere in the concept of human dignity.").

217 *See, e.g.*, Boxx & Hammond, *supra* note 70, at 1216 (noting that financial fiduciaries, like trustees, "do not generally have responsibilities that relate to the beneficiaries' personal values and desires"); *see also* Penner, *supra* note 200, at 205 ("But trustees or advising solicitors do not act *as* their beneficiaries or advisees, nor do they act *on their behalf*, in the sense that their acts are attributed to their beneficiaries or advisees.").

218 James Joyce, Ulysses 643–44 (Gabler ed. 1986).

219 *See, e.g.*, Unif. Tr. Code § 402(b) (Unif. Law Comm'n amended 2018) (listing ascertainable beneficiaries as a requirement for the creation of a trust); Sitkoff & Dukeminier, *supra* note 40, at 428 (same).

220 *See, e.g.*, Marsman v. Nasca, 573 N.E.2d 1025, 1026 (Mass. App. Ct. 1991) (holding that, where a trust provides for discretionary distributions to maintain a beneficiary at a level of "comfortable support and maintenance," the trustee has an affirmative duty to inquire into the beneficiaries' finances).

221 *See, e.g.*, DeMott, *supra* note 173, at 1052 ("[A] trustee unquestionably owes fiduciary duties to the beneficiaries of a trust, the trustee is not subject to the control of either the beneficiaries or the settlor, except as provided in the terms of the trust."); Boxx, *supra* note

Take two facts about contemporary trust law as illustrative of its impersonality. First, in contrast to other fiduciary roles (the durable power of attorney, say), trusteeship has largely migrated to wealth management institutions over lay friends and family members.[222] This is at least in part because a trustee can comply with all their duties with very limited knowledge of the beneficiaries as individual persons—institutions with expertise in financial management but little personal knowledge of the beneficiaries can straightforwardly pursue their objective best interests, as they could anyone else's, by maximizing the value and longevity of the trust corpus. Institutional trustees would be much worse situated to decide in some way tied to the individual identities of the beneficiaries, if that were what trust law demanded—but it doesn't.[223]

Second, the trust form has been straightforwardly adapted to accommodate beneficiaries who are not persons at all.[224] Every state has passed legislation enabling trusts for the benefit of pet animals, which work basically the same as ordinary private trusts—with trustees subject to the same basic best-interests framework of fiduciary duties, objectively managing the corpus prudently and avoiding conflicts, enforceable by a person designated by the settlor.[225] The same goes for trusts for the maintenance of gravestones or burial sites, which have also authorized by statute in many states.[226] Moreover, common law has always recognized trusts for the benefit of individuals as-yet-unborn or even unconceived, who are clearly not any kind of persons (if you think fetuses *in utero* are persons, fine, I can settle a trust for "my niece's children" while *she's* an infant).[227]

It is not altogether clear whether the trust, like agency, corresponds to an extra-legal social practice, but if it does, surely it is some kind of

3, at 20 ("[A] trustee must exercise independent judgment regarding investment of trust assets . . . but an agent is under a duty to follow the principal's desires regarding investment of assets given to the agent to protect").

222 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 403 (observing approximately $1.3 trillion in trust funds managed by financial institutions that are part of the Federal Reserve System).

223 *See supra* Part II.B.

224 *See, e.g.*, Brooks, *supra* note 178, at 227 (noting that in trust, "some beneficiaries are not rational"); Frankel, *supra* note 102, at 242, 245 ("[A] trust can be established for the benefit of a cat or a dog or an unborn child.").

225 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 437; Cal. Prob. Code § 15212(c) (2026). These sorts of trusts are enforced by guardians *ad litem*, just as where the beneficiary is an existing infant. *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 174.

226 *See* Sitkoff & Dukeminier, *supra* note 40, at 174.

227 *See, e.g.*, Gail Boreman Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 Hastings L.J. 563, 593 (1985) (observing that unborn beneficiaries can be the sole beneficiaries of a trust, "whether or not [they] are in existence").

en*trust*ment—the care of some*thing* for someone else.[228] And it is coherent to say "that bottle of wine isn't mine, I'm holding onto it for my first child," even when there is no such person. In contrast, it is as preposterous to claim to be acting as an agent for, literally on behalf of, one's as-yet-unconceived first child, as one's pet raccoon. (If "I'm holding onto this wine for my pet raccoon" sounds weird to you, as it does to me, I'd suggest this is because you do not think raccoons are conceptually capable of ownership, not anything about trust per se.)[229]

Where substituted judgment is a decision-making standard attuned to the individual personal identity of the person for whom one is deciding, best interests is not. Best interests is an objective test—based in what a reasonable person might want or think is best.[230] A trustee *can* act in the best interests of a beneficiary they know almost nothing about—whoever they are, it is in their objective best interests that the trust corpus be maximized, while minimizing the risk of the trustee accidentally squandering it.[231] Similarly, the best interests test can be applied on behalf of entities that are not persons. Assuming that animals do not have personal identities of the sort that could sustain an agency relationship, it is at least plausible that they have interests—and a trustee could act to further those interests by maximizing the trust corpus so as to ensure the supply of a cat's apparently favorite food and pay veterinary bills.[232]

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228 To be sure, the relationship between an ordinary concept of entrustment and common law trust is not at all obvious—every legal system has a concept of entrustment of property subject to duties, but only the common law trust implements this idea with a bifurcation of legal and equitable title. *See infra* Part IV.A. Indeed, common law recognizes another form that corresponds to ordinary concept of entrustment—bailment. *See, e.g.*, Danielle D'Onfro, *The New Bailments*, 97 Wash. L. Rev. 97, 103–17 (2022) (summarizing the law of bailments); Christopher M. Newman, *Bailment and the Property/Contract Interface*, George Mason Legal Stud. Rsch. Paper No. LS 15-12 (manuscript available at SSRN) (discussing the same). Bailment is a notoriously difficult area of law, and the standard of care governing bailee decision-making remains controversial, as does whether that standard is contractual and can be so modified. *See, e.g.*, George v. Bekins Van & Storage Co., 205 P.2d 1037, 1041 (Cal. 1949) (describing bailment law as "conflicting and confusing"). On the account offered here, to the extent that bailment law imposes mandatory duties on bailees, bailment law could be thought of as another fiduciary relationship, perhaps a kind of proto-trust that accomplishes a similar goal without the mechanism of bifurcation of title. *See, e.g.*, D'Onfro, *supra*, at 103 ("[T]rust is the lifeblood of the bailment relationship."). But the question of whether and how bailment in fact fits into the spectrum of fiduciary relationships is beyond the scope of this paper. *See supra* note 95.

