A BATTLE OF WILLS: THE UNIFORM PROBATE CODE VERSUS EMPIRICAL EVIDENCE

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ABSTRACT

This Article explores the goals, methods, and present state of empirical research relevant to inheritance law. The Article synthesizes extant empirical studies—including unpublished ones and two original data sets presented here for the first time—and compares them with default rules currently found in the Uniform Probate Code. The Article proposes revisions to the Code based on those studies. Finally, the Article suggests changes to the Uniform Law Commission's oversight process to make the Code more responsive to empirical evidence as it emerges in the literature.

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INTRODUCTION

Inheritance law teems with default rules. Apart from a handful of mandatory rules governing the formalization of wills and limits on freedom of testation, most of the field—and the bulk of its substantive doctrines—lies within the power of testators to supersede at their pleasure, by executing a detailed estate plan.[1]

Orthodox theory calls upon lawmakers to establish default rules that correspond with the probable intent of acting parties, these being deceased property owners in the inheritance realm.[2] The drafters of the Uniform Probate Code (the Code) acknowledge this goal—sort of. One of the "underlying purposes and policies" of the Code identified by its drafters is "to discover and make effective the intent of a decedent in [the] distribution of his property."[3] Read narrowly, this objective relates to individual cases rather than statistical probabilities. But a comment to one of the Code's default rules defends it as "preferred by most clients."[4]

The drafters of the original version of the Code, promulgated in 1969, indicated that its model intestacy statute—inheritance law's quintessential default rule—"attempts to reflect the normal desire of the owner of wealth as to the disposition of his property," adding that "for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want."[5] By following this roadmap, the Code creates "suitable rules . . . for the person of modest means who relies on the estate plan provided by law."[6] Such reliance, leading to planned intestacy, becomes possible only when the Code's rules conform to individual preferences. Otherwise, parties must execute wills to circumvent rules they reject.

Although the drafters of the revised Code of 1990 altered the language of this comment, they did not disavow its import. They reiterated the objective of facilitating planned intestacy, and they averred that the revised Code "further[s] that purpose, by . . . bringing [its provisions] into line with developing public policy and family relationships."[7] This vaguer statement alludes to social change that has transformed testamentary intent over time.

Given the drafters' emphasis on effectuating intent, we might expect them to rely on empirical data to ascertain popular preferences. Attention to data could have become a defining feature of the Code, distinguishing it from run-of-the-mill, nonuniform codes. Yet, in the end, comments accompanying

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[1] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) ("The main function of the law in this field is to facilitate rather than regulate.").

[2] For a theoretical overview, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033–62 (2004).

[3] UNIF. PROB. CODE § 1-102(b)(2) (UNIF. L. COMM'N, amended 2019).

[4] *Id.* § 2-106 cmt.; *see also id.* § 5-411 cmt. (declaring that "[c]arrying out the . . . person's intent *or probable intent* is a major theme of this article") (emphasis added).

[5] *Id*. *art*. 2, pt. 1 cmt. (UNIF. L. COMM'N, pre-1990 art. 2); *see also Proceedings of the Committee of the Whole - Uniform Probate Code*, NAT'L CONF. COMM'RS ON UNIF. STATE L. 15 (Aug. 4, 1967) [hereinafter *Proceedings*] (comments by Prof. Richard Wellman) ("The over-all approach of the draft [Uniform Probate Code] you are receiving is to shift probate and estate law from their present historical orientation toward what people want and need."); *id.* at 23 (aiming at "making the law's plan really fit what you think the average person would want.").

[6] UNIF. PROB. CODE art. 2, pt. 1 cmt. (UNIF. L. COMM'N, pre-1990 art. 2).

[7] *Id*. art. 2, pt. 1 general cmt. (UNIF. L. COMM'N, amended 2019).

only three sections of the Code explicitly cite quantitative studies to justify the default rules laid down by those sections.[8]

What explains this paucity of references? We gain some insight into the matter from statements made by the drafters over the years. The reporter for the original version of the Code, Professor Richard Wellman, consulted "[r]ecent and authoritative surveys of . . . testacy" that were available to him in the 1960s.[9] But Wellman also paid heed to "the virtually unanimous view of lawyers who have helped all kinds of clients with wills."[10] Wellman's successor as reporter for the revised version of the Code stressed this second source of authority. Responding to criticism that a controversial revision lacked an empirical foundation, the reporter retorted that the committee responsible for supervising the Code "is an organization that counts among its members not only leading scholars in the field but also nationally known estate planners of considerable insight and experience. . . . Their cumulative experience suggests that they have a pretty good idea of what most clients want."[11]

Thus spake Professor Lawrence Waggoner in 1996. His pronouncement suggests a more cavalier attitude toward empirical evidence than Wellman had evinced. If it extended to the rest of his committee, the attitude might explain why the drafters failed to make a more concerted effort to bring data to hand. Although Waggoner did not eschew empirical evidence, neither did he prioritize it. He took comfort in his committee's "cumulative experience" and felt confident it could guide assessments of probable intent, apparently, without resorting to statistical analysis.[12] This won't do, however. Eminence is no substitute for evidence.[13] To the extent the Code reflects expert judgment alone, it is marred by a rather quaint and naïve complacency.

At the same time, Waggoner may have calculated that he was making virtue—or adequateness—out of necessity. As he protested, "requiring a systematic empirical study before any reform can be put into place would paralyze the law-reform process. . . . [T]he Uniform Law

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[8] *See id.* §§ 2-102 cmt., 2-106 cmt., 2-302 cmt.

[9] Richard V. Wellman, *Selected Aspects of the Uniform Probate Code*, 3 REAL PROP., PROB. & TR. J. 199, 204–06 (1968) (citing to quantitative studies).

[10] *Id.* at 204.

[11] Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2337–38 (1996) (footnote omitted).

[12] *Id.*

[13] For modern discussions, see SANJIT DHAMI, THE FOUNDATIONS OF BEHAVIORAL ECONOMIC ANALYSIS 1365 (2016); Robyn M. Dawes, David Faust & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 716, 723–26 (Thomas Gilovich et al. eds., 2002); Hirsch, *supra* note 2, at 1070–74 (citing additional studies and noting an example of the superiority of data over expert judgment in the inheritance field); William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 *passim* (2001). Earlier legal thinkers had voiced concern over the absence of data to justify rules. *See* Oliver Wendell Holmes, *Twenty Years in Retrospect*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 154, 156 (Mark DeWolfe Howe ed., 1962) (1902) (observing that "we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe" and adding—in an anticipatory rebuke of Waggoner—that "the wisest are but blind guides."); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("The man of the future is the man of statistics."); William H. Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 38 (1943) (complaining that "whether [rules] achieve the desired result in the majority of cases or whether they defeat it, is rarely learned by courts or legislators . . . . "). For a Commissioner who shared this concern, see Richard E. Speidel, *Revisiting UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 608–09 (2001) (warning, contrary to Waggoner, that drafters of the UCC who are "satisfied by 'second best' data such as . . . the experience of the Reporters, [and] members of the Drafting Committee, . . . will frequently be 'shooting in the dark.' ").

Commission . . . has [no] funding for such studies."[14] Considered in this light, criticism of the drafters might appear querulous. If only a limited store of data was available, and if the drafters lacked the wherewithal to generate their own data, then what, pray tell, were they supposed to do?

If pointed then, the question rings hollow today. The scholarly landscape has changed since Waggoner extolled expertism in 1996. The empirical literature has burgeoned to such an extent that data pertinent to many of the default rules set out in the Code are now available at zero cost to the Commissioners.[15] The law reform process would not grind to a halt if today's drafters had to consult data before plunging ahead. Yet, by and large, the Commissioners have remained steadfast in their complacency. The committee that supervises the Code has made scant effort to track the empirical literature, let alone to make updates as new data appeared.[16]

This Article endeavors to rectify this inattention—to do what the drafters could and should have done for themselves. The Article synthesizes the empirical studies to date and contrasts their findings with default rules found in existing sections of the Code. To be sure, some of the studies are now dated, and we should hesitate to rely on data from the prelapsarian 1950s and 1960s, when the pioneering studies went to press.[17] The more current the data, the better. This Article also weighs evidence from unpublished studies. And the Article undertakes two original empirical studies and presents evidence from those ones as well.

The analysis will progress in stages. Part I begins by exploring the alternative forms that empirical studies have taken, their respective strengths and weaknesses, and the sorts of information they have sought to elicit in the inheritance field. Part II compares data relevant to the distribution of estates in the absence of a will with the Code's rules of intestacy. Part III proceeds

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[14] Waggoner, *supra* note 11, at 2337. Waggoner was not the first to make this rhetorical move. Long before the Code took shape, Professor Thomas Atkinson posited that "[i]t would be extremely difficult to make . . . statistical reviews of the provisions of numerous wills under various fact situations, or inquiry into the desires of many living persons as to who should receive their property." Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 188 (1935). Nevertheless, "[i]n [the] absence of such findings we must rely upon our hunch in forming our conclusions as to the best intestate plan." *Id.*

[15] References to many of the relevant studies will appear in the pages following. Empirical studies designed to aid in the formulation of *mandatory* rules are also beginning to emerge. *See, e.g.*, Fredrick E. Vars, *The Slayer Rule: An Empirical Examination*, 48 ACTEC L.J. 201, 211–31 (2023).

[16] *See infra* note 340–341 and accompanying text.

[17] *See* Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 393 (1950) (reporting probate data from 1929, 1934, 1939, 1941, and 1944); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (reporting probate data from 1963); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (reporting probate data from 1953 and 1957); *see also* Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. SOC. PSYCH. 347, 348, 351 (1937) (reporting selective probate data from 1880–85). Empirical studies have also appeared abroad, but we cannot assume that foreign data reflect American patterns, and we will not address those studies in this Article. *See* JANET FINCH, LYNN HAYES, JENNIFER MASON, JUDITH MASON & LORRAINE WALLIS, WILLS, INHERITANCE AND FAMILIES 66–161 (1996) (reporting British data); ALUN HUMPHREY, LISA MILLS, GARETH MORRELL, GILLIAN DOUGLAS & HILARY WOODWARD, INHERITANCE AND THE FAMILY: ATTITUDES TO WILL-MAKING AND INTESTACY 27–79 (Nat'l Ctr. for Soc. Rsch. ed., 2010) (same); Oscar Erixson & Henry Ohlsson, *Estate Division: Equal Sharing, Exchange Motives, and Cinderella Effects*, 32 J. POPULATION ECON. 1437 *passim* (2019) (reporting Swedish data); Christine Ho, *Strategic Parent Meets Detached Child? Parental Intended Bequest Division and Support from Children*, 59 DEMOGRAPHY 1353 *passim* (2022) (reporting Singaporean data); Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman, Rachel Feeney & Tanya Strub, *Making and Changing Wills: Preferences, Predictors, and Triggers*, SAGE OPEN, Jan.–Mar. 2016, at 1 (reporting Australian data). For a comparative study, see Browder, *supra*, at 1304, 1344–57 (comparing evidence from Washtenaw County, Michigan, and London, England).

to contrast data pertinent to contingencies within wills with the Code's testate default rules. Finally, Part IV takes stock of the Commissioners' handiwork and offers suggestions for drafters of future iterations of the Code.

I. THEORY

A. SOURCES AND METHODS

Empirical studies of inheritance law are anything but uniform. Scholars have harvested data from a variety of sources, each of which has advantages and disadvantages.

