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UNDESERVING HEIRS?—THE CASE OF THE “TERMINATED” PARENT

Richard Lewis Brown *

I. INTRODUCTION

Every state has an intestate succession statute that prescribes how the property of those who die without a will should be distributed.¹ Every state also by statute authorizes the government to intervene in the parent-child relationship in the most draconian manner possible by involuntarily terminating parental rights.² This article explores how the law functions at the intersection of these two statutory schemes—the inheritance regime, as expressed through intestate succession statutes, and the child welfare regime, as expressed through termination of parental rights statutes (“TPR statutes”).

These two legal regimes could not be more different in the role they ascribe to individual worthiness. The inheritance scheme historically has been blind to the worthiness of individual heirs. The child welfare scheme, in contrast, gives great weight to the individual worthiness—or, more accurately, unworthiness—of parents. The interaction of these two schemes inevitably raises an important, broader issue—whether, and how, the behavior of individual potential heirs ought to affect inheritance rights.³ Should

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1. See WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* 46 (3d ed. 2004).

2. See 1 JOAN HEIFETZ HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE*, § 4.04(1)(a) (Joan Heifetz Hollinger ed., 2004). For a listing of state termination of parental rights statutes, see Tracy B. Harding, Note, *Involuntary Termination of Parental Rights: Reform Is Needed*, 39 *BRANDEIS L.J.* 895, 896 n.11 (2001).

3. The possibility and advisability of a more expansive role for assessments of individual behavior, and thus worthiness, of heirs have been explored by several commentators. See, e.g., Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The*

the individualized unworthiness of a potential heir extinguish her inheritance rights? And if so, how should we determine which heirs are, in fact, sufficiently undeserving to warrant extinguishing their inheritance rights?

Intestate succession statutes are, by their very nature, formulaic. They determine who will inherit by applying a purely mechanical formula. Heirs inherit not because of their individual worthiness, but rather (and only) because they stand in a particular biological or marital relationship with the decedent.⁴ While there is considerable variation among state intestate succession statutes, the right of an heir (other than the surviving spouse)⁵ to inherit is almost always based on a parent-child relationship or a chain of parent-child relationships between the decedent and the heir. After the surviving spouse's share is determined, surviving issue (children, grandchildren, great-grandchildren, etc.) generally inherit the remainder of the estate.⁶ If there are no surviving issue, the remainder of the estate generally passes to the decedent's parents, or, if there are no surviving parents, to other ancestors, such as grandparents or great-grandparents, or collateral relatives, such as siblings, nieces and nephews, or cousins.⁷ The fact that a child was estranged, or a spouse unloving, or a parent insufferable, is of no consequence in determining inheritance rights. With very few exceptions,⁸ the personal characteristics of the heir are simply irrelevant to the heir's right to inherit. Like the meek, the undeserving can, and often do, inherit the earth.

Chinese Experiment, 32 U.C. DAVIS L. REV. 77 (1998); Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 277 (1994); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517 (1994).

4. In this respect, the intestate succession scheme stands in stark contrast to the law of wills. The primary function of a will is to effectuate the individualized intention of the testator, which can, and often does, reflect the testator's view of the worthiness or undeservingness of individual devisees.

5. The share of the estate received by the surviving spouse may depend on the size of the estate, whether the decedent also left surviving children, how many children survived the decedent, and whether all of the decedent's surviving children are also children of the surviving spouse and, conversely, whether all of the surviving spouse's children are also children of the decedent. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES*, 62-64 (7th ed. 2005); MCGOVERN & KURTZ, *supra* note 1, at 48-50.

6. See DUKEMINIER ET AL. *supra* note 5, at 73; MCGOVERN & KURTZ, *supra* note 1, at 50-54.

7. DUKEMINIER ET AL., *supra* note 5, at 78.

8. See *infra* Sections III.A-B.

In contrast, termination of parental rights is very much tied to an assessment of the personal characteristics of the parent. Parental rights can be terminated only upon a showing that the parent is unfit.⁹ Because, as the Supreme Court of the United States has recognized, “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State,”¹⁰ parental unfitness must be established by at least clear and convincing evidence.¹¹ The grounds for termination are generally specified in each state’s termination of parental rights statute. Physical or sexual abuse of the child, unsurprisingly, almost always constitutes grounds for termination. But state termination of parental rights statutes often include a variety of other parental failures as well, including neglect, abandonment, nonsupport, mental illness, substance abuse, and incarceration.¹² One obvious consequence of a termination of parental rights is to free the child for adoption.¹³ A termination decree, however, has effects beyond making the child adoptable. As we will see, the termination of parental rights is likely also to affect inheritance rights.

How, then, should the law function at the intersection of these two very different statutory schemes—intestate succession and termination of parental rights? What is, and more importantly, what should be, the effect of a termination of parental rights order on the right of the terminated parent to inherit from the child?¹⁴ Should termination of parental rights automatically disqualify a terminated biological parent from inheriting? If so, why? Do we believe that all terminated parents are, by definition, “bad” parents and thus unworthy of inheriting from their children? Do

9. 1 HOLLINGER ET AL., *supra* note 2, § 4.04(1)(a).

10. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

11. *Id.* at 769.

12. 1 HOLLINGER ET AL., *supra* note 2, § 4.04(1)(a)(i)–(vii).

13. Termination of parental rights, however, may well not be followed by adoption, leaving the child as a legal orphan. See generally Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995).

14. I have explored the closely connected issue of the effect of termination of parental rights on the right of the child to inherit from the terminated parent elsewhere. See Richard L. Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125 (2005).

we have reason to believe that disinheritance of the parent best reflects the intent of the child? And if termination of parental rights does extinguish the right of the parent to inherit from the child, should we similarly disqualify other relatives who are related to the decedent through the terminated parent?

State TPR statutes treat the inheritance rights of terminated parents in a variety of ways. In some states, the termination statutes explicitly preserve the right of the terminated parent to inherit.¹⁵ In contrast, other state statutes explicitly extinguish the right of terminated parents to inherit.¹⁶ Yet other statutes fail to expressly address the inheritance rights of parents at all.¹⁷ Part II of this article outlines and discusses the range of state statutory approaches to parental inheritance after termination of parental rights.

Although the worthiness of individual heirs is generally irrelevant to the operation of the intestate succession scheme,¹⁸ there are, in fact, a small number of significant exceptions to that general rule. This article looks first to these exceptions to determine what they might tell us about whether termination of parental rights ought to affect the inheritance rights of the terminated parent. The most notable such exception is the slayer rule, which precludes an heir from inheriting from a decedent who was murdered by the heir.¹⁹ Section III.A considers whether the rationales that underlie the slayer rule can be extended to justify the disinheritance of terminated parents. In a few jurisdictions, other categories of potential heirs as well are disinherited because of their individual malfeasance. In a small number of states, for instance, spouses who commit adultery or abandon their spouse cannot inherit from that spouse.²⁰ Similarly, in some states, parents who abandon or fail to support a child may be barred by statute from inheriting from that child.²¹ These statutes are ex-

15. See *infra* notes 23–24 and accompanying text.

16. See *infra* notes 25–27 and accompanying text.

17. See *infra* notes 28–38 and accompanying text.

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

19. See generally Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 844–56 (1993) (providing an overview of American slayer statutes).

20. See, e.g., CONN. GEN. STAT. ANN. § 45a-436(g) (West 2004); KY. REV. STAT. ANN. § 392.090(2) (LexisNexis 1999); MO. ANN. STAT. § 474.140 (West Supp. 2005); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (Consol. 1979 & Supp. 2005); 20 PA. CONS. STAT. ANN. § 2106(a) (West Supp. 2005).

21. For a detailed discussion on states' positions on this issue, see Monopoli, *supra*

plored in Section III.B. In the sections that follow, we consider whether the approach taken in these statutes should extend to the disinheritance of terminated parents.

Part IV moves to a more direct assessment of whether the automatic disinheritance of terminated parents is supported by any persuasive policy rationale. Section IV.A considers whether the disinheritance of terminated parents is justified by any benefit to the child and concludes that the disinheritance of the terminated parent does not benefit the child. Section IV.B analyzes whether the disinheritance of terminated parents might be justified as a means of redirecting the child's estate to more deserving caregivers. While this rationale might justify disinheriting some terminated parents, it does not constitute an adequate rationale to support the automatic disinheritance of all terminated parents that is effectuated by many TPR statutes.

Section IV.C explores the rationale for disinheriting terminated parents that seems, on the surface, to be the most compelling—the notion that parents whose parental rights have been terminated must be “bad” parents who do not deserve to receive any benefit, such as inheritance rights, from their children. Despite the initial appeal of this rationale, however, the disinheritance of terminated parents is difficult to justify as an appropriate means of punishing “bad” parents. The disinheritance provisions of termination statutes are poorly tailored for that purpose, being both seriously over-inclusive and under-inclusive in their effect. They are over-inclusive in that they terminate, and thus disinherit parents who may be “bad” parents in the sense that they are unable to parent adequately, but who are not “bad” in the sense of being morally culpable—as, for instance, parents who have been deemed inadequate because of mental illness or mental retardation or who have been subjected themselves to the domestic abuse in the home that underlies the termination. Similarly, the punishment of “bad” parents through disinheritance may be seriously under-inclusive. The child welfare system in general, including termination of parental rights proceedings, does not affect all parents equally. Rather, the system disproportionately affects parents who are women, parents who are poor, and parents who are racial minorities.²² Thus, the punishment by disinheritance

note 3, at 265–73, and Rhodes, *supra* note 3, at 532–41.

22. See generally Annette R. Appell, *Protecting Children or Punishing Mothers: Gen-*

affects primarily a racially and economically disadvantaged segment of the universe of parents.

Part V discusses whether disinheritance of terminated parents should also act to preclude inheritance by kin of the terminated parent. Finally, Part VI proposes an alternative to the current statutory approaches to parental inheritance rights after termination, suggesting that state termination of parental rights statutes be amended to provide for discretionary, rather than mandatory, extinguishing of the inheritance rights of terminated parents.

II. TERMINATION OF PARENTAL RIGHTS STATUTES AND INHERITANCE RIGHTS—THE STATUTORY LANGUAGE

As we are concerned with the effect of a termination of parental rights on the right of the terminated parent to inherit from the child, it seems sensible to look first at the language of the statutes themselves. We will see that the state statutes provide a variety of answers to our question and that many statutes provide no explicit answer at all.

Some statutes explicitly preserve the right of the terminated parent to inherit.²³ These statutes, which I will call Type A statutes, generally provide that the termination order divests both parent and child of all legal rights and obligations, *except* that the rights of both the parent and the child to inherit are not terminated.²⁴ Type A statutes are relatively rare.

More commonly, termination statutes explicitly extinguish the rights of the terminated parent to inherit. These statutes I will

der, Race, and Class in the Child Protection System [An Essay], 48 S.C. L. REV. 577 (1997).