229 *See, e.g.*, Toomey, *supra* note 8, at 168 (arguing that ownership requires the owner have the capacity to exercise absolute control over a thing).

230 *See supra* Part II.A.

231 *See supra* Part II.B.

232 There is a fundamental difference between a custodian, who cannot represent the object in her custody, and a trustee, who can represent the interests of another.

Now, you might at this point note that I also suggested above that trust beneficiaries may conceptually include such things as rocks and corpses, and object that, unlike persons and animals, these sorts of things do not have "interests" of any kind.[233] I agree. But you could, to be frank, have the same concern about a human being in a vegetative state, to whom "best interests" reasoning has routinely been applied.[234] From this perspective, it seems that "best interests," or something *like* it actually *can* be deployed on behalf of entities that do not have interests. The best interests standard is, after all, an objective, third-person test that looks to what we socially understand to be the best choice. A trustee cannot literally act in the "interests," best or otherwise, of a gravestone—but they *can* avoid investing the trust corpus in their friend's midlife crisis, and we can call that standard "best interests," even if "interests" is something of a legal fiction.[235]

In short, unlike agency, the fiduciary duties of a trustee are not tied to the personal identity of the beneficiary. Indeed, trust law does not presuppose the personality of its beneficiaries at all—it largely presumes a placeholder with generalized interests and reasonable aspirations. It makes sense that in this posture, the law would turn to best interests—an objective decision-making standard that does not take its object as a distinctive personal identity.

C. Postures Towards Personal Identity

We once again find ourselves at two poles of fiduciary law, but this time with an account of why the poles might be structured the way they are. Agency is a legal form oriented towards the personal identity of another and relies on substituted judgment, a mode of deciding on behalf of others *qua* their individual personal identity.[236] Trust is different—a trust beneficiary usually is an individual person, but they are not, *in*

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233 *See, e.g.*, Visa A.J. Kurki, A Theory of Legal Personhood 64 (2019) ("[T]hings *matter* only to sentient beings."); Ori J. Herstein, *The Identity and (Legal) Rights of Future Generations*, 77 Geo. Wash. L. Rev. 1173, 1188 (2009) ("Rights, by their nature, benefit the rightholder; as such, the rightholder must be capable of having interests.").

234 *See, e.g.*, Andrea J. Fenwick, *Applying Best Interests to Persistent Vegetative State—A Principled Distortion?*, 24 J. Med. Ethics 75, 75 (1998) (arguing that although "'[b]est interests' is widely accepted as the appropriate foundation principle for medico-legal decisions concerning treatment withdrawal from patients in persistent vegetative states," it may be incoherent, because they arguably do not have interests); *In re* Guardianship of L.W., 482 N.W. 2d 60, 75 (Wis. 1992) (applying the best interests test to determine whether to remove life support from an individual in a persistent vegetative state).

235 *Cf., e.g.*, Wellman, *supra* note 31, at 133 ("I do not believe that any legal system, not even our mighty American legal system, could confer genuine rights on trees.").

236 *See supra* Part III.A.

their capacity as trust beneficiary, being treated as an individual personal identity.[237] My argument now is that this reasoning explains the composition of legal standards, in different mixes of best interests and substituted judgment, across the spectrum of fiduciary relationships.

To take corporate directors again, in most cases, particularly for directors of publicly traded companies, the individual identities of the shareholders are entirely irrelevant—it is this fact about directors' posture, of course, that enables the existence of large companies and liquid capital markets in the first place.[238] Indeed directors usually don't even know the identities of most of their shareholders, and they need not to fulfill their role—a major shareholder in Corporation X could be Shell Corporation Y, the true owners of which the directors of Corporation X have no reason or need to know. Corporate directors decide for shareholders as placeholders, not individual personal identities, and in general do so on a best interests paradigm.[239] Of course, as discussed above, some directors must introduce aspects of substituted judgment into their decision-making.[240] These just are the circumstances where directors *do* have to care about shareholders as individuals (or the corporation, on realist views)—closely-held corporations, non-profits, or cases where the shareholders have established guiding values.[241]

Particularly illuminating of the way in which the law might mix best interests and substituted judgment based on its views of the goals and nature of a given fiduciary relationship is the story of the physician-patient relationship in the twentieth century. Before the rise of informed consent in the 1920s, physicians were legally expected to treat patients based on their own views of the patient's best interests.[242] Under this paradigm, patients were conceptualized not as individual personal identities but as placeholder complexes of symptoms and biological facts, to be treated as

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237 *See supra* Part III.B.

238 *See supra* notes 170–173 and accompanying text.

239 *See, e.g.*, Richard P. Wolfe, *Minority Shares Under the Louisiana Business Corporation Act: Expulsion, Oppression, and Fiduciary Duty*, 64 Loy. L. Rev. 25, 78 (2018) ("[A] director's paramount fiduciary duty is owed to the corporation in preference to its shareholders because the identity of the shareholders is subject to change. . . .").

240 *See supra* notes 174–176 and accompanying text.