Naturally, decedents cannot respond to polling, but their relics are open to inspection by researchers. Quite a few studies have mined probate records as troves of data. On one hand, such studies lay bare how actual testators planned their estates. On the other hand, excavating probate records is laborious, often yielding relatively small data sets. Furthermore, the data may be skewed in several ways. Today, fewer than a quarter of all decedents create estate plans available for study.[18] Most either employ living trusts or other will substitutes that, unlike wills, remain private after the property owner's death, or they make no estate plan at all.[19] Even decedents who execute wills may leave no permanent record of them; survivors frequently settle estates informally without initiating probate proceedings.[20] In addition, probate studies are confined to individual counties and hence may reflect preferences atypical of the country as a whole. Finally, testators draft wills in the shadow of the law, and some could rely on prevailing default rules, registering preferences only when they wish to deviate from those rules. The extent to which this reliance warps data gleaned from probate records is unknown.[21]

Surveys offer an alternative source of data, and researchers can conduct them in a variety of ways. Once upon a time, telephonic polling was common. In recent decades, electronic polling emerged as a more cost-efficient option and is increasingly used for empirical studies.[22] Although these polls could solicit information about formalized estate plans, they rarely do so. Typically, they inquire into respondents' distributive preferences, sometimes using the large panels available for canvasing to

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[18] A recent analysis found that 56.8% of decedents left wills, of which 38.4% were probated. *See* Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & CMTY. PROP. L.J. 1, 3–5, 27 (2015). Earlier studies reported comparable statistics. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 103, at 565 n.13 (2d ed. 1953); Jeffery A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 611–12 (1987); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 60, 61 tbl. 2.1, 62–63 (1985).

[19] On average, living trust settlors are wealthier than, and intestate decedents poorer than, testators of wills. *See* James, *supra* note 18, at 25–29; Stein & Fierstein, *supra* note 18, at 92, 95 tbl. 5.10; *infra* note 48 (citing to studies that also note other distinguishing characteristics of testators).

[20] *See* James, *supra* note 18, at 27 (reporting data suggesting that informal family settlements occurred in lieu of probate in over one third of the cases).

[21] *See* Cutler v. Cutler, 79 N.W. 240, 243 (Wis. 1899) ("The only object in making a will is to make a different disposition of property than that provided by statute."). For a further discussion and references, see Adam J. Hirsch, *When Beneficiaries Predecease: An Empirical Analysis*, 72 EMORY L.J. 307, 358 n.289 (2022).

[22] *See* Lynne D. Roberts, *Opportunities and Constraints of Electronic Research*, *in* RODNEY A. REYNOLDS, ROBERT WOODS, & JASON D. BAKER, HANDBOOK OF RESEARCH ON ELECTRONIC SURVEYS AND MEASUREMENTS 19, 19–21 (2007).

target respondents who fit the criteria of whatever issue is under investigation.[23]

One advantage of surveys is that they are not confined to evidence from testators. They can also include evidence from intestate decedents or settlors of living trusts. Surveys can also sample respondents throughout the country. Yet, despite their wide radii and deep internet penetration in the United States, surveys from panels of electronically accessible respondents could form an unrepresentative sample of the population as a whole.[24] Electronic polls yield nonprobability samples and, therefore, do not have a statistical margin of error. Researchers instead measure the accuracy of electronic polls with "credibility intervals."[25]

Respondents in all sorts of surveys could also fail to answer questions truthfully or thoughtfully.[26] Even when they do report their preferences thoughtfully, respondents' choices might change when they set about executing estate plans in the real world—the ones reflected in probate records.[27] Finally, surveys of all sorts can suffer from nonresponse bias.

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[23] *See, e.g.*, Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 249, 258, 271 (2018). In another genre, researchers sometimes explore how respondents believe testators should distribute estates in hypothetical situations rather than inquiring into their own preferences. Such studies disclose social norms but are unreliable indicators of popular wishes. *See, e.g.*, Marilyn Coleman & Lawrence H. Ganong, *Attitudes Toward Inheritance Following Divorce and Remarriage*, 19 J. FAM. & ECON. ISSUES 289, 294 (1998).

[24] *See* Jelke Bethlehem, *Selection Bias in Web Surveys*, 78 INT'L STAT. REV. 161 *passim* (2010); David Dutwin & Trent D. Buskirk, *Apples to Oranges or Gala Versus Golden Delicious? Comparing Data Quality of Nonprobability Internet Samples to Low Response Rate Probability Samples*, 81 PUB. OP. Q. (Special Issue) 213 *passim* (2017); Zerrin Asan Greenacre, *The Importance of Selection Bias in Internet Surveys*, 6 OPEN J. STATS. 397 *passim* (2016).

[25] *See* IPSOS, CREDIBILITY INTERVALS FOR ONLINE POLLING 1 (2012), https://www.ipsos.com/sites/default/files/2017-03/IpsosPA_CredibilityIntervals.pdf [https://perma.cc/7QV7-SGCA]. Whereas margins of error are based on classical, frequentist probability theory, credibility intervals derive from Bayesian probability theory. For a further discussion, see AAPOR, Understanding a "Credibility Interval" and How It Differs from the "Margin of Sampling Error" in a Public Opinion Poll (Oct. 7, 2012), https://aapor.org/statements/understanding-a-credibility-interval-and-how-it-differs-from-the-margin-of-sampling-error-in-a-public-opinion-poll/ [https://perma.cc/G9JF-TATF].

[26] Respondents betray a tendency to favor the first answer choice, known as order bias, which researchers can combat by randomizing survey answer choices. *See* Glenn D. Israel & C.L. Taylor, *Can Response Order Bias Evaluations?*, 13 EVALUATION & PROGRAM PLAN. 365 *passim* (1990). Respondents sometimes give false responses to avoid the embarrassment of expressing unconventional preferences. *See* Daniel J. Hopkins, *No More Wilder Effect, Never a Whitman Effect: When and Why Polls Mislead About Black and Female Candidates*, 71 J. POL. 769 *passim* (2009); Roger Tourangeau & Ting Yan, *Sensitive Questions in Surveys*, 133 PSYCH. BULL. 859 *passim* (2007). Researchers reduce this risk when they conduct surveys electronically, heightening respondents' sense of anonymity. *See* Timo Gnambs & Kai Kaspar, *Disclosure of Sensitive Behaviors Across Self-Administered Survey Modes: A Meta-Analysis*, 47 BEHAV. RSCH. METHODS 1237 *passim* (2015). At the same time, the anonymity of electronic surveys aggravates the risk of thoughtless responses, introducing "noise" into the data. *See* Victor B. Arias, L.E. Garrido, C. Jenaro, A. Martinez-Molina & B. Arias, *A Little Garbage In, Lots of Garbage Out: Assessing the Impact of Careless Responding in Personality Survey Data*, 52 BEHAV. RSCH. METHODS 2489 *passim* (2020); Nathan A. Bowling & Jason L. Huang, *Your Attention Please! Toward a Better Understanding of Research Participant Carelessness*, 67 APPLIED PSYCH.: INT'L REV. 227 *passim* (2018).

[27] *See* Charles F. Manski, *The Use of Intentions Data to Predict Behavior: A Best-Case Analysis*, 85 J. AM. STAT. ASS'N 934, 940 (1990) (concluding that "researchers should not expect too much from intentions data"). One of the functions of the will-execution ceremony is to underscore to testators that they are engaged in a legally-performative act, ensuring that their choices are not "casual or haphazard." Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941). It is a commonplace among estate planners that clients often make last-minute revisions when they confront the prospect of executing a document. *See* Radovich v. Locke-Paddon, 41 Cal. Rptr.2d 573, 582 (Ct. App. 1995) (observing that "common experience teaches that potential testators may change their minds more than once after the first meeting [with a drafting attorney]"); Giglio v. Robinson, No. HHDCV196117851S, 2021 WL 929950, at *2 (Conn. Super. Ct. 2021) (relating how a testator had a history of asking his attorney "to prepare various wills . . . and then neglect[ing] to sign those wills"); Miller v. Mooney, 725 N.E.2d 545, 550–51 (Mass. 2000) (again observing that "It is not uncommon . . . for a client to have a change of heart after reviewing a draft will. . . . An attorney frequently prepares

Some potential respondents decline to participate, distorting the results if they display systematic characteristics.[28] This difficulty fails to arise when researchers examine probate files, which are public records. The late authors of wills cannot refuse to take part in the study.

Another source of data available to researchers—albeit one they have underutilized—is published cases available in electronic databases such as Westlaw or LexisNexis. Data sets composed of published cases raise sampling concerns that once again demand caution. Estate plans that result in litigation and litigation that results in published opinions may form an unrepresentative sample of all estate plans.[29] At the same time, researchers can access these data at a nominal cost. Like probate records, published case records disclose actual estate plans rather than responses to questions. Case records can also offer advantages over probate records. Using an algorithm, researchers can amass cases concerning estate plans with rare features that arise too infrequently to investigate in a probate study.[30] What is more, cases sometimes detail information set out in the body of judicial opinions that came to light from fact-finding at trial, but which probate records would not disclose. No less astute an observer than Karl Llewellyn advocated this source as grist for empirical research.[31]

Ideally, researchers would combine these methodologies, studying a single empirical question through multiple means and then comparing the data sets in search of consistencies or inconsistencies.[32] That is also the most expensive approach if researchers are starting from scratch. Yet, so many published studies exist today that researchers may be able to identify a methodological gap in the examination of a discrete problem, fill that gap, and then compare the results with preexisting data generated by other methodologies.[33]

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multiple drafts of a will before the client is reconciled to the result."); Strong v. Fitzpatrick, 169 A.3d 783, 789 (Vt. 2017) (yet again observing that "even if a testator has made note of his or her intent through declarations to relatives, friends, neighbors and the like . . . that intent may change over time during the estate-planning process"); *see also* JAMES B. STEWART, THE PARTNERS 283–85 (1983) (concerning Nelson Rockefeller's protean estate plan). One study nonetheless found a "close correspondence" between respondents' reported preferences and their actual estate plans. *See* Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 L. & HUM. BEHAV. 479, 494–97 (1998). The difficulty with this evidence is that it failed to measure the fidelity of respondents' preferences with estate plans that they *subsequently* executed. For an earlier study reporting evidence from interviewees "who had made their wills," although not necessarily their *last* wills, see MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 83 (1970).

[28] *See* Robert M. Groves, *Nonresponse Rates and Nonresponse Bias in Household Surveys*, 70 PUB. OP. Q. 646 *passim* (2006).

[29] For further discussions and references, see Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1430–32 (2013); David Horton & Reid Kress Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1156 (2022).

[30] We will address two such studies in this Article. *See infra* notes 180–187, 241–245 and accompanying text. For another recent study using this methodology, see Christopher J. Ryan, Jr., *An Historical and Empirical Analysis of the Cy-Près Doctrine*, 48 ACTEC L.J. 289, 329–34 (2023).

[31] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 514 (1960).

[32] A few studies have taken this more complex approach. *See* SUSSMAN ET AL., *supra* note 27, at 44–52 (combining a study of probate records with interviews of survivors); Dunham, *supra* note 17, at 259–61 (combining a study of probate records with a "pilot survey"); Joel R. Glucksman, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 254, 266–78 (1976) (combining a telephonic survey with a study of probate records).

[33] *See, e.g.*, Hirsch, *supra* note 21, at 357–58, 360, 362–64.

B. MAJORITARIAN DEFAULTS—AND AN ALTERNATIVE

Once they have lighted on a methodology, researchers immediately face a substantive question: through whatever means, what exactly should they seek to investigate?

