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WHEN INFORMAL ADOPTION MEETS INTESTATE
SUCCESSION: THE CULTURAL MYOPIA OF THE
EQUITABLE ADOPTION DOCTRINE

*Michael J. Higdon**

I. INTRODUCTION

When it comes to inheritance rights in the United States, it is an unfortunate reality that, while the number of American families who fall into the nuclear-family model has declined,¹ the laws of intestate succession have nonetheless continued to cling to that model for purposes of defining an intestate decedent's "family."² Accordingly, for the many Americans who die intestate,³ there is a strong likelihood that those whom the decedent considered to be family will not inherit any of the decedent's estate.⁴ As a result,

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1. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991) [hereinafter *Family Resemblance*] ("The traditional nuclear family is rapidly becoming an American anachronism.").

2. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200 (2001) ("At the dawn of the twenty-first century, the inheritance system stands as one of the last bastions of the traditional American family. Many of its rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support." (citation omitted)); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 5 (2000) (noting that, with a few limited exceptions, "intestacy laws still reflect the nuclear family norm").

3. See Gary, *supra* note 2, at 15–16; see also *infra* notes 194–97 and accompanying text.

4. See *Urick v. McFarland*, 625 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1993) ("As family structure becomes less traditional, it is likely that the time-honored rules of intestacy will frequently fail to accommodate a decedent's true

critics of the modern intestacy scheme have called for more inclusive inheritance rights to help encompass those who do not fit the “traditional” definition of family.⁵ As an illustration of one such family, consider the story of Hattie O’Neal.

Hattie O’Neal is African American and was born in 1949 to Bessie Broughton, an unwed mother.⁶ When her mother died in 1957, Hattie was sent to live with a relative in New York City. In fact, Hattie would spend the next four years living in several different households, which were sometimes headed by relatives and other times by non-relatives who were simply in want of a “daughter.” Hattie was eventually sent to Georgia to live with Estelle Page, her paternal aunt. Soon thereafter, Page learned of a married couple, Mr. and Mrs. Roswell Cook, who were looking to adopt a little girl. After Page told the Cooks about Hattie, the couple came and met Hattie, who at this time was around twelve years of age, and ultimately took her home with them. From the time she went home with the Cooks until she married in 1975, Hattie was in all meaningful ways their “daughter.” Although she was never formally adopted and retained her own last name, the Cooks raised her as their own. Even when the Cooks divorced in the 1970s, Mr. Cook kept Hattie with him, continuing to raise her and providing for her education. Furthermore, after Hattie’s marriage, when she had children of her own, Mr. Cook referred to them as his “grandchildren.” Nonetheless, in 1991, Mr. Cook died without a will, which raises the following question: Does Hattie have the right to inherit as the child of Mr. Cook?⁷

Historically, the answer to that question would have been “no.” In fact, at one point the only children who could inherit from a decedent were the decedent’s biological children because “[f]or centuries laws tied inheritance to bloodline and legitimacy.”⁸ However, the laws of intestate succession have changed, albeit in a limited manner, to try to better reflect the evolution of the American family. For example, currently all states have intestacy statutes that allow both illegitimate and adopted children to inherit the same

testamentary intent.”).

5. See, e.g., Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1526–27 (2000); see also *infra* notes 201–02 and accompanying text.

6. See *O’Neal v. Wilkes*, 439 S.E.2d 490, 491 (Ga. 1994); see also *JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES* 99 (7th ed. 2005) (pointing out that O’Neal is African American).

7. *O’Neal*, 439 S.E.2d at 491.

8. Gary, *supra* note 2, at 37.

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as marital and biological children.⁹ Nonetheless, even this expanded definition of “children” fails to protect children, like Hattie, who were never formally adopted. As a result, some courts, “by dipping . . . into their reservoir of equity powers,”¹⁰ have turned to the doctrine of equitable adoption to adjudicate situations like Hattie’s.

Claims of equitable adoption, also known as “virtual adoption,” “de facto adoption,” and “adoption by estoppel,”¹¹ frequently arise in the context of intestate decedents who are survived by someone who, although raised by the decedent and treated as the decedent’s child, was never formally adopted.¹² Again, for those individuals, the intestate succession statutes historically offered no protection whatsoever, as the statutes applied only to biological descendants and formally adopted children. However, given that not all persons who a decedent may consider to be his “children” may have been formally adopted and, further, that excluding such a person from inheritance can cause great hardship to the surviving “child,” courts have used the doctrine of equitable adoption to treat such a person, for purposes of intestate succession, as though she were formally adopted and thus entitled to inherit as a child of the decedent.¹³

Despite the doctrine’s laudatory goals, this Article focuses on how the doctrine of equitable adoption, although created to make inheritance rights more inclusive, has instead served to reaffirm the preeminence of the nuclear family model as the standard for identifying the “children” of an intestate decedent. Specifically, the tests that courts have developed to determine whether an equitable adoption exists almost invariably require that there first have been a contract to adopt between the natural and “foster”¹⁴ parents.¹⁵ Although courts developed this requirement to help prevent fraud, the requirement has nonetheless made it nearly impossible for

9. See generally Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 113–14; Gary, *supra* note 2, at 57.

10. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 548 (2000).

11. See Rebecca C. Bell, Comment, *Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme*, 29 STETSON L. REV. 415, 416 n.3 (1999).

12. See generally Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 766–67 (1984).

13. See *infra* notes 212–13 and accompanying text.

14. For purposes of this Article, the term “foster parent” is used to refer to an individual who has informally adopted a child.

15. See *infra* notes 215–17 and accompanying text.

informally adopted children to qualify as *equitably* adopted children.

While other commentators have examined the restrictive nature of the equitable adoption doctrine, the purpose of this Article is to level a new criticism at the doctrine as it currently exists. Specifically, the prevailing tests for determining whether an equitable adoption has taken place are not only overly restrictive, but are also most likely to have a disproportionately negative impact on this country's minority racial and ethnic communities. Indeed, given that the rate of informal adoptions is relatively high among many of these minority communities currently living in the United States,¹⁶ it is the children of these minority families who are more likely to be excluded as heirs, even under this "inclusive" doctrine, simply by virtue of being reared in the "nontraditional" extended family model.

Part I will first detail the role that informal adoption plays within the extended family model as that model currently exists within the two most predominant minority ethnic communities in the United States. Against that backdrop, Part II will then delve more deeply into the law of intestate succession and, more specifically, the equitable adoption doctrine, looking both at the underlying policies as well as the specific tests that courts have developed to determine if someone qualifies as an equitably adopted child. In light of these judicially created tests, Part III will discuss the difficulties that an informally adopted child faces when trying to establish himself as an equitably adopted child. Finally, as a result of how underinclusive and potentially discriminatory the current tests are under the equitable adoption doctrine, Part IV will explore ways in which courts and legislatures can make the doctrine and the laws of intestate succession more cognizant of and more responsive to informally adopted children in the United States.

II. INFORMAL ADOPTION WITHIN THE EXTENDED FAMILY SYSTEM

George Murdock is credited with having coined the term "nuclear family."¹⁷ In 1949, Murdock defined the term as "a social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults."¹⁸ However, Murdock did not claim that most family units fell into the

16. See *infra* note 165 and accompanying text.

17. See Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 218 (2004).

18. *Id.*

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nuclear model; instead, Murdock merely laid out the husband-wife-child triad as a basic building block upon which most families are built.¹⁹ Furthermore, Murdock, who studied the ethnographies of 250 different cultures throughout the world, found that the nuclear-family model was only the norm in about twenty-five percent of those cultures.²⁰ In contrast, the majority of the cultures that Murdock looked at followed an extended family model, which was defined as a married adult residing not only with a spouse and children, but also with some members of the adult's original nuclear family.²¹

Even today, census data reveals a similar distribution of family models within the United States.²² Indeed, a number of studies have shown that the majority of American families do not mirror the nuclear-family model.²³ Nonetheless, as quite a few scholars have noted, many of the modern legal and social policies in America continue to use the nuclear-family model as the norm.²⁴

19. Bron B. Ingoldsby, *Family Origin and Universality*, in *FAMILIES IN MULTICULTURAL PERSPECTIVE* 83, 84 (Bron B. Ingoldsby & Suzanna Smith eds., 1995) (pointing out that Murdock concluded that "the nuclear family is a universal human social grouping that either stands on its own or serves as the basis for the more complex forms" (citation omitted)). *But see* Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 589 (noting that other anthropologists reject Murdock's contention of the nuclear family as the "basic unit of society").

20. Failinger, *supra* note 17, at 219.

21. *Id.*; *see also* Yoshinori Kamo, *Racial and Ethnic Differences in Extended Family Households*, 43 SOC. PERSP. 211, 212 (2000) (defining the extended family as "a household unit including any family members outside the core nuclear family unit"); Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the "Beneficial Family" and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 6-7 (2005) ("Historically, in global cultures, the term 'family' referred to a household made up not only of blood relatives, but also a host of extended family members, nonrelative boarders, and slaves living in a common residence.").

22. *See* JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS 1-3* (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>. Ironically, despite that recognition by the Census Bureau, it continues to define "family" using the nuclear family model, which provides that "[a] family is a group of two people or more (one of whom is the householder) related by birth, marriage, or adoption and residing together." U.S. Census Bureau, *Current Population Survey (CPS) - Definitions and Explanations*, <http://www.census.gov/population/www/cps/cpsdef.html> (last visited Jan. 16, 2008).

23. *See* Failinger, *supra* note 17, at 219; Woodhouse, *supra* note 19, at 570 ("Today, far from representing a radical fringe, nonnuclear families have become the norm for a generation.").

24. *See* Failinger, *supra* note 17, at 206 ("Despite this evidence of plural

Furthermore, as many legal commentators have pointed out, a number of laws that have a direct bearing on family all but ignore the extended-family model.²⁵ This omission is particularly objectionable given that the extended family model is much more prevalent within many of the current ethnic minority communities living in the United States.²⁶ As Justice Brennan wrote in *Moore v. City of East Cleveland*,

The “extended family” that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.²⁷

Under the extended family model, the “family” extends beyond the household and also encompasses “kinships,” which would include other relationships arising from both blood and marriage.²⁸

family/household structures, marriage and the nuclear family remain the chief focus of social and cultural debates in the United States.”); *see also* Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 45–49 (1998) (providing a survey of scholarship concerning the legal problems faced by “parents who do not live in the traditional nuclear family”); Ponte & Gillan, *supra* note 21, at 41 (noting the “privileging of, and reverential attitude toward, the nuclear family”).

25. *See, e.g.*, Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1652–53 (1995) (discussing how current adoption policy is based on the nuclear family model); Woodhouse, *supra* note 19, at 580 (noting that nontraditional families “are not fully recognized by laws which privilege the nuclear family”).

26. *See* Failing, *supra* note 17, at 234 (“Modern American ethnographic studies show similar patterns of extended family behavior, particularly when one looks at families from non-European cultures.”); Kamo, *supra* note 21, at 211 (“[L]iving in extended family households is much more common among certain groups of people [including] racial/ethnic minorities.”). Of course, as others have noted, it is difficult to know with any specificity the actual incidence of those families in the United States living in an extended family arrangement.

27. 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (citation omitted).

28. *See* Max E. Stanton, *Patterns of Kinship and Residence*, in FAMILIES IN MULTICULTURAL PERSPECTIVE, *supra* note 19, at 97, 100 (“The extended family is a corporate economic and political unit, as well as a kinship-based group.”); *see generally* C. Quince Hopkins, *The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship*

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Examples of such kinships include grandparents, aunts, uncles, cousins, and other relatives who, although related by blood or marriage, typically do not reside in the home with the nuclear family.²⁹ However, the extended family model frequently includes those without blood or marriage ties. In fact, there is another class of relationships included within the extended family called “fictive kinships,” which anthropologists define as “a binding relationship between individuals similar to that of close blood kin but not based on birth, marriage or descent.”³⁰ Examples of a fictive kinship, which Barbara Bennett Woodhouse has described as “culturally codified,”³¹ would include both the important role that the *compadrazgo*, or godparent, plays in many Hispanic cultures,³² as well as the African American tradition of “othermothering.”³³

As many anthropologists have noted, the extended family model and its inclusion of kinship relationships has a number of advantages.³⁴ However, one of the primary benefits of this model is the greater ability of family units to care for children in need of support.³⁵ Of course, in all ethnic groups, relatives can often be counted on to rear orphaned children. However, within certain ethnic and racial communities, the practice of “kinship care” is much more pervasive.³⁶ In fact, in many such communities, it is not uncommon for a relative, or even an unrelated member of the larger

Change in the United States, 13 CORNELL J.L. & PUB. POL'Y 431 (2004).

29. See Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 908 (2003).

30. Woodhouse, *supra* note 19, at 591–92; see also CAROL B. STACK, *ALL OUR KIN: STRUGGLES FOR SURVIVAL IN A BLACK COMMUNITY* 57–61 (1974) (describing the process by which, within the African American community, friendships can evolve into fictive kinships).

31. Woodhouse, *supra* note 19, at 591.

32. See *infra* notes 152–54 and accompanying text.

33. See *infra* note 56 and accompanying text.

34. See, e.g., Woodhouse, *supra* note 19, at 594 (“[B]onds of kinship provide a structure of interconnectedness and obligation sufficiently powerful, resilient, and flexible to insure support and shelter for all members of the community in times of need and to serve as a buffer between individuals and the impersonal state.”).

35. Holmes, *supra* note 25, at 1665 (outlining the “child-centered nature of the complex Black extended family structure”); Cynthia R. Mabry, *African Americans “Are Not Carbon Copies” of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 437–38 (1998).

36. Rebecca L. Hegar & Maria Scannapieco, *Grandma's Babies: The Problem of Welfare Eligibility for Children Raised by Relatives*, 27 J. SOC. & SOC. WELFARE 153, 155–56 (2000).

ethnic community, to go so far as to informally adopt a needy child.³⁷ As noted by the North American Council on Adoptable Children, “[a]s has been the case for years, unstructured, extended-family adoption continues to play a definitive role in the cultural make-up of many communities of color.”³⁸

This practice of informal adoption has been defined as “[t]he process by which dependent children are informally reared by adults who are not their natural or formal adoptive parents. The adult parent surrogates many [sic] or may not be related to the children.”³⁹ Although informal adoption no doubt exists within all racial and cultural communities,⁴⁰ social science, as well as the United States Census Bureau, have noted that the practice is particularly more prevalent in the African American and the Hispanic American communities.⁴¹ Given that these two minority populations account for almost thirty percent of the United States population,⁴² it is first necessary, prior to there being any hope of creating an inheritance scheme that is more responsive to the children of these communities, that the law have a thorough understanding of the roles that both the extended family model and the practice of informal adoption play within these communities.

A. *Informal Adoption Within the African American Family*

As noted by Sociology Professor Shirley A. Hill, “the social construction of the ideal family as a two-parent nuclear unit with a

37. Karen March, *Perception of Adoption as Social Stigma: Motivation for Search and Reunion*, 57 J. MARRIAGE & FAM. 653, 653 (1995) (“[M]any racial and ethnic groups in North America use the informal adoption practices of their traditional cultures . . .”).

38. TOM GILLES & JOE KROLL, N. AM. COUNCIL ON ADOPTABLE CHILDREN, BARRIERS TO SAME RACE PLACEMENT 14 (1991).

39. ROBERT B. HILL, NAT’L URBAN LEAGUE RESEARCH DEP’T, INFORMAL ADOPTION AMONG BLACK FAMILIES 9 (1977); see also Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 FUTURE OF CHILDREN 26, 28–29 (1993) (defining informal adoption as “when the birthmother allows another person (or persons), usually another family member, to take parental responsibility for her child without obtaining legal approval or recognition of that arrangement”).

40. Furthermore, different commentators looking at different cultures have referred to the practice of informal adoption differently. Indeed, synonyms for the practice of informally adopting a child include: “fostering,” “giving,” “schooling-out,” “child-switching,” “child-loaning,” “child-keeping,” and “adoptive fostering.” See Arvilla C. Payne-Price, *Etic Variations on Fosterage and Adoption*, 54 ANTHROPOLOGICAL Q. 134, 135 (1981).

41. See *infra* note 165 and accompanying text.

42. See Press Release, U.S. Census Bureau, *Minority Population Tops 100 Million* (May 17, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html> [hereinafter *Minority Population Press Release*].

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breadwinner father and a homemaker mother . . . was never a tradition among Black families.”⁴³ Instead, for the African American community, “family and household are not the same thing”⁴⁴ with “family” encompassing not only the members of a particular household, but also “key persons living in separate households.”⁴⁵ In fact, studies show that the extended family model exists in twenty-five to eighty-five percent of African American families.⁴⁶ Not surprisingly, one finds a very similar family model existing in West Africa, the location from which most American slaves were taken.⁴⁷ Indeed, “[t]he African immediate family, consisting of a father, his wives, and their children, is but a part of a larger unit. This immediate family is generally recognized by Africanists as belonging

43. Shirley A. Hill, *Class, Race, and Gender Dimensions of Child Rearing in African American Families*, 31 J. BLACK STUD. 494, 495–96 (2001).