241 *See, e.g.*, 18B Am. Jur. 2d *Corporations* § 1442 ("Other authority holds that the fiduciary duty of a director is owed to the individual stockholders as well as to the corporation."); *cf.* Gold, *supra* note 176, at 901 (noting directors' duty to follow guiding values established in a corporate charter).

242 *See, e.g.*, Ruth R. Faden et al., A History and Theory of Informed Consent 100–01 (1986) ("[B]efore the mid-twentieth century, the beneficence model . . . was the only operative model of the physician's responsibility to the patient."); Charity Scott, *Why Law Pervades Medicine: An Essay on Ethics in Health Care*, 14 Notre Dame J. L. Ethics & Pub. Pol'y 245, 263 (2000) ("Throughout most of the history of medicine, the doctor-patient relationship has been founded on the ethics of beneficence, or paternalism.").

would be best for a reasonable patient in their circumstances. Veterinarians treat animals this way today.[243]

But over the course of the twentieth century, our legal and social understanding of the physician-patient relationship underwent a radical shift—today it is understood to be fundamentally based on respect for the individual identity and preferences of the patient.[244] Across that same time period, the law has reconceptualized physicians more as agents than trustees, guided more by substituted judgment than by best interests—a change in the mode of decision-making as our understanding of the purpose of the relationship changed in law and social expectation.[245]

A similar story could be told about the law governing guardians and attorneys-in-fact.[246] Historically, guardians were thought of as officers of the court, delegated the state's *parens patriae* responsibility to take care of those who could not take care of themselves.[247]

The individual identity of the person subject to guardianship ("ward") had little to do with it.[248] Similarly, the incapacitated were not thought capable of serving as principals, and to that extent were not conceptualized as legal persons.[249] The development of durable powers of attorney and move towards guardianship-as-agency correspond to growing social and legal recognition of individuals with limited cognitive abilities as persons with personal identities.[250]

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243 *See, e.g.*, American Veterinary Medical Association, *Principles of the veterinary medical ethics of the AVMA*, AVMA, https://www.avma.org/resources-tools/avma-policies/principles-veterinary-medical-ethics-avma [https://perma.cc/LR2P-33LM] (last visited Mar. 26, 2026).

244 *See, e.g.*, Barry R. Furrow, et al., Health Law 265 (1995) ("The doctrine of informed consent developed out of strong judicial deference to individual autonomy . . . ."); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 Duke J. Gender L. & Pol'y 223, 227 (2009) (observing that "private law . . . allocate[s] decision-making power to the patient rather than the physician").

245 *See* Alicia R. Ouellette, *When Vitalism is Dead Wrong: The Discrimination Against and Torture of Incompetent Patients By Compulsory Life-Sustaining Treatment*, 79 Ind. L.J. 1, 3 (2004) ("The past thirty years have seen a radical shift from medical paternalism to patient autonomy as the gold standard for ethical decision-making in medicine.").

246 *See, e.g.*, Wellman, *supra* note 31, at 115 (observing that "[t]he relationship between guardian and ward . . . seems to be construed in the law as something of a mixture" of agency-type representation and trust-type representation).

247 *See, e.g.*, Frolik, *supra* note 72, at 57 (observing that the guardian's power historically derived from the court).

248 *See id.* at 57-58.

249 *See, e.g.*, Boxx, *supra* note 3, at 5 ("The principal's incapacity automatically terminated the agency because of the assumption that an agent acts at the direction of the principal."); Kohn & Koss, *supra* note 90, at 589 ("In order to have the capacity to serve as a principal in an agency relationship, an individual generally must possess the legal capacity to carry out the acts he or she is delegating to the agent.").

250 *See, e.g.*, Richard L. Cupp, *Cognitively Impaired Human, Intelligent Animals, and Legal Personhood*, 69 Fla. L. Rev. 445, 495 (2017) ("Courts and activists increasingly

Finally, this account can even help make sense of the complicated ways in which best interests and substituted judgment bleed into one another in trust and agency. The relationship that a trustee has with a settlor (whether or not it has a name in the law) *is* a personal one—the trust is a creation of the intentions and aspirations of the settlor, by exercise of their personal powers.[251] It makes sense, then, that vis-à-vis the settlor—when, say, interpreting the terms of the trust—trustees apply a frame more like substituted judgment.[252] And the situations in which agents are expected to rely on best interests reasoning are those in which the agency is peculiarly impersonal—I don't know much about the relationship between ship owners and captains, but I imagine it's less solicitous of the owner's identity than archetypical representation.[253]

To be clear, the hypothesis that substituted judgment is a relationship of respect for the individual identity of a person, while best interests is not, does not imply much, if anything, about which mode is to be preferred as a matter of legal design and political morality.[254] That is, there is no reason to think that all fiduciary relationships *ought* to be governed by substituted judgment, and that the impersonality of trust law is necessarily a moral failing. To the contrary, there may be (and at least seem to be) compelling reasons in particular contexts for best interests to govern the decision-making of some fiduciaries.

For example, the straightforward, easy to apply generalizations governing the behavior of trustees and corporate directors enable wealth management at lower cost for far more people.[255] If the best interest frame were not available, structures like publicly-traded companies would not be feasible.[256] Similarly, there might be good reasons—moral, economic, or otherwise—to permit settlors the option of an ongoing, conditional

recognize that humans with cognitive impairments have fundamental rights to, among other things, liberty, due process, and the pursuit of happiness."); Jonas-Sébastien Beaudry, The Disabled Contract: Severe Intellectual Disability, Justice and Morality (2021) (defending the moral personhood of people with severe intellectual disabilities).

251 *See, e.g.*, Lee-Ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 Cardozo L. Rev. 2579, 2579 (2011) (noting that among the first principles of trust law is a process of "achieving the settlor's goals").

252 *See supra* notes 187–89 and accompanying text.

253 *See supra* note 197 and accompanying text.