The answer hinges on what lawmakers aim to accomplish when they establish a default rule. If, for example, lawmakers aspire to set default rules in conformity with social norms, then researchers could assist them by eliciting abstract information about those norms.[34] But social defaults are unorthodox; to the extent they contravene individual preferences, citizens will pay to override social defaults, adding to the transaction costs of estate planning.[35]

Default rule theory instead favors majoritarian defaults because they minimize aggregate transaction costs.[36] When a default rule corresponds with citizens' preferences, they need not expend resources to dodge the rule. In estate planning, that means allowing individuals to avoid the cost of making a will or allowing them to streamline their wills, taking fewer contingencies into account.[37] And in pursuing this economic objective, majoritarian defaults simultaneously fulfill a larger social norm. Poorer citizens are less able to afford counsel to assist them in planning their estates, planning that includes the avoidance of default rules that contravene their preferences. By establishing defaults that correspond with most citizens' preferences, lawmakers narrow the gap between the poorer and wealthier parties' abilities to effectuate their intent. This convergence signifies the *leveling function* of majoritarian defaults.[38] In this instance, perhaps unusually, economic efficiency aligns with social justice.[39]

It may happen that, for whatever reason, the preferences of different groups of citizens diverge. In those situations, lawmakers could refine default rules to operate differently, depending on individuals' varying characteristics. A recent line of scholarship advocates these sorts of "personalized" defaults.[40] Customizing default rules to fit the preferences of different subcategories of citizens improves their fitness by minimizing transaction costs. To be sure, some distinctions (for instance, ones tied to gender or ethnicity) are politically unrealistic. And against transaction costs, lawmakers must also weigh information costs—to wit, the rising cost of

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[34] *See supra* note 23.

[35] For a further discussion and references, see Hirsch, *supra* note 2, at 1042–58. Social defaults could nonetheless prove efficient in circumstances where parties do not care enough to override them. For a mathematical model, see *id.* at 1097–99 app.

[36] For a discussion in the context of inheritance, see *id.* at 1039–42.

[37] For an early recognition, see Atkinson, *supra* note 14, at 187–88 (noting that if an intestacy statute benefits "the relatives whom an average property owner would be most apt to favor in his will . . . the number of cases in which a will is thought desirable will be reduced."). For an early example of planned intestacy, see Nichols v. Nichols (1814) 161 Eng. Rep. 1113, 1115–16; 2 Phill. Ecc. 180, 188 ("[The testator] said he had no will, that the law would make a good will for him—so that it was his intention that his widow should possess, after his death, the provision which the law would give her."); *see also* Cleveland v. Thomas (In re Estate of Cleveland), 22 Cal. Rptr. 2d 590, 599 (Ct. App. 1993) ("Many persons intentionally die intestate because the statutory scheme satisfies the basic goal of allowing their closest kin to succeed to their estates," thereby saving them "time and expense.").

[38] For a further discussion of this objective, see Hirsch, *supra* note 2, at 1051–52.

[39] *Cf.* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 88 (Brookings Inst. Press rev. ed. 2015).

[40] *See, e.g.*, Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349 *passim* (2019); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 *passim* (2014).

learning a default rule as it grows increasingly complex.[41] Yet, so long as lawmakers avoid excessive refinements and take pains to make statutory text as clear as possible, personalization can enhance a default rule and merits consideration.

In order to determine majoritarian defaults, empirical studies aim to identify the preferences of those who are polled or those whose estate plans are investigated. Thus far, most empirical studies in the inheritance realm have taken this form.

There exists, however, an alternative way to study citizens' attitudes that lawmakers can use to establish default rules—not to determine their preferred outcomes, but rather their assumptions about rules regulating those outcomes. In other words, researchers can investigate what most individuals who act without professional guidance believe the applicable default rules to be. By matching rules with prevailing intuitions about rules, lawmakers do not effectuate popular preferences. Instead, lawmakers reduce the incidence of planning mistakes committed by ignorant individuals. In earlier works, I dubbed this sort of rule an *error-minimizing* default.[42]

Error-minimizing defaults again fulfill a leveling function. Because poorer citizens are less likely to seek counsel than wealthier ones when they plan their estates, poorer citizens are more susceptible to error than their wealthier counterparts. Counsel will disabuse their clients of any misconceptions they may have about rules and will craft estate plans based on an accurate reading of the law. This disparity might be enhanced by what psychologists call a Dunning-Kruger effect (also known as *meta-ignorance*), whereby ignorant individuals harbor illusions about the extent of their knowledge, believing themselves to know more than they do, hence giving them greater confidence to act without inquiring into the state of the law.[43]

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[41] For a further discussion and references, see Hirsch, *supra* note 2, at 1062–64, 1100–01 app.; Hirsch, *supra* note 21, at 324–26.

[42] *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U.L. REV. 609, 633–35 (2009) [hereinafter Hirsch, *Text and Time*]; Adam J. Hirsch, *Waking the Dead: An Empirical Analysis of Revival of Wills*, 53 U.C. DAVIS L. REV. 2269, 2285–91 (2020) [hereinafter Hirsch, *Waking the Dead*]. Several surveys have sought to assess public awareness of the rules of intestacy, possibly prompting erroneous decisions to forgo will-making. *See* Mary Louise Fellows, Rita J. Simon, Teal E. Snapp & William D. Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 722–23 (1976) [hereinafter Fellows et al., *Illinois Study*]; Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. BAR FOUND. RSCH. J. 319, 339–40 (1978) [hereinafter Fellows et al., *Public Attitudes*]; Glucksman, *supra* note 32, at 261–66. Laypersons who draft their own wills could likewise rely on false assumptions about the default rules of testacy. For data on the frequency of homemade wills, see Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (finding that 36% of wills were homemade); David Horton, *Do-It-Yourself Wills*, 53 U.C. DAVIS L. REV. 2357, 2384–85 (2020) (finding that 19%–21% of wills were homemade, including software and form wills); Horton & Weisbord, *supra* note 29, at 1175–76 (finding that 31% of wills were homemade, including software and form wills). As a normative goal, error-minimization also applies to mandatory rules and has sometimes served to justify their reform. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N, amended 2019) (advocating a rule authorizing notarized wills because "lay people . . . think that a will is valid if notarized"); *id.* § 2-506 cmt. (establishing a liberal choice-of-law rule for will-formalization because it "provide[s] a wide opportunity for validation of expectations of testators."). For an early recognition, see *Extracts from the Original Reports of the Revisers* (1825), *in* 3 REVISED STATUTES OF THE STATE OF NEW-YORK 628 app. (1836) (abolishing the common-law rule barring wills from disposing of after-acquired property because the rule "must be unknown to the larger number of [testators] and must therefore . . . defeat the intent of the testator.").

[43] *See* David Dunning, *The Dunning-Kruger Effect: On Being Ignorant of One's Own Ignorance*, 44 ADVANCES EXPERIMENTAL SOC. PSYCH. 247, 250–52, 259–62 (2011). For evidence of meta-ignorance within inheritance law, see Hirsch, *Waking the Dead*, *supra* note 42, at 2288 & n.91; Johnson &

By implementing error-minimizing defaults, lawmakers not only minimize mistakes but also smooth the risk of error across the socioeconomic spectrum.

When should lawmakers favor error-minimizing defaults over majoritarian defaults? In theory, researchers could perform empirical studies of both majoritarian preferences and expectations and then weigh one against the other in areas where they conflict. This exercise would require researchers to relate transaction costs with error costs by assigning some normative value to each of them. Otherwise, they would remain incommensurable.[44] Because transaction costs (given the diminishing marginal utility of wealth) and error costs are both borne disproportionately by poorer individuals, determining the appropriate coefficient to relate those two costs is scarcely obvious. Further complicating the matter, error costs could prove transient if majoritarian defaults eventually become familiar to laypersons.

In lieu of a complex protocol, we can reasonably prioritize majoritarian defaults and install error-minimizing defaults *by* default in those situations where the majoritarian default is indeterminate. Such indeterminacy arises when the rule at issue fails to concern who the beneficiaries are and what they receive, but rather resolves a structural choice between two alternative estate plans, each of which could provide for any pattern of distribution—hence, involving preferences that researchers cannot explore in a survey. Such rules do exist, as we shall see.[45] The best we can do in such cases is to enact the rule more likely to put into effect the estate plan citizens anticipate they are implementing.

As concerns error-minimizing defaults, probate records are unlikely to reveal much of anything. These rarely state the assumptions that led testators to act as they did. Published case records might prove more illuminating, although we cannot count on them to report this information. Only by polling respondents can researchers determine with assurance what most individuals believe a given default rule to be. Lawmakers can then put into effect rules corresponding with popular assumptions, as opposed to popular preferences.

II. INTESTACY

For a variety of reasons, over half of all Americans lack an estate plan.[46] If they die without one, then the state steps in to devise an estate plan for

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Robbennolt, *supra* note 27, at 489–90; Fellows, et al., *Public Attitudes*, *supra* note 42, at 340 (noting earlier studies).

[44] "[L]ike judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). For a mathematical model, see Hirsch, *Text and Time*, *supra* note 42, at 659–63 app. The risk of error costs is tied to the frequency of intestacy and of unprofessional will-making. *See supra* note 42 and *infra* note 46.

[45] *See infra* Sections III.C, III.F.

[46] Although earlier studies reported that most Americans made estate plans, the most recent surveys reveal a retreat from planning and a preponderance of intestacy. *See* Rachel Lustbader, *Caring.com's 2023 Will Survey Finds that 1 in 4 Americans See a Greater Need for an Estate Plan Due to Inflation*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey/ [https://perma.cc/9LHJ-54XA] (finding that 33.1% of respondents had an estate plan, but noting an uptick in planning among Covid survivors); *American Experiences Survey: A Nationally Representative Multi-Mode Survey*, CONSUMER REPORTS 1, 6 (April 2022), https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_AES_April_2022.pdf [https://perma.cc/CZ8S-FSV5] (finding that 33% of respondents had a will); Jeffrey M. Jones, *How Many Americans Have a Will?*, GALLUP (June 23, 2021), https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx

them. The intestacy statute sets out "the will which the law makes" for those individuals who neglect to make their own.[47] Thus, the intestacy statute is composed of an array of default rules.

Although a broad section of the population dies without an estate plan, intestate decedents do not represent a cross-section. Empirical evidence shows that poorer Americans are more likely to die without an estate plan than wealthier ones.[48] If and when preferences differ systematically along the metric of wealth, lawmakers can account for the disparity in either of two ways. They can gear the rules of intestacy to suit those citizens who are most likely to become subject to them. Alternatively, lawmakers can refine the rules, distinguishing outcomes for different decedents based on their socioeconomic status. Although the drafters of the Code spoke of establishing rules of intestacy suitable for "person[s] of modest means,"[49] they have also pursued the second strategy, as we shall see.[50]

A. SPOUSES

Under the Code, as revised in 1990, if an intestate decedent is survived by a spouse and children, all of whom are children of the marriage, and the spouse likewise has no children who are not children of the intestate decedent, then the spouse receives the entire estate.[51] This rule replaces the one found in the original version of the Code, whereby the spouse received the first $50,000 plus one-half of the balance of the intestate estate, regardless of whether the spouse had children who were not children of the intestate decedent.[52]

The drafters defend the revised version of this provision by reference to data. "Empirical studies support the increase in the surviving spouse's intestate share," the comment elaborates, for "[t]he studies have shown that

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[https://perma.cc/UZ5F-7EPB] (finding that 46% of respondents had a will, and tracking data over time); *see also* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2527–35, 2540–55 (2020) (presenting data from 2020 and noting earlier surveys). Surveys likely undercount citizens who die testate, because they include younger respondents who will ultimately execute estate plans. Yet, intestacy predominates even among older respondents. *See* Lustbader, *supra* (finding that 55% of respondents aged 55 and older had no estate plan). *But cf*. David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1121 (2015) (finding in a probate study of Alameda County, California between Jan. 1, 2008 and Mar. 1, 2009 that 57% of decedents died with a will and 43% died intestate); Jones, *supra* (finding that 76% of Americans aged 65 and older had a will in 2021). For surveys of respondents' reasons for engaging in or refraining from estate planning, see CONSUMER REPORTS, *supra*, at 7–8; Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1077 (1978).