44. Niara Sudarkasa, *African American Families and Family Values*, in BLACK FAMILIES 9, 20 (Harriette Pipes McAdoo ed., 3d ed. 1997); see also ANDREW BILLINGSLEY, CLIMBING JACOB’S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 31–32 (1992) (“[I]n our definition of African-American family organization, people do not have to live in the same household in order to function as a family unit.”).

45. ROBERT B. HILL ET AL., RESEARCH ON THE AFRICAN AMERICAN FAMILY: A HOLISTIC PERSPECTIVE 104 (1993) [hereinafter HILL, HOLISTIC PERSPECTIVE]; see also McConnell, *supra* note 24, at 52 (noting that, within the African American community, “genetic family is recognized but not elevated over other types of extended biological and nonbiological family relationships”).

46. Melvin N. Wilson & Timothy F. J. Tolson, *Familial Support in the Black Community*, 19 J. CLINICAL CHILD PSYCHOL. 347, 347 (1990); see also Rubye W. Beck & Scott H. Beck, *The Incidence of Extended Households Among Middle-Aged Black and White Women*, 10 J. FAM. ISSUES 147, 150 (1989) (“Cross-sectional evidence indicates that black kin are more likely to share a residence than are white kin.”). However, it should be noted that, given that the African American definition of “family” often extends beyond a single household, it is difficult to know what percentage of African Americans live in an extended family versus a nuclear family model. See Jacqueline Marie Smith, *The Demography of African American Families and Children at the End of the Twentieth Century*, in CHILD WELFARE REVISITED: AN AFRICENTRIC PERSPECTIVE 15, 23 (Joyce E. Everett et al. eds., 2004). Nonetheless, statistics do reveal that, between 1970 and 1980, the percentage of African Americans living in an extended family household rose from twenty-three to twenty-eight percent, while the same statistic remained at eleven percent for whites. HILL ET AL., *supra* note 45, at 102. Of course, as these statistics demonstrate, not all African American families fall into the extended family model. Indeed, as at least one commentator has noted, “a large number of African-American families function along nuclear lines.” NANCY BOYD-FRANKLIN, BLACK FAMILIES IN THERAPY: UNDERSTANDING THE AFRICAN AMERICAN EXPERIENCE 54 (2d ed. 2003). Nonetheless, as Boyd-Franklin points out, even those households often “are active in their extended families.” *Id.*

47. Sudarkasa, *supra* note 44, at 10–11.

to a local relationship group termed the 'extended family.'"⁴⁸ Additionally, the costs of child rearing in the extended family model of West Africa are "rarely born exclusively by biological parents; rather, they are shared by many people through the extended family and other social networks."⁴⁹

Furthermore, in marked contrast to the nuclear family model, in both African and African American culture, it is consanguinity, and not conjugality, that most generally defines "family."⁵⁰ As noted anthropologist Dr. Niara Sudarkasa explains:

African extended families were (and are) large multigenerational groupings of relatives built around a core group known as a *lineage*. Members of this group of "blood relatives" trace their descent from a common male ancestor through a line of males in some societies, such as the Yoruba of Nigeria, or from a female ancestor through a line of females, in societies such as the Ashanti of Ghana

Because lineage members were and are prohibited from marrying one another, they must take their spouses from other lineages. In this way, extended families are created.⁵¹

However, even then, the notion of "family" within African American culture frequently transcends both marriage and bloodline. In fact, one of the hallmarks of African American families is the concept of collective unity that manifests itself in several forms of extended family kinships. Professor Connie M. Kane provides two examples:

One is the three-generation household, a structure that allows for pooling financial and human resources for the care of children and the elderly, as well as for the emotional support of parents. Another is that of family members choosing to live in separate households but close proximity to each other, so that daily interaction is not only possible but likely. And a

48. HILL ET AL., *supra* note 45, at 105 (quoting MELVIN J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* 182 (Beacon Paperback 1958)); *see also* Sudarkasa, *supra* note 44, at 13–19.

49. Hegar & Scannapieco, *supra* note 36, at 155.

50. BILLINGSLEY, *supra* note 44, at 28 ("Blood ties or lineage constitute the strongest element in the African-American kinship system."); Niara Sudarkasa, *Interpreting the African Heritage in Afro-American Family Organization*, in *BLACK FAMILIES* 37, 42 (Harriette Pipes McAdoo ed., 2d ed. 1981) ("The most far-reaching difference between African and European families stems from their differential emphasis on consanguinity and conjugality In Africa, unlike Europe, in many critical areas of family life the consanguineal core group rather than the conjugal pair was paramount.").

51. Sudarkasa, *supra* note 44, at 14.

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third structure quite common in African American communities is that of fictive kin. Here, families establish familial relationships with people who are not related by blood and who may or may not live with the nuclear family. Friends or neighbors are likely candidates for fictive kin relationships and may be given kinship titles, such as aunt or uncle.⁵²

Despite these different forms, the key benefit underlying the extended family model within the African American community is the same: survival.⁵³ In fact, many scholars credit the extended family as “the institution most responsible for the survival of African people in the United States.”⁵⁴ Specifically, the extended family model employs a “collectivistic philosophy,” in which the individual members focus not on individual needs, but on the needs of the collective so as to ultimately benefit the greater African American community.⁵⁵ One example of this mutual support can be found in the practice of “othermothers,” a term used to describe African American women who provide both extended and sometimes permanent child care to the children of friends and relatives.⁵⁶

Of course, given the rather large obstacles that African Americans have historically faced, this need for survival may not be so easy for others to comprehend. As Nancy Boyd-Franklin notes, “[i]t is often difficult for those raised within a purely Westernized system focused on the individual and the nuclear family to understand a worldview that places the well-being of the social whole before that of its members.”⁵⁷ For those who may have difficulty understanding the worldview that Boyd-Franklin points to, they need only consider two obstacles that have made the extended family model almost indispensable to African Americans. Although many such obstacles persist today, the two that are most relevant here are slavery and this country’s history of discriminatory child welfare practices. Given that African American families have managed to triumph over both, the success of the

52. Connie M. Kane, *African American Family Dynamics as Perceived by Family Members*, 30 J. BLACK STUD. 691, 692–93 (2000) (citations omitted).

53. BOYD-FRANKLIN, *supra* note 46, at 6 (“[S]urvival skills are among the most significant strengths of African American families today.”); *see also* STACK, *supra* note 30, at 28 (noting the “strategies for survival” emanating from the “extensive networks of kin and friends” in the African American community).

54. Sudarkasa, *supra* note 44, at 12; *see also* HILL, *supra* note 39, at 29 (“The institution primarily responsible for the survival and advancement of black people from slavery to present times has been the extended family.”).

55. BOYD-FRANKLIN, *supra* note 46, at 6.

56. *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 271 (1995) (“It is not uncommon for a Black child’s “Mama” to be a woman who did not give birth to her or who is not even related to her by blood.”).

57. BOYD-FRANKLIN, *supra* note 46, at 6.

extended family model cannot be overstated.

As a preliminary matter, in terms of American slavery, some sociologists, taking the “ethnocentric” view, posit that slavery destroyed all remnants of African culture.⁵⁸ Others, however, take the “cultural relativistic” view and find that “the history and the heritage of the African-American people does not begin or end with slavery. It goes far back into ancient Africa, back to the origins of all humankind and the rise of civilization.”⁵⁹ As noted earlier, the extended family network constitutes one of the key characteristics of West African culture.⁶⁰ Thus, cultural relativists would argue that the extended family network that exists today in African American culture can be traced back to West Africa.⁶¹ However, regardless of whether the first African Americans brought extended family networks with them to the United States, many historians have noted how slavery actually created more incentives to extend the notion of the family beyond nuclear boundaries and into the larger community.⁶²

Indeed, given the challenges that enslaved African American families faced, the extended family model was crucial.⁶³ As one legal scholar has noted, “[f]rom the beginning of the importation of Africans to the Americas, Black families have been subject to systematic and institutional and individual deprivation and degradation, resulting in the tearing of their social and familial order.”⁶⁴ Particularly vulnerable were slave children, who were frequently separated from their parents.⁶⁵ Faced with so many

58. See BILLINGSLEY, *supra* note 44, at 83; see also Jualynne Elizabeth Dodson, *Conceptualizations of African American Families*, in BLACK FAMILIES, *supra* note 44, at 67, 67–73.

59. BILLINGSLEY, *supra* note 44, at 83–84. “There is a distinct nexus between Africa and America, which, though broken and perverted, is nevertheless not to be neglected.” Mark Fine et al., *Family Stability in Black Families: Values Underlying Three Different Perspectives*, 18 J. COMP. FAM. STUD. 1, 12 (1987) (quoting W.E.B. DUBOIS, THE NEGRO AMERICAN FAMILY 9 (1908)).

60. See *supra* notes 47–49 and accompanying text.

61. See Dodson, *supra* note 58, at 73–76 (discussing the cultural relativistic view).

62. See, e.g., Sudarkasa, *supra* note 44, at 18–19 (noting the importance of kinship networks on and across plantations).

63. See Roberts, *supra* note 56, at 269 (“Because families could be torn asunder at the slavemaster’s whim, slave communities created networks of mutual obligation that reached beyond the nuclear family related by blood and marriage.”).

64. Holmes, *supra* note 25, at 1661.

65. John Hope Franklin, *African American Families: A Historical Note*, in BLACK FAMILIES, *supra* note 44, at 5, 5–6.

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children in need of a family, the extended family model with its “flexible boundaries where outside members can be subsumed into the formally defined family”⁶⁶ became particularly crucial.⁶⁷

Specifically, one of the most effective ways in which the extended family model contributed to the survival of African Americans during slavery was through the practice of informal adoption.⁶⁸ As noted by Robert B. Hill in his book *Informal Adoption Among Black Families*, “one of the key functions performed by the black extended family is the informal adoption or foster care of children by grandparents, aunts and uncles and other kin.”⁶⁹ Thus, slave children left without parents would be informally adopted by other members of the slave community. According to Hill, “during slavery, the practice of informal adoption of children by grandparents and aunts and uncles permitted thousands of black children to withstand the ordeals of slavery -- [sic] after their parents had often been sold as chattel.”⁷⁰

Unfortunately, even after slavery had been abolished, African American families continued to face challenges that would further underscore the need for the extended family network and informal adoptions. Specifically, African American families were generally excluded from the child welfare programs that existed following the end of slavery.⁷¹ In fact, at the 1930 White House Conference on Child Health and Protection of Dependent and Neglected Children, Dr. Ira De A. Reid presented data outlining the discriminatory treatment that African American families were receiving in foster and child care.⁷² The data showed that 1) African American families were at best underrepresented and, at worst, completely excluded

66. G. Susan Mosley-Howard & Cheryl Burgan Evans, *Relationships and Contemporary Experiences of the African American Family: An Ethnographic Case Study*, 30 J. BLACK STUD. 428, 431 (2000).

67. See McConnell, *supra* note 24, at 52 (“[S]lavery . . . forced the creation of systems of mutual support beyond the traditional nuclear family.”).

68. See Ruth G. McRoy, *African American Adoptions*, in CHILD WELFARE REVISITED, *supra* note 46, at 256, 260 (“During slavery, the community’s response to the disruption of family bonds was to absorb children left without parents into existing family networks.”).

69. HILL, *INFORMAL ADOPTION*, *supra* note 39, at iv.

70. *Id.* at 22; see also Woodhouse, *supra* note 19, at 592–93.

71. See McRoy, *supra* note 68, at 260; see also ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 58 (1972) (describing the “cruel and fateful years just after emancipation, when Black people were largely deserted by the wider society”); Franklin, *supra* note 65, at 8.

72. See BILLINGSLEY & GIOVANNONI, *supra* note 71, at 81–85; see also Robert B. Hill, *Institutional Racism in Child Welfare*, in CHILD WELFARE REVISITED, *supra* note 46, at 57, 60 [hereinafter Hill, *Institutional Racism*].

from the Mother's Aid program (a precursor to AFDC and TANF); 2) despite the higher rates of illegitimacy that existed among African Americans, facilities that were designed to care for illegitimate children and their unwed mothers were almost exclusively for whites; and 3) most health care services existed mainly to serve whites, despite the high level of infant mortality that existed among African Americans at the time.⁷³ Furthermore, during segregation, African American children were excluded from most adoption agencies.⁷⁴ In light of this discrimination, it was the extended family that "came to the rescue of thousands of related and non-related African American children who had no means of support."⁷⁵ Once again, this rescue was frequently achieved through the practice of informal adoption.⁷⁶

Even today, despite the greater availability of child welfare services to African American families, the extended-family model continues to serve a pronounced role within the African American community.⁷⁷ To explain this continuation of the extended family, some commentators have offered that "poverty, racism, and socioeconomic and psychological stressors have necessitated the continuation of the pattern of extended family as a buffer against negative external forces."⁷⁸ Furthermore, just as the extended family model continues to survive within the African American community, so too does the practice of informal adoption.⁷⁹

73. BILLINGSLEY & GIOVANNONI, *supra* note 71, at 81–85.

74. BOYD-FRANKLIN, *supra* note 46, at 63.

75. McRoy, *supra* note 68, at 260 (citation omitted).

76. *Id.*; see also BOYD-FRANKLIN, *supra* note 46, at 63 (noting that "the kinship care and informal adoption process provided an unofficial social service network for African American families and children").

77. See Hill, *Institutional Racism*, *supra* note 72, at 60 ("Although much higher proportions of African American children and families are currently represented in [child welfare] programs, the services are still inaccessible or inadequate for the large numbers of low-income families that need them.")

78. McRoy, *supra* note 68, at 260. Some critics note the continued presence of racism in the current child welfare system of today. See Oronde A. Miller & Rebecca Jones Gaston, *A Model of Culture-Centered Child Welfare Practice*, 82 CHILD WELFARE 235, 236 (2003) (describing the "cultural arrogance of the American child welfare system").

79. See Stolley, *supra* note 39, at 29 (describing the contemporary practice of informal adoption as "widespread"). In fact, it is not uncommon to see contemporary African American scholars include the informally adopted when defining "family." For example, in his book *Climbing Jacob's Ladder: The Enduring Legacy of African American Families*, Andrew Billingsley provides the following:

What do we mean by "African American family"? Essentially, it is an intimate association of persons of African descent who are related to one another by a variety of means, including blood, marriage, formal

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Specifically, in regards to the extended family, statistics show that, in 1996, 23% of African American children lived in extended families, compared with only 10% of white children.⁸⁰ Furthermore, one finds even greater differences between the races when looking at the treatment of children who are born out of wedlock. Specifically, Hill notes that, as late as 1977, 90% of African American children born out of wedlock were retained by the extended family, in contrast with only 7% of nonmarital white children whom are more likely to be put up for adoption.⁸¹ Additionally, an African American child is four and a half times as likely as a white child to live with neither parent.⁸² For instance, according to the U.S. Census, in 2001, 9.56% of African American children lived apart from both parents.⁸³ For white children, the percentage was only 3%.⁸⁴ This statistic is important because, in considering the rate of informal adoption, an African American child who does not live with either parent has a much greater chance of being informally adopted. In fact, Robert B. Hill has noted that 80% of African American children not living with either parent are informally adopted.⁸⁵ Furthermore, statistics reveal that the number of African American children who live with and have been informally adopted by relatives rose from 1.3 to 1.4 million between 1970 and 1979.⁸⁶ By 1990, the number had reached 1.6 million.⁸⁷ In total, it has been estimated that nearly 15% of African American children are informally adopted.⁸⁸

adoption, informal adoption, or by appropriation; sustained by a history of common residence in America; and deeply embedded in a network of social structures both internal and external to itself. Numerous interlocking elements come together, forming an extraordinarily resilient institution.

BILLINGSLEY, *supra* note 44, at 28.

80. Smith, *supra* note 46, at 23–24.

81. HILL, *INFORMAL ADOPTION*, *supra* note 39, at 23.

82. Marian Wright Edelman, *An Advocacy Agenda for Black Families and Children*, in *BLACK FAMILIES*, *supra* note 44, at 323, 324.

83. U.S. CENSUS BUREAU, *LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS AND MARITAL STATUS OF PARENTS, BY AGE, GENDER, RACE, AND HISPANIC ORIGIN OF THE CHILD FOR ALL CHILDREN* tbl.C3 (2001), *available at* <http://www.census.gov/population/socdemo/hh-fam/cps2001/tabC3-black.pdf>.