254 *Cf., e.g.*, Dresser, *supra* note 140, at 1843 (noting that "most scholars and legal authorities . . . regard the best interests standard as morally suspect.").

255 *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 621 (2004) (justifying the architecture of trust law on economic grounds); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 Wash. & Lee L. Rev. 1373, 1374 (1993) ("Deference to managerial discretion has been thought to have a value of its own . . . .").

256 *See supra* notes 238–41 and accompanying text.

gift of the kind donative trusts allow.[257] Perhaps it is a good thing for the law to enable wealth management for the benefit of the unborn, pets, and inanimate things that matter to people—certainly at least there is demand for these sorts of things.[258] Best interests reasoning in trusts or trust-like mechanisms makes pursuing these sorts of goals possible—and, indeed, has made possible the de-personalized structures of wealth management and growth that underlie modern economies.

D. Charitable Fiduciaries

Finally, it is worth situating one difficult feature of fiduciary law, thus far largely undiscussed, within the proposed framework—fiduciary relationships that appear to be "with" a cause.[259] Charitable trusts, for instance, do not have beneficiaries, but are rather organized for the benefit of "one or more *charitable purposes*."[260] On the one hand, causes are obviously not persons, and we might think that a fiduciary relationship with a cause is an impersonal one. From this perspective, it is not surprising that it is trust and corporate law that have developed a fiduciary infrastructure for the benefit of abstract causes.[261]

On the other hand, it is not at all semantically bizarre to describe oneself as the agent of a cause or other abstraction—people do this all the time. And it is precisely in the context of charitable trusts and corporations with dedicated causes that we see fiduciaries engage most prominently in substituted judgment-style reasoning. For example, under the *cy pres* doctrine, charitable trustees have *more* flexibility to modify the purpose of the trust to changed circumstances than private trustees, so long as they can show the new purpose would fall within the settlor's broader

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257 *See, e.g.*, Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 BYU L. Rev. 629, 630 (2016) ("[T]he prototypical donative trust arises from and is structured to effectuate a particular kind of gift transfer . . . ."); F. Ladson Boyle, *Present Interest Gifts in Trust: Donor and Donee Problems*, 29 Gonz. L. Rev. 453, 497 (1994) (noting many reasons that donors elect to give gifts in trust rather than outright).

258 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 437 (summarizing evidence of demand for pet trusts); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356, 356 (2005) (finding that states that abolished the rule against perpetuities saw substantial increases in their trust assets).

259 *See, e.g.*, Miller & Gold, *supra* note 55, at 523 (observing that some fiduciary relationships "entail fiduciary administration for purposes rather than persons").

260 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 768.

261 *See, e.g.*, Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 Cornell J.L. & Pub. Pol'y 1, 9 (2009) (discussing the organization of nonprofit corporations, "the predominant form of charitable organization in the United States").

goals under the circumstances—a kind of substituted judgment adapted to the longevity of charitable trusts.[262]

Perhaps this is because, unlike rocks, animals, and individuals in persistent vegetative states, causes are not mind-independent constituents of the universe. Rather, a cause *just is* linguistically encoded intentional meaning—"For the children;" "global communist revolution;" "a scholarship for a graduate interested in shipbuilding each year at my alma mater."[263] To that extent, causes, like all linguistic meaning, presuppose intentions.[264] "For the children" means something *in English*—for us to do anything with it, we *have* to assume that a speaker *intended to communicate* something by it.[265] If that is not true, it is nothing.[266]

From this perspective, charitable trusts *are* meaningfully personal, and it is probably best to think of the relevant beneficiary not as an impersonal cause, but as the settlor of the trust or shareholders of a non-profit corporation—the persons who prescribed the cause in a linguistic way.[267] And, indeed, this is to a large extent how charitable law actually functions.[268] There has been, for instance, a broad trend towards granting settlors standing to sue for violation of the terms of a charitable trust, making charitable

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262 *See, e.g.*, Miller & Gold, *supra* note 55, at 551 ("[G]overnance mandates enable extension of the personality of persons through delegation of powers to promote particular *abstract purposes*.").

263 *See, e.g.*, H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 385 (1957) ("[X] meant something is (roughly) equivalent to 'Somebody meant something by x.'").

264 *See, e.g.*, Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 3 (2015) ("Persons have goals; communications do not."); Larry Alexander & Saikrishna Prakash, *Is That English You're Speaking—Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004) ("Whenever someone reads the Constitution or any other text, he explicitly or implicitly does so with an author in mind.").

265 *See, e.g.*, Grice, *supra* note 263, at 385 ("'[X] means (timeless) that so-and-so' might as a first shot be equated with some statement or disjunction of statements about what 'people' (vague) intend (with qualifications about 'recognition') to effect by x.").

266 *See, e.g.*, Alexander & Prakash, *supra* note 264, at 977 ("Without an author who intends a meaning, such marks are meaningless."); Grice, *supra* note 263, at 383 ("*A* must intend to induce by *x* a belief in an audience, and he must also intend his utterance to be recognized as so intended."); Ekins, *supra* note 264, at 4 ("Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try and recognize.").

267 *See, e.g.*, Miller & Gold, *supra* note 55, at 564 ("In lieu of a best interests standard, one could, for example, argue that fiduciaries are obliged to act in a manner that would be most likely to advance the purposes specified for their mandates."); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 103, 108 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019) ("[T]here is some uncertainty regarding whether the fiduciary relationship is with, and the fiduciary duties are to, the organization itself or its purposes.").

268 *See, e.g.*, Gold, *supra* note 176, at 882–89 (arguing that the duty of loyalty can be fulfilled in this way).

fiduciary law look more like agency.[269] Because causes, charitable or otherwise, are irreducibly personal in the relevant sense, that is indeed the better framework through which to view these sorts of relationships.