23. See, e.g., HAW. REV. STAT. § 571-63 (1993 & Supp. 2004) (“No judgment of termination of parental rights entered under sections 571-61 to 571-63 shall operate to terminate the mutual rights of inheritance of the child and the parent or parents involved” (emphasis added)); ME. REV. STAT. ANN. tit. 22, § 4056(1) (2004) (“An order terminating parental rights divests the parent and the child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, *except the inheritance rights between the child and his parent.*” (emphasis added)); N.H. REV. STAT. ANN. § 170-C:12 (LexisNexis 2001) (“An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations. . . . *The rights of inheritance of both the parent and the child shall not be divested until the adoption of said child.*” (emphasis added)).

24. See *supra* note 23.

call Type B statutes. Some Type B statutes explicitly extinguish the inheritance rights of the parent but do not address the inheritance rights of the child.²⁵ Other Type B statutes explicitly extinguish the inheritance rights of the parent while explicitly preserving the inheritance rights of the child.²⁶ Yet another variant of the Type B statute explicitly extinguishes the inheritance rights of both the parent and the child.²⁷

Other statutes fail to expressly address the inheritance rights of the parent at all. Most commonly, these statutes explicitly preserve the inheritance rights of the child but are silent as to the effect of termination of the inheritance rights of the parent.²⁸ The

25. See, e.g., NEB. REV. STAT. § 43-293 (2004) (“An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other *and the parents shall have no rights of inheritance with respect to such juvenile.*” (emphasis added)).

26. See, e.g., KAN. STAT. ANN. § 38-1583a(f) (2000) (“A termination of parental rights . . . shall not terminate the right of the child to inherit from or through the parent. Upon such termination, all the rights of birth parents to such child, *including their right to inherit from or through such child,* shall cease.” (emphasis added)); OKLA. STAT. ANN. tit. 10, § 7006-1.3(A) (West 1998) (“The termination of parental rights terminates the parent-child relationship, including . . . *the parent’s right to inherit from or through the child. Provided, that nothing herein shall in any way affect the right of the child to inherit from the parent.*” (emphasis added)); VA. CODE ANN. § 64.1-5.1(5) (2002) (“[A]n order terminating residual parental rights . . . shall terminate the rights of the parent to take from or through the child in question but the order shall not otherwise affect the rights of the child, the child’s kindred, or the parent’s kindred” (emphasis added)).

27. See, e.g., DEL. CODE ANN. tit. 13 § 1113(b) (1999) (“Upon the issuance of an order terminating the existing parental rights . . . , *the child shall lose all rights of inheritance from the parents whose parental rights were terminated . . . and the parents whose parental rights were terminated . . . shall lose all rights of inheritance from the child.*” (emphasis added)); GA. CODE ANN. § 15-11-93 (2005) (“An order terminating the parental rights of a parent . . . is without limit as to duration and terminates all the parent’s rights and obligations with respect to the child and all rights and obligations of the child to the parent arising from the parental relationship, *including rights of inheritance.*” (emphasis added)); IDAHO CODE ANN. § 16-2011 (2001) (“An order terminating the parent and child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, *including rights of inheritance, with respect to each other.*” (emphasis added)); NEV. REV. STAT. ANN. § 128.015(1) (2004) (defining the “parent and child relationship” to include “all rights, privileges and obligations existing between parent and child, *including rights of inheritance.*” (emphasis added)). While it is not entirely clear from the text of the Georgia statute above that it applies to both the child and the parent, a Georgia court has held that the language of an almost identical predecessor statute acts to terminate the inheritance rights of both parent and child from each other. See *Spence v. Levi*, 211 S.E.2d 622, 624 (Ga. Ct. App. 1974).

28. ARIZ. REV. STAT. ANN. § 8-539 (1999) (“An order terminating the parent-child relationship shall divest the parent and the child of all legal rights . . . with respect to each other *except the right of the child to inherit . . . from the parent. This right of inheritance . . . shall only be terminated by a final order of adoption.*” (emphasis added)); COLO. REV. STAT. § 19-3-608(1) (2004) (“An order for the termination of the parent-child legal relation-

Connecticut statute is typical, providing that “[t]ermination of

ship divests the child and the parent of all legal rights . . . with respect to each other, *but it shall not modify the child's status as an heir at law which shall cease only upon a final decree of adoption.*” (emphasis added)); D.C. CODE § 16-2361(a) (2001) (“An order terminating the parent and child relationship divests the parent and the child of all legal rights . . . with respect to each other, *except the right of the child to inherit from his or her parent. The right of inheritance of the child shall be terminated only by a final order of adoption.*” (emphasis added)); KY. REV. STAT. ANN. § 625.104 (LexisNexis 1999) (“Following the entry of an order involuntarily terminating parental rights in a child, *the child shall retain the right to inherit from his parent under the laws of descent and distribution until the child is adopted.*” (emphasis added)); LA. CHILD. CODE ANN. art. 1038 (2004) (“A final judgment terminating parental rights relieves the child and the parent . . . of all of their legal duties and divests them of all of their legal rights with regard to one another . . . except: (1) *The right of the child to inherit from his biological parents and other relatives.*” (emphasis added)); MONT. CODE ANN. § 41-3-611(1) (2003) (“An order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other . . . , *except [t]he right of the child to inherit from the parent.*” (emphasis added)); N.M. STAT. § 32A-4-29(P) (2004) (“A judgment of the court terminating parental rights divests the parent of all legal rights and privileges *A judgment of the court terminating parental rights shall not affect the child's rights of inheritance from and through the child's biological parents.*” (emphasis added)); N.C. GEN. STAT. § 7B-1112 (2003) (“An order terminating the parental rights . . . terminates all rights . . . of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, *except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued.*” (emphasis added)); S.C. CODE ANN. § 20-7-1576(A) (Supp. 2004) (“An order terminating the relationship between parent and child . . . divests the parent and the child of all legal rights . . . with respect to each other, *except the right of the child to inherit from the parent. A right of inheritance is terminated only by a final order of adoption.*” (emphasis added)); TENN. CODE ANN. § 36-1-113(l) (Supp. 2004) (“An order terminating parental rights shall have the effect of severing forever all legal rights . . . of the parent . . . and of the child. . . . *Notwithstanding the provisions of subdivision (l)(1), a child . . . shall be entitled to inherit from a parent whose rights are terminated until the final order of adoption is entered.*” (emphasis added)); TEX. FAM. CODE ANN. § 161.206(b) (Vernon Supp. 2004–2005) (“[A]n order terminating the parent-child relationship divests the parent and the child of all legal rights and duties with respect to each other, *except that the child retains the right to inherit from and through the parent unless the court otherwise provides.*” (emphasis added)). See, e.g., UTAH CODE ANN. § 78-3a-413(1) (2002) (“An order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other, *except the right of the child to inherit from the parent.*” (emphasis added)); WYO. STAT. ANN. § 14-2-317(a) (2005) (“An order terminating the parent-child legal relationship divests the parent of all legal rights and privileges and relieves the child of all duties to that parent except . . . *[t]he right of the child to inherit from the parent shall not be affected by the order.*” (emphasis added)).

parental rights' means the complete severance by court order of the legal relationship . . . between the child and the child's parent or parents so that the child is free for adoption *except it shall not affect the right of inheritance of the child.*"²⁹ I will call such statutes Type C statutes. While Type C statutes fail explicitly to address the right of the parent to inherit from the child after the termination, Type C statutes seem implicitly to extinguish the right of the parent to inherit. The parent's right to inherit can hardly continue to exist in the face of statutory language that terminates all rights and duties between parent and child *except* the right of the *child* to inherit.³⁰ In fact, in one of the very few judicial decisions interpreting these provisions of the TPR statutes, the Supreme Court of Kentucky held that under the Kentucky statute³¹ (a typical Type C statute), a father whose parental rights had been terminated had no intestate or inheritance claim to his child's estate.³² It is less clear, however, whether Type C statutes act to terminate the right of relatives of the terminated parent to inherit from the child *through* the terminated parent. In other words, should a termination of parental rights order preclude a grandparent, or an aunt or uncle, or even another child of the terminated parent from inheriting from his or her grandchild, or niece or nephew, or brother or sister?³³

Finally, some statutes—Type D statutes—make no reference at all to inheritance rights of either parent or child.³⁴ We cannot

29. CONN. GEN. STAT. ANN. § 45a-707(8) (West 2004).

30. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:08 (6th ed., rev. 2000). ("[T]he legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.")

31. See KY. REV. STAT. ANN. § 625.104 (LexisNexis 1999).

32. *Scott v. Montgomery Traders & Trust Co.*, 956 S.W.2d 902, 904 (Ky. 1997).

33. For a discussion of this question, see *infra* Part V.

34. See, e.g., IND. CODE ANN. § 31-35-6-4(a)(1) (LexisNexis 2003) ("[A]ll rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support, pertaining to the relationship, are permanently terminated. . . ."); IOWA CODE ANN. § 232.2(56) (West Supp. 2005) ("Termination of the parent-child relationship' means the divestment by the court of the parent's and child's privileges, duties and powers with respect to each other."); MINN. STAT. ANN. § 260C.317 (West 2003) ("Upon the termination of parental rights all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and the parent shall be severed and terminated"); N.D. CENT. CODE § 27-20-46(1) (Supp. 2005) ("An order terminating parental rights of a parent terminates all the parent's rights and obligations with respect to the child and of the child to or through the parent arising from the parental relationship."); VT. STAT. ANN. tit. 15A, § 3-505(a) (2002) ("An order issued under this part granting the petition . . . terminates the

know with any certainty how a court in a Type D jurisdiction will treat the inheritance rights of the terminated parent. Although Type D statutes do not expressly extinguish the inheritance rights of the terminated parents, there is reason to think that they may well be interpreted as having that effect. The language used in many Type D statutes to describe the effect of a termination order is quite broad,³⁵ suggesting that all legal rights and obligations existing between the parent and the child are terminated. The Wisconsin statute, for instance, provides that “[a]n order terminating parental rights permanently severs all legal rights and duties between the parent and the child.”³⁶ It would seem difficult for a court to interpret such broad language as preserving the right of the parent to inherit from the child. In fact, we have further indication of the way in which courts are likely to interpret the effect of such broad statutory language on the right of a terminated parent to inherit from the few cases that have explicitly or implicitly applied such language to the right of a child to inherit from his or her terminated parent. The Supreme Court of Minnesota, for instance, interpreted a Type D statute to extinguish the right of a child to inherit from a terminated parent.³⁷ Several other courts, while not directly addressing the right of the child to inherit from a terminated parent, have assumed without discussion that the child’s right to inherit is terminated by a Type D statute.³⁸ Given that the primary purpose of TPR statutes is to protect the child,³⁹ it seems inconceivable that courts that construe a statute to extinguish the rights of the object of that TPR statutory protection, the child, would construe the same statute as preserving the right of the terminated parent to inherit from the child.

Most state TPR statutes, then, either explicitly or implicitly extinguish the right of a terminated parent to inherit from the child. Type B statutes explicitly extinguish the parent’s inheritance rights, while Type C statutes almost certainly extinguish those rights implicitly. And although Type D statutes do not di-

relationship of parent and child between the respondent and the minor . . .”).