84. U.S. CENSUS BUREAU, *HOUSEHOLD RELATIONSHIPS AND LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS, BY AGE, SEX, RACE, HISPANIC ORIGIN, AND METROPOLITAN RESIDENCE* tbl.C2 (2001), *available at* <http://www.census.gov/population/socdemo/hh-fam/cps2001/tabC2-white.pdf>.

85. Hill, *Institutional Racism*, *supra* note 72, at 69.

86. HILL, *HOLISTIC PERSPECTIVE*, *supra* note 45, at 32.

87. ROBERT B. HILL, *THE STRENGTHS OF AFRICAN AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER* 126 (1999) [hereinafter HILL, *AFRICAN AMERICAN FAMILIES*].

88. BILLINGSLEY, *supra* note 44, at 30. Of course, despite the relatively

In looking at African American households in which an informal adoption has taken place, scholars have noted certain patterns in terms of who is doing the “adopting.” First, it should be noted that African Americans who are most likely to informally adopt are unmarried, older, less educated, and living on a low or fixed income.⁸⁹ Furthermore, it is grandparents, and generally grandmothers, who play one of the most active roles in the practice of informal adoption within the African American community.⁹⁰ Specifically, Hill notes that for those children who were informally adopted before age six, two-thirds were informally adopted by grandparents.⁹¹ Additionally, studies have also shown that a disproportionate number of African American children are reared by elderly African American women.⁹² In fact, statistics reveal that one in three African American families containing young children are

high incidence of informal adoption, the African American community is in no way adverse to the practice of formal adoption. In fact, a survey by the National Urban League African American Pulse Survey found that, among African American households, one-third were interested in formally adopting. McRoy, *supra* note 68, at 261. Furthermore, as Andrew Billingsley points out, “[w]hile it is not generally reported, middle-income African-American families adopt children at a higher rate than their white counterparts.” BILLINGSLEY, *supra* note 44, at 29. For a discussion of the barriers faced by the African American community when it comes to formal adoption, see Charmaine Yoest, *Points of Light: Informal Adoption in the Black Community*, 19 CHILDREN TODAY 8, 9–10 (1990). One of those barriers is actually a cultural bias within the African American community against formal adoption. In fact, one study found that eighty-nine percent of the single African American mothers surveyed “felt that if they had chosen formal adoption, they would receive significant negative feedback from their peers and community.” *Id.* at 9.

89. Hill, *Institutional Racism*, *supra* note 72, at 69; *see also*, HILL, INFORMAL ADOPTION, *supra* note 39, at 60 (noting the “disproportionate low-income status of informally adopted children”). For a discussion of whether poverty contributes to the present continuation of the extended family model within the African American community, see Harriette Pipes McAdoo, *Patterns of Upward Mobility in Black Families*, in BLACK FAMILIES, *supra* note 50, at 155.

90. BILLINGSLEY, *supra* note 44, at 30–31 (“Grandparents continue to be the primary agents of informal adoption.”); HILL, INFORMAL ADOPTION, *supra* note 39, at 44–45. For a discussion of the benefits associated with the active role that grandmothers play in the extended family model, see Wilson & Tolson, *supra* note 46, at 349.

91. HILL, INFORMAL ADOPTION, *supra* note 39, at 45. Additionally, “African-American students are more likely than White students to describe their grandparents as ‘surrogate parent[s].’” Maldonado, *supra* note 29, at 909.

92. Maldonado, *supra* note 29, at 903 (“African-American children are more than twice as likely as White children to live with their grandparents. Not surprisingly, African-American women have a 60% likelihood of living with their grandchildren in an extended family at some point . . .”).

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headed by women who are sixty-five years or older, compared with one in ten white families.⁹³ After grandparents, it is aunts and uncles who most often informally adopt.⁹⁴ Finally, Hill notes that “about 12 percent of the black children who were informally adopted in families were not relatives of the heads of household.”⁹⁵

Although scant, there are also some statistics relating to the age at which African American children are most likely to be informally adopted. First, African American children are typically taken in at very early ages.⁹⁶ This statistic is not that surprising given that one of the circumstances that typically leads to an informal adoption is the “immaturity” of the birth mother.⁹⁷ Nonetheless, regardless of the age at which African American children are taken in for informal adoption, Hill noted in his study of informal adoptions within African American families that “the majority of informally adopted children being reared today are in fact school-age and would be considered at an age that was ‘hard to place’ for formal adoption.”⁹⁸

Finally, it is important to note that, when it comes to informal adoptions within African American extended families, these arrangements rarely involve any formal agreement.⁹⁹ Furthermore, even though these kinship placements may start out as temporary, they frequently become permanent.¹⁰⁰

93. Mosley-Howard & Evans, *supra* note 66, at 432; *see also* Hegar & Scannapieco, *supra* note 36, at 157 (“African-American children make up forty-four percent of those living with grandparents without a parent in the home[, which] is about six times more common for African-American children . . . than it is for white . . . children.” (citations omitted)). As others have pointed out, it is not surprising that grandparents play a larger role in parenting in the African American community given that African American mothers, along with Latinas, “are generally younger, poorer, and less likely than other women to be married when they bear children.” Maldonado, *supra* note 29, at 906.

94. HILL, *INFORMAL ADOPTION*, *supra* note 39, at 45.

95. *Id.*

96. *Id.* at 41.

97. *Id.* at 46; Wilson & Tolson, *supra* note 46, at 349; *see also* Melvin N. Wilson, *The Context of the African American Family*, in *CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE* 85, 101–02 (Joyce E. Everett et al. eds., 1991) (noting that, along with the immaturity of the biological mother, other circumstances contributing to informal adoption include “death or illness of the child’s parents; separation or divorce of the parents; . . . proximity of a relative to particular school . . . [and] personal needs of the adopter”).

98. HILL, *INFORMAL ADOPTION*, *supra* note 39, at 42.

99. Wilson, *supra* note 97, at 102; Wilson & Tolson, *supra* note 46, at 349.

100. Wilson, *supra* note 97, at 102; Wilson & Tolson, *supra* note 46, at 349.

B. Informal Adoption Within the Hispanic Family

In 2003, history was made when the U.S. Census Bureau announced that the nation's Hispanic population had officially surpassed the African American population to become the nation's largest minority group.¹⁰¹ Not only has the Hispanic community retained that title, but it also continues to be the nation's fastest-growing minority community.¹⁰² In fact, between 2005 and 2006, the Hispanic population in the United States increased by 3.4%, compared with a 1.3% increase in the African American population.¹⁰³ Overall, it is estimated that there are 44.3 million Hispanics living in the United States today.¹⁰⁴ Of course, one must be careful to note that the term "Hispanic" is merely a blanket term that encompasses a number of individuals from various regions and cultures.¹⁰⁵ In defining this community more specifically, a report on the 2000 Census showed that 58.5% of the nation's Hispanic population identified as Mexican, 9.6% identified as Puerto Rican, 3.5% as Cuban, and the balance as "Other Hispanic," which includes Spanish, Dominican, and Central and South American.¹⁰⁶

Not surprisingly, within this heterogeneous group, there exist "different histories, traditions and beliefs."¹⁰⁷ One of the central traditions with numerous variations within the larger Hispanic

101. Press Release, U.S. Census Bureau, Hispanic Population Reaches All-Time High of 38.8 Million, New Census Bureau Estimates Show (June 18, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-100.html>.

102. Minority Population Press Release, *supra* note 42.

103. *Id.*; see also U.S. CENSUS BUREAU, THE HISPANIC POPULATION: CENSUS 2000 BRIEF 2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> [hereinafter HISPANIC POPULATION 2000 BRIEF] (noting that the Hispanic population increased 57.9% from 1990 to 2000).

104. Minority Population Press Release, *supra* note 42.

105. See MICHAEL BENJAMIN, CULTURAL DIVERSITY, EDUCATIONAL EQUITY AND THE TRANSFORMATION OF HIGHER EDUCATION 53 (1996); Berta Esperanza Hernandez-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 815 (1999) (noting "the panethnic groups collectively catalogued under the umbrella of the Latina/o label").

106. See HISPANIC POPULATION 2000 BRIEF, *supra* note 103, at 2 & fig.2; see also BENJAMIN, *supra* note 105, at 53 (listing those of Mexican origin as comprising 62% of the U.S. Hispanic population; Puerto Rican, 13%; and Cuban, 5%).

107. BENJAMIN, *supra* note 105, at 53; see also Bron B. Ingoldsby, *Poverty and Patriarchy in Latin American*, in FAMILIES IN MULTICULTURAL PERSPECTIVE, *supra* note 19, at 335, 335 ("It is not possible to make accurate generalizations about an area as large and diverse as Latin America.").

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community is the role of the family.¹⁰⁸ As sociologist Alfredo Mirandé notes, “[j]ust as there is no one uniform Anglo-American family, so there is no one [Hispanic] family but a number of family types that vary according to region, recentness of migration to the United States, education, social class, age, and urban-rural locale.”¹⁰⁹ Nonetheless, within the Hispanic community, there are a number of key family characteristics that, although perhaps not universal, do exist across the various subgroups.¹¹⁰ One of those characteristics, and the one most relevant to the discussion here, is “a strong, persistent familistic orientation,”¹¹¹ or “familism,”¹¹² within the Hispanic community.¹¹³

Similar to the African American community, “the multigenerational, informal extended family” is the basic family unit within the Hispanic community.¹¹⁴ This model is comprised of not only the traditional nuclear family, but also “highly integrated extended kinship systems”¹¹⁵ including both primary kin, such as parents and siblings, and secondary kin, which would include aunts, uncles, cousins, and grandparents.¹¹⁶ Furthermore, it is not uncommon in the Hispanic community for the extended family to include even close friends and neighbors.¹¹⁷ Thus, like the African

108. See Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1321 (1992) [hereinafter *La Familia Latina*] (“There is no one ‘Latino culture,’ nor one definitive Latino family pattern in the United States.”).

109. ALFREDO MIRANDÉ, *THE CHICANO EXPERIENCE: AN ALTERNATIVE PERSPECTIVE* 153 (1985).

110. Hernandez-Truyol, *supra* note 105, at 815 (noting that many of the “cultural commonalities” within the Hispanic community “converge around the importance of family”).

111. Oscar Ramírez & Carlos H. Árce, *The Contemporary Chicano Family: An Empirically Based Review*, in *EXPLORATIONS IN CHICANO PSYCHOLOGY* 3, 15 (Augustine Barón Jr. ed., 1981).

112. Robert S. Bausch & Richard T. Serpe, *Recruiting Mexican American Adoptive Parents*, 78 CHILD WELFARE 693, 701 (1999) (defining “familism” as “the strong affective attachment to one’s extended family”).

113. MIRANDÉ, *supra* note 109, at 153 (“Probably the most significant characteristic of the Chicano family is its strong emphasis on familism.”); Hernandez-Truyol, *supra* note 105, at 816 (“*La familia* is of sacrosanct importance in the *cultura Latina*.”).

114. BENJAMIN, *supra* note 105, at 56.

115. Ramírez & Árce, *supra* note 111, at 15.

116. *Id.* at 16 (defining and distinguishing primary and secondary kin); see also *La Familia Latina*, *supra* note 108, at 1322 (“[F]amilia encompasses broad, extended family ties including many generations of aunts, uncles, grandparents, and cousins.”).

117. As Professor Mirandé notes, within the Hispanic community, there is little distinction between friends and relatives. “Not only are relatives included

American community, members of the Hispanic community view family and household as two distinct terms. In fact, so entrenched is this distinction in the Hispanic community that it is even reflected in the Spanish language:

In Spanish, the denotation of the term *familia* is generic. *Familia* can embrace all extended family kin and single or various combinations of individual households. Thus, when speaking Spanish, one is usually careful to make a distinction between a reference to extended family members or households at large (*familia* always) and a reference to members of the immediate household (*la casa*—"house" or "home"), which is ordinarily a nuclear-family centered dwelling.¹¹⁸

However, despite this distinction between family and household, it is not uncommon for a Hispanic household to contain more members of the extended family than would typically be found in a nuclear family household. For example, within the Hispanic community, it is not unusual for several generations to live in the same household.¹¹⁹

Furthermore, the extended-family model differs from the nuclear-family model, not only in who counts as "family," but also in the high degree of closeness between those family members. For example, children in Hispanic families typically develop "close bonds not only with members of the immediate family but with grandparents, aunts and uncles, cousins, and family friends."¹²⁰ As a result, those reared in a nuclear-family model may have some difficulty relating to the close and cohesive role that the extended family plays within the Hispanic community.¹²¹ For example, as anthropologist Susan Emley Keefe points out:

For Mexican Americans it is important to see relatives regularly face-to-face, to embrace, to touch, and to simply be with one another, sharing the minor joys and sorrows of daily

as friends but friends are symbolically incorporated into the family." MIRANDÉ, *supra* note 109, at 155; *see also* Failing, *supra* note 17, at 234–35 (noting the inclusion of "close friends and neighbors" in Mexican American families).

118. Jaime Sena-Rivera, *Extended Kinship in the United States: Competing Models and the Case of La Familia Chicana*, 41 J. MARRIAGE & FAM. 121, 123 (1979); *see also* MIRANDÉ, *supra* note 109, at 157 ("[F]or Chicanos, the distinction between *casa* (household) and *familia* (relatives) is significant.").

119. *See* MIRANDÉ, *supra* note 109, at 153 (quoting RUTH D. TUCK, NOT WITH THE FIST: MEXICAN AMERICANS IN A SOUTHWEST CITY 122 (1946)); *La Familia Latina*, *supra* note 108, at 1322.

120. MIRANDÉ, *supra* note 109, at 153.

121. BENJAMIN, *supra* note 105, at 59 ("[B]y comparison with Whites, Hispanic kinship systems are extraordinarily close and cohesive.").

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life. For Anglos, these things are integral to nuclear family life but less important with regard to extended family ties.¹²²

This close network of kin operates to promote “economic assistance, encouragement, and support” among its members.¹²³ The role of the family is so strong within the Hispanic community that the family is often placed ahead of the individuals who constitute it and “includes many responsibilities and obligations to immediate family members and other kin.”¹²⁴ In this sense, the extended family within the Hispanic community works as “a problem-solving unit.”¹²⁵ As Professors Patterson and Marsiglia note, “[t]he greater kin-centeredness of Mexican American families as opposed to the strong ethos of independence common among European American families, may intensify the natural helping processes and outcomes among Latinos.”¹²⁶ Other commentators have also pointed to Hispanic families as exceeding white families in terms of the help and support that members provide to one another.¹²⁷

In many ways, this interfamily support has been necessary to the advancement of the Hispanic community within the United States. Just as the extended family made it easier for African Americans to weather the challenges of slavery and discriminatory child-welfare policies,¹²⁸ so too has this family model enabled the Hispanic community to combat the unique difficulties that it has faced in this country.¹²⁹ This benefit does not suggest, however, that the extended-family model among the Hispanic community is

122. Susan Emley Keefe, *Real and Ideal Extended Familism Among Mexican Americans and Anglo Americans: On the Meaning of “Close” Family Ties*, 43 *HUM. ORG.* 65, 68 (1984).

123. See Shirley L. Patterson & Flavio Francisco Marsiglia, “Mi Casa Es Su Casa”: *Beginning Exploration of Mexican Americans’ Natural Helping*, 81 *FAMILIES SOC’Y* 22, 24 (2000).

124. Ingoldsby, *supra* note 107, at 337.

125. Patterson & Marsiglia, *supra* note 123, at 24; see also Rosina M. Becerra, *The Mexican-American Family*, in *ETHNIC FAMILIES IN AMERICA: PATTERNS AND VARIATIONS* 153, 161 (Charles H. Mindel et al. eds., 4th ed. 1998) (“The family is a major support system, a unit to which the individual may turn for help when in stress or in other types of need.”).

126. Patterson & Marsiglia, *supra* note 123, at 24.

127. *E.g.*, Ingoldsby, *supra* note 107, at 337 (“In many ways, the Hispanic family helps and supports its members to a degree far beyond that found in individualistically oriented Anglo families.”).