[47] PETER LOVELASS, THE WILL WHICH THE LAW MAKES (1785) (retitled THE LAW'S DISPOSAL OF A PERSON'S ESTATE WHO DIES WITHOUT WILL OR TESTAMENT in subsequent editions).

[48] The studies also identify other distinguishing characteristics of intestate individuals. *See* SUSSMAN ET AL., *supra* note 27, at 73–74, 202; Lustbader, *supra* note 46; DiRusso, *supra* note 42, at 41–54; Fellows, et al., *Public Attitudes*, *supra* note 42, at 336–39 (also noting earlier studies); Marsha A. Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills*, 22 J. FAM. & ECON. ISSUES 243, 250–58 (2001); David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627 n.177 (2015) (reporting evidence from probate records); Horton, *supra* note 46, at 1121–22; Jones, *supra* note 46; James, *supra* note 18, at 25–26; Poppe, *supra* note 46, at 2546–47, 2550; Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. REV. 665, 680–85 (2020) (reporting evidence from probate records).

[49] UNIF. PROB. CODE art. 2 pt. 1 general cmt. (UNIF. L. COMM'N, amended 2019).

[50] *See infra* notes 70, 74 and accompanying text.

[51] *See* UNIF. PROB. CODE § 2-102(1)(B) (UNIF. L. COMM'N, amended 2019).

[52] *See id.* § 2-102(3) (UNIF. L. COMM'N, pre-1990 art. 2).

testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children."[53] A string cite to empirical studies follows.[54]

Although the referenced studies support the approach taken in the revised Code, the most recent of those studies is now nearly half a century old.[55] The latest studies, based on electronic surveys, suggest that times have changed. Popular preferences regarding the distribution of estates have evolved.[56]

The electronic surveys found that among respondents who are survived by a spouse and children of the marriage, preferred allocations to the spouse fail to follow a steady progression but instead scatter along the range of allocations with three peaks, separated by valleys, at 0%, 50%, and 100%.[57] With this sort of pattern, the plurality preference can differ sharply from the average (or mean) preference, which complicates the task of determining the efficient default rule—the one minimizing transaction costs.

Which number, then, should lawmakers focus on—the plurality preference or the mean preference? On reflection, the answer depends on the elasticity of demand for estate planning. If donative preferences are inelastic—that is, if benefactors will pay to override rules of intestacy that deviate even slightly from their preferred scheme of distribution—then lawmakers should implement the plurality default. No other default will motivate fewer benefactors to expend resources on wills. If, however, preferences are elastic—that is, if benefactors are satisfied by rules of intestacy that only approximate their preferred scheme of distribution—then lawmakers should instead implement the mean default. The mean default halves the loaf, so to speak, "minimizing the total distances between every [benefactor's] preferences and the default outcome," thereby "reduc[ing] total dissatisfaction overall."[58] If preferences are elastic, then the mean preference will motivate the fewest benefactors to bear the expense of executing a will, even if none of them prefers that exact scheme of distribution.

Unfortunately, empirical scholars have never studied the elasticity of estate planning preferences. Hence, lawmakers cannot currently determine

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[53] *Id.* § 2-102 cmt. (UNIF. L. COMM'N, amended 2019) (emphasis in original).

[54] *See id*. The provision in the original version of the Code was also informed by data, although it cited no studies in its comment. *See id.* § 2-102 cmt. (UNIF. L. COMM'N, pre-1990 art. 2); *Proceedings*, *supra* note 5, at 23–24 (referring to Dunham, *supra* note 17).

[55] Evidence from the latest of the cited studies dates to 1979. *See* CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 184 (1987) (presenting evidence from probate records). Other early studies went uncited in the comment. *See* Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 417 (1987) (reporting probate data for 1981–82); Fellows et al., *Illinois Study*, *supra* note 42, at 728–30; Glucksman, *supra* note 32, at 266–78.

[56] *See* Yair Listokin & John Morley, A Survey of Preferences for Estate Distribution at Death Part I: Spouse and Partners 10 (Feb. 14, 2023) (unpublished study) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332171 [https://perma.cc/L2Qr-RUP2]) (surveying 8,500 respondents through YouGov; no date is indicated); Emily S. Taylor Poppe, *Married, With Children at Death*, 47 ACTEC L.J. 131, 154–55 (2022) (surveying 1,975 respondents in 2019 through Qualtrics); *see also* Sean Fahle, What Do Bequests Left by Couples with a Surviving Member Tell Us About Bequest Motives?, 7–8, 11–15, 88–89 (Jan. 26, 2023) (unpublished study) (available at https://ssrn.com/abstract=4338835 [https://perma.cc/L749-SAQY]) (reporting data from 8,191 exit interviews in the Health and Retirement Study, National Institute on Aging, between 2004–2016). Recent probate studies have failed to report data disaggregated to address the instant question. *See* Poppe, *supra*, at 150.

[57] *See infra* notes 59–63 and accompanying text.

[58] Listokin & Morley, *supra* note 56, at 32.

whether plurality defaults or mean defaults achieve greater efficiency. Under conditions of empirical ignorance, lawmakers could reasonably allow either measurement to guide them.

If respondents are survived by a spouse and children of the marriage, one study reported a plurality preference that 100% of the estate be distributed to the spouse (although "0% is almost equally popular") and a mean preference that 52% of the estate go to the spouse.[59] The other study reported a plurality preference of 50% and a mean preference of around 59% to the spouse.[60] If, however, we confine the data set to intestate respondents, one study reported a plurality preference of 0% and a mean preference of just under 50% to the spouse.[61] The other study reported a plurality preference of 50% to the spouse and did not report a mean preference.[62] Overall, both studies suggest that "the popularity of allocating all of the intestate estate to the surviving spouse has waned."[63]

Neither of these studies asked respondents to explain their preferences, making the reasons for the discrepancy with earlier data a matter of conjecture.[64] One author speculates that the shift could reflect the growing visibility of blended families in the United States. If intestate parents in the 1970s could count on their surviving spouses to provide in turn for their children together, that prospect becomes less certain if a surviving spouse remarries following the death of the intestate parent.[65] Whatever the explanation, recent data conflict with the provision of the Code setting the spousal share in intestacy, which suggests that the Code, whose drafters relied on older empirical studies,[66] has become obsolete in its treatment of this issue.

Another variable complicates the matter. When one author segregated the data by the wealth of respondents, she found a correlation between wealth and preferences—the wealthier the respondents, the likelier they were to prefer to leave their entire estate to the surviving spouse.[67] This result reverses the pattern found in earlier studies indicating that individuals with

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[59] *Id.* at 14.

[60] *See* Poppe, *supra* note 56, at 160, 162.

[61] *See* Listokin & Morley, *supra* note 56, at 18.

[62] *See* Poppe, *supra* note 56, at 166–68.

[63] *Id.* at 168. A recent study based on panel data, confined to decedents with wills survived by spouses and children, found that 30% bequeathed to non-spouses, including small bequests, or 22% when limited to substantial bequests. Fahle, *supra* note 56, at 11 & n.13, 88–89. The author estimates that in wills that included bequests to non-spouse beneficiaries, the average fraction of the estate assigned to them was 49.5%. *Id.* at 12–13 & n.14, 30, 89.

[64] One study attributes the divergence between these results and prior studies to "the sampling biases inherent in probated will studies." Listokin & Morley, *supra* note 56, at 29. Yet, prior studies relying on survey evidence had likewise reported that respondents preferred to give larger fractions of their estates to spouses, even when data sets were confined to intestate individuals. *See* Contemporary Studies Project, *supra* note 46, at 1085 (reporting that a *majority* (56%) of intestate individuals preferred to leave 100% of their estates to their spouses, and a mean amount of 76%); *see also* Fellows et al., *Illinois Study*, *supra* note 42, at 728–29 (reporting that a majority (53.3%) of respondents preferred to leave 100% of their estates to their spouses, and a mean amount of 72.2% assuming the child was a minor, without separating testate and intestate respondents; whereas if the child was an adult, a plurality (41.2%) preferred to leave 100% to their spouses with a mean amount of 72.1%); Fellows, et al., *Public Attitudes*, *supra* note 42, at 359 (reporting that a majority of respondents preferred to leave 100% of their estates to their spouses, without separating testate from intestate respondents); Glucksman, *supra* note 32, at 267–70 (reporting complex preferences).

[65] *See* Poppe, *supra* note 56, at 153–54.

[66] *See supra* notes 53–55 and accompanying text.

[67] *See* Poppe, *supra* note 56, at 168–73.

greater means were *more* inclined to divide their estates between a spouse and children.[68] The author offers no speculation about the cause of this statistical inversion.

The drafters of the Code could account for the variable of wealth by aligning the rule with the average size of intestate estates. The problem is that this number varies geographically, and insufficient data on the matter has yet to emerge.[69] To establish a uniform rule, the drafters would have to arrive at a nationwide estimate, which oversimplifies the problem. The better approach, surely, is for lawmakers to incorporate the metric of wealth into the rule by establishing a ladder of alternative outcomes, as the Code already does in other contexts.[70] For the smallest net estates, the surviving spouse and children would divide the estate; for the largest ones, the surviving spouse would take more. The Code's drafters could derive such a stratified rule from existing data.[71]

If an intestate decedent leaves behind a surviving spouse and at least one child from another marriage or relationship, the Code establishes a different rule. Under the original version of the Code, the spouse received half the estate and the children divided the other half.[72] Under these conditions, the drafters reasoned, intestate decedents could no longer count on surviving spouses to provide in turn for children with whom they might not have a parental relationship.[73] As revised in 1990, the Code reserves a minimum share for the surviving spouse and then divides the estate equally between spouse and children above that amount.[74] Under this formula, the amount the spouse receives varies with the size of the estate.

Only one of the recent surveys tabulated data regarding respondents' preferences when they have children from another marriage or relationship along with a surviving spouse. The study reported a plurality preference of 0% going to the spouse (but now 100% was almost equally popular!) and a mean preference of 48% going to the spouse, just 4% below the mean allocation when all of the children are within the marriage.[75] Earlier surveys indicated that when children outside the marriage exist, respondents preferred to divide their estates between the spouse and children, but those

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[68] *See* SUSSMAN ET AL., *supra* note 27, at 89–90; Contemporary Studies Project, *supra* note 46, at 1089. The drafters of the Code relied on this evidence. *See* UNIF. PROB. CODE § 2-102 cmt. (UNIF. L. COMM'N, amended 2019). *But see* Fellows et al., *Public Attitudes*, *supra* note 42, at 362–64 (finding that the variable of wealth was statistically insignificant under these facts).

[69] *Compare* Horton, *supra* note 48, at 627 (finding that the average intestate estate in Alameda County, California was $530,704 in 2007), *with* Wright, *supra* note 48, at 682 (finding that the median intestate estate in Alachua County, Florida was $17,400 in 2013); *see also* Stein & Fierstein, *supra* note 18, at 82–83 (reporting earlier data)..

[70] *See, e.g.*, UNIF. PROB. CODE §§ 2-102(2)–(4) (UNIF. L. COMM'N, amended 2019).