IV. Implications

In closing, the view offered here has a number of implications, both for theory and practical legal design. This Part sketches four. First, the account holds that agency is a fundamental relationship in fiduciary law, not reducible to analogy with trust. Second, it reveals connections and distinctions between fiduciary law and contract law. At the same time, the theory helps illuminate the role of the concept of personal identity in private law. Finally, it helps us think about the circumstances in medical decision-making in which substituted judgment is appropriate, and those in which it isn't.

A. Fundamental Nature of Agency

Trust, as has already been mentioned, is often considered the paradigmatic fiduciary relationship[270] and fiduciary law an outgrowth of it, perpetuated by ad hoc analogy.[271] There has always been something odd about this claim. The contemporary common law private trust is a relatively recent legal innovation—a product of nineteenth-century equity—and is often considered unique to the common law world.[272] And yet many relationships called "fiduciary" in common law—agency and partnerships, for example, not to mention, say, parent-child relationships—are more or less universal, precede the development of the common law trust, and function in roughly comparable ways everywhere.[273]

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269 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 800 ("Today a majority of states allows the settlor of a charitable trust to enforce the trust.").

270 *See supra* note 39 and accompanying text.

271 *See, e.g.*, Daniel Yeager, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 Drake L. Rev. 179, 184 (2017) ("Identifying fiduciary relationships is done by analogy to the law of trusts.").

272 *See, e.g.*, Frederic W. Maitland, Equity: A Course of Lectures 23 (John Brunyate, 2d ed., 1936) ("Of all the exploits of Equity, the largest and most important is the invention and development of the Trust. . . ."); *see also* Sitkoff & Dukeminier, *supra* note 40, at 410 ("A fairer claim is that the use of the trust for donative transfer is a distinctive features of the Anglo-American legal tradition.").

273 Obviously, there are differences, but the basic idea of representation and of collectivities with some particular legal status are more or less universal. *See, e.g.*, DeMott, *supra* note 60, at 20 (discussing the civil law of agency); Jeffrey L. Patterson, *Development of the concept of corporation from earliest Roman times to A.D. 476*, 10 Acct. Hist. J. 1 (1983) (tracking the development of Roman corporate forms); *see also* Edelman, *supra* note 34, at

On the account offered here, trust is *not* the only fundamental fiduciary relationship—agency is just as basic.[274] From this perspective, agency is not reducible to trust—it is true that both are relationships in which a person makes legally effective decisions (in some sense) "on behalf of" another, as all fiduciary relationships, but by very different standards, with very different relationships to the other for whom they are deciding. The irreducible characteristic of agency makes some sense. After all, as has already been mentioned, agency and representation are ubiquitous features of ordinary social life—it would be odd if the *legal* version of agency, which facially bears such resemblance to the ordinary concept, were derivable from the specifics of an apparently-contingent nineteenth century development of the Anglophone Courts of Chancery.[275]

None of this is to say, however, that agency is *more* fundamental than trust. Trust isn't just a form of agency, either. It involves deciding according to a different standard, in a different posture, applicable in different contexts.[276] This makes sense too. The ordinary idea of entrustment, or of holding something on behalf of someone else, is hardly thought of as a variation of representation.[277] Since its development in common law jurisdictions, trust has indeed been thought to be fundamental.[278] (And, by the way, the canard that nothing like it exists in civil law is an exaggeration—holding property for the benefit of another, subject to legal duties not to abuse or destroy it, is a feature of all, or at least nearly all, legal systems).[279]

In short, on this account, and as Carl Wellman and others have suggested, the domain of fiduciary law is organized around *two* fundamental relationships—agency *and* trust, with concomitant paradigmatic modalities of reasoning, substituted judgment and best interests.[280] The other

24 ("[A]lthough the concept of a 'fiduciary' undertaking is a recent one, the concept of an undertaking itself is extremely old.").

274 *See* Brooks, *supra* note 178, at 230 (noting that on some accounts, agency is a "prototype fiduciary relationship"); Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 Mich. L. Rev. 609, 611-12 (2020) (arguing that agency is fundamental in corporate law and could not be replicated by contract).

275 *See supra* Part III.A.

276 *See, e.g.*, Wellman, *supra* note 31, at 116 ("A trustee can and ought to represent the interests, rather than the will, of the beneficiary.").

277 *See supra* Part III.B.

278 *See supra* note 39.

279 *See, e.g.*, Sitkoff & Dukeminier, *supra* note 40, at 410 (summarizing foreign conceptions of trust law); *see also* Michele Grazieadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 288, 294 ("Virtually all of the relationships that would be considered fiduciary in common law countries would, in most civilian jurisdictions, be considered to raise issues similar to those in the common law world.").

280 *See, e.g.*, Charles E. Rounds, Jr., *The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together With A*

fiduciary relationships mix aspects of agency with aspects of trust, based on the purposes and nature of the relationship. Seeing the role of best interests and substituted judgment in fiduciary law, in other words, helps map its domain, and focus once again on the agency relationship as at least as fundamental a fiduciary one as long paradigmatic trust.[281]

B. Fiduciary Standards and Contract

On the account offered here, the set of relationships the common law calls "fiduciary" involves two basic postures—a posture towards another person as an individual personal identity, and a de-personalized frame that treats them as a generalized abstraction.[282] Across the spectrum of fiduciary relationships, the law allocates these decision-making postures based on its views of the nature and purpose of each fiduciary relationship.[283] For the most part, the relevant blend of decisional standards seems to inhere in the relationships in which they appear—if a relationship is one of agency, the law guides it by substituted judgment standard; if it is not guided by the substituted judgment standard, it is not agency.[284] From that perspective, my account is consistent with a view of fiduciary law as rooted in legal status.[285]

Nevertheless, many fiduciary relationships are consensual.[286] And it is perhaps implicit in my claim that the standards of substituted judgment and best interests roughly correspond to ordinary intuitions governing social practices such as representation and entrustment.[287] From that perspective, it is not implausible that, for example, the substituted judgment standard accords with the consensual expectations of parties entering into an agency relationship—raising the possibility that the theory could fit with an implied contract view of fiduciary law.[288]

The difficulty in figuring out whether that is right is that we would also need a theory of contract—only marginally less controversial than

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Model Fiduciary Relations Course Syllabus, 18 Regent U. L. Rev. 251, 252–53 (2006) ("[A]gency and trust are two of the five elements of the periodic table of common law private relationships . . . .").