128. See *supra* notes 63–76 and accompanying text.

129. See generally Bonnie Thornton Dill, *Fictive Kin, Paper Sons, and Compadrazgo: Women of Color and the Struggle for Family Survival*, in *WOMEN OF COLOR IN U.S. SOCIETY* 149, 158–64 (Maxine Baca Zinn & Bonnie Thornton Dill eds., 1994) (explaining how the extended family has helped the Hispanic community combat difficulties it has faced in the United States).

entirely a product of that community's American experience. Social scientists debate the extent to which the contemporary prevalence of the extended-family model within the Hispanic community is a result of external cultural forces as opposed to internal forces such as adaptation and survival.¹³⁰ However, studies show that the extended-family model exists not just in the Hispanic community within the United States, but throughout Latin America.¹³¹

Nonetheless, in focusing on the internal forces that promote a continued adherence to the extended-family model within the Hispanic community, social scientists have identified two such forces. First, the extended family has helped Hispanic Americans deal with the challenge of poverty.¹³² Although poverty afflicts members of all races in the United States, "[t]he Latino family experiences more severe financial burdens than the white American family."¹³³ White Americans on average have a household income that is 41% higher than that of the average Hispanic family.¹³⁴ Furthermore, families headed by single mothers constitute the majority of the poor in the United States.¹³⁵ Among these single-mother households, 45% are African American or Hispanic.¹³⁶

130. See Ramírez & Árce, *supra* note 111, at 11 (noting the lack of consensus on "whether the Chicano extended family is primarily a cultural holdover or primarily a functional adaptation"); Maxine Baca Zinn, *Familism Among Chicanos: A Theoretical Review*, 10 HUMBOLDT J. SOC. REL. 224, 229 (1982) (noting the tension between the internal and external forces that may have shaped the contemporary role that familism plays in the Hispanic community).

131. RUTH D. TUCK, NOT WITH THE FIST: MEXICAN-AMERICANS IN A SOUTHWEST CITY 122 (1946) ("In Latin America, the family includes not only parents and children, but an extended circle of relatives as well."); Zinn, *supra* note 130, at 228; see also Becerra, *supra* note 125, at 158 (discussing how the "traditional structure of the Mexican family grew out of the socioeconomic needs dictated by the agrarian and craft economies of Mexico").

132. See Marta Tienda & Ronald Angel, *Headship and Household Composition Among Blacks, Hispanics, and Other Whites*, 61 SOC. FORCES 508, 511 (1982) (arguing that the greater prevalence of the extended family model within the Hispanic community is at least partially attributable to economic disadvantage).

133. *La Familia Latina*, *supra* note 108, at 1323.

134. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 5, 8 tbl.2 (2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

135. McConnell, *supra* note 24, at 55 (citing JOEL F. HANDLER & YEHESEKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 17 (1991)).

136. *Id.* (noting that African American and Latina single-woman headed households make up 55% of those households who receive public assistance); see also Vilma Ortiz, *Women of Color: A Demographic Overview*, in WOMEN OF COLOR IN U.S. SOCIETY, *supra* note 129, at 13, 33 (noting that some racial-ethnic groups, including Mexican and Puerto Rican, have higher poverty rates among

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Accordingly, some commentators have pointed to familism as a response to these “historical conditions of economic deprivation” among the Hispanic community.¹³⁷

Second, scholars have noted a general underutilization of governmental resources by the Hispanic community.¹³⁸ To understand this point, one must first take into account that the “history of Hispanics in North America is typically one of migration.”¹³⁹ This fact is crucial given that research shows that immigrants to the United States typically live in extended families for the first ten years.¹⁴⁰ However, even at the end of that time period, immigrants tend to live close to and rely heavily upon extended family.¹⁴¹ This finding seemingly stems from the fact that, “[i]n times of stress or when problems arise, [Hispanic Americans] typically [turn] to the family for help rather than to outside agencies.”¹⁴²

To explain this underutilization of formal resources, scholars have offered three rationales.¹⁴³ The first would simply be a lack of awareness within the community as to the availability of these resources.¹⁴⁴ A second rationale is what is referred to as “culture conflict,” which simply refers to the inevitable difficulties that arise when communicating with one from another culture.¹⁴⁵ Finally, there is fear. As sociology professor Joan W. Moore explains:

Another set of reasons adduced for low utilization of formal resources by Mexican Americans is that even the assistance offered by the “helping agencies” is confounded by their historical involvement with highly punitive agencies. Despite

female-headed households).

137. Zinn, *supra* note 130, at 231; *see also* Dill, *supra* note 129, at 164 (noting how the extended family network within the Hispanic community provides “the potential for an exchange of services among poor people whose income did not provide the basis for family subsistence”).

138. *See, e.g.*, Joan W. Moore, *Mexican Americans and Cities: A Study in Migration and the Use of Formal Resources*, 5 *INT’L MIGRATION REV.* 292 (1971).

139. BENJAMIN, *supra* note 105, at 54.

140. McConnell, *supra* note 24, at 54.

141. *Id.*; *see also* Ramírez & Árce, *supra* note 111, at 15 (noting that, even with acculturation, “familism, both in terms of values and behaviors, is at ‘the core of a culture’ and is thus retained and maintained, while more superficial cultural traits are discarded and forgotten by succeeding generations”).

142. MIRANDÉ, *supra* note 109, at 151–52; *see also* Patterson & Marsiglia, *supra* note 123, at 24–25 (“The sense of not belonging that some Mexican Americans feel may prompt them to seek help from the extended family instead of requesting help from unfamiliar institutions.”).

143. *See, e.g.*, Moore, *supra* note 138, at 294–95.

144. *Id.* at 295.

145. *Id.* at 294–95.

their intent, government bureaucracies *cannot* be specific. The provision of one kind of service, e.g. [sic] medical, may entail intrusion into questions of citizenship, family status, and financial problems in the process of establishing eligibility. Fear of the agency (the result of recurrent experiences which become part of the ethnic tradition) is thus suggested as a reason for avoidance.¹⁴⁶

Thus, regardless of whether the cause is ignorance, cultural conflict, or fear, Mexican Americans tend to rely less on formal resources like governmental benefits, and more on informal resources like the extended family. Specifically, studies show that members of the extended family can typically be counted on to provide services like “temporary housing, personal advice, nursing during times of illness, and emotional support.”¹⁴⁷ Even in the area of child care, the extended family tends to provide the majority of support. In fact, part of Hispanic culture is the tenet that children are primarily cared for by the family.¹⁴⁸ Thus, Latinas who work outside the home tend to rely, not on day care centers, but on family members to provide child care.¹⁴⁹

Furthermore, in some instances, this reliance on the extended family goes beyond daily child care to temporary child placement and even informal adoption. In the area of temporary placement within the Hispanic community, Michael Benjamin notes that “in times of crisis, family boundaries are sufficiently flexible and the norms of mutual support (*confianza en confianza*) sufficiently strong to sanction child lending.”¹⁵⁰ This process of child lending has been

146. *Id.* at 295; see also Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGRANT HEALTH 151, 155 (2001) (concluding that “lack of documentation—and the fear associated with it—is a powerful deterrent to people obtaining care they believe they need”); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45, 56 (2005).

147. Becerra, *supra* note 125, at 161; see also M. Jean Gilbert, *Extended Family Integration Among Second-Generation Mexican Americans*, in FAMILY AND MENTAL HEALTH IN THE MEXICAN AMERICAN COMMUNITY 25, 40 (J. Manuel Casas & Susan E. Keefe eds., 1978) (categorizing the kinds of exchanges within the Hispanic community as “*basic exchange* including financial gifts or loans and the provision of shelter, and *personal service exchange* including labor, babysitting, sickbed care, personal advice with problems, and transportation”).

148. See, e.g., CARMEN INOA VAZQUEZ, PARENTING WITH PRIDE: LATINO STYLE: HOW TO HELP YOUR CHILD CHERISH YOUR CULTURAL VALUES AND SUCCEED IN TODAY’S WORLD 163 (2004) (“According to the traditional way, employing nannies and babysitters is frowned on . . .”).

149. See *La Familia Latina*, *supra* note 108, at 1325.

150. BENJAMIN, *supra* note 105, at 56–57; see also Nydia Garcia-Preto, *Puerto Rican Families*, in ETHNICITY & FAMILY THERAPY 242, 245 (Monica

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described as “the easy and frequent transferring of excess children from one nuclear family to another, within a structure of blood and ritual kin.”¹⁵¹

Of particular importance in this area is the godparent, or *compadrazgo*. Among Mexican Americans, the *compadrazgo* is an example of a fictive kinship in which there exists “a core relational commitment between the child and sponsor as well as between the sponsor and the child’s parents.”¹⁵² Historically, *compadres* (or godparents) “had a moral obligation to act as guardians, to provide financial assistance in times of need, and to substitute in case of the death of a parent.”¹⁵³ Today, although the original meaning has evolved to rely less on the notion of substitute parentage, the institution of *compadrazgo* custom nonetheless remains intact as a social function with the Hispanic community.¹⁵⁴

Similar to the family’s role in providing extended child care, the Hispanic community relies on the extended family when it comes to adoption. As many social scientists have noted, among the Hispanic community, there is a cultural predisposition against formal adoption and toward informal adoption.¹⁵⁵ In fact, one study found that when compared to African Americans and whites, Hispanic women are much less likely to adopt a child.¹⁵⁶ This preference has been attributed to a number of obstacles that Hispanic Americans face when attempting formal adoption. In essence, these obstacles have been broken into two categories: structural and cultural. First, similar to the rationales that were discussed earlier concerning the

McGoldrick et al. eds., 3d ed. 2005) (“[T]ransferring children from one nuclear family to another within the extended system in times of crisis is common . . .”).

151. J. Mayone Stycos, *Family and Fertility in Puerto Rico*, 17 AM. SOC. REV. 572, 577 (1952).

152. Woodhouse, *supra* note 19, at 592.

153. Dill, *supra* note 129, at 164; *see also* NORMA WILLIAMS, *THE MEXICAN AMERICAN FAMILY: TRADITION AND CHANGE* 26–27 (1990) (noting that it is the responsibility of the *compadrazgo* “to take care of the physical and spiritual needs of the child in the event that the parents could not perform these essential duties”).

154. MIRANDÉ, *supra* note 109, at 155. *But see* Stycos, *supra* note 151, at 578 (noting that although *compadrazgo*, as it exists in the United States, is “now an empty ritual,” it is nonetheless “a living and vital part of social relations among Puerto Ricans”).

155. *See* Maria Suarez Hamm, *Latino Adoption Issues*, in NAT’L COUNCIL FOR ADOPTION, *ADOPTION FACTBOOK III*, at 257, 257–58 (Connaught Marshner ed., 1999) (noting the cultural bias against formal adoption); Baushe & Serpe, *supra* note 112, at 701 (noting the “cultural preference for informal rather than formal adoption”).

156. Stolley, *supra* note 39, at 37–38.

underutilization of formal resources by Mexican Americans, there are structural obstacles to formal adoption such as “lack of information, financial resources, and bilingual workers.”¹⁵⁷ Also, data suggests that the waiting time to adopt for Hispanics tends to be longer than for whites, and also some agency criteria has the effect of screening out minority families.¹⁵⁸

However, in addition to those structural obstacles to adoption, cultural obstacles also come into play. One cultural obstacle is “the threat that adoption represents to the masculinity of Latino males”¹⁵⁹ because adoption could be taken to mean either that the natural father is incapable of providing for the child or that the adopting father is infertile, two impressions that could undermine a male’s machismo.¹⁶⁰ Another cultural obstacle is the strong sense of familism, as discussed earlier,¹⁶¹ which includes the belief that the family should take care of its own.¹⁶² In fact, one study showed that this belief was a “very important factor” for 36% of Hispanic couples who chose not to adopt, and “somewhat important” for 22%.¹⁶³ The final obstacle emerges from the simple fact that adoption has not historically been practiced within the Latino culture.¹⁶⁴

As a result of these structural and cultural obstacles to formal adoption, the rate of informal adoption among the Hispanic community is relatively high. Although researchers have paid relatively little attention to informal adoption within the Hispanic community, the U.S. Census Bureau has noted that informal adoptions are higher among the African American and Hispanic communities.¹⁶⁵ Unfortunately, the only information available to

157. Bausch & Serpe, *supra* note 112, at 706.

158. *Id.* at 698.

159. *Id.* at 706.

160. See BENJAMIN, *supra* note 105, at 58 (“According to group norms, men are obliged to protect and provide for their kith and kin.”); Bausch & Serpe, *supra* note 112, at 701 (“For Mexican American males who uphold machismo values, formal adoption may be unacceptable, particularly if issues of subfecundity or infertility are involved.”); see also Judith L. Gibbons et al., *Gender Attitudes Mediate Gender Differences in Attitudes Toward Adoption in Guatemala*, 54 *SEX ROLES* 139, 142 (2006) (“[T]hose who hold machismo beliefs have more negative beliefs about adoption.”).

161. See *supra* notes 111–27 and accompanying text.

162. Bausch & Serpe, *supra* note 112, at 706.

163. *Id.* at 707 tbl.3.

164. However, this is not to suggest that the practice of formal adoption did not exist historically. See, e.g., Ann S. Blum, *Public Welfare and Child Circulation, Mexico City, 1877 to 1925*, 23 *J. FAM. HIST.* 240 (1998) (discussing the historic role that adoption policy and practices played in Mexico).

165. ROSE M. KRIEDER, U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEPCHILDREN: 2000*, at 3 (2003), available at www.census.gov/prod

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provide a more specific understanding of the practice is fairly specific to the Puerto Rican community. For example, J. Mayone Stycos, who studied the practice of informal adoption in Puerto Rico, made the following observations:

At the death of the father or mother of a family, it is quite usual in rural areas for the members to be dispersed to kin or ritual kin, but such a family crisis is hardly needed for the adoption of children. For example, a very young child may be sent to live with a relative or friend who is better off economically, or to live with grandparents who may be lonely. The latter will informally adopt the child, feed and clothe it, and in return may expect it to assist in the housework.¹⁶⁶

Stycos also notes that these informal adoptions can last “from months to life.”¹⁶⁷ Furthermore, in looking at those Puerto Rican children who have been informally adopted (*hijos de crianza*), Professor Melba Sanchez-Ayendez notes that these children “are generally treated by their adoptive parents as though they were their own and that their status within the household is like that of the other children of the parents,” and that, even when no legal adoption was involved, these children nonetheless “know that the family and home of the adoptive parents is their own.”¹⁶⁸

Currently, more information is needed concerning the practice of informal adoption within other subgroups comprising the Hispanic community. Nonetheless, what is known regarding the larger Hispanic community and what is particularly important for purposes of this Article is that the Hispanic community, with its emphasis and reliance on the extended family, frequently relies on family when it comes to child care. As a result, given the cultural predisposition against formal adoption, many children who cannot be cared for by their natural parents are being informally adopted by members of the extended family, who may or may not be biologically related.

/2003pubs/censr-6.pdf.

166. Stycos, *supra* note 151, at 578 (citation omitted).

167. *Id.*

168. Melba Sánchez-Ayéndez, *The Puerto Rican Family*, in *ETHNIC FAMILIES IN AMERICA: PATTERNS AND VARIATIONS* 199, 204 (Charles H. Mindel et al. eds., 4th ed. 1998). Sánchez-Ayéndez further notes that “[t]he practice of informal adoption still exists among Puerto Ricans in the United States.” *Id.* at 214. However, she does concede that “[m]any of those Puerto Ricans who might consider informally adopting a child opt for legal adoption to avoid emotional suffering and legal consequences in the future.” *Id.*

III. THE LAW OF INTESTATE SUCCESSION

Despite the prevalence of the extended family model within these minority ethnic communities, the law of intestate succession remains almost exclusively based on the nuclear-family model.¹⁶⁹ In fact, historically one of the policies underlying intestacy has been the promotion of the nuclear family.¹⁷⁰ As Lawrence M. Friedman notes:

Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it Rules favoring wives and children reinforce the nuclear family. Any radical change in the rules, if carried out, will radically change the society.¹⁷¹

Indeed, the law of inheritance continues to cling to this policy even as other areas of law have taken a more expansive view of the various individuals who may constitute a “family.”¹⁷² As one commentator noted, “[a]t the dawn of the twenty-first century, the inheritance system stands as one of the last bastions of the traditional American family.”¹⁷³ Because of this disparity between the intestate definition of family and other legal definitions of family, individuals today may be somewhat surprised to learn exactly who their “heirs” are for purposes of intestate succession.¹⁷⁴

169. Foster, *supra* note 2, at 201 (noting “the failure of inheritance law to adapt to the changing American family”); Gary, *supra* note 2, at 4-5 (noting that, with limited exceptions, “intestacy laws still reflect the nuclear family norm”); Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 212 (2004) (pointing out the Uniform Probate Code’s adherence to “outmoded assumptions inapplicable to many American families” and the corresponding “absurd results”).

170. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 324.

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

172. See, e.g., Gary, *supra* note 2, at 4 (noting that “[i]n many states, laws such as wrongful death statutes, workers compensation laws, custody and visitation statutes and housing statutes now include persons beyond legally married spouses and legal children”).