[71] *See* Poppe, *supra* note 56, at 169–70 (reporting data for four wealth categories, including zero and negative wealth, but without calculating mean preferences). The other recent study solicited data on income rather than wealth and found similarly that higher income is associated with greater generosity toward spouses. *See* Listokin & Morley, *supra* note 56, at 12, 24. Under a stratified rule, the specified thresholds could be adjusted for inflation. *See* UNIF. PROB. CODE § 1-109 (UNIF. L. COMM'N, amended 2019).

[72] *See* UNIF. PROB. CODE § 2-102(4) (UNIF. L. COMM'N, pre-1990 art. 2).

[73] *See id.* § 2-102 cmt. (UNIF. L. COMM'N, amended 1990).

[74] *See id.* §§ 1-109(b), 2-102(4)) (granting the first $150,000 to the surviving spouse, adjusted for inflation).

[75] *See* Listokin & Morley, *supra* note 56, at 16.

respondents allocated larger shares to the spouse than recently reported, again suggesting that the mores of inheritance have evolved.[76]

One of the early studies reported that the wealth of respondents had no significant impact on preferences under these facts,[77] a result that calls into question the Code's current formula of reserving a minimum share for the surviving spouse.[78] But the same study raises the question whether the rule laid down in the Code is sufficiently refined in another way. The study found disparities between respondents' preferences when the child outside the marriage was living with the other parent or living with the respondent and the spouse.[79] The most recent survey failed to differentiate those scenarios, suggesting the need for additional research into this question.[80] On reflection, this factor could prove double-edged: on one hand, if the child is living with the respondent and the spouse, then the respondent might feel closer to the child;[81] but on the other hand, under these conditions, the respondent could calculate that the current spouse is also sufficiently close to the child to provide in turn for that child.[82] At any rate, if modern evidence supports the distinction, drafters could incorporate it into the Code's rule of intestacy objectively by differentiating shares on the basis of custody.

If a spouse and no descendants survive the intestate decedent, but one or both of the intestate decedent's parents survive, then under the Code, the estate is divided between the surviving spouse and parents. Under the original version of the Code, the spouse took the first $50,000 plus half of the balance, and the parents received the rest.[83] The revised Code tips the scales toward the spouse, granting the spouse the first $300,000 plus three-quarters of the balance and reserving the rest for the parents.[84] Once more, the Code offers a string citation to older empirical studies in support of this rule.[85]

The latest empirical studies have again found patterns of peaks and valleys along the range of preferences rather than a steady progression of preferences. One study, based on an electronic survey of 1,975 respondents

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[76] *See* Contemporary Studies Project, *supra* note 46, at 1094–95 (reporting a mean preference of 58% to the spouse under these facts and not reporting plurality preferences); Fellows et al., *Illinois Study*, *supra* note 42, at 728–29, 732 (reporting a plurality preference of 50% to the spouse, and a mean preference of either 50.3% or 56.7% to the spouse, depending on whether the child outside the marriage lives or does not live with the respondent and the spouse); Fellows et al., *Public Attitudes*, *supra* note 42, at 366, 390–91 (reporting a plurality preference of 50% to the spouse and not reporting mean preferences).

[77] *See* Fellows et al., *Public Attitudes*, *supra* note 42, at 366–67, 390–91. A still earlier study of probate records for wills had detected evidence of a disparity of intent connected to the size of the estate under these facts, but "the number of multiple marriage cases is too small to make reliable generalizations." *Id.* at 365; *see also* SUSSMAN ET AL., *supra* note 27, at 91, 93–94 (presenting evidence from a data set of 28 wills).

[78] *See supra* note 74 and accompanying text.

[79] *See* Fellows et al., *Illinois Study*, *supra* note 42, at 728–29, 732 (reporting data detailed, *supra* note 76). Other relevant factors suggested by the prior probate study were the length of the current marriage and whether the previous marriage had ended in death or divorce. *See* SUSSMAN ET AL., *supra* note 27, at 91, 93–94 (observing that "[t]he divorces in these cases often resulted in alienation and isolation of the testators from their children.").

[80] *See* Listokin & Morley, *supra* note 56, at 15–16. A modern study should also address the case of shared custody, in which the child spends some time in each household.

[81] *See* SUSSMAN ET AL., *supra* note 27, at 93–94 (quoted *supra* note 79). *But cf. infra* note 114 and accompanying text (addressing divisions among children, not necessarily tied to preferred divisions between spouse and children).

[82] *See infra* text at notes 129–138 (reporting data on intent to provide for stepchildren).

[83] *See id.* § 2-102(2) (UNIF. L. COMM'N, pre-1990 art. 2).

[84] *See id.* § 2-102(2) (UNIF. L. COMM'N, amended 2019).

[85] *See id.* § 2-102 cmt.

polled in 2019, found that a plurality of respondents preferred to leave 100% of their estate to their spouse and a mean amount of 69.16% under these facts.[86] When the data set was confined to those who were intestate (1,134 respondents), the plurality response remained unchanged, and the mean amount fell slightly to 66.84%, whereas when the data set was instead confined to those who were married (1,027 respondents), the plurality response remained unchanged, and the mean amount rose to 79.0%.[87] The other recent study, polling 8,500 respondents, similarly reported that a plurality of respondents preferred to leave 100% of their estate to their spouse and a mean amount of 69% under these facts.[88]

Whereas the Code has shifted in the direction of allocating more to the spouse, the contrast between recent and older data suggests that preferences are moving in the opposite direction, toward a pattern of allocating less to the spouse under these facts.[89] If we focus on plurality preferences, the Code fails to allocate enough to the spouse. If we focus instead on mean preferences, recent data suggest that the Code is too generous to the spouse, although the numbers fail to deviate sharply from a three-quarter share for the spouse, as the Code currently provides. Furthermore, under the Code, the fraction of the estate that the spouse receives decreases as the estate grows larger.[90] Regression analysis suggests, on the contrary, that wealth is positively correlated with intent to provide a larger fractional share for the spouse.[91]

The only survey that has ever examined preferences when an intestate decedent is survived by a spouse but not children or parents found, remarkably, that respondents wish to allocate only a mean amount of 58% of the estate to the spouse.[92] Under the Code, the spouse would receive the entire estate under these facts.[93] This finding needs to be corroborated, and further studies should also investigate which heirs respondents prefer to benefit along with the spouse under these circumstances.

There remains the issue of who should qualify as a surviving spouse for purposes of intestacy. The Code provides that "divorce" terminates an individual's status as a surviving spouse.[94] By negative inference, a spouse retains that status under the Code until such time as a divorce is finalized, notwithstanding legal or de facto permanent separation of the couple.

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[86] *See* Emily S. Taylor Poppe, *Choice Building*, 63 ARIZ. L. REV. 103, 130–32 (2021).

[87] *See id.* (not reporting data for respondents who were both intestate *and* married).

[88] *See* Listokin & Morley, *supra* note 56, at 16–17.

[89] *See* Contemporary Studies Project, *supra* note 46, at 1099, 1124 (finding that a majority (73%) of respondents would want the spouse to receive the entire estate, rising to 92% of respondents if the parents were "financially secure" and falling to 54% if the parents were "less well off"); Fellows et al., *Illinois Study*, *supra* note 42, at 725–26 (finding that a majority (58.6%) of respondents would want the spouse to receive the entire estate if both parents survived, with a mean amount of 77.5% to the spouse; 54.4% of respondents would want the spouse to receive 100% if only the mother survived, with a mean amount of 78.3% to the spouse; and 59.7% of respondents would want the spouse to receive 100% if only the father survived, with a mean amount of 81.7 to the spouse); Fellows et al., *Public Attitudes*, *supra* note 42, at 351 (finding that a majority (70.8%) of respondents would want the spouse to receive the entire estate if the respondent was survived by a spouse and mother); *see also id.* at 350 n.110 (summarizing still older studies). For a prior discussion, see Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 180–85 (2006).

[90] *See* UNIF. PROB. CODE § 2-102(2) (UNIF. L. COMM'N, amended 2019).

[91] *See* Poppe, *supra* note 86, at 136, 154.

[92] *See* Listokin & Morley, *supra* note 56, at 17 (not reporting a plurality preference).

[93] UNIF. PROB. CODE § 2-102(1)(A) (UNIF. L. COMM'N, amended 2019).

[94] *See id.* §§ 1-201, 2-802 (failing expressly to define divorce).

This result conflicts with evidence from a study in 2016 that electronically polled 333 respondents who were in the process of divorcing but were not yet divorced, and another 333 who were either legally or de facto permanently separated from their spouses.[95] Among spouses who were in the process of divorcing, a plurality (37.9%) wished to leave nothing to the other spouse, and a majority (59.2%) wished to leave the other spouse less than half or nothing—a proportion that increased to 64.8% when the data set was limited to intestate respondents.[96] Similarly, 57.8% of permanently separated spouses preferred to leave the other spouse less than half or nothing, with nothing being the preference of a plurality—and again, intestacy magnified this preference.[97]

These data suggest that the drafters of the Code should redraw the line distinguishing marriage from divorce. For purposes of intestacy, a spouse ought to lose that status either when the couple legally separates or when spouses file for divorce.[98] De facto permanent separation might reasonably have the same effect, although it would require definition (perhaps based on a list of relevant factors) and the sort of evidentiary inquiry that intestacy law has traditionally eschewed.[99]

At the other end of the spectrum, a survey from 2016 also polled 334 respondents who were engaged to be married to gauge their distributive preferences. A supermajority (79.5%) preferred to leave their fiancé either all (43.3%) or half (36.2%) of their estate.[100] These proportions fell slightly for intestate respondents but not enough to alter majority preferences.[101]

Three other studies—one from before and the other two after the legalization of same-sex marriage[102]— examined the preferences of unmarried cohabitants. The first study was based on a telephonic survey in 1996 of 256 respondents broken into three cohorts: respondents with same-sex partners, those with opposite-sex partners, and the general public.[103] Respondents reported how they would prefer to divide their estates between their partner and parents. Whereas a majority of respondents with same-sex partners (64.7%) preferred to leave the entire estate to their partners, a plurality of respondents with opposite-sex partners (42.4%) wished to leave half the estate to their partners.[104] If the respondent was instead survived by

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[95] *See* Hirsch, *supra* note 23, at 258–60, 271–72.

[96] *See id*. at 258–59. The results, however, were not consistent by gender. Among women, 64.8% of divorcing respondents wished to leave less than half or nothing to their spouse, whereas only 50.0% of men shared that preference. *See id.* at 259. A default rule of intestacy "personalized" for each gender appears politically unrealistic, however. *See supra* note 40 and accompanying text.

[97] *See* Hirsch, *supra* note 23, at 271–72. The presence or absence of a decree of legal separation did not significantly affect the data, but a gender divide reappeared: Whereas 61.5% of women wished to leave their permanently separated husband less than half or nothing, only 49.5% of men shared that preference. *See id.*

[98] Under nonuniform legislation, a decree of legal separation blocks intestacy rights in two states: California and Louisiana. *See id.* at 274.

[99] The mechanical operation of intestacy law facilitates planned intestacies and reduces decision costs. *See supra* note 37 and *infra* note 351 and accompanying text. The Code conforms to this conventional pattern. *See, e.g.*, UNIF. PROB. CODE §§ 2-101–14 (UNIF. L. COMM'N, amended 2019).

[100] Hirsch, *supra* note 23, at 249–50.

[101] *See id.* The proportion of men wishing to leave all or half of their estates to their fiancées was higher than among women, but the same majority preference appeared for both groups. *See id.* at 250.