35. See *supra* note 34.

36. WIS. STAT. ANN. § 48.43(2) (West 2003).

37. See *In re Estate of Braa*, 452 N.W.2d 686, 687 (Minn. 1990); see also Brown, *supra* note 14, at 136 (providing additional discussion of the *Braa* case).

38. See Brown, *supra* note 14, at 136–38 & nn.61–66.

39. *Id.* at 141.

rectly address the inheritance rights of either parent or child, they typically use very broad language to describe the effect of the termination order; and thus, they are likely to be interpreted to extinguish the inheritance rights of the parent (and perhaps the child as well). Only Type A statutes, which are uncommon, clearly preserve the rights of the terminated parent to inherit.

Extinguishing the inheritance rights of parents whose parental rights have been terminated may seem, at first blush, eminently justifiable. Surely, parents who have failed to meet their parental responsibilities so egregiously as to warrant termination of parental rights should not be able to benefit from their now terminated parental relationship. But is it that simple? Should the fact that a parent's rights have been terminated automatically result in the extinguishing of the parent's right to inherit from the child, and, if so, why?⁴⁰

III. UNDESERVING HEIRS—ANALOGIES FROM OTHER CONTEXTS

Can we argue that the inheritance rights of terminated parents should be extinguished because the parental malfeasance or nonfeasance that led to the termination proceeding makes the parents undeserving heirs? Generally, the worthiness or unworthiness of individual heirs is not relevant to the determination of inheritance rights.⁴¹ The right to inherit and the portion of the decedent's estate to be inherited are determined solely by mechanical application of the intestate succession statutes and not by any assessment of the worthiness of the various potential heirs.⁴² The fact that the decedent's daughter has been dutiful and attentive, while the decedent's son has been rebellious and inattentive, is irrelevant to the determination of the inheritance

40. The most straightforward potential answer would be what I call the "definitional" approach. If the intestate succession statutes provide for inheritance by parents, biological parents whose parental rights have been terminated are, by definition, no longer to be considered as parents and thus no longer entitled to inherit. That approach, however, seems too simplistic. The biological parent-child relationship is of fundamental significance in our culture and in our legal system. Our inheritance system in particular is based on the assumption that blood relationships are of paramount importance in determining inheritance rights. The right of biological parents to inherit should be extinguished only for well considered policy reasons. This article therefore turns to consideration of possible policy rationales for extinguishing the inheritance rights of terminated parents.

41. See Monopoli, *supra* note 3, at 259–60.

42. See *id.*

shares of either.⁴³ The worthiness of the heir need not be irrelevant to the disposition of the decedent's estate, of course. The decedent could have reflected the relative deservingness of his two children in a will.⁴⁴ But, in the absence of a will, the comparative merits of the two children are completely beside the point.⁴⁵

But are there circumstances in which the worthiness of the potential heir ought to be relevant to the ability of the heir to inherit? Are there instances in which the conduct of the potential heir toward the decedent is so egregious that the bad behavior ought to render the heir ineligible to inherit? And, if so, should terminated parents be so categorized?

A. *Undeserving Heirs—The Slayer Statute Analogy*

Despite the general rule that the worthiness of individual heirs is irrelevant, most American jurisdictions recognize at least one situation in which the individual unworthiness of the heir is relevant—in fact, disqualifying.⁴⁶ If I murder my rich Aunt Suzy in order to inherit her estate, I am almost certain to be disqualified from inheriting from her.⁴⁷ That disqualification results from what is known as the slayer rule.⁴⁸ The rule appeared first as a judicial application of the equitable maxim *nullus commodum capere potest de injuria sua propria* (“no one shall take advantage of his own wrong”).⁴⁹ In most states, the common law rule has been supplanted, or supplemented, by statutes known as “slayer stat-

43. *See id.*

44. A testator's freedom to reward the individual worthiness of any potential devisee is not unbounded. A parent's desire to reward through devise the worthiness of a child, for instance, is limited in many states by forced or elective share statutes that protect surviving spouses from disinheritance by providing that surviving spouses may elect to take a statutorily prescribed share of the testator's estate rather than taking under the will. *See generally* DUKEMINIER ET AL., *supra* note 5, at 425–28; MCGOVERN & KURTZ, *supra* note 1, at 147–57.

45. *See Foster, supra* note 3, at 79 & n.4.

46. *See* William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 65 (1969).

47. *See id.*

48. For more expansive treatments of the development of the slayer rule, see generally Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986); McGovern, *supra* note 46; Sherman, *supra* note 19, at 844–56.

49. WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, *THE CYCLOPEDIA OF LAW* 710 (James C. Cahill ed., 2d ed. 1922).

utes.”⁵⁰ These statutes are by no means uniform in their scope and effect.⁵¹ They vary in their definitions of which slayers are so unworthy as to be disqualified from inheriting.⁵² Some slayer statutes bar inheritance only by intentional killers, while others extend the bar to at least some unintentional killers.⁵³ Some apply expressly only to the decedent’s probate estate, while others extend to non-probate assets.⁵⁴ But despite these variations, the essential thrust of all slayer statutes is the same—to disinherit the most egregiously unworthy of heirs.

The rationales underlying slayer statutes are largely intuitive and, in most applications, persuasive.⁵⁵ The statutes reflect, as did the common law rule, the equitable notion that wrongdoers should not be allowed to profit from their wrongdoing.⁵⁶ The rule, however, is not simply an expression of moral judgment about slayers. As Professor Sherman has pointed out, slayer statutes are not a form of criminal penalty.⁵⁷ Rather, they are “designed to preserve the integrity of our property-transfer system by preventing a person from altering, by means of a wrongful slaying, the course of property succession as intended by the source of the property.”⁵⁸ Closely allied to this notion of the wrongness of allowing murderers to reorder succession in order to profit from their killing is the desire to deter opportunistic killing by heirs.⁵⁹ Allowing me to inherit from my rich Aunt Suzy would encourage other would-be heirs to kill their rich relatives.⁶⁰ The slayer rule is also explained as a mechanism for protecting the presumed intent of the decedent.⁶¹ We presume that my rich Aunt Suzy, if she could express her intentions from her grave, would not intend for me, her killer, to inherit her wealth.

50. See MCGOVERN & KURTZ, *supra* note 1, at 75–76; Sherman, *supra* note 19, at 846 & n.207 (providing a list of state slayer statutes).

51. See Sherman, *supra* note 19, at 848–49.

52. See MCGOVERN & KURTZ, *supra* note 1, at 76–77.

53. See *id.*; see also Sherman, *supra* note 19, at 848–51.

54. See MCGOVERN & KURTZ, *supra* note 1, at 75–76.

55. As Professor Sherman has argued, the rationales underlying the slayer statutes seem far less persuasive when applied to mercy killings. See Sherman, *supra* note 19, at 874.

56. See MCGOVERN & KURTZ, *supra* note 1, at 75.

57. Sherman, *supra* note 19, at 859.

58. *Id.* at 860.

59. See *id.*

60. See *id.*

61. *Id.* at 861.

Are these rationales transferable to the termination of parental rights context and do they suggest that terminated parents, like slayers, should be barred from inheriting? The answer would seem to be no. The slayer statute rationales do not seem to be readily transferable to termination of parental rights.⁶² Slayer statutes are fundamentally different from the disinheritance provisions of TPR statutes.⁶³ A direct causal relationship between the unworthy act (the killing of the decedent) and the potential for inheritance underlies the slayer statutes.⁶⁴ In the absence of the killer's bad act, there would be no inheritance at all, because the decedent would not have died. In contrast, there is no such causal link in the termination of parental rights context.⁶⁵ The bad acts of the terminated parent (abuse, neglect, abandonment, etc.) bear no causal relationship to inheritance.⁶⁶ So, while slayer statutes bar the unworthy heir because the slayer's bad act itself altered the intended property disposition of the decedent, TPR statutes disinherit the terminated parent not because the parent's bad acts had any causal connection with the inheritance, but rather because it simply seems wrong to allow a "bad" parent to benefit from his or her parental status.⁶⁷

The second rationale supporting the slayer statutes—deterrence—flows directly from this causal relationship between the bad act (the killing) and the inheritance.⁶⁸ Allowing the killer to benefit directly from his bad act—killing the decedent—would encourage such killings.⁶⁹ Again, however, that rationale seems inapplicable to TPR statutes, where there is no causal link between the bad act and the inheritance. It might be argued that the disinheritance features of many TPR statutes do play a deterrence role—that the threat of losing inheritance rights will deter parents from acting abusively or neglectfully toward their children. That notion, however, seems fanciful. Whatever forces drive parents to abuse or neglect their children would hardly seem

62. See Monopoli, *supra* note 3, at 273–75.

63. See *id.* at 274–75.

64. See *id.* at 275.

65. See *id.*

66. See *id.*

67. Professor Monopoli makes much the same point in her discussion of rationales for statutes that disinherit parents who fail to support a child. See *id.* at 274–75.

68. See *id.* at 275.

69. See Sherman, *supra* note 19, at 860.

amenable to influence by the distant prospect that they will outlive their children and that their children will leave substantial estates.⁷⁰ The possibility of inheritance from a child must seem so remote to parents as to be a negligible, or more likely a non-existent, factor in their choice of behaviors.⁷¹

The third rationale supporting slayer statutes—the presumption that the decedent would not have wanted his killer to inherit his estate—seems more relevant to the disinheritance provisions of TPR statutes. Perhaps the central purpose of the intestate succession scheme is to replicate the presumed intent of decedents.⁷² Furthermore, we might want to be particularly sensitive to the presumed intent of children because children cannot opt out of the intestacy scheme.⁷³ Adults can easily avoid the default rules of the intestate succession statutes by executing a will. Children, however, lack the legal competence to execute wills and thus cannot opt out of the intestate succession scheme.⁷⁴ But what should we presume children of terminated parents would intend? It may seem intuitively correct that an abused or neglected child would not want his abusive or neglectful parent to inherit, but that intuition may not be correct. Professor Monopoli has noted that “literature on child psychology establishes that even children with abusive and neglectful parents desperately want to maintain their relationship with those parents” and that “[s]tudies indicate that children continue to love and bond with parents who have badly abused and/or abandoned them.”⁷⁵ Similarly, Professor Appell has noted that “foster children have persistent psychic ties to their parents. They frequently express a continuing desire to visit their biological parents and, in some cases, a desire to resume living with them. In fact, foster children may experience termination of parental rights and adoption as unreasonable and unnatu-

70. Professor Monopoli discusses the same concern (whether the possibility of disinheritance will affect the behavior of inadequate parents) in the context of statutes that disinherit fathers that fail to support their children. See Monopoli, *supra* note 3, at 281–82.

71. See *id.* at 281.

72. 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. 321, 323–24.

73. See Monopoli, *supra* note 3, at 274 (“Depriving an American decedent of the usual ability to cut out someone who has wronged him militates in favor of a statute which will accomplish that very act.”).

74. See MCGOVERN & KURTZ, *supra* note 1, at 292.

75. Monopoli, *supra* note 3, at 277.

ral.”⁷⁶ In any event, we simply lack evidence that would tell us whether or not the typical child whose parents have been terminated would want those parents to inherit from them. It is a question about which these children almost certainly have never thought.