173. Foster, *supra* note 2, at 200 (“Many of its rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support.”).

174. See Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137, 147 (2005) (“In truth, most people

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For example, a survey by the American Bar Foundation asked participants if they knew who would inherit their property in the absence of a will. Although over 70% responded that they did know who would inherit, only 44.6% could then accurately list the relatives who would actually take under the governing intestate statute.¹⁷⁵

Of course, the law of intestate succession was never designed to perfectly delineate for each intestate decedent *every* individual that the decedent would have considered to be his family.¹⁷⁶ Instead, these laws merely seek to determine the presumed donative intent of the average decedent.¹⁷⁷ In other words, the law of intestacy is largely based on to whom the average person would likely have left his property if that person had executed a will.¹⁷⁸ Indeed, it was this policy that motivated the intestacy scheme proposed by the drafters of the Uniform Probate Code. “The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death.”¹⁷⁹ The rationale behind this attempt to conform the laws of inheritance with general donative intent is that, without any conformity, the intestacy scheme would effectively operate as “a trap for the ignorant or misinformed.”¹⁸⁰

(including most lawyers whose practice does not include probate matters) do not know precisely how their state intestacy statute would distribute their property.”); Fellows et al., *supra* note 170, at 339 (noting evidence indicating that “people who die intestate do not know how their property will be distributed”); Gary, *supra* note 2, at 18 (noting studies that have revealed that “actual knowledge of the intestate distributive scheme is limited”).

175. Fellows, *supra* note 170, at 339–40.

176. See Gary, *supra* note 2, at 1 (“An analysis of intestacy law must begin with the recognition that an intestacy statute cannot work equally well for every potential decedent.”); Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 451 (2003) (pointing out that “the strict scheme of intestate succession cannot possibly allow for every situation and every individual’s wishes”).

177. DUKEMINIER ET AL., *supra* note 6, at 62; Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 651 (2002) (“Of course, intestacy statutes presume an intent and do not attempt to determine a decedent’s actual intent.”); Holob, *supra* note 5, at 1499 (“[I]n creating default rules, probate codes attempt to best approximate how most testators dispose of their estate when dying with a valid will.”).

178. See Gary, *supra* note 2, at 7 (noting that the goal of recreating donative intent is “[t]he most commonly identified goal of intestacy statutes”); Seidman, *supra* note 169, at 211 (“Intestacy laws dictate succession of an intestate decedent’s estate, aiming primarily to honor the presumed donative intent of the decedent.”).

179. UNIF. PROBATE CODE art. II, pt. I, general cmt. (1974) (amended 1991).

180. Fellows, *supra* note 170, at 324.

However, there are also other important policy concerns underlying the laws of intestate succession. For instance, there is the policy of crafting a system of inheritance that is “clear, simple, and comprehensible,”¹⁸¹ so as to allow for the “ease of administration of the probate system.”¹⁸² For this reason, “American legislatures have used objective rules to determine a survivor’s inclusion within an intestacy provision,” so as to avoid a “messy inquiry into the subjective quality of the survivor’s relationship with the decedent.”¹⁸³ The fear is that an intestate system requiring too much of an individual inquiry would create too much of a burden for probate courts and would also make it more difficult for individuals to predict who would be their likely heirs under the intestacy statutes.

Another concern underlying the current intestate succession system is the policy of ensuring that there is a fair distribution of property among the decedent’s family so as to “not produce disharmony within the surviving family members [n]or disdain for the legal system.”¹⁸⁴ Finally, there is the goal of protecting the financially dependent family.¹⁸⁵ As one commentator has noted, “[p]rotection of financially dependent family members benefits not only an intestate’s dependents . . . , but also other family members and the public at large, upon whom the burden of supporting the dependents would otherwise fall.”¹⁸⁶

With these underlying policies, most intestate schemes have an initial preference for the surviving spouse, followed by surviving children, then parents, then siblings, and then on to more remote relations in the decedent’s bloodline.¹⁸⁷ If no “family” members survive the decedent, then the estate will escheat to the state.¹⁸⁸

181. Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 945 (1995).

182. Gary, *supra* note 177, at 652.

183. Brashier, *supra* note 174, at 145.

184. Lomenzo, *supra* note 181, at 947 (alteration in original). “A major concern of any probate legislation or dispositive system is justice and fairness for the successors.” *Id.* (citation omitted).

185. Fellows et al., *supra* note 170, at 324. Actually, protecting the dependent family and promoting the nuclear family have been identified as two of four community aims underlying the intestacy scheme. The others include: “avoid[ing] complicating property titles and excessive subdivision of property [and] encourag[ing] the accumulation of property by individuals.” *Id.*

186. Lomenzo, *supra* note 181, at 947.

187. DUKEMINIER ET AL., *supra* note 6, at 78. However, in some states, a surviving spouse must share the estate with the descendants or, if the decedent left no descendants, with the parents of the decedent. *See id.* at 63–64.

188. *See* Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV.

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Notably, non-relatives almost never inherit under the intestacy statutes no matter how emotionally close they were to the decedent. Indeed, as one commentator notes, “[w]hen no ‘close’ family members survive, the law ignores those in intimate, dependent relationships with the decedent to confer windfalls on distant relatives who may not even have known the decedent.”¹⁸⁹ Accordingly, “a blended family member, extended family member, or nonrelative who was the decedent’s primary caregiver or long-term dependent generally receives no recognition under intestate succession statutes.”¹⁹⁰ A person who falls into one of these categories is thus considered to be “an ‘unnatural’ recipient of the decedent’s estate.”¹⁹¹

Nonetheless, individuals have quite a bit of control in determining whether they will be subject to their state’s intestacy scheme. Indeed, “an individual can freely determine the disposition of wealth owned at death by executing a will.”¹⁹² Thus, the intestate scheme exists merely as a default mechanism that will come into play only if the decedent fails to execute a valid will.¹⁹³ Despite this fact, the laws of intestacy continue to play a preeminent role within the law of inheritance simply because the majority of Americans die each year without a will.¹⁹⁴ Furthermore, studies reveal that a large percentage of those who die intestate are people with modest estates.¹⁹⁵ In fact, one study found that 72.3% of those whose estates

1055, 1072 n.130 (1995) (referring to the Uniform Probate Code).

189. Foster, *supra* note 2, at 206–07.

190. *Id.* at 207–08 (footnotes omitted).

191. *Id.* at 208 & n.45 (“We must conclude the gift to [the legatee] is ‘unnatural’ because he would not inherit under the laws of intestacy” (quoting *In re Estate of Gersbach*, 960 P.2d 811, 817 (N.M. 1998))).

192. Fellows et al., *supra* note 170, at 322; *see also* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29 (1994) (“People whose individuated intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.”).

193. *See* Gary, *supra* note 2, at 1 (“An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will.”).

194. *See* DUKEMINIER ET AL., *supra* note 6, at 59 (“In surveys taken in the last 10 years, 39 to 48 percent of adults claim to have a will.”); Fellows et al., *supra* note 170, at 337 (reporting the results of a study in which 45% of the respondents had wills).

195. *See* Fellows et al., *supra* note 170, at 336 (noting prior studies that found that “wealth, age, and occupation are directly related to the frequency of testacy”); Gary, *supra* note 2, at 14 (“[I]ntestacy statutes will apply most often to persons with modest estates.”).

were valued at between \$0 and \$99,999 did not have wills.¹⁹⁶ In contrast, only 15.4% of those with estates valued between \$200,000 and \$1 million did not have a will.¹⁹⁷ Thus, given the relatively large number of people for whom the dictates of the intestacy statutes are a reality, commentators have been understandably quite critical of the failure of those statutes to accurately reflect the general composition of American families.

A. *Criticisms of Modern Intestacy Law*

The problem with most contemporary intestacy statutes is that they are, simultaneously, both overinclusive and underinclusive.¹⁹⁸ The statutes are overinclusive in the sense that the law of intestacy is concerned solely with legal status.¹⁹⁹ Thus, even an “unworthy” heir, short of having murdered the decedent,²⁰⁰ is protected by the intestacy statute so long as he occupied the requisite legal relationship to the decedent.

However, it is the underinclusive nature of the status-based scheme that is frequently identified as being the more troublesome complaint against the law of intestate succession. Specifically, critics have noted how the narrow view of family in inheritance law undermines the important policies of honoring donative intent and protecting the financially dependent family.²⁰¹ Accordingly, to make the laws of inheritance more inclusive and representative of the different family models in which individuals may align themselves, critics have called for reform of the definition of “family” in the intestacy statutes.²⁰² These calls for reform can be principally

196. See Waggoner, *supra* note 192, at 29 (citing Fellows et al., *supra* note 170).

197. *Id.* at 30.

198. See Gary, *supra* note 2, at 41.

199. See Brashier, *supra* note 174, at 145; Foster, *supra* note 2, at 206 (“The decedent’s closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent.”); Gary, *supra* note 2, at 41 (noting that “legal ties do not necessarily create familial ties”).

200. For a discussion of how different states have prevented killers from inheriting from their victims, see Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986) (“Relying on the equitable maxim that individuals should not profit from their own wrongful acts, courts and legislatures bar slayers from taking their victims’ property or in any way benefiting economically from the premature death of their victims.”).

201. See, e.g., Brashier, *supra* note 174, at 145 (noting how the current practice of basing intestate succession entirely on legal status “can lead to arbitrary results that send a decedent spinning in his grave”); Holob, *supra* note 5, at 1510–12.

202. Particularly vulnerable to this underinclusiveness are those families

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divided into two main approaches: the formal and the functional.²⁰³

Under the formal approach, lawmakers simply expand the statutory definition of “family” to include specific individuals outside the traditional nuclear family.²⁰⁴ For example, by redefining “children” in an intestacy statute to include adopted children, the law has expanded a person’s ability to qualify as an intestate “heir” solely by virtue of being formally adopted.²⁰⁵ Nonetheless, the formal approach is still concerned exclusively with legal status. Thus, using the above example, even though the law now includes adopted children as “children” for purposes of intestate succession, it is still exclusively that person’s legal status as “adopted child” that permits such inheritance.²⁰⁶

In contrast, the functional approach looks beyond legal status and into the actual relationship that the individual shared with the decedent. In other words, it “inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs.”²⁰⁷ Thus, a purely functional approach would focus not on whether an individual was the biological or adopted child of the decedent, but on whether the individual and the decedent actually shared a parent-child relationship. In this sense, the functional approach is more tailored to the individual decedent.

who do not conform to the “traditional” family model. *See, e.g.*, Brashier, *supra* note 174, at 189–92 (advocating reform of the intestate statutes to better reflect the role of half-blood siblings); Gary, *supra* note 177, at 680 (seeking reform of intestacy statutes for step-children); Seidman, *supra* note 169, at 233 (proposing that the Uniform Probate Code define and identify “committed partners” in the intestate succession scheme).

203. *See Family Resemblance, supra* note 1, at 1644–48.

204. *See* Gary, *supra* note 2, at 31–32 (describing the formal approach as “bringing ‘new’ families into the fold”); *Family Resemblance, supra* note 1, at 1644–45.

205. The formal approach is not limited to parent-child relationships. For example, in the case of half-blood siblings, a state legislature could simply redefine “sibling” to encompass half-blood as well as whole-blood siblings. Furthermore, one state has even taken a formal approach to giving intestate succession rights to same-sex couples. Specifically, the state of Hawaii allows same-sex couples to register as “reciprocal beneficiaries.” HAW. REV. STAT. § 572C-3 to -5 (2006). By so doing, each beneficiary is entitled to inherit from the other the same way that a spouse would. *Id.* § 560:2-102.

206. *See* Gary, *supra* note 2, at 39 (noting that, in regards to the current laws of intestate succession regarding an adopted child, “the question for inheritance purposes is the formal legal definition of family rather than whether the person functioned as a family”).

207. *See Family Resemblance, supra* note 1, at 1646.

B. Equitable Adoption

The equitable adoption doctrine, at least in theory, is one example of the functional approach.²⁰⁸ Indeed, unlike the formal approach and its preoccupation with the legal relationship of the decedent and his survivors, it is only the explicit absence of such a relationship that even causes the doctrine of equitable adoption to come into play. Specifically, equitable adoption is designed to protect the inheritance rights of an individual who, believing himself to be the child (whether biological or adopted) of the decedent, nonetheless lacks the legal status of “child” as defined in the intestate succession statutes.²⁰⁹ To illustrate, consider the following scenario:

At a young age, Bill is either orphaned or his biological parents simply decide they cannot care for him. At any rate, a foster parent takes Bill in her home and raises him until he is an adult, providing for him just as she would a biological or formally adopted child. Now, it could be that during Bill’s time in the foster parent’s home, the foster parent either attempted but did not complete a formal adoption or that the foster parent simply did nothing. Nonetheless, Bill grows up believing that the foster parent, for all intents and purposes, is his parent. Bill’s belief could be based on a representation by the foster parent of Bill’s status or could simply be an assumption arising out of the foster parent’s silence on the issue. Subsequently, the foster parent dies without a will, leaving Bill with the belief that he will inherit his “parent’s” estate. However, during the probate process, Bill actually learns that he has no right to inherit because he lacks any blood or legal ties to the decedent.

Given the problem posed by this illustration, equitable adoption can accomplish two noteworthy goals. First, it protects children like Bill, who lack the legal status of “child,” from automatic

208. RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, DECEDENTS' ESTATES: CASES AND MATERIALS 92 (2006) (“[U]nlike a statute that seeks uniformity, equitable adoption derives from the facts of each situation.”). This is not to suggest, however, that equitable adoption is the sole functional test found in the various laws to intestate succession. For instance, the Uniform Probate Code prohibits a parent from inheriting from or through a child if that parent failed to “openly treat the child as his” or “refused to support the child.” UNIF. PROBATE CODE § 2-114(c) (10th ed. 1991). Furthermore, California has a statute in place that, by utilizing a functional approach, allows a stepchild to inherit in limited circumstances. CAL. PROB. CODE § 6454 (Deering 2002).

209. See generally William G. Reeves, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, 57 J. MO. B. 130 (2001); Rein, *supra* note 12, at 766 (“Although not adopted with statutory formalities, the equitably adopted child may be able to maintain a claim in equity to at least some of the benefits that come with the status of a biological or legally adopted child.”).

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disinheritance. However, to those who criticize the underinclusive nature of the intestacy statutes, it is the second accomplishment that is perhaps the most significant. Namely, the doctrine affirmatively frees both judge and jury from the constraints of the current intestate statutes and their narrow definition of “child.” Indeed, the equitable adoption doctrine permits a decision maker to look not only at statutory definitions, which, as noted earlier, are largely based on the nuclear family model, but also at the discrete relationship between a specific decedent and a specific individual claiming to be the decedent’s “child.”

When analyzing such a relationship under the equitable adoption doctrine, courts have relied on two different theories for justification: a contract-based approach and an estoppel approach.²¹⁰ However, under both approaches, and despite the fact that the doctrine permits a more functional approach to determining inheritance rights, courts have nonetheless created rather rigid proof requirements that have served to limit the benefits of the equitable adoption doctrine.²¹¹

1. *Theories of Recovery*

Before getting into the current limits of the equitable adoption doctrine, it is important to understand the theoretical underpinnings that courts have used to justify the doctrine and its rather drastic departure from the plain language of the intestacy statutes. Currently, recovery is justified either as the specific performance of an unfulfilled contract to adopt between the natural and foster parents or an equitable estoppel of the one’s ability to deny the status of an individual as having been adopted.²¹² In essence:

The doctrine is predicated on principles of contract law and equitable enforcement of the agreement to adopt for the purpose of securing the benefits of adoption that would otherwise flow from the adoptive parent under the laws of intestacy had the agreement to adopt been carried out; as such it is essentially a matter of equitable relief. Being only an equitable remedy to enforce a contract right, it is not intended or applied to create the legal relationship of parent and child, with all the legal consequences of such relationship, nor is it meant to create a legal adoption.²¹³

210. See *infra* notes 212–29 and accompanying text.

211. See *infra* notes 230–35 and accompanying text.

212. Reeves, *supra* note 209, at 130 (quoting *Weidner v. Am. Family Mut. Ins. Co.*, 928 S.W.2d 401, 403 (Mo. Ct. App. 1996)).

213. *In re Estate of Seader*, 76 P.3d 1236, 1240 (Wyo. 2003).

Although the two theories have already been discussed extensively by other commentators,²¹⁴ a brief overview is nonetheless necessary before moving on to the constraints that judges have imposed on the equitable adoption doctrine, regardless of the underlying theory.