[102] *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[103] *See* Mary Louise Fellows, Monica Kirkpatrick Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 MINN. J.L. & INEQ. 1, 31 (1998).

[104] *See id.* at 38–41.

one or more children, most preferred an equal division between partner and children.[105]

A more recent study, based on an electronic survey of 1,975 respondents polled in 2019, assumed that respondents were survived by a parent, no children, and a partner (without distinguishing between partners of the same or opposite sex).[106] Preferences once more ranged along the full scale of alternatives with peaks at 0%, 50%, and 100%. Among all respondents, the plurality preference was to leave 50% of the estate to the nonmarital partner, and the mean preference was to leave 45.7% to the partner.[107] Among the subset of respondents who actually had a nonmarital partner (174 out of 1,975 respondents), the plurality preference was again to leave 50% to the partner, and the mean preference was to leave 54.4% to the partner.[108]

Another recent study was based on an electronic survey of 500 respondents who actually had a nonmarital partner.[109] The study found the same sort of trimodal pattern but reported somewhat less generosity toward the partner than the previous study. Here, the plurality preference was 0% of the estate to the partner, and the mean preference was 43% to the partner when the respondent had a living parent but no children.[110]

These studies again suggest that the Code's focus on marriage as the sole criterion of spousal rights in intestacy is incompatible with the data. Of course, engagement and romantic partnership comprise relationships that—like de facto separation—are not legally formalized and, as such, would implicate evidentiary inquiries (perhaps based on a factors test) that would impose burdens on courts. Courts have borne those burdens in other contexts, but legislators enacting intestacy statutes have sidestepped them by relying on objective criteria.[111] Evidentiary burdens present legitimate concerns but might not prove insurmountable. If drafters anticipate resistance and wish to preserve the appeal of a Uniform act, they can designate unorthodox provisions as optional sections.[112]

B. DESCENDANTS

Under the Code's intestacy provisions, children share equally, regardless of their age, gender, or means.[113] This equation corresponds with empirical evidence from a multitude of studies drawing on different sources of data, although none of them are cited in the Code.[114] Likewise, under the Code,

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[105] *See id.* at 47–50.

[106] *See* Poppe, *supra* note 86, at 137–43.

[107] *See id.* at 137–39.

[108] *See id.* at 137–40. Further limiting the data to the subset of respondents who were both intestate and had a nonmarital partner changed the mean preference only slightly (54.2%). *See id.* at 141 n.213.

[109] *See* Listokin & Morley, *supra* note 56, at 10.

[110] *See id.* at 14, 16–17 (also reporting respondents' preferences toward nonmarital partners in other scenarios).

[111] *See* Hirsch, *supra* note 23, at 245–48 (noting how engagement can affect other legal rights).

[112] *See* Ronald R. Volkmer, *Uniform Trust Code's Influence in Various States*, 39 EST. PLAN., Sept. 2012, at 41, 42 (noting a provision of the Uniform Trust Code that "proved to be so controversial that the Uniform Law Commission . . . ma[de] it an 'optional' provision.").

[113] *See* UNIF. PROB. CODE §§ 2-103(c), 2-106(b) (UNIF. L. COMM'N, amended 2019).

[114] *See id.* §§ 2-103 cmt., 2-106 cmt.; SUSSMAN ET AL., *supra* note 27, at 96–98, 101; Jere R. Behrman & Mark R. Rosenzweig, *Parental Allocations to Children: New Evidence on Bequest Differences Among Siblings*, 86 REV. ECON. & STAT. 637, 638–40 (2004); Contemporary Studies Project, *supra* note 46, at 1101–02; Fahle, *supra* note 56, at 20–22; Fellows et al., *Illinois Study*, *supra* note 42, at 736–37; Fellows et al., *Public Attitudes*, *supra* note 42, at 368–70; Debra S. Judge & Sarah Blaffer Hrdy, *Allocation of Accumulated Resources Among Close Kin: Inheritance in Sacramento, California, 1890-1984*, 13

nonmarital children share equally with marital children.[115] Additional empirical evidence supports this division, which the Code again fails to cite.[116] Even when a child has special needs, one early study found that respondents would prefer not to augment that child's share but rather would rely on other children (or the state) to provide for that child.[117]

One possible exception, identified in both early and more recent studies, arises in connection with a child who performs eldercare services for a parent. The provision of eldercare services prompts many testators, perhaps a majority, to differentiate bequests in the caregiver's favor.[118] Nonetheless, the Code drafters would have no way to achieve this result objectively. They could do so only by opening the door to extrinsic evidence, which would contravene traditional formulae for rules of intestacy.[119]

Another issue emerges from the fact that men can sire children without their knowledge. If a child remained unknown to a father throughout his lifetime, can the child nonetheless claim an intestate share as heir to the

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ETHOLOGY & SOCIOBIOLOGY 495, 510–16, 518 (1992); Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests*, 94 AM. ECON. REV. 1669, 1673 (2004); Kathleen McGarry, *Inter Vivos Transfers and Intended Bequests*, 73 J. PUB. ECON. 321, 335 (1999); Paul L. Menchik, *Unequal Estate Division: Is it Altruism, Reverse Bequests, or Simply Noise?*, *in* MODELLING THE ACCUMULATION AND DISTRIBUTION OF WEALTH 105, 111–12 (Denis Kessler & André Masson eds., 1988) [hereinafter Mechnik, *Unequal Division*]; Paul L. Menchik, *Primogeniture, Equal Sharing, and the U.S. Distribution of Wealth*, 94 Q.J. ECON. 299, 310, 314–15 (1980); Edward C. Norton & Courtney Harold Van Houtven, *Inter-Vivos Transfers and Exchange*, 73 S. ECON. J. 157, 164, 169 (2006); Edward C. Norton & Donald H. Taylor, Jr., *Equal Division of Estates and the Exchange Motive*, 17 J. AGING & SOC. POL. 63, 72–74 (2005); Schneider, *supra* note 55, at 424–25; Mark O. Wilhelm, *Bequest Behavior and the Effect of Heirs' Earnings: Testing the Altruistic Model of Bequests*, 86 AM. ECON. REV. 874, 880 (1996); *see also* JACQUELINE L. ANGEL, INHERITANCE IN CONTEMPORARY AMERICA 65, 85–86, 148 (2008) (presenting interview data); Britt, *supra* note 17, at 351 (reporting data from the 1880s); *infra* note 118 (citing additional studies); *cf.* Dunham, *supra* note 17, at 252–54 (finding a tendency toward differentiation); Marco Francesconi, Robert A. Pollack & Domenico Tabasso, *Unequal Bequests*, 157 EUR. ECON. REV. 1, 2 (2023) (finding a growing minority of testators differentiating bequests to children); Nigel Tomes, *Inheritance and Inequality Within the Family: Equal Division Among Unequals, or Do the Poor Get More?*, *in* MODELLING THE ACCUMULATION AND DISTRIBUTION OF WEALTH, *supra*, at 79, 94–96 (using older data, finding around half of wills deviated significantly from equality when wills that distributed nothing to children were excluded, a result disputed in Menchik, *Unequal Division*, *supra*, at 109-12). For a historical study, see SHAMMAS ET AL., *supra* note 55, at 42–47, 108–12, 202–04.

[115] *See* UNIF. PROB. CODE § 2-117 (UNIF. L. COMM'N, amended 2019).

[116] *See id.* § 2-117 cmt.; HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 307–09, 318–20 (1971) (reporting survey evidence); Contemporary Studies Project, *supra* note 46, at 1104–05, 1141; Fellows, et al., *Illinois Study*, *supra* note 42, at 728–29, 723–33, 736–37; Fellows et al., *Public Attitudes*, *supra* note 42, at 372–73.

[117] *See* Contemporary Studies Project, *supra* note 46, at 1125–26.

[118] *See id.* at 1128–29 (finding that only 38% of respondents prefer to divide their estates equally among children when one of them "took care of you [the respondent] in your old age"); Meta Brown, *Informal Care and the Division of End-of-Life Transfers*, 41 J. HUM. RES. 191, 198, 202–03 (2006) (finding that a smaller majority of testators bequeathed equally to children when testators had care needs than when they did not); Fahle, *supra* note 56, at 22–26, 54–56 (finding a "strong positive association" between bequests and caregiving by children) (quotation at 26); Max Groneck, *Bequests and Informal Long-Term Care: Evidence from HRS Exit Interviews*, 52 J. HUM. RES. 531, 531–33, 542, 544–45, 550–60, 562–63 (2017) (finding "a strong and significant correlation between children's caregiving and bequests," but still finding equal division to predominate) (quotation at 533); *see also* SUSSMAN ET AL., *supra* note 27, at 98–103, 118–19 (presenting anecdotal evidence); B. Douglas Bernheim, Andrei Shleifer & Lawrence H. Summers, *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045, 1058–68 (1985) (finding indirect evidence that bequests serve to reward caregiving); Norton & Taylor, *supra* note 114, at 77, 79–80 (same); *cf.* Donald Cox & Mark R. Rank, *Inter-Vivos Transfers and Intergenerational Exchange*, 74 REV. ECON. & STAT. 305, 308–11 (1992) (finding that services by children are compensated via inter vivos gifts, not bequests, and citing earlier studies); Norton & Van Houtven, *supra* note 114, at 167–69 (same); Light & McGarry, *supra* note 114, at 1675–79 (finding a variety of motives for unequal bequests).

[119] *See* UNIF. PROB. CODE § 2-101(a) (UNIF. L. COMM'N, amended 2019) (barring extrinsic evidence); *cf.* 33 R.I. GEN. LAWS ANN. § 33-1-6 (West 2023) (granting courts discretion to award up to $150,000 worth of real estate to a surviving spouse from an intestate estate).

father's estate? The Code is agnostic on the right to establish paternity following a father's death, leaving the issue in alternative optional provisions to either the "state's parentage act," other "state law," or the Uniform Parentage Act of 2017.[120] Under the Uniform Parentage Act, children can prove paternity postmortem, through genetic testing if necessary.[121]

Would men wish to provide an inheritance to children they never learned they had and, hence, with whom they could never have formed a parental relationship? I undertook an empirical study of this question in 2014, polling 489 men about their dispositive preferences by telephone.[122] A majority of men (61.4%) preferred that an unknown child inherit, even if they were married and had other children in wedlock (59.2%).[123] Among men who expressed this preference, a supermajority (83.3%) preferred that an unknown child inherit an equal share with known children, even if they were married and had children in wedlock (81.2%).[124] These data support treating unknown children like other children for purposes of intestacy. Therefore, the drafters ought to amend the Code to permit postmortem paternity proceedings unequivocally.

Under the Code, adopted children inherit as heirs equally with other children of the adoptive parents.[125] This rule accords with empirical evidence, which the Code yet again fails to cite.[126] At the same time, other rules of intestacy found in the Code pertaining to adoption—in particular, the Code's conflation of intestacy rights of children subject to confidential and open adoption, and of children adopted as minors and adults—appear facially questionable.[127] Nonetheless, no empirical evidence of intent exists regarding these matters.

Under the Code, unadopted stepchildren do not inherit alongside other children. They become heirs only if the spouse and all eligible blood relatives predecease the intestate decedent.[128] Empirical evidence from two recent studies calls this rule into question. The first study polled 109 stepparents electronically about their dispositive preferences regarding their

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[120] UNIF. PROB. CODE §§ 1-201(5), (9), (32) & Legislative Note to Paragraphs (5) and (32), 2-103(c) (UNIF. L. COMM'N, amended 2019).

[121] *See* UNIF. PARENTAGE ACT §§ 201(3), 203, 510, 605(3), 607(a), 616(a) (UNIF. L. COMM'N, amended 2017).