B. *Undeserving Heirs—The Spousal Misconduct and Parental Failure to Support Analogy*

The rationales that underlie the slayer statutes, then, do not seem applicable to disinheritance provisions of TPR statutes. But, should disinheritance on the basis of “unworthiness” be extended beyond slayer statutes to instances, like termination of parental rights, in which there is no causal link between the bad behavior of the potential heir and the availability of an inheritable estate? In other words, should we bar inheritance simply because the heir’s conduct toward the decedent may have been reprehensible? In fact, such bars to inheritance do exist. Although they are less common than slayer statutes, these other inheritance bars based on the individual unworthiness of the potential heir may be more analogous to TPR statutes.

One example is spousal misconduct. The notion that marital misconduct could disqualify the misbehaving spouse from inheriting from the wronged spouse has deep historical roots.⁷⁷ Several states, by statute, now bar inheritance by spouses who have committed adultery or abandoned or failed to support the decedent spouse.⁷⁸

76. Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 447 (2004) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)) (footnotes omitted). Similarly, Professor Roberts has noted that “most children in foster care, who typically have been removed because of neglect, have close and loving relationships with their parents, and it is indescribably painful to be separated from them.” DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 17–18 (2002).

77. See THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 37, at 148–53 (2d ed. 1953).

78. See, e.g., CONN. GEN. STAT. ANN. § 45a-436(g) (West 2004) (“A surviving husband or wife shall not be entitled to a statutory share . . . or an intestate share . . . in the property of the other if such surviving spouse, without sufficient cause, abandoned the other and continued such abandonment to the time of the other’s death.”); KY. REV. STAT. ANN. § 392.090(2) (LexisNexis 1999) (“If either spouse voluntarily leaves the other and lives in adultery, the offending party forfeits all right and interest in and to the property and estate of the other, unless they afterward become reconciled and live together as husband

Other states, in statutes even more relevant to our discussion, bar inheritance by parents who have failed to support their children.⁷⁹ In the absence of such statutes, courts have almost invariably allowed abandoning, neglectful, or even abusive parents to take their prescribed intestate share upon the death of their natural children.⁸⁰ A number of states, however, have (or have had) statutes that preclude inheritance by a narrow class of “unworthy” parents—non-marital fathers who have not acknowledged or supported their biological children.⁸¹

These statutory limitations on the right of non-marital fathers to inherit from their children may be explained by two rationales.⁸² First, the ability of non-marital fathers to inherit from their natural children is dependent on proof of paternity, and providing support is an indication of paternity.⁸³ Second, barring the non-marital father from inheriting serves to punish a father who has “already done the child a great disservice by burdening the child with the social and legal disability of illegitimacy.”⁸⁴

A very few states have extended the inheritance bar to “unworthy” parents more broadly—mothers as well as fathers and marital as well as non-marital parents. North Carolina enacted the

and wife.”); MO. ANN. STAT. § 474.140 (West Supp. 2005) (“If any married person voluntarily leaves his or her spouse and goes away and continues with an adulterer or abandons his or her spouse without reasonable cause and continues to live separate and apart from his or her spouse for one whole year next preceding his or her death, or dwells with another in a state of adultery continuously, such spouse is forever barred from his or her inheritance rights, homestead allowance, exempt property or any statutory allowances from the estate of his or her spouse unless such spouse is voluntarily reconciled to him or her and resumes cohabitation with him or her.”); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (Consol. 1979 & Supp. 2005) (“A husband or wife is a surviving spouse . . . unless it is established . . . that: . . . (5) The spouse abandoned the deceased spouse, and such abandonment continued until the time of death. (6) A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.”); 20 PA. CONS. STAT. ANN. § 2106(a) (West Supp. 2005) (“A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest under this chapter in the real or personal estate of the other spouse.”).

79. For a thorough discussion of these statutes, see Rhodes, *supra* note 3, at 532–41, and Monopoli, *supra* note 3, at 265–73.

80. See Rhodes, *supra* note 3, at 524.

81. See Monopoli, *supra* note 3, at 263.

82. See *id.* at 263–64.

83. See *id.*

84. *Id.* at 264.

earliest of these statutes in 1927.⁸⁵ The state legislature enacted the statute in reaction to a Supreme Court of North Carolina decision decided the previous year in which the court held that a father who had abandoned his child was nonetheless entitled to share in a wrongful death award when the child was killed by falling through an elevator shaft.⁸⁶ The North Carolina wrongful death statute provided that wrongful death awards should be disposed of in accordance with the state intestacy statute, which provided for an equal allocation between mother and father if both survived a child who left no spouse or issue.⁸⁷ The court concluded that it was bound by the statutory language and that to “stretch the language of the statute . . . to meet the facts in the present case” would “make, and not construe, the law.”⁸⁸ In response to that decision, the North Carolina legislature enacted a statute providing “that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child’s estate under the provisions of this section.”⁸⁹

North Carolina was followed by the enactment of similar statutes in New York in 1941,⁹⁰ and in the 1980’s through 2000,

85. See Act of Mar. 9, 1927, ch. 231, 1927 N.C. Sess. Laws 591–92; Rhodes, *supra* note 3, at 532.

86. See *Avery v. Brantley*, 131 S.E. 721, 722–23 (N.C. 1926).

87. See *id.* at 721–22.

88. *Id.* at 722 (internal citation omitted).

89. Act of Mar. 9, 1927, ch. 231, 1927 N.C. Sess. Laws 591–92 (quotation marks omitted). The current version of the statute provides:

Any parent who has willfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child’s estate and all right to administer the estate of the child, except—

(1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or

(2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

N.C. GEN. STAT. ANN. § 31A-2 (LexisNexis 2003 & Supp. 2004). For recent commentary on the history and scope of section 31A-2, see Heyward D. Armstrong, Comment, *In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act*, 81 N.C. L. REV. 1149 (2003).

90. See N.Y. DEC. EST. LAW § 87 (Baldwin Supp. 1941). The current version of the statute provides:

No distributive share in the estate of a deceased child shall be allowed to a

Pennsylvania,⁹¹ Connecticut,⁹² Virginia,⁹³ Ohio,⁹⁴ South Caro-

parent who has failed or refused to provide for, or has abandoned such child while such child is under the age of twenty-one years, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child.

N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(a) (Consol. 1979 & Supp. 2005).

91. The current version of the statute provides:

Any parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has:

- (1) failed to perform the duty to support the minor or dependent child or who, for one year, has deserted the minor or dependent child; or
- (2) been convicted of one of the following offenses under Title 18:
 - section 4303 (relating to concealing death of child); section 4304 (relating to endangering welfare of children);
 - section 6312 (relating to sexual abuse of children); or an equivalent crime under Federal law or the law of another state involving his or her child;

shall have no right or interest under this chapter in the real or personal estate of the minor or dependent child. The determination under paragraph (1) shall be made by the court after considering the quality, nature and extent of the parent's contact with the child and the physical, emotional and financial support provided to the child.

20 PA. CONS. STAT. ANN. § 2106(b) (West Supp. 2005).

92. The current version of the statute provides:

If there are no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate, provided no parent who has abandoned a minor child and continued such abandonment until the time of death of such child, shall be entitled to share in the estate of such child or be deemed a parent for the purposes of subdivisions (2) to (4), inclusive, of this subsection.

CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West 2004).

93. The current version of the statute provides:

If a parent willfully deserts or abandons his or her minor or incapacitated child and such desertion or abandonment continues until the death of the child, the parent shall be barred of all interest in the estate of the child by intestate succession unless the parent resumes the parental relationship and duties and such parental relationship and duties continue until the death of the child.

VA. CODE ANN. § 64.1-16.3(B) (2002).

94. The current version of the statute provides:

Subject to divisions (C), (D), and (E) of this section, a parent who has abandoned his minor child who subsequently dies intestate as a minor shall not inherit the real or personal property of the deceased child pursuant to section 2105.06 of the Revised Code. If a parent is prohibited by this division from inheriting from his deceased child, the real or personal property of the deceased child shall be distributed, or shall descend and pass in parcenary, pursuant to section 2105.06 of the Revised Code as if the parent had predeceased the deceased child.

OHIO REV. CODE ANN. § 2105.10(B) (LexisNexis 2002).

lina,⁹⁵ and Kentucky.⁹⁶ The 1990 Uniform Probate Code includes a related provision in section 2-114, the section defining the parent-child relationship.⁹⁷ Subsection (c) of section 2-114 provides that “[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”⁹⁸ The new section 2-114 substantially expands the scope of the inheritance bar beyond that of the old section 2-109(2), which barred only non-marital fathers who failed to acknowledge and support the child.⁹⁹ Some commentators have argued that statutes that disinherit abandoning or non-supporting parents should be more widely adopted.¹⁰⁰

IV. TERMINATED PARENTS AS UNDESERVING HEIRS

This gets us to the heart of the matter—should the approach exemplified by statutes that bar inheritance by “unworthy” spouses or parents be incorporated into the termination of paren-

95. The current version of the statute provides:

Notwithstanding any other provision of law, if the parents of the deceased would be the intestate heirs pursuant to Section 62-2-103(2), upon the motion of either parent or any other party of potential interest based upon the decedent having died intestate, the probate court may deny or limit either or both parent's entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 20-7-40 and did not otherwise provide for the needs of the decedent during his or her minority.

S.C. CODE ANN. § 62-2-114 (Supp. 2004).

96. The current version of the statute provides:

A parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession in any part of the estate and shall not have a right to administer the estate of the child, unless:

- (a) The abandoning parent had resumed the care and maintenance at least one (1) year prior to the death of the child and had continued the care and maintenance until the child's death; or
- (b) The parent had been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent had substantially complied with all orders of the court requiring contribution to the support of the child.

KY. REV. STAT. ANN. § 391.033(1) (LexisNexis Supp. 2004). See Rhodes, *supra* note 3, at 532–37, and Armstrong, *supra* note 89, at 1172 n.146, from both of whom I have borrowed this chronology of statutory adoptions.

97. See UNIF. PROBATE CODE § 2-114 (amended 2003).

98. *Id.* at § 2-114(c) (alterations in original).

99. See *id.* at § 2-109(2) (repealed 1990).

100. See, e.g., Monopoli, *supra* note 3, at 298; Rhodes, *supra* note 3, at 518.

tal rights process? Or, to ask that question in broader form, what justifiable purposes are served by extinguishing the inheritance rights of terminated parents? Does cutting off the inheritance rights of terminated parents benefit the child, or other identifiable persons, or society in general?

A. *Terminated Parents as Undeserving Heirs—The Benefit to the Child Rationale*

Is the child benefited? Arguably, the child could be benefited in two ways—first, because the threat of disinheritance deters bad parental behavior or, second, because the presumed intent of the child is furthered by disinheriting the parent. But, as discussed in conjunction with the slayer statutes,¹⁰¹ which do rely in part on these rationales, neither rationale seems persuasive when applied to termination of parental rights. The likelihood that abusive, neglectful, or incapable parents will be effectively encouraged to perform their parenting responsibilities by the possibility of inheriting from their children seems highly improbable.¹⁰² Nor is it clear that barring even “bad” parents from inheriting reflects the intent of the child.¹⁰³ If barring a parent from inheriting does not benefit the child during the child’s life by deterring bad parenting and does not necessarily reflect the intent of the child, it is hard to see how the child is benefited in any way at all.