In looking at the specific performance theory of recovery, the Supreme Court of Arizona laid out the following criteria:

This court has in two instances recognized the widely held doctrine of equitable adoption, and laid down the following principles: (1) the promisor must promise in writing or orally to adopt the child; (2) the consideration flowing to the promisor must be twofold: (a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association and obedience to the promisor during the latter's lifetime; (3) when upon the death of the promisor the child has not been made the legally adopted child of the promisor, equity will decree that to be done which was intended to be done and specifically enforce the contract to adopt; (4) the child will be entitled to inherit that portion of the promisor's estate which he would have inherited had the adoption been formal.²¹⁵

Thus, under the contract approach, courts first require the existence of a contract to adopt between the decedent and the natural parents.²¹⁶ Once such an agreement is proven, these courts will then "presuppose that the foster parent as promisor has

214. See Reeves, *supra* note 209, at 130–35; Rein, *supra* note 12, at 770–80; R. Brent Drake, Note, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 GA. L. REV. 675, 681–92 (2005); James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 954–67 (1999).

215. *In re Estate of Lamfrom*, 368 P.2d 318, 320–21 (Ariz. 1962). The Supreme Court of Utah has stated that:

It is generally recognized that where a child's parents agree with the adoptive parents to relinquish all their rights to the child in consideration of the adoptive parents' agreement to adopt such child, and to care and provide for it the same as though it were their own child, and such agreement is fully performed by all parties connected with such contract except there is no actual adoption, the courts will decree specific performance of such contract and thereby award to the child the same distributive share of the adoptive parents' estate as it would have been entitled to had the child actually been adopted as agreed.

In re Estates of Williams, 348 P.2d 683, 684 (Utah 1960).

216. See *Cavanaugh v. Davis*, 235 S.W.2d 972, 974 (Tex. 1951) ("[T]he agreement to adopt . . . [is] a necessary predicate for the interposition of the equity powers of the courts to decree an adoption by estoppel . . .").

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contracted to effect a legal adoption and that by granting relief the court is specifically enforcing that contract.”²¹⁷ Of course, as Professor Rein notes, this analysis is a bit artificial. Specifically, the parties to such a “contract” would include, not the child, but the natural and foster parents. Thus, the child is relegated to the position of a third-party beneficiary, which is questionable given that the child, in performing filial services to the foster parents, is providing part of the consideration.²¹⁸ Furthermore, the contract theory raises the thorny question of whether any person, given the state’s interest in child welfare, has the ability to make a legal contract that designates a child’s adoptor.²¹⁹ Finally, even courts are forced to concede that a contract to adopt cannot be specifically enforced against someone who is already dead.²²⁰ Indeed, as Rein notes, “[a] corpse cannot adopt anyone.”²²¹

In contrast, courts using the estoppel approach, although still requiring proof of an agreement to adopt, “stress the child’s performance of filial services for the foster parent and purport to protect the child ‘against the fraud of the adoptive parents’ neglect or design in failing to do that which he in equity was obligated to do.”²²² As the Missouri Court of Appeals explained:

“Where one takes a child into his home *as his own*, thereby voluntarily assuming the *status of parent*, and by reason thereof obtains from the child the love, affection, companionship, and services which ordinarily accrue to a parent, he is thereafter estopped to assert that he did not adopt the child in the manner provided by law” provided that

217. Rein, *supra* note 12, at 770.

218. *Id.* at 772–73; see also Edward W. Bailey, *Adoption “By Estoppel,”* 36 TEX. L. REV. 30, 35 n.19 (1957) (“Regarded as a third-party-beneficiary contract, it must be conceded that the arrangement is characterized by most peculiar features, since the courts uniformly recognize that the child’s services constitute the performance bargained for by the adopting parent.”).

219. See Rein, *supra* note 12, at 773–74 (“A biological parent might be bound by his promise to relinquish custody should the court find the relinquishment to be in child’s best interest. But no court would enforce a new custodial arrangement or agreed-upon adoption which it found to be inimical to the child’s welfare.”).

220. See, e.g., *Laney v. Roberts*, 409 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982) (“Such an action seeks the specific performance of an agreement to adopt after the death, intestate, of the last surviving putative foster parent, when, paradoxically, the agreement can no longer be specifically performed.”); *Wooley v. Shell Petroleum Corp.*, 45 P.2d 927, 931 (N.M. 1935) (“A specific performance of a contract to adopt is impossible after the death of the parties who gave the promise.”).

221. Rein, *supra* note 12, at 774.

222. *Id.* at 771 (quoting *Jones v. Guy*, 143 S.W.2d 906, 909 (Tex. 1940)).

“justice, equity and good faith” compel a decree of equitable adoption. One who seeks a decree of equitable adoption has the onerous task of producing evidence so clear, cogent, and convincing as to leave no reasonable doubt in the chancellor’s mind.²²³

Although this approach solves some of the questions raised by the contract approach, Professor Rein points out that the estoppel approach nonetheless leaves many unanswered questions. Specifically, equitable estoppel requires a showing of three elements: “(1) a promise or representation of fact; (2) actual and reasonable reliance on the promise or representation; and (3) resulting detriment.”²²⁴ First, it is difficult for such a child to show detriment given that the foster parents did provide the child with a home and financial support.²²⁵ Of course, as Rein notes, the detriment could be psychological: “Any child who grows up with the belief that he is a natural child of the only parents he knows is bound to be distressed when he learns that society views him as a legal stranger to his family.”²²⁶ Furthermore, aside from the problem with detriment, a proponent would also likely have difficulty proving reliance. Indeed, it is unclear whether this element requires that the child relied on the contract to adopt or on the representation of his status as the decedent’s child.²²⁷ If it is the former, then “[r]eliance on the agreement itself is usually impossible because a young child cannot comprehend the import of a contract.”²²⁸ If instead the proponent is required to show a reliance on status, then that too would be difficult to prove as “[i]t seems safe to assume that most children, even if they knew of their lack of status, would remain in the foster home and continue to act as dutiful children simply because they would have no other viable option.”²²⁹

Thus, both the contract and the equitable estoppel theory leave some unanswered questions. Nonetheless, these two approaches continue to serve as the sole theories under which most courts have

223. *Mize v. Sims*, 516 S.W.2d 561, 564 (Mo. Ct. App. 1974) (citations omitted).

224. Rein, *supra* note 12, at 776.

225. *Id.* (“Detriment in the economic sense will usually be difficult to prove because the foster parents have given the child the home, education, and support that the biological parents were presumably unwilling or unable to provide.”).

226. *Id.* at 778; *see also infra* notes 284–86 and accompanying text.

227. Rein, *supra* note 12, at 776; *see also* George C. Sims, Comment, *Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162, 169 & n.39 (1963).

228. Rein, *supra* note 12, at 776.

229. *Id.*

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justified expanding the intestate succession definition of “children” to encompass the equitably adopted.

2. *Current Limitations on the Scope of Equitable Adoption*

Despite its potential to make the law of intestate succession more inclusive, the doctrine of equitable adoption currently can boast only limited success regardless of whether courts have adopted a contract- or estoppel-based approach. First, as a preliminary matter, the doctrine has been explicitly rejected by almost a third of the courts who have even considered it.²³⁰ Those courts have done so on the basis that adoption is exclusively governed by statute.²³¹ For example, the Supreme Court of Arkansas held that “inheritance under the theory of ‘virtual adoption’ is unknown to the law of Arkansas [because the statutes relating to adoption] set out the only method of adoption in Arkansas.”²³² Furthermore, even among those states that have recognized equitable adoption, every state but one has nonetheless undermined the functional nature of the doctrine by relying on rather formal and rigid criteria that have greatly limited the doctrine’s effectiveness.

Specifically, as noted above, those courts have confined the doctrine to only those scenarios in which the person claiming an equitable adoption can first prove that a contract to adopt existed between his natural parents and the decedent. This requirement in itself precludes most informal adoptions, which would likely lack the requisite contract.²³³ Furthermore, the doctrine is limited further because the proponent must prove not only the existence of a contract to adopt, but also the terms and conditions of the agreement.²³⁴ Additionally, in attempting to make these required showings, the proponent’s burden of proof has been described as “highly rigorous” and requiring evidence that is “so clear, cogent and convincing as to leave no room for reasonable doubt.”²³⁵ Notably,

230. Drake, *supra* note 214, at 681 (“As of 1997 thirty-nine jurisdictions had considered the equitable adoption doctrine. While twenty-seven jurisdictions have clearly recognized the doctrine, at least twelve have not.” (footnotes omitted)).

231. *Id.*

232. Wilks v. Langley, 451 S.W.2d 209, 212 (Ark. 1970).

233. See *supra* note 99 and accompanying text.

234. Reeves, *supra* note 209, at 131–32; see also Eldred v. Glenn, 52 S.W.2d 35, 38 (Mo. Ct. App. 1932) (“It will not satisfy the requirement to show that there was an understanding of an indefinite character, leaving its terms more or less to inference, that the child was to be taken [by the alleged adopter] and reared as a member of the family.”).

235. Reeves, *supra* note 209, at 131; see also Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 634 (Mo. Ct. App. 2006) (describing the same burden of proof for proponents).

these requirements exist regardless of whether the court is basing recovery on the contract or the estoppel theory.

Of course, some courts have used the doctrine's inherent discretion to relax these rather rigid requirements.²³⁶ Unfortunately, however, in so doing, the courts fail to adequately explain their rationale, which results in an inconsistent application of the doctrine.²³⁷ For instance, in *Laney v. Roberts*, the proponent admitted that she knew she had never been formally adopted and also denied any knowledge of a contract to adopt.²³⁸ As a result, the proponent could not claim that she performed as the child of the foster parents either in consideration of a contract to adopt or in reliance upon any representation that she had been adopted. Nonetheless, the Florida court allowed her claim merely noting, with no further explanation, that "there is absolutely no evidentiary value in the fact that [the proponent] knew she was not formally adopted (which fact, by definition, is the gist of this lawsuit) or was unaware of the agreement (to which she was not a party) between her natural parents and [her foster parents]."²³⁹

Furthermore, using the estoppel approach, some courts have relaxed the requirement that the proponent prove reliance. For example, in *Mize v. Sims*, the Missouri Court of Appeals rejected an argument that an equitable adoption cannot take place unless "the agreement of the adopting parent be communicated to the child so that the child can act in reliance on the agreement."²⁴⁰ In so doing, the court explained that "[w]e do not cast a burden upon a child of tender age to remember events beyond his little comprehension."²⁴¹ Furthermore, at least one court has dispensed with the reliance requirement altogether. Specifically, in *Calista Corp. v. Mann*, the Supreme Court of Alaska held that, because of "the evidentiary problems of proof," it was not mandatory for the proponent to show that

the foster parents . . . represented to the child, either expressly or by their conduct, that he or she was adopted . . . [or that] the child, to the extent that his or her age permitted, . . . carried out his or her filial obligations in the belief that he or

236. Rein, *supra* note 12, at 783 ("Whatever the stated standard of proof, courts can apply it with varying degrees of strictness depending on whether or not they want to find a contract.").

237. See Hargis, *supra* note 176, at 464 (noting that equitable remedies like equitable adoption "are neither fairly nor consistently applied").

238. 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982).

239. *Id.*

240. 516 S.W.2d 561, 566 (Mo. Ct. App. 1974).

241. *Id.*

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she was an adopted child.²⁴²

However, it is troubling that the court failed to offer any justification for its rather drastic departure from the requirements for equitable estoppel.

In addition, courts using both approaches have permitted proponents to demonstrate the existence of an adoption agreement through “circumstantial evidence.”²⁴³ This evidence typically includes such things as (1) whether the child was taken into the decedent’s home at a young age; (2) whether the child maintained a relationship with his natural parents after being taken in by the decedent; (3) whether the decedent held the child out publicly as his own child; and (4) whether the decedent provided the child with any inter vivos or testamentary gifts that would signify the decedent’s recognition of the child as his own.²⁴⁴ For example, even in the face of weak evidence of an oral agreement to adopt, the Supreme Court of Missouri nonetheless found that there had been an equitable adoption based largely on the actions of the foster parents:

From the day she arrived in their home plaintiff was unconditionally and absolutely held out to the world as the daughter of Howard and Vera Hays and was so accepted by the public generally. They did so with such amazing success that for 27 years the people in the various communities where the family lived thought she was their natural child. . . . To the greatest extent possible they did everything they could to make Virginia their natural child. All records (including school and census) and all their statements and conduct so indicated. Vera even prepared a family tree showing Virginia’s lineage as their daughter.²⁴⁵

However, it is important to note that, even though some courts have allowed a proponent to demonstrate the existence of a contract using these factors, the courts have nonetheless required that such evidence be “consistent only with the existence of the equitable adoption and inconsistent with any other reasonable hypothesis leaving nothing to conjecture.”²⁴⁶ Accordingly, courts have refused to

242. 564 P.2d 53, 62 & n.22 (Alaska 1977).

243. Rein, *supra* note 12, at 780 (“Although a few courts have insisted on direct evidence of a contract, most permit proof by circumstantial evidence such as ‘the acts, conduct and admissions of the parties.’” (footnote omitted)).

244. See Reeves, *supra* note 209, at 132–35; see also, Jess T. Hay & Ronald M. Weiss, Comment, *The Doctrine of Equitable Adoption*, 9 Sw. L.J. 90, 101–02 (1955) (“[T]he strongest type of circumstantial evidence consists of statements made by the adopting parent during his lifetime from which the agreement may be inferred.”).

245. Lukas v. Hays, 283 S.W.2d 561, 564, 567 (Mo. 1955).

246. Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 634 (Mo. Ct. App.

find equitable adoption when the facts merely indicated an intention to adopt versus a promise to adopt.²⁴⁷ Furthermore, the courts have also held that proof of a family relationship alone is insufficient to prove an equitable adoption given that the actions of the foster parents could have been motivated solely by charity and kindness and not a promise to adopt.²⁴⁸ For example, the Texas Court of Appeals refused to find an equitable adoption in the case of an aunt who had taken in her niece:

It would not have been unnatural when viewed in the light of common knowledge and experience for this aunt to take her orphaned infant niece and rear her to maturity, giving her all the care and advantages of which the aunt was capable, receiving in turn that which was justly due in the way of affection and normal services, without any agreement or intention on the part of the aunt to adopt the child and thereby make her a legal heir to property. Some one had to care for the respondent or she would have become a charge upon the public.²⁴⁹

To be fair, the courts have imposed these strict requirements, not in an effort to deny a worthy individual his inheritance, but to protect the testator's donative intent.²⁵⁰ As the courts have noted, it would not be unusual for a person to raise an orphan or abandoned child purely out of charitable motives "without any agreement or intention on the part of the [decendent] to adopt the child and thereby make her a legal heir to property."²⁵¹ Accordingly, the courts have clung tightly to the rather high burden of proof on the basis that any

2006); *see also* *Bellinger v. Boatmen's Nat'l Bank of St. Louis*, 779 S.W.2d 647, 650 (Mo. Ct. App. 1989).

247. *See, e.g.*, *King v. Heirs & Beneficiaries of Watkins*, 624 S.W.2d 252, 257 (Tex. App. 1981) (holding that "the testimony of witnesses as to [the decedent's] intention to adopt appellant cannot be considered as evidence of an agreement to adopt"); *House v. House*, 222 S.W.2d 337, 338-39 (Tex. Civ. App. 1949) (finding no equitable adoption, even though the decedent "had expressed an intention to sometime in the future adopt [the proponent]").

248. Rein, *supra* note 12, at 782 (acknowledging that a "benevolent person may, of course, take in a homeless child without intending to adopt him").

249. *Cavanaugh v. Davis*, 235 S.W.2d 972, 978 (Tex. 1951); *see also* *Garcia v. Saenz*, 242 S.W.2d 230, 232 (Tex. Civ. App. 1951) ("Acts of human kindness referable to an undertaking to rear and educate a helpless child do not prove an agreement to adopt.").

250. *See* Rein, *supra* note 12, at 782 ("Courts that emphasize the high standard of proof are trying to ensure that the alleged promisor truly intended to adopt the child.").

251. Bell, *supra* note 11, at 430 n.114 (citing *Cavanaugh*, 235 S.W.2d at 978).

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relaxation would be “tantamount to an invitation to fraud.”²⁵² Additionally, courts also point to the policy of protecting the welfare of needy children as a basis for retaining the high evidentiary standard: “If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, . . . the rule should be kept and observed.”²⁵³ However, what these latter courts fail to consider is that those “reluctant” parents, like all individuals, are free to make a will to memorialize their desire that the foster child not inherit.