[122] *See* Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP. TR. & EST. L.J. 175, 228–29 (2015). The survey, conducted by the Public Mind Poll, also polled 502 women for whom the question was rephrased as a normative inquiry, since women are biologically incapable of having unknown children. The resulting data are, however, irrelevant for the determination of majoritarian defaults. *See id.* at 229–30.

[123] *See id.* at 230–31.

[124] *See id.*

[125] *See* UNIF. PROB. CODE § 2-118(a) (UNIF. L. COMM'N, amended 2019).

[126] *See id.* § 2-118 cmt.; Contemporary Studies Project, *supra* note 46, at 1104–05, 1141 (finding that 94% of respondents favored treating natural and adopted children equally); Judge & Hrdy, *supra* note 114, at 516–17, 519 (finding similar results in a study based on probate records). *But cf.* Light & McGarry, *supra* note 114, at 1675 (reporting more recent survey evidence from 1999 confined to women and finding a tendency to discriminate against adopted children regarding planned bequests).

[127] Under the Code, adopted children forfeit their right to inherit as heirs from their natural families even if the adoption was open, which allows natural parents to establish a relationship with children they gave up for adoption. The same principle applies to adult adoptions, which are necessarily open. *See* UNIF. PROB. CODE § 2-119(b) (UNIF. L. COMM'N, amended 2019). For a further discussion, see Hirsch, *supra* note 2, at 1088–90.

[128] *See* UNIF. PROB. CODE §§ 1-201(5), 2-103(j) (UNIF. L. COMM'N, amended 2019); *see also id.* § 1-201(5) (UNIF. L. COMM'N, pre-2019 art. 1) (explicitly excluding stepchildren from the definition of "child"). Under the original version of the Code, unadopted stepchildren did not qualify as heirs under any circumstances. *See id.* § 2-103 (UNIF. L. COMM'N, pre-1990 art. 2).

stepchildren.[129] A majority (56.9%) preferred to leave their stepchildren the same amount or more than a biological or adopted child.[130]

Neither gender nor wealth significantly affected these preferences.[131] The concurrent presence of biological or adopted children did not alter majority preferences, although it did shrink the scale of the majority.[132] But another variable proved more significant. Among stepparents whose stepchildren grew up in the stepparent's household "full time," 75% preferred that their stepchildren receive the same amount or more than natural children.[133] Among those whose stepchildren grew up in the stepparent's household "part-time," that number fell to 67%.[134] By comparison, among those whose stepchildren grew up "full time in the other biological parent's household," the number declined to a minority of 37%, with 27% wanting the stepchildren to inherit nothing.[135]

A subsequent study drawing on a larger data set of 716 stepparents corroborates these results.[136] The study reports that among stepparents who have no biological or adopted children, they would, on average, prefer to leave each stepchild 29.7% of the estate; among stepparents who also have biological or adopted children, they would on average prefer to leave each stepchild 13.2% of the estate and each natural or adopted child 25.7%.[137] Yet, among stepparents who had "ever lived with their stepchildren," they wished, on average, to leave each stepchild 19.7% of the estate. By contrast, among stepparents who had "never lived with stepchildren," they wished on average to leave each stepchild 9.9%—a dramatic difference that accords with the first study.[138] Quantitative and anecdotal evidence from sociological

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[129] *See* Courtney Bravo, Stepfamilies and Intestacy Law: A Proposal for Stepparent and Stepchild Inheritance 5 (2018) (unpublished study) (available at https://actecfoundation.org/wp-content/uploads/Stepfamilies-Intestacy-Law-A-Proposal-for-Stepparent-and-Stepchild-Inheritance-for-posting.pdf [https://perma.cc/B92R-NEK8]). The poll was conducted in 2018 by Qualtrics. The 109 respondents who had stepchildren were culled from a larger dragnet of 1,050 respondents. *See id.*

[130] *See id.* at 6. The 109 respondents included several who were either unsure of their preferences or for whom different answers applied to different stepchildren. *See id.* at 5–6.

[131] *See id.* at 7–8; *cf.* Kim Porter, *The Will of the Wealthy*, TR. & EST., Aug. 1999, at 56, 56 (reporting results from a poll of affluent respondents, finding that "[l]ess than 41 percent" felt that their natural children and stepchildren should inherit equally, without stratifying the results by the household in which stepchildren were raised).

[132] Among stepparents with no biological or adopted children, 65.5% wished to leave their stepchildren the same as or more than another child would receive, whereas among stepparents who also had biological or adopted children, 53.75% wished to leave their stepchildren the same as or more than other children. *See* Bravo, *supra* note 129, at 6.

[133] *Id.* at 9. This fraction reflected preferences among 44 respondents. When three respondents who were either unsure or for whom different answers applied to different stepchildren are eliminated, the fraction rose to 80.5%. *See id.* (based on my own calculation).

[134] *Id.* at 9–10. This fraction reflected preferences among 22 respondents. When three respondents who were either unsure or for whom different answers applied to different stepchildren are eliminated, the fraction rose to 73.7%. *See id.* (based on my own calculation)

[135] *Id.* at 10–11. This fraction reflected preferences among 30 respondents. When four respondents who were either unsure or for whom different answers applied to different stepchildren are eliminated, the fraction of respondents wanting stepchildren to receive the same or more than natural children rose to 42.3%, and the fraction wanting stepchildren to receive nothing rose to 36.4%. *See id.* (based on my own calculation).

[136] Yair Listokin & John Morley, A Survey of Preferences for Estate Distribution at Death, Part 2: Children and Other Beneficiaries 16 (2023) (unpublished study) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332182 [https://perma.cc/72VK-4FXC]). The 716 stepparents were culled from a larger dragnet 8,500 respondents, polled electronically through YouGov. *See id.* at 9.

[137] *See id.* at 15–16.

[138] *See id.* at 17. Although its data set is small, an additional recent study of probate records lends credibility to the survey evidence. Among 32 testators who "clearly identified" that they had stepchildren, a plurality (31%) made an equal division between children and stepchildren. An additional 25% of

studies on the formation of parental bonds between stepparents and stepchildren lend further support to these data.[139]

Viewed together, these results suggest that stepchildren who were in the full or shared custody of the spouse of an intestate decedent during their marriage (an objective criterion) should qualify as heirs alongside natural and adoptive children. The drafters ought to amend the Code accordingly.[140]

Even if the drafters are unprepared to go this far, they should reconsider two wrinkles in the Code that recent data call into question. Under the Code, if an intestate decedent is not survived by a spouse or collateral relatives, then his or her stepchildren, if any, will take before the estate escheats.[141] In light of the data, only stepchildren who were in the sole or shared custody of the intestate decedent's spouse during their marriage should qualify as heirs under this provision.

Also under the Code, if all the descendants of an intestate decedent are also descendants of the surviving spouse, but the surviving spouse has additional descendants who are not descendants of the intestate—that is, stepchildren of the intestate—then the surviving spouse does not take the entire estate. Instead, the spouse receives the first $225,000 plus half the balance of the estate, and the descendants of the intestate decedent receive the rest.[142] Under these facts, the drafters posit, "the [intestate decedent's] descendants are unlikely to be the *exclusive* beneficiaries of the surviving spouse's estate," raising the need "to assure the [intestate decedent's] own descendants of a share" consonant with intent.[143] Data suggest that this rule is reasonable if the Code must apply it across the board.[144] Yet, in those instances where stepchildren grew up in the intestate decedent's household, data cast doubt on the intestate decedent's disapproval of a surviving spouse sharing an inheritance with the intestate decedent's stepchildren. The drafters of the Code should amend the rule to apply only in those instances where the surviving spouse has descendants who are not descendants of the intestate

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testators provided for stepchildren when they had no other children. 13% left everything to stepchildren, disinheriting other children. But 26% favored children over stepchildren, either leaving stepchildren nothing or token bequests. The authors did not (and probably could not) differentiate between stepchildren who had or had not lived with the testator. *See* Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 368–69 (2017). For earlier studies, see SUSSMAN ET AL., *supra* note 27, at 110–13; Brown, *supra* note 118, at 202–03; Francesconi et al., *supra* note 114, at 2–4; Light & McGarry, *supra* note 114, at 1675–79; Norton & Van Houtven, *supra* note 114, at 169.

[139] *See* Hirsch, *Text and Time*, *supra* note 42, at 651 nn.183–84 (citing studies); Hirsch, *supra* note 2, at 1091 nn.261–62 (same). Studies suggest that bonds between a stepparent and stepchildren can even survive a subsequent divorce from the natural parent. *See* Hirsch, *Text and Time*, *supra* note 42, at 652 n.185 (citing studies).

[140] One nonuniform act has taken a step in this direction. *See* CAL. PROB. CODE § 6454 (West 2023). There are numberless anecdotal examples of estate plans reflecting this preference. *See, e.g.*, Ferguson v. Critopoulos, 163 So. 3d 330, 332 (Ala. 2014) (observing that "[a]lthough the decedent did not adopt [his stepchildren], it is undisputed that [they] enjoyed a parent-child relationship with the decedent . . . . [They] were named as the residual legatees under the decedent's will."); *see also* Isom v. Scarlatelli, No. E067988, 2019 WL 1482466, at *2–3 (Cal. Ct. App. Apr. 4, 2019) (concerning an estate plan that disinherited biological children in favor of a stepchild).

[141] *See* UNIF. PROB. CODE § 2-103(j) (UNIF. L. COMM'N, amended 2019).

[142] *See id.* § 2-102(3).

[143] *Id.* § 2-102 cmt. (emphasis in original). The original version of the Code created no separate rule for this scenario. *See id.* § 2-102 (UNIF. L. COMM'N, pre-1990 art. 2).

[144] *See* Fahle, *supra* note 56, at 17 n.19, 26–27 (finding on the basis of panel data that 49% of decedents with a spouse and children, together with stepchildren, left part of their estates to a non-spouse, versus 27% of those decedents with a spouse and children who lacked stepchildren).

decedent, *and* those descendants were not in the sole or shared custody of the spouse during their marriage.

Finally, there is the matter of dividing an estate among different generations of descendants. As regards divisions between living children and their descendants, the Code follows the traditional rule that living children supersede their progeny.[145] Empirical evidence bears out this approach, although the studies go unmentioned in the Code.[146]

As regards divisions between living children and the descendants of deceased children, and divisions among those descendants, the Code adopts the "per capita at each generation" formula, which ensures that all descendants of the same generation (namely, children, grandchildren, great-grandchildren, etc.) take coequal shares.[147] Quantitative studies support this choice, and in the accompanying comment the drafters cite one of them (although the comment misreports the data).[148] In this instance, empirical evidence did influence the formulation of the Code.

C. PARENTS AND SIBLINGS

Under the Code, if an intestate decedent leaves no spouse or children but is survived by either one or both parents as well as siblings, and all of the siblings are descended from the same parents as the intestate decedent, then the surviving parent or parents take the entire estate.[149] The Code cites no empirical evidence to defend this rule.[150] Nonetheless, one recent and two earlier studies investigated the issue. The recent study polled 2,033 respondents who have parents and siblings but no descendants. It found that, on average, respondents wish to provide equally for, or slightly favor, their siblings.[151] Similarly, one of the early studies found that a plurality of respondents preferred to leave equal shares to as many of their parents and siblings who survived them.[152] The other early study found that a plurality of

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[145] *See* UNIF. PROB CODE §§ 2-103(c), 2-106(b) (UNIF. L. COMM'N, amended 2019).