But even if extinguishing the inheritance rights of terminated parents does not benefit the child, we may think it simply unfair that a parent who is so evil or inept as to be terminated should be able to inherit from the child. But unfair in what way? And unfair to whom? Do we mean unfair to specific, identifiable persons, or do we mean unfair in a more generalized way, reflecting our sense that it is simply wrong to allow a parent to benefit from a relationship in which the parent did not fulfill his or her most basic responsibilities? We might, in fact, mean both.

101. See *supra* Section III.A.

102. See *supra* note 70 and accompanying text.

103. See *supra* notes 75–76 and accompanying text.

B. *Terminated Parents as Undeserving Heirs—The Fairness to Other Caregivers Rationale*

Allowing a terminated parent to inherit might be unfair to specific persons in the sense that the terminated parent's share of the inheritance would likely reduce the share that would otherwise go to those who bore the costs and responsibilities of rearing the child.¹⁰⁴ For instance, if only one parent has been terminated, the cost and responsibility of raising the child likely falls on the non-terminated parent. Most intestate succession statutes provide that, in the absence of spouse or issue, the decedent's estate will pass to the parents,¹⁰⁵ although in a very few states, the parents will share with the decedent's siblings.¹⁰⁶ If only one parent survives, the surviving parent generally will take the entire estate.¹⁰⁷ In most jurisdictions, then, if the terminated parent can inherit, his share will reduce the share of the non-terminated parent who bore the responsibility and cost of rearing the child. In contrast, if the terminated parent is barred from inheriting, the non-terminated parent is likely to inherit the entire estate, which may be a fairer result. Similarly, if both parents have been terminated, the estate may well escheat to the state.¹⁰⁸ If, as a result of the termination of the parental rights of both parents, the child has become a ward of the state, perhaps that result is fair, as the financial burden of raising the child has fallen to the taxpayers. This might seem a plausible rationale for disinheriting *some* terminated parents. Unfortunately, however, TPR statutes do not simply authorize extinguishing inheritance rights in such circumstances. Rather, the statutes impose blanket disinheritance on all terminated parents, regardless of the alternative disposition that will result.

104. For a discussion of the protection of the interests of a non-abandoning parent in the context of parental misconduct statutes, see Monopoli, *supra* note 3, at 278–79.

105. See Rhodes, *supra* note 3, at 519.

106. See *id.* at 519–20.

107. See, e.g., ARIZ. REV. STAT. ANN. § 14-2103(2) (West 1995); CONN. GEN. STAT. ANN. § 45a-439(a)(1) (West 2004); WASH. REV. CODE ANN. § 11.04.015(2)(b) (West 1998); UNIF. PROBATE CODE § 2-103(2) (amended 2003).

108. This result will be obtained if the effect of the termination of parental rights is to bar inheritance not only by the terminated parents themselves, but by kin of the terminated parents as well. See *infra* Part V, which discusses whether, in fact, the inheritance rights of the kin of terminated parents should be extinguished.

C. *Terminated Parents as Undeserving Heirs—The Punishment of “Bad” Parents Rationale*

What about the broader notion of unfairness—the idea that it is simply wrong to allow a parent, who was a sufficiently “bad” parent to warrant termination of parental rights, to continue to benefit from his status as a parent. Is it appropriate for the TPR and intestacy schemes to incorporate and effectuate that general sense of fairness? Replicating the presumed intent of those who die without wills has often been identified as the primary goal of intestate succession statutes.¹⁰⁹ Other societal goals have been identified as well, including protecting the decedent’s family, avoiding complicating and excessively subdividing property titles, promoting the nuclear family, and encouraging the accumulation of property.¹¹⁰ All of these are instrumental goals. Is it also appropriate to use the intestacy regime simply to declare society’s disapproval of particular behaviors, even if there is no reasonable likelihood that the intestacy statutes will in fact deter undesirable behaviors? Or, to rephrase the issue, is it appropriate to use the inheritance system as a means of punishing bad behavior? If we do want to use inheritance bars as a form of punishment, how do we determine which parents are sufficiently “bad” to warrant punishment? Is it accurate to characterize every terminated parent as a “bad” parent who is unworthy of inheriting? How are we to be sure that the objects of punitive measures deserve punishment? Who are these “bad” parents, and how and why are they “bad”?

1. The Over-Inclusiveness of Automatic Disinheritance

If our goal is “punishment” of bad parents, the disinheritance provisions of TPR statutes are poorly tailored to achieve that purpose, being both seriously over-inclusive and under-inclusive. For instance, if we accept the premise that it is appropriate to use the withholding of inheritance rights as a method of punishing bad behavior, it is fairly easy to conclude that it is appropriate to bar a parent who has been physically or sexually abusive from inheriting from his victim. But termination of parental rights

109. See Fellows et al., *supra* note 72, at 323–24.

110. *Id.* at 324.

generally is authorized not just for abuse, but for neglect as well.¹¹¹ In fact, the majority of child maltreatment cases involve neglect rather than abuse.¹¹² The neglect that triggers termination of parental rights can be the result of circumstances clearly beyond the control of the terminated parent, such as mental illness or mental retardation.¹¹³ In such instances, we should recognize that termination flows from the inability of the parents to perform adequately as parents, rather than from any morally reprehensible behavior by the parents. A brief sketch of several recent termination of parental rights cases may illustrate that distinction.

In *R.G. and T.G. v. Marion County Office, Department of Family and Children*,¹¹⁴ the Court of Appeals of Indiana upheld the termination of parental rights of a mother and father who were both mildly retarded—the mother’s IQ was sixty-four and the father’s was sixty-two.¹¹⁵ Their child, who was born five weeks premature,¹¹⁶ suffered from hydrocephalus and was “moderately to severely developmentally delayed,” requiring “physical, occupational, and speech and language therapy.”¹¹⁷ While the court acknowledged the mother’s love for her child, it concluded that the parents lacked “the skills and knowledge necessary to fulfill the

111. See 1 HOLLINGER ET AL., *supra* note 2, at § 4.04(1)(a).

112. See ROBERTS, *supra* note 76, at 34 (“[M]ost cases of child maltreatment stem from parental neglect. Nationwide, there are twice as many neglected children as children who are physically abused. In 1998, just over half (54 percent) of substantiated cases involved neglect, compared to 23 percent involving physical abuse and 12 percent sexual abuse.”); see also Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 768 (2001).

113. See Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL’Y 387, 401–02 (2000).

[A]most every statute routinely includes mental or psychiatric disability and developmental disability—under various pseudonyms—as factors for courts to consider.

Whether specifically articulated or not, courts regularly sweep a label of “mental deficiency” under the “unfitness” or “incapacitated” umbrella when determining termination of parental rights. All too often there appears a presumption that ‘mentally disabled’ means an inability to adequately parent, without proving a nexus between the disability and its manifestations, or an individualized inquiry.

Id. (footnotes omitted).

114. 647 N.E.2d 326 (Ind. Ct. App. 1995).

115. See *id.* at 327.

116. *Id.*

117. *Id.* at 329.

obligations of a parent to a child with the specialized needs of [the parents' child]."¹¹⁸ The court noted that the child's foster mother, who had indicated a desire to adopt the child, had substantial experience working with developmentally disabled children.¹¹⁹ Given the limited abilities of the parents, the special needs of the child, and the particular competence of the potential adoptive parents, the court concluded that termination of parental rights was appropriate.¹²⁰

A second example is provided by *In re A.V.*,¹²¹ in which the Court of Appeals of Minnesota upheld the termination of parental rights of the parents of two sets of twins.¹²² Two of their four children were developmentally delayed.¹²³ The father had fallen from a roof in a construction accident, which caused impairment of his cognitive functioning and his anger control ability, and the mother suffered from personality disorder and low cognitive function.¹²⁴ Noting that the trial court had "acknowledged the inherent tragedy in its conclusion,"¹²⁵ the appellate court concluded that the parents simply lacked the capacity to parent.¹²⁶ In language that is relevant to our consideration of the appropriateness of punishing terminated parents by extinguishing their inheritance rights, the court also concluded that "if the issue of palpable unfitness were to be decided strictly on the basis of *conduct* and not on the *conditions of the parents*, termination of parental rights would be unwarranted under these circumstances."¹²⁷

*In re Marcus W.*¹²⁸ provides a third example. In *Marcus*, the Court of Appeals of Nebraska upheld the termination of the parental rights of a mother of three children.¹²⁹ The mother had been diagnosed with "cognitive dysfunction consistent with frontal lobe impairment, generalized anxiety disorder, and mood dis-

118. *Id.* at 330.

119. *See id.* at 329-30 n.9.

120. *See id.* at 330.

121. 593 N.W.2d 720 (Minn. Ct. App. 1999).

122. *See id.* at 720-21.

123. *See id.* at 721.

124. *Id.*

125. *Id.* at 722.

126. *See id.*

127. *Id.* at 721 (emphasis added).

128. 649 N.W.2d 899 (Neb. Ct. App. 2002).

129. *See id.* at 903-04.

order.”¹³⁰ She also suffered from hydrocephalus, which had required several shunts, and she suffered from seizures.¹³¹ The mother had an estimated IQ of seventy-three.¹³² A licensed psychologist and neuropsychologist had testified that the mother “would need assistance for daily living activities which require consistent attention or concentration, such as financial responsibilities, medical decisionmaking, treatment compliance, and parenting”¹³³ and that the mother’s frontal lobe disorder “would be a mental disease or defect that would significantly affect her ability to parent the children.”¹³⁴ In language that highlights the tragedy inflicted by these cases—not just on the children, but on the parents as well—the court noted:

It is difficult to terminate the parental rights of someone who we believe truly loves her children, who appears to have consistently complied with the numerous orders of the juvenile court, and who has had this proceeding brought against her through no fault of her own.

...

....

... The fact that [the mother] has persisted over so many years in trying to learn the necessary skills to care for her children makes a determination that she is unfit very difficult. However, the evidence is clear and convincing that she does not have the mental ability to do so, in spite of her admirable efforts.¹³⁵

As these three cases demonstrate, parents who are in no way morally culpable may be subject to termination of parental rights and a consequent loss of inheritance rights. Parental rights also may be terminated for reasons that courts view as blameworthy, but that in fact may unfairly allocate the cause of harm to the child. In a number of states, exposure to domestic violence has been characterized as child maltreatment that warrants termination of parental rights.¹³⁶ Some state statutes explicitly enumer-

130. *Id.* at 905.

131. *Id.* Hydrocephalus is “a condition where too much cerebral spinal fluid collects on the brain.” *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 912.

135. *Id.* at 913–14.

136. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 92–98 (2001). For more extensive discussion of the status of battered women in the child welfare system, see G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN’S L.J. 89

ate exposure to domestic violence as a form of maltreatment.¹³⁷ In other jurisdictions, courts have construed exposure to domestic violence as a form of neglect.¹³⁸ In these circumstances, mothers who are themselves the victims of abuse may be characterized as neglectful for “failing to protect” the child from direct abuse or even from exposure to the mother’s own abuse.¹³⁹ As a result, the victims of domestic abuse can be legally blamed for the harmful effect of that abuse on their children.¹⁴⁰ In the words of one commentator, “the dangerous confluence of two powerful archetypes—being a mother and being battered—inflicts double injury on women who wear both mantles. They not only bear the scars of their abuser, but they also shoulder the blame for the harms others cause to their children.”¹⁴¹

Exposure to domestic violence may, indeed, have serious adverse effects on children, and those adverse effects may warrant removal of the child from the home.¹⁴² Treating a non-abusing

(1999); Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner’s Abuse*, 6 HASTINGS WOMEN’S L.J. 67 (1995); Jill A. Phillips, Comment, *Re-Victimized Battered Women: Termination of Parental Rights for Failure to Protect Children from Child Abuse*, 38 WAYNE L. REV. 1549 (1992); Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487 (2001); The “Failure to Protect” Working Group, *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000).

137. See, e.g., CONN. GEN. STAT. ANN. § 17a-106b (West 1998); KY. REV. STAT. ANN. § 620.023(1)(d) (LexisNexis Supp. 2004); see also Weithorn, *supra* note 136, at 95–96.

138. See Weithorn, *supra* note 136, at 24; see also The “Failure to Protect” Working Group, *supra* note 136, at 851 (explaining the legal basis for finding battered mothers guilty of neglect).

139. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229, 229 (1996).

Across the nation, the misapplication of the “failure to protect” doctrine is causing nonabusive battered mothers to lose custody of their children. Under the “failure to protect” doctrine, courts deem guardians who fail to protect their wards from unreasonable harm to be unfit. Consequently, the court removes a child who has been abused by a father figure not only from the custody of the abuser, but from the care of the mother as well.

Id.

140. See The “Failure to Protect” Working Group, *supra* note 136, at 849. (“Charging battered mothers with ‘failure to protect’ implies that they are neglecting their children, because they did not prevent the violence. It places blame upon the mother, the primary target of the violence, for the actions of the abuser.”) (footnote omitted).

141. Justine A. Dunlap, *The “Pitiless Double Abuse” of Battered Mothers*, 11 AM. U. J. GENDER SOC. POL’Y & L. 523, 523 (2003).

142. See Weithorn, *supra* note 136, at 4–6.

In the past two decades, researchers have amassed an impressive body of

mother as morally culpable, however, may overlook the complicated dynamics of domestic violence. As one commentator stated:

Battered women are beaten, threatened, and coerced. They live in constant terror and chaos. Their efforts to escape a violent and fear-filled relationship are met with rage and increased violence. Most women are isolated from friends and family and have received little if any assistance from protection agencies such as the police or the Department of Social Services. These factors dramatically affect battered mothers' ability to resist the controlling and coercive behavior of their abusers successfully. Consequently, the repeated attempts by battered women to gain safety often fail, resulting in increased danger to themselves and their children.¹⁴³

Abused mothers, in fact, may have few viable means of protecting themselves and their children. While reporting the abuse to authorities may seem an obvious remedy, statutes that mandate social services or law enforcement personnel to file reports with child welfare authorities may deter abused mothers from reporting their abuse to such personnel.¹⁴⁴ Abusers may use this fear of

empirical data demonstrating the negative impact of exposure to domestic violence upon children's psychological development and functioning. Exposed children may develop a range of social, emotional, and academic problems, including aggressive conduct, anxiety symptoms, emotional withdrawal, and serious difficulties in school. Research also suggests that these children are more likely than are children from nonviolent homes to develop emotional and adjustment problems as adults, including repetition of the patterns of violence they observed as children. The data clearly demonstrate that growing up in violent homes is detrimental to children, even when children are not direct victims of physical or sexual abuse. Researchers have observed, in fact, that samples of children exposed to domestic violence display symptoms and difficulties quite similar to children who have been direct victims of physical abuse.

Id. (footnotes omitted); see also Amy Haddix, Comment, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 788 (1996).

[R]ecent psychological studies indicate that domestic violence committed against a mother has a profound effect on the children who witness it. Children who live in an environment of domestic violence are very likely to suffer emotional and physical abuse. Empirical studies indicate that children of all ages who witness domestic violence exhibit aggravated behavioral problems.

Id. (footnotes omitted).

143. Enos, *supra* note 139, at 231.

144. The "Failure to Protect" Working Group, *supra* note 136, at 857-58; see Enos, *supra* note 139, at 250-51.

[The] policy of removing children from battered mothers can be interpreted to mean that any time a battered mother goes to a social worker, talks to her children's teacher, goes to her doctor or calls the police to report domestic violence, she may be placing the custody of her children in jeopardy.

The chilling effect of charging battered mothers with failing to protect

the removal of their children to deter women from reporting abuse.¹⁴⁵

Leaving home, and thus escaping the abuser, may similarly seem an obvious remedy for abused women. Again, however, such a remedy may be illusory. Attempts to leave the home may lead the abuser to threats of violence against the woman or her children or, worse yet, an actual increase in violence.¹⁴⁶ Moreover, abused women may simply lack the independent financial resources to leave.¹⁴⁷

This phenomenon—battered women losing custody of their children because of their status as victims of domestic violence—was the focus of an exhaustive opinion issued by United States District Court Judge Jack Weinstein in *Nicholson v. Williams*.¹⁴⁸ *Nicholson* involved a class action against the City of New York and its Administration for Children Services (“ACS”) “brought on behalf of abused mothers and their children who are separated from each other because the mother has suffered domestic abuse and the children are for this reason deemed neglected by the mother.”¹⁴⁹ The opinion describes instance after instance in which ACS unreasonably and unfairly removed children from the custody of their battered mothers, evidencing, in the words of Judge Weinstein, “widespread and unnecessary cruelty by agencies of the City of New York towards mothers abused by their consorts, through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect

their children is that they will be even more reluctant to reach out to law enforcement, social services and the courts for the help they need. Knowing that they may be investigated by child protective services, charged with neglect or lose their children to foster care, battered mothers, isolated and afraid, are more likely to remain in an abusive home so that they can remain with their children.

The “Failure to Protect” Working Group, *supra* note 136, at 857–58.

145. Weithorn, *supra* note 136, at 126.

146. See Enos, *supra* note 139, at 243.

147. See *id.* at 246; see also The “Failure to Protect” Working Group, *supra* note 136, at 859.

148. 203 F. Supp. 2d 153 (E.D.N.Y. 2002). The challenged actions in *Nicholson* involved initial removal of children from their parents rather than termination of parental rights. See *id.* at 254. Removal from parental custody is often a prequel to termination and the concerns expressed by Judge Weinstein are equally relevant to the termination context. For commentary on *Nicholson*, see generally Dunlap, *supra* note 141.

149. *Nicholson*, 203 F. Supp. 2d at 163–64.

the children.”¹⁵⁰ The judge captured the plight of the battered mother in these words:

The mother may lack the ability or resources to either protect herself or the children. Economic, emotional, moral or other ties may, as a practical matter, prevent the mother from separating from the abuser or seeking governmental protection against him. She may hope for eventual reconciliation—and sometimes it does occur. Myriad subtle reasons may prevent her from separating from the abuser, protecting the children, or seeking assistance. In some households ethnic or social mores are relied upon to justify abuse as a “traditional right.” Ability to deal with tensions induced by self, a partner, children, and economic and social factors varies enormously among those who become embroiled in domestic violence.¹⁵¹

Termination of parental rights may also result from circumstances in which the parent is arguably more blameworthy, such as drug or alcohol dependency¹⁵² or incarceration,¹⁵³ but that might be ameliorated, given time and resources. The paucity of resources available may result in the termination of parental rights of parents who, given more time and assistance, could have developed into viable parents.¹⁵⁴ Recent federal legislation may

150. *Id.* at 163.

151. *Id.* at 164.

152. See 1 HOLLINGER ET AL., *supra* note 2, at § 4.04(1)(a)(vii); see, e.g., *In re Brandon OO*, 757 N.Y.S.2d 374 (N.Y. App. Div 2003); *In re Precious W.*, 776 N.E.2d 794 (Ill. App. Ct. 2002); *In re Kristina D.*, 721 A.2d 1256 (Conn. App. Ct. 1999).

153. See ROBERTS, *supra* note 76, at 211. (“Some courts have ruled that a lengthy jail term is enough to permanently sever the bond between imprisoned parents and their children. Incarceration itself constitutes statutory grounds for termination of parental rights in some states.”); see also Mariely Downey, *Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN’S L.J. 41 (2001).

ASFA has had grave implications for incarcerated mothers. Because of the forced separation between a mother and her child when she is incarcerated, there is a greater risk for the possibility of termination of parental rights on the basis of abandonment or permanent neglect. Under ASFA, the expedited timetable for filing for termination based on the length of time a child has been in foster care is especially problematic. Women who are incarcerated on even relatively minor charges are now at risk for forfeiting their motherhood under ASFA.

Id. at 45 (footnotes omitted). For a general overview of how states approach the termination of parental rights for incarcerated parents, see Steven Fleischer, Note, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312 (1998).

154. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 775–76 (2001) (“[O]nce the state coercively removes children from their families, it all too frequently fails to provide meaningful and sufficient services to support or reunify the families. On the contrary, the unavailability of needed services and inappropriateness of some provided services are well-established.”) (footnotes omitted).

exacerbate the inability of troubled parents to salvage their parental relationship. The Adoption and Safe Families Act of 1997 (“ASFA”),¹⁵⁵ aimed at reducing the number of children languishing in long-term foster care, imposes time constraints that act to accelerate the process of termination of parental rights.¹⁵⁶ Most notably, ASFA requires that the state file a petition to terminate parental rights if the child has been in foster care for fifteen of the most recent twenty-two months.¹⁵⁷ The statutes of every state have been amended to comply with the mandates of ASFA.¹⁵⁸ As a consequence of ASFA, the “law creates an implicit presumption that a parent who allows a child to linger in foster care for fifteen months is unfit.”¹⁵⁹ A cure to problems such as substance abuse, incarceration, or domestic violence may well be impossible within a fifteen-month time frame.¹⁶⁰ There may, for instance, be long waiting periods for admittance to substance abuse treatment pro-

155. Pub. L. No. 105–89, 111 Stat. 2115.

156. See 42 U.S.C. § 675(5) (2000); Brown, *supra* note 14, at 128–31 (providing a brief overview of the effect of federal legislation, including ASFA, on the termination of parental rights process (providing a more extensive analysis of ASFA); see also Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1 (2001); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999); Richard Wexler, *Take the Child and Run: Tales from the Age of AFSA*, 36 NEW ENG. L. REV. 129 (2001).

157. See 42 U.S.C. § 675(5)(E) (2000). The filing requirement, however, is subject to several statutory exceptions:

- The state will not be required to file a petition to terminate parental rights if
- (i) at the option of the State, the child is being cared for by a relative;
 - (ii) a State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
 - (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child’s home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of the title are required to be made with respect to the child.

Id. § 675(5)(E)(i)–(iii).

158. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 198 (2004).