281 *See, e.g.*, Wellman, *supra* note 31, at 114–15 (outlining this distinction).

282 *See supra* Part III.

283 *See supra* Part III.C.

284 *See supra* Part II.B.

285 *See, e.g.*, Markovits, *supra* note 97, at 224 (describing fiduciary relationships as essentially legal statuses, conceptually distinct from contract).

286 *See, e.g.*, Smith, *supra* note 35, at 26 ("Typically, a person is not required to accept a power, or to accept a role that carries powers with it.").

287 *See supra* Part III.B–C.

288 *See supra* note 14.

a theory of fiduciary law.[289] For instance, some scholars take it as analytic that contracts are the infinitely customizable product of specific consent.[290] If that is right, then fiduciary law cannot be fully contractual—the fiduciary standards of substituted judgment or best interests inhere non-waivably, as a descriptive legal matter, in certain kinds of relationships.[291] But other scholars have challenged the notion that mandatory rules are always extra-contractual, and if that is right, then perhaps fiduciary law could be accommodated in a broader conception of contract.[292]

The distinction between contract and fiduciary law I propose was mentioned earlier—fiduciary law involves some *other-regarding* posture (decisions made "on behalf of" another, in any sense), while contract involves a posture *towards the content of an agreement*.[293] We have learned that in fact fiduciary law is organized around two distinct other-regarding frames.[294] But *both* of those frameworks are different than that of contract partners whose duties are fulfilled entirely by complying with the meaning of an agreement—decision-making under a contract is not "on behalf of" the contract partner in any meaningful sense; it is determined by the meaning of the agreement. To be sure, this picture depends on a controversial theory of contract law—some scholars take contract to create an ongoing interpersonal relationship the content of which is not exhausted by the meaning of the agreement between them.[295]

But the benefit of this perspective is the insight it offers on the relationship between contract and the content of fiduciary relationships. One common way to enter a fiduciary relationship is by contract. You and I can agree—"I will serve as your agent at the cattle auction for $20." On the view I am suggesting, there are two things going on here. We have

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289 *See, e.g.*, Seana Valentine Shiffrin, *Is A Contract a Promise? in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 241, 242 (Andrei Marmor, ed., 2014) (summarizing debates over whether contracts are promises or agreements); Gregory Klass, *Promise, agreement, contract*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 39, 39 (Hanoch Dagan & Benjamin C. Zipursky, eds., 2020) ("Contract, promise, and agreement are contested concepts. One finds in the literature various conceptions of each, and the theorists' conceptions typically reflect their substantive commitments.").

290 *See, e.g.*, DeMott, *supra* note 4, at 887 (arguing that fiduciary law cannot be contractual because it contains many mandatory rules).

291 *See supra* Part I.A.

292 *See, e.g.*, Crescente Molina, *Contracting Without Promising*, 75 U. TORONTO L.J. 203, 237 ("[T]he parties who agree to a juridical transaction need not have intentionally assumed the *conventionally imposed contractual obligations* for these obligations to *hold* or *exist* in the first place . . . .").

293 *See supra* note 81 and accompanying text.

294 *See supra* Part II.B.

295 *See, e.g.*, Andrew Jordan, *The Promise of Contract Pluralism*, 56 CONN. L. REV. 639, 645 (2024) (suggesting that contract law might be attuned to moral characteristics of the different ongoing relationships of contract partners).

a contractual relationship constituted by the content of the agreement. Each of our *contractual* duties is satisfied by complying with the meaning of the agreement—my serving as your agent; your giving me $20. But, as it happens, the content of this agreement requires me to adopt another sort of posture towards you—it requires me to be your "agent," a word that denotes the concept of agency. And the concept of agency requires me to decide according to the substituted judgment standard—to adopt a relationship towards your individual personal identity.

You can call all of this "contract" if you want. But I suspect doing so obscures more than it illuminates. On the one hand, it is obviously possible to have agreements that *don't* create anything other than a posture towards the content of an agreement—"1,000 widgets for $1,000." And it is possible (and may well be a good idea) for the law to sometimes require people to exercise substituted judgment without any agreement—guardianship being perhaps the clearest example.[296] Consider, moreover, trust. Trusts are, like many agency relationships, generally created by an agreement between settlor and trustee. The content of that agreement requires the trustee to begin a trust-type fiduciary relationship with a *beneficiary*—with whom the trustee has had no agreement, and therefore no contractual relationship.[297] The trustee's relationship with the beneficiary generates duties owed by the trustee to the beneficiary by virtue of their relationship—surely any duties owed by the trustee by virtue of their agreement with the settlor are owed to the *settlor*.[298]

Finally, treating each of these frameworks distinctively helps us see that each of the *three* relevant postures—substituted judgment, best interests, and agreement—have different purposes and functions. Agency treats a principal as an ongoing, evolving, individual person, and changes with them over time.[299] Trust does not even presuppose the personhood of its beneficiary, and allows for financial management on behalf of virtually anything.[300] Contract is different than either. Like agency, contract presupposes the personhood of the parties to an agreement—you can be a trustee for your pet raccoon; you can't enter into a contract with it.[301] But, unlike agency, contract allows the parties to freeze the content of their duties towards one

296 *See supra* Part I.A.

297 And perhaps, as suggested above, an agency-type fiduciary relationship with the settlor. *See supra* notes 186-91 and accompanying text.