Despite these concerns, one court has nonetheless gone so far as to affirmatively reject the requirement that the proponent first prove the existence of a contract to adopt.²⁵⁴ Specifically, in *Wheeling Dollar Savings & Trust Co. v. Singer*, the West Virginia Supreme Court of Appeals, in setting out the standard for equitable adoption, stated that “[w]hile the existence of an express contract of adoption is very convincing evidence, an implied contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims.”²⁵⁵ Instead, the court held that an equitable adoption could take place even without a contract to adopt so long as the proponent “can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption.”²⁵⁶ In defining what circumstances would be deemed “sufficient facts” for purposes of proving an equitable adoption, the court relied on many of those same circumstances, listed above,²⁵⁷ that courts had used as “circumstantial evidence” of a contract to adopt:

252. Reeves, *supra* note 209, at 131 n.19.

253. Benjamin v. Cronan, 93 S.W.2d 975, 981 (Mo. 1936).

254. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W. Va. 1978) (“[I]f a claimant can, by clear, cogent and convincing evidence, prove . . . that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption, a finding of an equitable adoption is proper without proof of an adoption contract.”). Currently, West Virginia is the only state that has jettisoned the contract requirement. However, the Court of Appeals of New Mexico, although not going as far as West Virginia, has affirmatively questioned whether that state should continue to adhere to the contract requirement. *Otero v. City of Albuquerque*, 1998-NMCA-137, ¶ 19, 965 P.2d 354, 361 (N.M. Ct. App.) (“Perhaps, however, our Supreme Court today would not find it necessary to be as restrictive as it has been in the past, when it has required an actual contract of adoption between the equitable parent and the natural parents . . .”) (citing Rein, *supra* note 12, at 785–86).

255. *Wheeling Dollar*, 250 S.E.2d at 374.

256. *Id.*

257. See *supra* notes 243–45 and accompanying text.

Circumstances which tend to show the existence of an equitable adoption include: the benefits of love and affection accruing to the adopting party, the performances of services by the child, the surrender of ties by the natural parent, the society, companionship and filial obedience of the child, an invalid or ineffectual adoption proceeding, reliance by the adopted person upon the existence of his adoptive status, the representation to all the world that the child is a natural or adopted child, and the rearing of the child from an age of tender years by the adopting parents.²⁵⁸

Thus, the *Wheeling Dollar* test is a much more inclusive and functional incarnation of the equitable adoption doctrine. Although it may, in essence, rely on the same factual findings that other courts have relied upon, the *Wheeling Dollar* test uses those facts, not to prove the preliminary issue of whether a contract to adopt existed, but to determine the actual relationship that existed between the proponent and the decedent, and whether those facts indicate that this relationship was equal to that of parent and child.

IV. EQUITABLE ADOPTION'S FAILURE TO RECOGNIZE THE INFORMALLY ADOPTED

Given that the functional approach to defining family is "inevitably comparative [in] nature,"²⁵⁹ even when using the functional approach to determining inheritance, courts must be careful not to allow the nuclear-family model to serve as the guiding standard. To do so would be detrimental to nontraditional families.²⁶⁰ As Professor Susan N. Gary has noted, "[i]f the functional definition of family is based on the way a nuclear family functions, then many non-traditional families may still be left out of the definition."²⁶¹ As currently applied, the doctrine of equitable adoption is a prime example of this very problem.

Specifically, by limiting recovery to only those individuals who can prove the existence of a contract to adopt, the equitable adoption doctrine, as it is currently applied in most states, is using the nuclear-family model as a benchmark for relief. In essence, the

258. *Wheeling Dollar*, 250 S.E.2d at 373-74 (citations omitted). Interestingly, the court also named certain circumstances that could help negate a finding of equitable adoption, such as "failure of the child to perform the duties of an adopted child, or misconduct of the child or abandonment of the adoptive parents." *Id.* at 374 (citations omitted).

259. *Family Resemblance*, *supra* note 1, at 1653.

260. *Id.* at 1642-44 (noting how the practice of defining "family" using the nuclear-family model as the standard "has resulted in the denial of benefits to a growing number of individuals involved in many different types of nontraditional relationships").

261. Gary, *supra* note 2, at 42.

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current tests for equitable adoption only recognize those individuals for whom the birth parents and the foster parents contemplated, yet did not carry through with, an adoption contract.²⁶² However, as detailed in Section II, for a large number of Americans, specifically within the minority populations of the United States where the extended family model is the norm, even the thought of a formal adoption is somewhat rare and, in some cases, frowned upon.²⁶³ Accordingly, the practice of informal adoption is much more common within those families.²⁶⁴ However, under the equitable adoption doctrine, with the majority of courts insisting on the existence of a contract to adopt, informally adopted children in those families would rarely be able to recover under the equitable adoption doctrine. To illustrate this difficulty and the resulting harm, consider the result in Hattie O'Neal's case as referenced at the beginning of this Article.

Again, after the death of her mother, Hattie lived with a number of individuals before her paternal aunt ultimately gave Hattie to Mr. and Mrs. Cook.²⁶⁵ Although the Cooks never adopted the twelve-year-old girl, Hattie lived with the couple for approximately fourteen years until she got married in 1975.²⁶⁶ Additionally, the couple provided for Hattie's education and referred to her as their "daughter," and to her children as their "grandchildren."²⁶⁷ In 1991, Mr. Cook died intestate, and Hattie claimed an interest in the estate as Mr. Cook's daughter.²⁶⁸ When the administrator of the estate refused to recognize Hattie's claim, she filed suit asking the court to declare that Mr. Cook had equitably adopted her, thus entitling her to inherit as though she had been statutorily adopted by Mr. Cook.²⁶⁹

The Supreme Court of Georgia held that Hattie had not been equitably adopted.²⁷⁰ In an opinion that relied entirely upon the contract theory of equitable adoption, the court began its analysis by looking at whether there was a valid contract for adoption.²⁷¹ Furthermore, as a preliminary matter, the court stated that "[t]he first essential of a contract for adoption is that it be made between

262. *See supra* notes 233–35 and accompanying text.
263. *See supra* notes 155–60 and accompanying text.
264. *See supra* note 41 and accompanying text.
265. *O'Neal v. Wilkes*, 439 S.E.2d 490, 491 (Ga. 1994).
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 492.
271. *Id.* at 491.

persons competent to contract for the disposition of the child.”²⁷² By finding that the parties did not have legal authority to consent to an adoption, which is a precursor to any recovery under the contract theory of equitable adoption, the court was able to quickly dispose of Hattie’s claim.²⁷³ In essence, Hattie lost because Estelle Page, the paternal aunt who offered Hattie to the Cooks, did not have the capacity to contract for Hattie’s adoption:

O’Neal concedes that, after her mother’s death, no guardianship petition was filed by her relatives. Nor is there any evidence that any person petitioned to be appointed as her legal custodian. Accordingly, the obligation to care and provide for O’Neal, undertaken first by Campbell, and later by Page, was not a legal obligation but a familial obligation resulting in a custodial relationship properly characterized as something less than that of a legal custodian. Such a relationship carried with it no authority to contract for O’Neal’s adoption. . . . Because O’Neal’s relatives did not have the legal authority to enter into a contract for her adoption, their alleged ratification of the adoption contract was of no legal effect and the court did not err in granting a judgment notwithstanding the verdict in favor of the [administrator of the estate].²⁷⁴

In her dissent, Justice Sears-Collins argued in favor of moving away from basing equitable adoption on a strict application of contract law.²⁷⁵ Her dissent pointed out that, under contract law, the requirement that a person have legal authority to consent to an adoption is designed to protect not only the child and the adopting parents, but also the person who has arranged the adoption.²⁷⁶ However, as the dissent noted, in the context of an equitable adoption claim, the adopting parents have died, and the only party with any interest to be protected at that point is the child.²⁷⁷ According to the dissent, by then penalizing that child for someone else’s failure to comply with contract requirements, the majority had

272. *Id.* The full test that the court relied upon also requires:

Some showing of an agreement between the natural and adoptive parents, performance by the natural parents of the child in giving up custody, performance by the child in living in the home of the adoptive parents, partial performance by the foster parents in taking the child into the home and treating [it] as their child, and . . . the intestacy of the foster parent.

Id. (quoting *Williams v. Murray*, 236 S.E.2d 624, 625 (Ga. 1977) (alterations in original)).

273. *Id.* at 492.

274. *Id.*

275. *Id.* at 494 (Sears-Collins, J., dissenting).

276. *Id.* at 493 (citing 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS* § 21.11 (2d ed. 1987)).

277. *Id.* at 493–94.

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failed to honor the maxim that “[e]quity considers that done which ought to be done.”²⁷⁸ As a result, the dissent advocated that the court “abandon the contract basis for equitable adoption in favor of [a theory that is] more flexible and equitable.”²⁷⁹

In neither the majority nor the dissent, however, do any of the justices take note of the racial or cultural background in which this case arose. For instance, nowhere in the opinion does the court note any of the circumstances that might have made it either unlikely or extremely difficult for the Cooks to adopt Hattie. For instance, nowhere in the opinion is it revealed that Hattie O’Neal is African American, that the rural Georgia town where she lived with the Cooks has a mere population of 767 (751 of which are African American), or that there were no lawyers in that town during the time period in which Hattie came to live with the Cooks.²⁸⁰ In fact, all the court ever really says as to Hattie’s background is that “we sympathize with O’Neal’s plight.”²⁸¹ Although the reader does not know what the court meant by “plight,” by calling it “O’Neal’s plight,” there is some implication that the situation in which Hattie had found herself was somehow exclusive to her. However, as evidenced by the prevalence of informal adoptions in the minority communities within the United States, if the law continues to fail to account for cultural differences in the area of equitable adoption, Hattie’s plight could very well become the plight of many Americans.

V. PROPOSAL

As illustrated by the harsh result in Hattie’s case, the law of inheritance as it currently exists in most states effectively excludes a number of minority children residing in “nontraditional” families. Thus, just as the law of inheritance has already taken some steps to protect America’s changing families by including illegitimate and adopted children, the law nonetheless needs to recognize that a number of children are still being excluded from inheritance rights. While others have focused on the discriminatory impact that the current laws of intestate succession have on stepchildren, the purpose of this Article is to focus on another class of children who face similar discrimination. Specifically, a large number of

278. *Id.* at 494.

279. *Id.* The dissent would still hold that children have to “sufficiently establish the existence of the contract to adopt.” *Id.* at 493. However, the dissent would not require, as a prerequisite to recovery, that the party who entered into that contract had the legal authority to do so. *Id.*

280. *DUKEMINIER ET AL.*, *supra* note 6, at 99.

281. *O’Neal*, 439 S.E.2d at 492.

informally adopted children, many of whom are found in the African American and Hispanic American communities, are facing the threat of disinheritance simply by virtue of being reared in a nontraditional family.

As an initial matter, failing to protect these children substantially undermines several of the policies behind inheritance rights. First, allowing a natural or adopted child to inherit while, at the same time, excluding a child whom the decedent considered to be the equivalent of a natural or adopted child fails to effectuate the decedent's donative intent. Given that the law of inheritance is concerned only with effectuating the donative intent of the average decedent, it is entirely reasonable to assume that the average decedent who informally adopts a child, just like the decedent who formally adopts, would intend for that child to inherit.

Second, the failure to include an informally adopted child also undermines the policy of protecting the financially dependent family. Just as a decedent's natural, adopted, and illegitimate children may be financially dependent on the decedent, so too would an informally adopted child. In fact, given that both informal adoptions as well as the likelihood of intestacy are more common in poorer families,²⁸² informally adopted children are much more likely to be harmed financially if prevented from inheriting from their "parents" as those children may not have many other resources. At the very least, however, given these two policies underlying the law of inheritance, there is no basis for distinguishing between children who are formally adopted and those who are informally adopted.²⁸³

By excluding an informally adopted child, inheritance law not only fails to provide financial support for that child, but also denies that child a sense of emotional support. As Gary explains, "[a]n intestacy statute provides emotional support to family members simply by identifying them as persons entitled to a distribution from

282. *See supra* notes 89, 132–36, 195–96 and accompanying text. Furthermore, it should be noted that these children, if not permitted to inherit as the children of a decedent, will also be foreclosed from claiming Social Security benefits. *See* 42 U.S.C. §§ 402(d)(3), 416(h)(2)(A) (2000) ("In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by [the state in which the decedent was domiciled].")

283. For this reason, it should be of no legal consequence that an informally adopted child may actually be an adult when the foster parent dies. Indeed, just as the law of intestate succession is already blind to a child's age when determining an adopted or biological child's share, so too should be any system designed to extend inheritance rights to the informally adopted.

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the decedent's estate. By doing so, the statute validates their relationship with the loved one who has died."²⁸⁴ Furthermore, the absence of this emotional support can take a psychological toll on those excluded from inheritance: "Loss of inheritance is upsetting for financial reasons, but even more so for its psychological toll."²⁸⁵ Thus, at death, the informally adopted, while mourning the loss of someone important in her life, is told that legally her relationship to the person was unnatural.²⁸⁶

Of course one of the justifications for limiting inheritance rights to biological and adoptive children is the need to make the estate administration process predictable and not unduly burdensome. As a result, "[p]robate courts are accustomed to making heirship determinations based on the existence of easily identifiable legal relationships."²⁸⁷ Thus, some may argue that including informally adopted children as potential heirs would have a number of dangerous consequences: 1) it would make the process of identifying one's heirs much more lengthy and difficult; 2) it would give rise to frivolous or perhaps fraudulent claims; and 3) it would make it more difficult for an individual to predict the identity of his potential heirs should he die intestate.

While the equitable adoption doctrine has already opened the courthouse door to nonlegal relatives without any resulting flood of litigation, the courts have greatly limited the number of people who can qualify as having been equitably adopted.²⁸⁸ However, in terms of the goal of creating certainty and predictability in the intestate scheme, these concerns should not outweigh the benefits of guarding donative intent, protecting a decedent's surviving family, and creating a nondiscriminatory inheritance scheme. As one commentator has noted, "justice is more important than certainty."²⁸⁹ Furthermore, when the intestacy scheme is in conflict with the desires of the typical decedent, "the statute is probably flawed, and public skepticism concerning the fairness of the probate process results."²⁹⁰

284. Gary, *supra* note 177, at 652.

285. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 623 (1997).

286. *See supra* note 191 and accompanying text.

287. Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 936 (1989).

288. *See supra* notes 233–35 and accompanying text.

289. E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 288 n.142 (2002) (quoting Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 425 (1997)).

290. Brashier, *supra* note 174, at 147.

Nonetheless, these concerns over certainty and ease of administration are important and should be considered when designing any functional approach to intestate succession. Thus, with those concerns in mind, what follows are two proposed solutions that would remedy the failings of the equitable adoption doctrine to be more inclusive of informally adopted children, and at the same time, limit the potential for fraudulent and other claims that would unduly burden the probate process.

A. *Reform the Equitable Adoption Doctrine*

The first option is simply to reform the equitable adoption doctrine as it currently exists. Specifically, courts should jettison the requirement that, prior to even having the proponent's relationship with the decedent considered, the proponent first prove the existence of a contract to adopt between the natural and foster parents.²⁹¹ As discussed earlier, and as was illustrated in Hattie O'Neal's case, this rigid requirement has in many cases denied recovery to children who in all respects have been treated as the decedent's biological or adoptive child.²⁹²

Not only is this contract requirement fatal to many worthy proponents, it is also unnecessary for granting relief. As Professor Rein points out, "[i]f estoppel is the true basis for the granting of equitable relief, whether or not a contract existed or even whether or not the foster parent intended to formally adopt the child should be beside the point."²⁹³ Instead, Rein suggests that the focus need only be on whether "the foster family's acts or omissions induced the child to believe that he was the foster parent's biological or formally adopted child."²⁹⁴

However, the problem with this suggestion, just like the current application of the equitable adoption doctrine, is that it continues to use the nuclear-family model as the standard by which we would continue to determine who is a "child." Specifically, to require that a child was led to believe that he had been formally adopted effectively eliminates those situations where the child knows he has not been formally adopted yet still believes himself to be the child of the foster parents. Accordingly, given the nature of informal adoption within the African American and Hispanic communities, where formal adoptions are rare and sometimes even disfavored,²⁹⁵ a slight modification to Rein's suggestion is necessary. Thus, the test

291. See *supra* notes 233–34 and accompanying text.

292. See *supra* notes 265–74 and accompanying text.

293. Rein, *supra* note 12, at 786 (footnote omitted).

294. *Id.*

295. See *supra* note 155 and accompanying text.

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that courts should use to determine whether an equitable adoption took place is whether the acts or omissions of the foster parents led the proponent to believe that the foster parents considered him to be the equivalent of a natural or adopted child.