159. *Id.* at 198. ASFA requires that a petition for termination be filed within the prescribed time period. See Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?* 28 CAP. U. L. REV. 97, 100 (1999). It does not, however, require that parental rights in fact be terminated. *Id.* at 101.

160. See Ross, *supra* note 158, at 209.

grams¹⁶¹ and, once admitted, successful treatment may require successive courses of treatment to break the cycle of addiction.¹⁶²

2. The Under-Inclusiveness of Automatic Disinheritance

The disinheritance provisions of TPR statutes are not only over-inclusive in the sense that they act to punish terminated parents who are not in any meaningful sense deserving of punishment. They are also under-inclusive in that they do not affect all abusive or neglectful parents equally, but rather impact certain parents disproportionately. Parents charged with maltreatment of their children are disproportionately poor, disproportionately minorities¹⁶³ (despite the fact that "there is no correlation between race and rates of child maltreatment"),¹⁶⁴ and disproportionately mothers.¹⁶⁵

Families that are enmeshed in the child welfare system are disproportionately poor.¹⁶⁶ In Professor Robert's striking words, "[p]overty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there."¹⁶⁷ The high correlation between poverty and child abuse is dramatically documented in the U.S. Department of Health and Human Services's Third National Incidence Study of Child Abuse and Neglect, which found that

161. *See id.* at 211.

162. *Id.* at 212.

163. *See* Charlow, *supra* note 112, at 763. ("[P]oor children in the United States are still being removed from their homes under child welfare laws. Because minorities are disproportionately poor, their children are removed in disproportionate numbers despite the fact that minority parents do not abuse or neglect more frequently than white parents.") *Id.*

164. Appell, *supra* note 22, at 584 n.35.

165. *See id.* at 584.

The vast majority of children live with their mothers, whether in single parent households, with their father as well as their mother, or with their mother and her significant other. This necessarily means that where abuse or neglect takes place, a mother's role is likely to be at issue, either as a perpetrator, for placing the child in harm's way, or for failure to protect the child from another adult. Indeed, when we talk about child abuse and neglect we are almost always talking, at some level, about mothers and their children, even if the mother's partner is the abuser.

Ross, *supra* note 158, at 180 (footnote omitted).

166. *See* Appell, *supra* note 22, at 584.

167. ROBERTS, *supra* note 76, at 27.

“family income was significantly related to incidence rates in nearly every category of maltreatment.”¹⁶⁸

Why this correlation exists is less clear. It may result from higher rates of reporting, due to the increased monitoring of families receiving welfare or social services, rather than higher rates of occurrence or maltreatment.¹⁶⁹ It may well be, however, that there are real causal links between poverty and child maltreatment.¹⁷⁰ Poor families suffer the “stress caused by economic hardship,”¹⁷¹ including “[o]vercrowded and dilapidated housing,”¹⁷² “[i]nadequate food, clothing, and health care,”¹⁷³ and the “despair that stems from stifled opportunities.”¹⁷⁴ Professor Appell vividly captures the plight of the poor mother:

Poor mothers are more likely to live in high risk areas under high stress related to the blight and violence which surrounds them and under the strain of living on government benefits that are below subsistence level. Some days, having the money or energy to do one more thing, such as to take three buses to go shopping or to visit a child, is just too much. When judged by someone who has a car or car-fare and who does not have to spend much time worrying about obtaining food, clean clothing, toiletries, or dodging bullets and crack dealers, these mothers appear not to care enough about mothering.¹⁷⁵

168. ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEPT OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 10 (1996).

Compared to children whose families earned \$30,000 per year or more, those in families with annual incomes below \$15,000 per year were . . . more than 22 times more likely to experience some form of maltreatment under the Harm Standard and over 25 times more likely to suffer maltreatment of some type using the Endangerment Standard

Id.

169. ROBERTS, *supra* note 76, at 32–33 (“[T]he heightened monitoring of poor families results in the discovery of a great deal of child maltreatment—especially neglect—that would have gone unnoticed had it occurred in the privacy afforded wealthier families.”).

170. *See id.* at 31.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*; *see also* Charlow, *supra* note 112, at 776.

One may argue that the greater stress of poverty, the dangerous neighborhoods in which poor people generally reside, and the lack of money for adequate child care, food, medical care, and housing, all contribute to the likelihood that a poor parent will not have the energy or time to properly care for her children or will be more likely to lose her temper and inappropriately discipline her children.

Id.

175. Appell, *supra* note 22, at 586.

Poverty is not the only characteristic that is typical of parents charged with child maltreatment. Disproportionate numbers of minority children, and thus minority parents, are enmeshed in the child welfare system, despite the fact that child maltreatment rates are not higher in minority families.¹⁷⁶ Of the 542,000 children in the foster care system in September of 2001, 38% were classified as black non-Hispanic, 17% as Hispanic, and only 37% as white non-Hispanic.¹⁷⁷ In contrast, only 12.3% of the U.S. population is black or African-American, 12.5% is Hispanic or Latino, and 75.1% is white.¹⁷⁸ While the families subject to the child welfare system are predominately minority, the decision makers who operate the child welfare system—caseworkers, attorneys, and judges—are predominately white.¹⁷⁹

This over-representation of minority families in the child welfare system may simply be a result of the correlation between race and poverty.¹⁸⁰ On the other hand, the over-representation of minority children in the child welfare system may not simply be a result of the link between poverty and race, but rather may reflect racial bias in the system.¹⁸¹ Professor Roberts argues that “even without definitive proof of racial bias on the part of [child welfare workers and judges], it is accurate to say that the over-representation of Black children in the child welfare system results from racism.”¹⁸² Professor Roberts notes that black families are subject to “racial bias in the initial reporting of maltreatment,”¹⁸³ and that “race affects the decision to separate reported parents from their children.”¹⁸⁴ Similarly, Professor Appell argues

176. See Charlow, *supra* note 112, at 771; Appell, *supra* note 22, at 584 & n.35.

177. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE AFCARS REPORT 2 (2003) (providing preliminary estimates of fiscal year 2001 as of March 2003), available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm> (last visited Nov. 13, 2005).

178. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN 3 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> (last visited Nov. 13, 2005).

179. Appell, *supra* note 22, at 585.

180. See Charlow, *supra* note 112, at 775 (“[A] number of studies appear to support the theory that the cause of the minority over-representation in the system is the disproportionate number of poor minorities. In other words, neglect is related to poverty, not minority status.”).

181. See ROBERTS, *supra* note 76, at 47.

182. *Id.*

183. *Id.* at 49.

184. *Id.* at 51.

that “[a]lthough definitive proof of race and class bias may have eluded empirical researchers, evidence suggests that indicators of poverty may be confused with indicators of potential child abuse or neglect, and that risk-assessors are unconsciously biased to see minority and socioeconomically disadvantaged families as pathological.”¹⁸⁵ Some commentators have argued that it is judges’ preconceived definitions of “good” mothers that lead to the termination of parental rights, even in the absence of harm to the child,¹⁸⁶ and that women of color are more likely to be perceived as bad mothers.¹⁸⁷

These parents, often poor, minority women, may be unrepresented by counsel in their confrontation with the power of the state.¹⁸⁸ And the unequal nature of the parent’s confrontation with the state has been powerfully characterized by the Supreme Court of the United States as follows:

The State’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State’s attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency’s own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.¹⁸⁹

V. EXTINGUISHING THE INHERITANCE RIGHTS OF PARENTAL KIN

When termination of parental rights does extinguish the inheritance rights of the parent, we face a further question—does the termination order bar only inheritance by the terminated

185. Appell, *supra* note 154, at 773 (footnotes omitted).

186. See Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL’Y 61, 67 (1995).

187. See *id.* at 69.

188. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 865–66 (2d ed. 1988).

189. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

parent, or is the effect broader, extinguishing the inheritance rights of the parent's kin as well? The statutes themselves provide little guidance. Type B statutes (which explicitly extinguish the inheritance rights of parents)¹⁹⁰ generally say nothing at all about the right of parental kin to inherit from the child *through* the terminated parent. Those very few Type B statutes that do explicitly address the inheritance rights of parental kin vary dramatically. The Virginia statute affects inheritance rights very narrowly, extinguishing the right of the terminated parent to inherit, but providing that the "order shall not otherwise affect the rights of the child, the child's kindred, or the parent's kindred to take from or through the parent or the rights of the parent's kindred to take from or through the child."¹⁹¹ In contrast, the Delaware statute extinguishes inheritance rights very broadly, providing that "the child shall lose all rights of inheritance from the parents whose parental rights were terminated and from their collateral or lineal relatives and the parents whose parental rights were terminated *and their collateral or lineal relatives* shall lose all rights of inheritance from the child."¹⁹²

Type C statutes do not explicitly address the inheritance rights of parents and as a consequence, say nothing about the inheritance rights of parental kin.¹⁹³ Similarly, Type D statutes, which make no explicit mention of inheritance rights at all, say nothing about the inheritance rights of parental kin.¹⁹⁴

In most jurisdictions, then, the language of the statutes does not help us determine whether extinguishing the inheritance rights of the terminated parents also extinguishes the rights of parental kin to inherit. We could read the statutes as cutting off the inheritance rights not only of the parent, but of the parent's kin as well. In other words, not only is the parent barred from inheriting from the child, but all other parental family members (e.g., grandparents, aunts and uncles and cousins, etc.) are barred

190. See *supra* Part II for a description of Type B, C, and D statutes and identification of examples of each type. Type A statutes, which explicitly retain the inheritance rights of both parent and child after termination (at least until the child's subsequent adoption) are not discussed in this part of the article, as the clear intent of such statutes is to leave inheritance rights unaffected by the termination order.

191. VA. CODE ANN. § 64.1-5.1(5) (2002) (emphasis added).

192. DEL. CODE ANN. tit. 13 § 1113(b) (1999 & Cum. Supp. 2004) (emphasis added).

193. See *supra* notes 28–33 and accompanying text.

194. See *supra* notes 34–39 and accompanying text.

as well. The Supreme Court of Washington, in a recent decision, reached just that conclusion. In *In re Estate of Fleming*,¹⁹⁵ the parental rights of the decedent's mother had been terminated when the decedent was an infant in order to free the decedent for adoption.¹⁹⁶ The decedent, however, was never adopted.¹⁹⁷ When the decedent died intestate as an adult, he was unmarried and childless.¹⁹⁸ He was, however, survived by his terminated biological mother and half-brother, another son of his biological mother.¹⁹⁹ The court held that "[w]hile the order could not change [the biological mother's] status as the biological parent of [the child], it did end her *legal status* as his parent."²⁰⁰ And, the court continued, as the terminated mother was no longer the child's legal mother, she did not fall within the meaning of "parent" in the state intestate succession statute,²⁰¹ and thus was not entitled to inherit from the child.²⁰² Getting to the issue with which we are immediately concerned, the court went on to hold that the decedent's half brother was similarly barred from inheriting from his sibling.²⁰³ The court, relying on the language in the intestate succession statute that "those issue of the parent" who survive may inherit, held:

195. 21 P.3d 281 (Wash. 2001).