298 *See, e.g.*, Margaret Gilbert, Joint Commitment: How We Make the Social World 8 (2014) (arguing that agreements create directed obligations to the other parties of the agreement); Klass, *supra* note 289, at 44 (same).

299 *See supra* note 208 and accompanying text.

300 *See supra* Part III.B.

301 Restatement (Second) of Contracts § 12 (Am. Law Inst., 1981) ("No one can be bound by a contract who has not legal capacity to incur at least voidable contractual duties.").

another at a particular moment in time.[302] And, like trust, *after* an agreement is formed, contract partners can be agnostic to the individuality of their contract partner and simply comply with the meaning of the agreement.

There is, of course, much more to be said about all of this. For now, suffice it to say that my account offers an illuminating way to see fiduciary law—and the relationships that comprise it—as distinct from at least some plausible theories of contract, clarifying the role of fiduciary and contractual postures in the architecture of private law.

C. Personal Identity and Legal Personality

Legal personhood—the characteristic of *being* a person in the eyes of the law—is widely recognized to be a foundational, constitutive feature of any legal system.[303] But the theory of fiduciary standards offered here reveals that even a comprehensive theory of legal person*hood* might not be sufficient to make sense of private law. A theory of personal identity, what makes one the *same* person across time, or one *the individual* person that one is as opposed to other legal persons, may be required.[304] And indeed, there is growing recognition in private law theory of the organizing significance of personal identity in a number of domains—from contracts to property.[305]

The theory of fiduciary law presented above offers another point of entry to the role of personal identity in private law—in agency and fiduciary law. Moreover, it suggests that the law's theory of personal identity must be a relatively thick one. In this context, it is worth turning to a distinction among theories of personal identity offered by the philosopher Marya Schechtman. Schechtman argues that there are two kinds of questions we might ask about personal identity—the Reidentification

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302 *See, e.g.* Toomey, *supra* note 75, at 16 (describing contract as a mechanism for "enforcing intent crystallized at a particular, legally significant moment").

303 *See, e.g.*, Kurki, *supra* note 233, at 1 (noting the importance of a concept of legal personhood); Ngaire Naffine, Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person, 1 (2009) (illustrating the same); Paul B. Miller, *The Concept of Personality in Private Law*, *in* Interstitial Private Law 179, 180 (Samuel L. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith, eds., 2024) ("The legal concept of a *person* is *primordial*.").

304 *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. Rev. 1073, 1078 (2022) (distinguishing between theories of personhood and personal identity).

305 *See* DeMott, *supra* note 60, at 3 (noting that "agency doctrine does not treat the principal as personally discontinuous over time"); Fox-Decent, *supra* note 197, at 377 (describing the parent-child relationship as pre-occupied with the continuity of the personal identity of the child over time); Kaiponanea T. Matsumura, *Binding Future Selves*, 75 La. L. Rev. 71, 81 (2014) (observing that contract law "generally assumes the existence of a continuous personal identity").

Question, "what makes a person at time t_2 the same person at time t_1," and the Characterization Question, "of which beliefs, values, desires, and other psychological features make someone the person she is."[306]

The theory offered here reveals that in some areas of private law, including trust law, the Reidentification Question may be what we care about. As mentioned, a private donative trust must have ascertainable beneficiaries—the trustee needs to be able to make sure that they are making distributions to the right person and not, say, an imposter.[307] This requires some theory of personal identity, but of a sort that could (perhaps) be satisfied by something like numerical, bodily identity.[308] Trust law itself does not demand much, if anything, beyond that—we don't need to know anything *about* that person, about *who* they are and what about them makes them themselves.[309]

Agency law, however, demands on its own terms a different sort of theory of personal identity. To determine whether an agent, or similar fiduciary making a substituted judgment, has fulfilled their duties, we need to know what the principal would have done in the relevant circumstances.[310] To make *that* judgment, we need to know *about* the principal, not just that the principal still exists—we need to know what makes them *the* person that they are, as distinct from others.[311] This sounds more like Schechtman's Characterization Question—a theory of those things *about ourselves* that make us the person that we are, as opposed to someone else.[312] A number of such theories have been offered in the philosophical literature.[313] The structure of agency law or substituted judgment does not itself tell us how to select among these, but the point is that law

306 *See, e.g.*, Schechtman, *supra* note 207, at 2 (distinguishing these questions).

307 *See, e.g.*, Unif. Tr. Code § 402(1)(a) (Unif. Law Comm'n amended 2018) (listing ascertainable beneficiaries as a requirement for the creation of a trust); Sitkoff & Dukeminier, *supra* note 40, at 428 (same).

308 *See* Schechtman, *supra* note 207, at 68 ("The perceived tension between our competing intuitions concerning persons can thus be resolved by offering a physically based account of reidentification and a psychologically based account of characterization.").

309 To be sure, there is no *a priori* reason a single theory of personal identity could not answer both questions. *See, e.g.*, Harold Noonan, *Introduction*, *in* Personal Identity xiv (Harold Noonan, ed., 1993) (discussing theories of personal identity that turn on psychological continuity).

310 *See supra* Part III.A.

311 *See* Schechtman, *supra* note 207, at 68; Markovits, *supra* note 97, at 224 ("[F]iduciaries engage each other not abstractly, for their universal humanity, but concretely, as the particular persons whom they are and become . . . ."); Brooks, *supra* note 178, at 237 ("Fiduciaries tend to acquire special knowledge about their beneficiaries.").

312 *See* Schechtman, *supra* note 207, at 73 ("The most familiar examples of the characterization question are more specifically questions of which characteristics are *truly* those of some person (as opposed, say, to those which are his as a result of hypnosis, brainwashing, or some other form of coercion).").