Accordingly, this Article suggests that until such time as legislatures amend the inheritance laws to encompass informal adoptions, courts should adopt a standard like that employed in *Wheeling Dollar*. Again, in *Wheeling Dollar*, West Virginia dispensed with the contract requirement and instead now merely requires the proponent to prove that “his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption.”²⁹⁶ By eliminating the contract requirement, the court is then free to look solely at the relationship between the proponent and the decedent. This relationship should be the sole focus of the inquiry given that “most equitable adoption cases must be stretched to establish the elements of either contract theory,” and that “the real basis for the claim is the family relationship between the decedent and an individual, who played the role of decedent’s child, and who was a likely object of testamentary bounty.”²⁹⁷

In looking solely at the relationship between the two parties, *Wheeling Dollar* again provides useful factors to help analyze the relationship and whether it bears a close enough resemblance to parent and child. As noted earlier, the court in *Wheeling Dollar* set out the following circumstances that, if present, would satisfy the court that an equitable adoption had taken place: performance of filial services by the child; surrendering of ties by the natural parents, the companionship and obedience of the child; an invalid or ineffectual adoption proceeding; reliance by the child on his adoptive status, the representation to others by the foster parents that the child is a natural or adopted child; and the rearing of the child from a young age by the foster parents.²⁹⁸

However, courts must be careful to realize that those circumstances are merely factors and, in applying those standards, to not let the nuclear family model serve as the criteria against which those circumstances are measured. Specifically, there are two such circumstances in *Wheeling Dollar* in particular that could be problematic in this regard and thus warrant some discussion here.

First, *Wheeling Dollar* lists “the surrender of ties by the natural parent” as one of the circumstances that would tend to show an

296. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W. Va. 1978); see also notes 254–57 and accompanying text.

297. *Mahoney*, *supra* note 287, at 925–26.

298. See *supra* note 258 and accompanying text.

equitable adoption.²⁹⁹ While such a factor, if present, would certainly make it appear more likely that an equitable adoption had taken place, it must be understood that the absence of this circumstance should never be fatal. Indeed, within the extended family model, it would not be uncommon for a child, although informally adopted by a friend or family member, to nonetheless maintain some contact with the biological parents.³⁰⁰ Second, as noted in Part II, many informally adopted children may have difficulty showing that there was “an invalid or ineffectual adoption proceeding.”³⁰¹ For instance, given the cultural predisposition against formal adoption within the Hispanic community,³⁰² it would not be difficult to imagine an informally adopted Hispanic child who not only could not point to a failed adoption proceeding, but who affirmatively knew of the foster parent’s disdain for formal adoption. Thus, to automatically hold the absence of any of these circumstances against the child would reflect a cultural bias, effectively penalizing that child for not being reared in a more traditional nuclear-family model. Instead, these circumstances should be treated only as individual factors, the absence of which may be explained or supplemented by one of the other factors.

However, to offset the degree to which these suggestions would relax the standard for equitable adoption, and perhaps invite frivolous or fraudulent claims, the “representation to all the world that the child is a natural or adopted child”³⁰³ factor should be changed to whether the proponent and decedent held themselves out as parent and child *for a substantial period of time*.³⁰⁴ As an initial matter, the wording is changed to eliminate the inherent cultural bias given that the former could imply that the foster parent would

299. *Wheeling Dollar*, 250 S.E.2d at 373.

300. For example, Charmaine Yoest, in looking at one family in which a grandmother informally adopted one of her grandchildren, describes the situation as follows:

Though Gale’s mother was present, Grandma Jones was always the children’s primary caregiver. Gale says of her mother, “It was like she was my sister.” Gale distinctly remembers her mother sitting down in the kitchen one day and deliberately deciding that Gale would belong to her grandparents, while the other two children would remain hers. “My mother informally gave me to my grandparents,” says Gale.

Yoest, *supra* note 88, at 8–9.

301. *See Wheeling Dollar*, 250 S.E.2d at 373.

302. *See supra* note 155 and accompanying text.

303. *See Wheeling Dollar*, 250 S.E.2d at 373.

304. Some courts have employed a similar factor in deciding equitable adoption claims. *See, e.g.,* *Lawson v. Atwood*, 536 N.E.2d 1167, 1170 (Ohio 1989) (requiring clear and convincing evidence that the “child and the one claiming to be parent have held themselves out to be parent and child for a substantial period of time”).

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have to hold a nonbiological child out as being formally adopted, which, again, may be a term that is either unknown or avoided by the members of some ethnic communities.

However, the more substantial change is the requirement that this “holding out” exist for a substantial period of time. Although courts would be free to define what constitutes the requisite time period, requiring some continuous and extended demonstration of a parent-child relationship should dissuade individuals from bringing weaker or frivolous claims, which will help to promote some degree of predictability and also to not unduly burden the administration of probate. Furthermore, as noted in Part II, many informal adoptions begin as temporary placements and, over time, grow into something permanent.³⁰⁵ By requiring that the parent-child relationship exist for a certain period of time, the law can eliminate the chance that the decedent was merely providing temporary care to the proponent at the time of death.

Furthermore, to also help limit meritless claims, courts should continue to require that a proponent prove his claim by clear, cogent, and convincing evidence.³⁰⁶

B. Create a Statutory Solution

The above proposal to reform the doctrine of equitable adoption should be viewed merely as an interim step to reform. Ultimately, the recognition of informally adopted children as potential heirs needs to come from the state legislatures in the form of revisions to the current statutes governing intestate succession. In fact, a statutory approach is necessary to cure a number of problems posed by the equitable adoption doctrine.

First and foremost, a number of state courts have refused to even recognize equitable adoption on the basis that adoption is purely a creature of statutory law.³⁰⁷ By expanding the existing intestacy statutes to permit a functional approach to defining the parent-child relationship, these states would seemingly no longer have any objection to allowing informally adopted children to petition the court for inheritance rights equal to a formally adopted child. Thus, more informally adopted children nationwide would have protections equivalent to those afforded by the equitable adoption doctrine as proposed above.

Second, such a change to the existing inheritance law is quite a

305. See *supra* note 100 and accompanying text.

306. Incidentally, it should also be noted that the *Wheeling Dollar* opinion was issued in 1978, and since that time, there has been no indication of any resulting increase in cases in West Virginia involving equitable adoption claims.

307. See *supra* notes 230–32 and accompanying text.

large step away from the traditional objective-based approach to determining inheritance rights. As a result, there are likely to be a number of concerns and unanswered questions, which the state legislature is better equipped to answer. For example, Professor Rein noted a number of questions that have already arisen in the context of, what Rein terms, the “Pandora’s Box” of equitable adoption.³⁰⁸

Some of the toughest questions raised by the equitable adoption doctrine center around the extent of the inheritance rights afforded an equitably adopted child. Although any recommendations on these questions are beyond the limited scope of this Article, identifying some of the issues relating to the equitable adoption doctrine helps illustrate the need for a statutory solution. First, states must determine whether the equitably adopted person is limited to inheritance from the foster parent or whether he may also inherit from the foster parent’s blood relatives. Thus far, the states are in disagreement.³⁰⁹ Second, in many states, a person loses the right to inherit from her biological parents once she has been formally adopted.³¹⁰ The question then arises of whether an equitably adopted child should be treated in a similar fashion. Although no case law currently exists on this topic, it is only a matter of time before a state court will be forced to resolve this admittedly complicated issue. Just as the various state legislatures have been charged with defining the inheritance rights of adopted children vis-à-vis their biological parents and adoptive parents, so too should the state legislatures be entrusted with developing solutions to these issues as they relate to equitably adopted children.

Finally, some of the other questions raised by the equitable adoption doctrine that would be best left to the state legislatures include:

Does an equitably adopted child have standing to contest the unfavorable will of his foster parent? After divorce, does the foster parent have a continuing duty to support his equitably adopted child, and, if so, is the biological parent still liable for child support? Can the equitably adopted child recover a work[er]’s compensation death benefit for the death of his

308. Rein, *supra* note 12, at 768.

309. Compare Board of Educ. v. Browning, 635 A.2d 373, 380 (Md. 1994) (holding that an equitably adopted child could not inherit from the foster parent’s sister), with First Nat’l Bank in Fairmont v. Phillips, 344 S.E.2d 201, 205 (W. Va. 1985) (holding that an equitably adopted child could inherit from another child of the foster parent).

310. See Rein, *supra* note 12, at 718–31 (discussing the various approaches that states have used to determine the inheritance rights of adopted children).

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foster parent? Can the foster parent recover a work[er]’s compensation death benefit for the death of his equitably adopted foster child? Can the equitably adopted child bring a wrongful death action for the death of his foster parent? Can the foster parent bring a wrongful death action for the death of his equitably adopted child? When a stranger to the informal adoption makes a gift in a private instrument to someone else’s “children,” “issue,” “grandchildren,” or “heirs,” can one enter the designated class by way of equitable adoption?³¹¹

Given this long list of questions associated with extending inheritance rights to the functional equivalents of children, it would be much more efficient for a state legislature to answer all of these questions at once in the form of a statutory scheme, as opposed to sitting back and waiting for a court, under the equitable adoption doctrine, to formulate answers to these difficult questions as they happen to arise.

A third benefit to a statutory solution would be a greater effectuation of the policy that inheritance rights should provide some element of certainty and predictability. By leaving the matter entirely to the courts, a likely proponent of equitable adoption would be less likely to even know that such a remedy is available and also to know what standards or criteria are to be used to decide such a claim. As noted earlier, the doctrine of equitable adoption as it currently exists is applied more or less strictly depending on the actual court deciding the case.³¹² A statutory scheme would be capable of providing a single, more specific standard. Furthermore, given the unanswered questions listed above, many proponents would be proceeding with their claims in the dark until such time as a court had cause to resolve all of those issues, which again, could be resolved all at once by the state legislature.

The final benefits of a statutory remedy flow from the problems typically associated with equitable remedies. First, as pointed out above, there are a number of questionable assumptions underlying the theory of equitable adoption, namely whether it is based on specific performance or equitable estoppel.³¹³ A statutory remedy, then, would eliminate the need for such legal fictions and allow the courts to instead simply apply the relevant statute.³¹⁴ Additionally, a statutory remedy would permit courts to avoid the specter of engaging in what has been pejoratively described as “judicial

311. *Id.* at 768–70.

312. *See supra* notes 236–42 and accompanying text.

313. *See supra* notes 212–29 and accompanying text.

314. *See Hirsch, supra* note 10, at 547–48 (using the equitable adoption doctrine’s theories of recovery as examples of legal fictions that are ill-suited to the facts of the cases).

legislation.”³¹⁵

Given then that the problem of creating a more functional scheme for defining an intestate decedent’s “child” is best dealt with statutorily, a seemingly daunting question arises: What should such a statute look like? However, one scholar has already proposed a statute that would effectively accomplish the goal of giving informally adopted children a realistic chance of qualifying as a decedent’s child.

Specifically, in arguing that stepchildren should be afforded the same inheritance rights as natural and adoptive children, Gary proposes the following language that could be added to the definitions of “child” found in current intestacy statutes:

(a) [A]n individual is the child of another individual and an individual is the parent of another individual if the person seeking to establish the relationship proves by clear and convincing evidence that a parent-child relationship existed between the two individuals at the time of the decedent’s death

(b) [Factors] Although no single factor or set of factors determines whether a relationship qualifies as a parent-child relationship, the following factors are among those to be considered as positive indications that a parent-child relationship existed:

(1) The relationship between the parent and child began during the child’s minority. The younger the child, the greater the weight to be given to this factor;

(2) The duration of the relationship was sufficient for the formation of a parent-child bond;

(3) The decedent was married to or was a committed partner of a biological or adoptive parent of the child;

(4) The parent held the child out as his or her child, referring to the child as his or her child or treating the child as his or her child;

(5) The parent provided economic and emotional support for the child; the child provided economic and emotional support for the parent;

315. *Id.* at 535.

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(6) Treatment of the child by the parent was comparable to the decedent's treatment of his or her [biological or adoptive] children; and

(7) The decedent named the child or parent as a beneficiary to receive property at the decedent's death through a nonprobate transfer.³¹⁶

There are a number of advantages to this proposed statute. Initially, to help prevent the problems of a resulting flood of litigation and fraudulent claims, the requisite burden of proof would still be clear and convincing evidence.³¹⁷ Furthermore, the language explicitly states that the factors are not dispositive. As noted above, when describing ways to reform the current equitable adoption doctrine, the fact that extended families function in ways that are sometimes quite different from nuclear families requires that there be some flexibility in any functional test of "family." Additionally, Gary's proposed statute lays out the functional test of child in a way that is not culturally biased. Unlike the *Wheeling Dollar* test, discussed above, the proposed statute does not require that the foster parent treat or hold out the child as a "formally adopted child." Instead, the statute merely describes the test as "comparable to the decedent's treatment of his or her legal children." In so doing, the statute implicitly makes clear that a decedent could consider someone to be her "child," without using formal adoption as the standard for comparison, given that this practice may be foreign or even disdainful to many Americans in minority ethnic communities.

Furthermore, Gary has provided sufficiently specific factors to limit a judge's ability to use too much discretion when adjudicating a claim.³¹⁸ This element is key given that "[a]bandoning the simplicity and consistency associated with objective rules is a scary proposition for American probate law."³¹⁹ Instead, Gary offers a combination approach that does have some degree of flexibility, yet at the same time relies on specific factors, many of which would require objective evidence. Such an approach was recommended by Professor Brashier in proposing a statute to deal with the inheritance rights of "half-bloods": "Inheritance law could maintain much of its fixed-rule simplicity and yet incorporate an element of inclusiveness and

316. Gary, *supra* note 2, at app.I.

317. *Id.* at 73. Furthermore, it should be noted that the statute would not even come into play unless a proponent made an application with the court. Otherwise, the current intestacy statute would apply.

318. See Hargis, *supra* note 176, at 464 ("Allowing discretion ensures more consistent results than these equitable remedies, because they offer specific guidelines in determining the case.").

319. Brashier, *supra* note 174, at 188.

flexibility by permitting probate courts to use extrinsic but objective evidence concerning the decedent's family relationships."³²⁰ Accordingly, by focusing on factors that are susceptible to objective proof, Gary's proposed statute provides a more inclusive scheme that nonetheless retains some degree of certainty and predictability. In addition, providing this list of objective factors would help provide individuals with a better understanding of the consequences of dying intestate given that all judges would be required to evaluate the same factors. As one commentator has noted, "requir[ing] courts to consider the same factors in each case [helps to] ensure fair and consistent results."³²¹

Nonetheless, for jurisdictions that perhaps agree in principle with the proposed statute contained herein but who, nonetheless, would like more limiting language, one possibility may be found in England's family maintenance statute. In England, "any person . . . who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased" and who was so maintained for at least two years can apply for an intestate share.³²² A somewhat similar restriction could also be added to the above statute. Specifically, a proponent could first be required to show that for a certain amount of time during the decedent's life, perhaps two years, he was financially dependent on the decedent. Thus, the first paragraph of the statute would become:

[A]n individual is the child of another individual and an individual is the parent of another individual if the person seeking to establish the relationship proves by clear and convincing evidence that both *he or she was financially dependent on the other for at least a two-year consecutive period* and that a parent-child relationship existed between the two individuals at the time of the decedent's death.

Courts would have to define "financially dependent"; however, once the proponent made that required support showing, the court would then proceed with the remainder of the statutory factors to determine if a parent-child relationship existed at the time of death. Having this threshold requirement could help eliminate weaker

320. *Id.* at 189.

321. Hargis, *supra* note 176, at 464.

322. Inheritance (Provision for Family and Dependants) Act of 1975, ch. 63, § 1(1)(e) (Eng. and Wales), *amended by* Civil Partnership Act of 2004, ch. 33, § 4(2) (Eng. and Wales). The statute further provides that "a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person." *Id.* § 1(3).

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claims; yet, at the same time, it is not the sort of threshold requirement—like the contract requirement that currently exists in the equitable adoption doctrine—that would effectively bar a number of deserving claims. Indeed, it is entirely reasonable to expect that anyone who equitably adopted a child would have provided financial support for that child. Furthermore, including a time requirement (for the same reasons one is proposed above in reforming the equitable adoption doctrine) would help provide a greater sense of security that the proponent's relationship with the decedent was not merely a temporary arrangement that never actually blossomed into a full-scale informal adoption.

VI. CONCLUSION

As the law of intestate succession begins to move toward a more functional approach in determining whether a parent-child relationship exists, one must be cautious not to make those determinations using the nuclear family as the standard by which all other relationships are to be measured. Doing so effectively ignores a large population within the United States and jeopardizes the inheritance rights of some of the country's more vulnerable citizens. Currently, the doctrine of equitable adoption illustrates this danger. By using formal adoption as the norm, the law effectively disinherits those who were brought into a family by virtue of informal adoption, a practice that is quite common in America's two largest ethnic minorities. Accordingly, to greater protect the rights of these individuals, the law of intestate succession needs to be expanded to permit such individuals, whom the decedent treated as the equivalent of natural or adoptive children, the right to claim an intestate share. Failure to do so not only undermines the policies behind intestate succession, but also serves to advance a system of inheritance that is both outdated and discriminatory.