196. *Id.* at 283. The mother's parental rights were terminated in 1947 under Rem. Rev. Stat. § 1700, which authorized the surrender of children to charitable organizations for the purpose of making the child available for adoption. *Id.* The statute provided that when a child was surrendered to a charitable organization, "the rights of its natural parents or of the guardian of its person (if any) shall cease." *Id.* at 283-84. The court order approving the mother's voluntary termination of her parental rights stated that she was "permanently deprived of any and all maternal rights and interests in and to the said Baby Boy Fleming." *Id.* at 284.

197. *Id.* at 283.

198. *Id.*

199. *Id.*

200. *Id.* at 284 (emphasis in original).

201. *Id.* at 284-85. See WASH. REV. CODE ANN. § 11.04.015(2) (West 1998), which reads in relevant part:

(2) Shares of others than surviving spouse. The shares of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:

(a) To the issue of the intestate . . .

(b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate.

(c) If the intestate not be survived by issue or by either parent, then to those issue of the parent or parents who survive the intestate . . .

202. *In re Estate of Fleming*, 21 P.3d at 286.

203. *See id.*

The right of a sibling to inherit from a deceased sibling is based upon the person's status as the issue of a common parent; there is no direct distribution to a person based upon his or her status as a sibling of the deceased. The common parent provides the link through which the estate passes.²⁰⁴

Thus, the half-brother of the decedent was barred from inheritance and, in the absence of any other heirs, the estate escheated to the state.²⁰⁵

The court's analysis of the issue is troublesome. Citing its earlier *Donnelly*²⁰⁶ decision, the *Fleming* court relied on a single policy goal: "In order to give a child a fresh start, all interests and rights between the biological parent and child are severed when that relationship is terminated."²⁰⁷ That rationale, however, seems inapt. *Donnelly*, which persuasively articulated the "fresh start" policy, was an adoption case, not a termination of parental rights case.²⁰⁸ The *Fleming* court viewed that distinction as irrelevant, concluding:

The legislative policy identified in *Donnelly* applies to the entire adoption process, including the termination of the biological parent-child relationship. The adopted child must be given a "fresh start." The legislative policy provided that all ties be severed at this point, not at the time the child is placed into the adoptive family. In fact, the Legislature indicated so in RCW 26.33.130(2), stating: "[a]n order terminating the parent-child relationship divests the parent and the child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other." Given this, it stands to reason our holding in *Donnelly* applies not only to cases where an adoption has occurred but also to cases in which the parent-child relationship has been permanently severed in anticipation of an adoption.²⁰⁹

The Washington court's approach is unpersuasive. Ideally, termination of parental rights will result in adoption. But often, as was the case in *Fleming*, it does not. When termination does not lead to adoption, there is no family into which the child can be integrated. If the notion of "fresh start" is to have any meaning, it must mean a fresh start in a new, replacement family. When the

204. *Id.*

205. *Id.*

206. *In re Estates of Donnelly*, 502 P.2d 1163 (Wash. 1972).

207. *In re Estate of Fleming*, 21 P.3d at 286.

208. *See In re Estates of Donnelly*, 502 P.2d at 1164.

209. *In re Estate of Fleming*, 21 P.3d at 285 (alteration in original).

Donnelly court spoke of a “fresh start,” it referred to “giving the adopted child a ‘fresh start’ by treating him as the natural child of the adoptive parent, and severing all ties with the past.”²¹⁰ The value of granting a fresh start seems dependent on there being a new, adoptive family in which the child will start afresh. There can be no “fresh start,” in the sense articulated in *Donnelly*, until and unless the child is adopted into a new family.

How, then, should we treat the inheritance rights of kin of terminated parents? Most statutes simply do not tell us whether extinguishing the inheritance rights of terminated parents has the additional effect of barring inheritance by parental kin as well.²¹¹ Assuming, as the Supreme Court of Washington did in *Fleming*, that inheritance by other family members through the terminated parent is automatically barred seems unnecessarily draconian. There is no reason to assume that parental kin are unworthy heirs. It is hard to imagine a policy rationale for disinheriting family members, particularly siblings, who are in no way responsible for the inadequate parenting that led to the termination. So how should we treat the inheritance rights of kin of terminated parents?

The slayer statutes provide an alternative model.²¹² Slayer statutes, like TPR statutes, bar inheritance by potential heirs because they are “unworthy” to inherit.²¹³ As with TPR statutes, the slayer statutes must address the question of the scope of the inheritance bar: Is the unworthy heir, the slayer, alone barred, or does the bar extend to all who would inherit through the unworthy? Many slayer statutes provide that the disqualified slayer will be treated as if he or she predeceased the victim,²¹⁴ which means that the slayer alone is barred, while other relatives of the slayer may still inherit through the slayer. Such an approach would avoid the unhappy result reached in *Fleming*. If only one parent is terminated, the unterminated parent, who likely bore the burden of raising the child, will generally inherit the entire estate, assuming that the decedent left no surviving spouse or

210. *In re Estates of Donnelly*, 502 P.2d at 1136.

211. *See supra* notes 190–94 and accompanying text.

212. *See supra* Section III.A.

213. *See supra* notes 46–56 and accompanying text.

214. *See, e.g.*, ALA. CODE § 43-8-253(a) (1991 & Supp. 2004); FLA. STAT. ANN. § 732.802(1) (West 1995); GA. CODE ANN. § 53-1-5(b) (1997); *see also* Sherman, *supra* note 19, at 851.

children.²¹⁵ If, as in *Fleming*, there are no surviving, untermi-
nated parents (and, again assuming no surviving spouse or chil-
dren), the estate will go to parental kin with surviving siblings
generally being the first takers.²¹⁶ Such a result seems likelier to
replicate the intent of such decedents than does the escheat to the
state that occurred in *Fleming*.

VI. PROPOSAL

Most current TPR statutes explicitly or implicitly bar inheri-
tance by parents after termination. Type B statutes expressly ex-
tinguish the right of the terminated parent to inherit.²¹⁷ Type C
statutes do not expressly address the inheritance rights of par-
ents, but likely extinguish those rights implicitly.²¹⁸ And the very
broad language used in Type D statutes to describe the effect of
the termination order suggests that Type D statutes as well are
likely to be interpreted as extinguishing the inheritance rights of
terminated parents.²¹⁹

Automatic disinheritance of terminated parents is troubling.
While some terminated parents have acted reprehensibly and
thus seem deserving of "punishment," or at least undeserving of
benefits flowing from their status as parents, TPR statutes that
disinherit terminated parents do so in blanket fashion. No parent
whose parental rights have been terminated may inherit from his
or her biological child, regardless of the reason for the termina-
tion. In this respect, the statutes operate too broadly. Parental
rights are terminated not only because parents have been abu-
sive, but also because parents are incapable of adequate parent-
ing. That lack of capacity may result from mental or physical
handicaps or abuse, which are far beyond the control of the par-
ent and thus undeserving of moral censure or punishment. Simi-
larly, in disinheriting automatically, the TPR statutes operate
unfairly, disproportionately affecting the inheritance rights of
poor, minority mothers.

215. See *supra* note 104.

216. See *DUKEMINIER ET AL.*, *supra* note 5, at 78–80.

217. See *supra* notes 25–27 and accompanying text.

218. See *supra* notes 28–33 and accompanying text.

219. See *supra* notes 34–39 and accompanying text.

Those termination statutes, however, that explicitly, and thus automatically, preserve the right of parents to inherit after termination of parental rights (Type A statutes) also miss the mark. While not all terminated parents are truly unworthy heirs, some clearly are. Just as it seems unjust to disinherit parents whose parental rights are terminated because of their mental or psychological impairments, it seems unjust to allow parents whose rights have been terminated because of the parents' physical or sexual abuse of their children to benefit from their relationship with the children that they have treated reprehensibly. While it is difficult, and perhaps impossible, to accurately estimate the presumed testamentary intention of children of terminated parents,²²⁰ in the case of seriously abusive parents, it does not seem inappropriate to substitute our societal judgment that such parents should not inherit from the child when the child dies before reaching the age of legal capacity to execute a will.

Virtually all current TPR statutes, then, because they either terminate the inheritance rights of *all* terminated parents or preserve the inheritance rights of *all* terminated parents, deal inadequately with the issue of post-termination inheritance rights. State statutes should be amended to remove provisions that either automatically extinguish or automatically preserve the inheritance rights of the terminated parent and to include instead a provision authorizing the court issuing the final termination order to terminate the inheritance rights of the parent. In deciding whether to extinguish parental inheritance rights, the statute should direct the court to consider several factors.

First, the court should consider whether the parental behavior that precipitated termination is of a nature that warrants disinheritance. Physical or sexual abuse of the child would be prime examples of behavior warranting disinheritance, while inability to parent adequately due to the parent's mental deficiencies would not warrant disinheritance. While many termination cases will be far less clear-cut than these examples, judicial discretion should result in fewer clearly inappropriate results than the current automatic mechanisms.

Second, as a minor child is unable to execute a will and thus effectuate her own plan of testamentary property disposition, the

220. See *supra* notes 75–76 and accompanying text.

court should consider whether the relationship between the parent and the child suggests that the child would prefer disinheriting or not disinheriting the parent. Again, this factor may be difficult for a court to apply. But, again, the court, having heard evidence concerning the effect of the parent's behavior on the child in conjunction with the termination of parental rights proceedings, is in a position to make a more informed assessment than is possible under statutes that allow for no individualized assessment of the individual child's probable intent.

Third, the court should consider whether disinheriting the parent whose parental rights have been terminated would likely lead to a more equitable property disposition than would preserving the parent's inheritance rights. For instance, if a mother is likely to bear all of the costs of raising a child after the termination of the father's parental rights, extinguishing the inheritance rights of the father may be appropriate.

Similarly, there seems no good reason to automatically bar inheritance by kin of the terminated parent, as some statutes do. The better approach would be to follow the example set by many slayer statutes and treat a parent whose inheritance rights have been extinguished as if the parent predeceased the child.

VII. CONCLUSION

Existing TPR statutes deal poorly with the post-termination inheritance rights of terminated parents. It might be appropriate to extinguish the inheritance rights of a terminated parent if, as a consequence, a greater share of the child's estate will pass to others (such as a non-terminated parent or other relatives) who bore the expense and responsibility of rearing the child. By mandating automatic extinguishing of inheritance rights, however, existing statutes allow for no such assessment and give no consideration to where the estate will go and to the fairness of that disposition. It may be appropriate to extinguish the inheritance rights of parents who abuse or intentionally neglect their child—those parents whose conduct is so reprehensible that society cannot fairly allow them to benefit from their parental status. Again, however, existing statutes disinherit parents far too broadly. It is apparent that parental rights frequently are terminated for reasons such as parental mental illness or mental retardation that do not war-

rant punishment. It also seems likely that the punitive effect of barring inheritance rights falls disproportionately on poor, minority mothers. TPR statutes that effect a blanket disinheritance of all terminated parents, those who lack the ability or resources to parent effectively, as well as those who are abusive or intentionally neglectful, then, would seem to paint with far too broad a brush. TPR statutes should be amended to provide for discretionary, rather than mandatory, disinheritance of terminated parents.