313 *See* Schechtman, supra note 207, at 93 (offering such a theory).

must have *some* theory of personal identity in a thick, normative sense, at least to adjudicate agency cases.[314]

In short, the fundamental nature of agency in the pantheon of fiduciary relationships, and its reliance on the substituted judgment standard, offers another angle into the constitutive importance of personal identity in private law, increasingly recognized elsewhere. Whatever the law's theory of personal identity, it must account not only for the bare reidentification required by trust, but also for the kinds of considerations towards which substituted judgment is oriented—the story, relationships, values, commitments, and so on, that make up the person for whom we are deciding *who* they are.

D. The Future of Fiduciary Standards

This Article's contribution has been primarily theoretical—it offers a new lens through which to make sense of the distribution of decision-making standards across fiduciary relationships. In so doing, however, the account provided here suggests new ways to think normatively about how such standards—alongside alternatives such as contract[315]—*ought* to be distributed by the law. It suggests that relationships that the law (justifiably) thinks of as oriented towards an individual's personal identity ought to be guided by the substituted judgment standard, while best interests can have important roles in other sorts of relationships.[316]

From that perspective, how the law ought to think about the degree of individual inter-personality in particular relationships is an essential question of normative legal design. This question can be approached in a variety of ways. First, one set of questions concerns the *ethical substance* of the proffered relationship as a matter of interpersonal morality. I've suggested above, for example, that the notion that ordinary relationships of representation are oriented towards the personal identity of another is intuitive.[317] But a number of philosophers have argued that, despite appearances, personal identity does not have normative weight.[318] If that is right, according ethical (and maybe legal) value to whatever illusion

314 *See, e.g.*, DeMott, *supra* note 60, at 34 (noting that agency law is focused "on assuring a principal's autonomy through time and thus on the principal's present self and preferences.").

315 *See supra* Part IV.B.

316 *See supra* Part III.

317 *See supra* Part III.A.

318 *See, e.g.*, Derek Parfit, Reasons and Persons 217 (1986) ("Personal identity is not what matters."); Galen Strawson, *Against Narrativity*, 17 Ratio 428, 437 (2004) ("My own conviction is that the best lives almost never involve this kind of self-telling . . . .").

passes for the "evolving personal identity of another" would be based on a fundamental moral error.

On the other hand, some have suggested that at least many animals have the kind of self-identity over time that approximates the moral significance of personal identity.[319] If that's right, our relationship with animals might be better conceived in the ethical framework of representation rather than entrustment.[320] And at the same time, it is conceivable that there are cases in ordinary ethics where, notwithstanding the existence of an ongoing, genuine personal identity in another person, we ought to treat them as a placeholder or reasonable person—perhaps for reasons of discretion or privacy.

However those debates play out as a matter of interpersonal ethics, the extent to which the law should be responsive to them, or answer to reasons of its own in political and legal theory, is a separate question.[321] Indeed, it might be that the *law* has peculiar reasons—efficiency, for instance—to adopt the de-personalized frame of best interests in certain contexts. I've suggested this might justify the way in which the law conceptualizes the fiduciary status of trustees and corporate directors.[322] It might be that as a matter of interpersonal morality we ought always treat others as the individualized person that they are.[323] But perhaps the benefits of large-scale organization and wealth management outweigh strict compliance with interpersonal morality in the aggregate.

Even in contexts where the law aspires to treat a beneficiary as an individualized person, it faces questions in how to operationalize that commitment. We have already seen this, for example, in the different ways in which the law implements the substituted judgment standard in cases involving, say, durable powers of attorney and executors interpreting wills.[324] In both cases, the law views the relationship as oriented towards the individual personal identity of another—but given the longevity of the former and the particularly difficult epistemic position of the latter, the law more strictly confines the executor's decision-making to the plain

319 *See generally* Evelyn B. Pluhar, Beyond Prejudice: The Moral Significance of Human and Nonhuman Animals 6 (1995) (arguing that many non-human animals have moral status in part by virtue of their capacity to care about what happens to themselves across time).

320 *See supra* Part III.

321 *See, e.g.*, Scott J. Shapiro, Legality 109, 118-19 (2011) (observing that law is answerable to different normative considerations than interpersonal morality in devising solutions to coordination problems).

322 *See supra* Part III.C.

323 *See, e.g.*, Immanuel Kant, Groundwork of the Metaphysics of Morals 42 (Mary Gregor, ed., 1997) (". . . *Act so that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.*").

324 *See supra* Part II.B.

meaning of what the testator wrote.[325] The point is that whatever one thinks of the substance of these relationships as a matter of interpersonal morality, the law faces normative questions of its own in implementing fiduciary standards in practice and guarding against abuse.

In short, while my project here has been theoretical, it offers a valuable perspective on the standards that ought to govern particular fiduciary relationships. My account points us toward theorizing about the extent to which a particular relationship is or ought to be oriented towards the individual personal identity of another, while answering to considerations of aggregation, efficiency, epistemic prophylaxis, and more.

Conclusion

Fiduciary law—a domain stretching from the S&P 500 to the hospice bed, with no apparent correlate in ordinary intuition—has long resisted theorization. Progress, however, has been made, in observing that all relationships we call fiduciary involve one person deciding (in some sense) "on behalf of" another, guided by some standard. But the question of *what standard* has remained.

This Article has argued that the decision-making paradigms of best interests and substituted judgment—debated, hashed out, and applied in health law—organize and make sense of the standards by which fiduciaries decide throughout the domain of fiduciary law. Agency, a relationship towards the personal identity of a principal, asks its fiduciaries to apply the substituted judgment standard—to do what the principal would have done. Trust, a relationship that takes its beneficiaries more as placeholders, asks its fiduciaries to act in their objective best interests.

Between these poles the spectrum of fiduciary relationships covers a broad range of postures towards beneficiaries—some more personal, some less, some governed more by substituted judgment, some closer to best interests. In this way, fiduciary law can tailor standards of conduct for its myriad purposes—from organizing the management of money and economic growth, to making decisions for us in the first and last moments of our lives.

325 *See supra* Part II.B.