[146] *See id.* §§ 2-103 cmt., 2-106 cmt. The most recent study corroborates earlier ones. *See* Listokin & Morley, *supra* note 136, at 13. For earlier data, see Contemporary Studies Project, *supra* note 46, at 1105–06; Fellows et al., *Illinois Study*, *supra* note 42, at 737–38. *But cf.* Fellows et al., *Public Attitudes*, *supra* note 42, at 373–76, 391 (reporting a plurality preference in favor of providing a share for the child of a living child when the child of a deceased child simultaneously takes by representation and noting still earlier studies).

[147] *See* UNIF. PROB. CODE §§ 2-106(b), 2-106 cmt. (UNIF. L. COMM'N, amended 2019).

[148] *See id.* § 2-106 cmt. (citing Raymond H. Young, *Meaning of "Issue" and "Descendants"*, 13 ACTEC PROB. NOTES 225 (1988)). Young's study, polling 361 clients of ACTEC Fellows, found that 66.2% of respondents preferred per capita at each generation. *See* Young, *supra*, at 225. The Code's comment instead states that "[o]f 761 responses, 541 (71.1%) chose the per-capita-at-each-generation system" in "[a] survey of client preferences." *See* UNIF. PROB. CODE § 2-106 cmt. (UNIF. L. COMM'N, amended 2019). The data reported in the comment include 400 additional responses by *students* in classes of Academic Fellows of ACTEC, 75.5% of whom preferred per capita at each generation. *See* Young, *supra*, at 225. Three earlier surveys, uncited in the comment, yielded even stronger support for this system of representation. *See* Contemporary Studies Project, *supra* note 46, at 1108–16, 1146 app.J; Fellows et al., *Illinois Study*, *supra* note 42, at 739–42; Fellows et al., *Public Attitudes*, *supra* note 42, at 378–84. As amended in 2019, the Code extended this system to collateral relatives. *See* UNIF. PROB. CODE §§ 2-103(d)–(i), 2-106(c)–(f) (UNIF. L. COMM'N, amended 2019). No empirical evidence confirms this extension, although it follows logically from the data. *See* Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127, 131–41 (2021) (describing the new provisions without defending them empirically).

[149] *See* UNIF. PROB. CODE § 2-103(d)–(e) (UNIF. L. COMM'N, amended 2019).

[150] *See id.* § 2-103 cmt.

[151] Respondents on average wished to give 24.5% of their estate to parents and 30.5% to siblings. *See* Listokin & Morley, *supra* note 136, at 11–14.

[152] *See* Fellows et al., *Public Attitudes*, *supra* note 42, at 346–48.

respondents preferred to leave everything to their parents.[153] This evidence aside, the Code's rule conflicts with the most recent study, which suggests "generosity to siblings" under these facts.[154]

If, however, an intestate decedent is survived by only one parent and half-siblings who are not descended from the surviving parent, then under the Code as revised in 2019 the surviving parent takes half and the half-siblings divide the rest of the estate.[155] The Code offers no justification for this exception, empirical or otherwise.[156] The rationale appears to be that if a surviving parent supersedes siblings, the parent will provide for the siblings in turn, but not for half-siblings who are not the surviving parent's kin.[157] Whether this reasoning corresponds with the intent of intestate decedents has yet to be studied empirically. It does, though, rest on the assumption that intestate decedents wish to provide for their half-siblings. And that raises another question: Do intestate decedents, on average, feel the same benevolence towards half-siblings as they do towards their whole-blooded (or "full") siblings?

The Code assumes that the answer is yes. Under the Code, if no spouse, children, or parents survive, then siblings share the intestate estate equally regardless of whether they are full- or half-siblings.[158] At the same time, stepsiblings take no part of the estate.[159] Once again, the Code cites no empirical evidence in support of this formula.[160]

Only a single published study bears on the question. Over a six-year period between 2001 and 2006, the author of the study distributed a questionnaire to students enrolled in his Decedents' Estates course at the University of Memphis Law School, accumulating a data set of 357 respondents.[161] The questionnaire asked a series of four questions regarding distributive preferences to full- and half-siblings (but not stepsiblings) and then offered respondents the opportunity to give narrative explanations. As the author was aware, the respondents in this study did not form a random sample. They "were mostly young, white adults from middle-class Tennessee backgrounds, all of whom [held] a college degree."[162] Nonetheless, at the very least, the data hold clues about the preferences of intestate decedents generally.

The first question was generic. It asked how the estate of an intestate decedent who is survived by one full-sibling and one half-sibling should be

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[153] *See* Fellows et al., *Illinois Study*, *supra* note 42, at 724–25. The plurality preference accounted for 37.6% of respondents if one parent survived and approximately 40% if both survived. *See id.* The mean preference, however, was to leave 56.7% to a single surviving parent, and collectively 70.3% to the parents if both survived. *See id.*; *see also id.* at 725 n.22 (noting a still earlier study). For a further discussion, see Scalise, *supra* note 89, at 187–89.

[154] Listokin & Morley, *supra* note 136, at 12–13.

[155] *See* UNIF. PROB. CODE § 2-103(d)–(e) (UNIF. L. COMM'N, amended 2019). Siblings descended from a surviving parent take nothing under this formula. *See id.* Prior to the 2019 amendment, living parents superseded siblings without exception. *See id.* § 2-103(2) (UNIF. L. COMM'N, pre-2019 art. 2)

[156] *See id.* § 2-103 cmt. (UNIF. L. COMM'N, amended 2019).

[157] *See* Fellows & Gallanis, *supra* note 148, at 134–35, 138–39 (asserting vaguely that the amendment "respond[s] to blended families").

[158] *See* UNIF. PROB. CODE §§ 2-103(f), 2-107 (UNIF. L. COMM'N, amended 2019).

[159] *See id.*

[160] *See id.* §§ 2-103 cmt., 2-107 cmt. For formulae under nonuniform legislation, see SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS, AND ESTATES § 2.2, at 65–66 (6th ed. 2021); *infra* note 164.

[161] *See* Ralph Calhoun Brashier, *Half-Bloods, Inheritance, and Family*, 37 U. MEM. L. REV. 215, 260–61 (2007).

[162] *Id.* at 259 n.154.

distributed between them.[163] A plurality of respondents (33.6%) chose to divide the estate evenly between the two, followed closely by 31.7% who would grant a double portion to the full-sibling.[164] Among sixty-one respondents who actually had both full- and half-siblings, an enlarged plurality (42.6%) favored distributing equal shares to each one, in accord with the Code's approach.[165]

The remaining questions dug deeper. Another scenario presented respondents with the case of a full-sibling and an illegitimate half-sibling who "[were] reared in the same household" with the intestate decedent.[166] A majority of respondents (58.6%) favored distributing the estate equally between them under these facts.[167] Among respondents who actually had full- and half-siblings, the majority grew to 73.8%.[168] The social experience of a common upbringing appears to beget fraternal affection, which the Code assumes.[169]

A third scenario altered preferences. When the illegitimate half-sibling "did not grow up in the same household" with the intestate decedent and the full-sibling, a plurality of respondents (44.1%) favored excluding the half-sibling; the next most common preference (31.6%) was to award the full-sibling a double portion.[170] Among respondents who actually had full- and half-siblings, a plurality (36.1%) again chose to exclude the half-sibling; the next most common preference (34.4%) was again to grant the full-sibling twice as much as the half-sibling.[171] The social experience of broken or diminished contact appears, by the same token, to attenuate fraternal affection.[172] Individuals might never have even met their half-siblings. Only 16.1% of all respondents and 19.7% of respondents who actually had full- and half-siblings favored an equal division between them under these circumstances—yet the Code so provides.[173]

A final question posed the scenario of an intestate decedent who was survived by a full-sibling and an illegitimate half-sibling whose existence was unknown to the intestate decedent.[174] A supermajority of respondents (76.5%) favored excluding the unknown half-sibling.[175] Among respondents who actually had full- and half-siblings, a slightly larger supermajority (78.7%) wished to exclude the unknown half-sibling.[176] These data again

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[163] *See id.* at 261.

[164] *See id.* at 261, 264. A few states apply the double-portion formula under nonuniform legislation. *See, e.g.*, FLA. STAT. ANN. § 732.105 (West 2020).

[165] *See* Brashier, *supra* note 161, at 262, 264. Among 35 respondents with a half-sibling only, a plurality of 37.1% favored equality. *See id.*

[166] *Id.* at 269.

[167] *See id.* at 269, 271.

[168] *See id.* Among respondents with half-siblings only, 79.4% favored equality. *See id.*

[169] The respondents' anecdotal explanations tended to bear out this social reality. *See id.* at 276 n.175.

[170] *Id.* at 272, 274.

[171] *See id.*

[172] Again, the respondents' anecdotes supported this social reality. *See id.* at 277 n.176. For sociological investigations of the two scenarios generally supporting the legal distinction suggested by the data, see Hirsch, *supra* note 2, at 1092 n.267 (citing to sociological studies and other discussions).

[173] *See* Brashier, *supra* note 161, at 272–74. Among respondents with half-siblings only, a plurality (44.1%) preferred to exclude the half-sibling; the next most common response (29.4%) would grant the full-sibling a double-portion. Only 17.6% of respondents would give equal shares to each. *See id.* at 274.

[174] *See id.* at 265.

[175] *See id.* at 265, 268.

[176] *See id.* at 266, 268. Among respondents with half-siblings only, 74.3% preferred to exclude the unknown half-sibling. *See id.*

contradict the Code, which draws no distinction between known and unknown siblings.[177] The data also contrast with the preferences of fathers to provide for unknown children that we noted earlier.[178] Whereas fathers might feel a sense of responsibility toward all of their offspring, respondents displayed no comparable feelings toward unknown siblings, whose conception (if anything) they might resent.[179]

In an original study undertaken for this Article, I used an algorithm to generate a data set of published cases in which testators distributed bequests between beneficiaries who were identified as full- and half-siblings.[180] My goal was to add a layer of evidence to the preexisting survey evidence. The data set proved to be of limited usefulness. The algorithm generated forty-two cases (plus a forty-third case, identified otherwise), just three of which concerned wills that had been probated after 1960, too few to establish a decisive statistical pattern.[181] Furthermore, only two of the cases provided background information concerning whether half-siblings and testators grew up in the same household, a variable found to be significant in the survey.[182]

In any event, the salient characteristic of testators' preferences revealed by this body of cases is heterogeneity. In five out of the forty-two cases (11.6%), the testator made bequests only to full-siblings, disinheriting half-siblings. In a further four cases (9.3%), only some of the half-siblings were disinherited, and the rest received equal shares with full-siblings. In eleven cases (25.6%), full-siblings received greater shares than half-siblings. In two of those eleven cases, half-siblings received exactly one-half shares, as mandated by several nonuniform statutes.[183] In one case (2.3%), only some half-siblings received less; the rest were treated equally with full-siblings. In eight cases (18.6%), testators treated full-siblings and half-siblings equally, as under the Code. In five cases (11.6%), individual full- and half-siblings were disinherited (or received less) than others. In four cases (9.3%), half-siblings were systematically favored over full-siblings. And in the remaining five cases (11.6%), the opinions failed to clarify the relative value of shares received by full- and half-siblings.

In the one case where evidence revealed that full- and half-siblings had grown up in separate households, the testator favored full-siblings over half-siblings—yet the same was true in the one case where evidence suggested that they had grown up in the same household.[184] Two more cases revealed

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[177] *See* UNIF. PROB. CODE § 2-103(f) (UNIF. L. COMM'N, amended 2019).

[178] *See supra* text accompanying notes 122–124.

[179] For anecdotal responses in the survey, see Brashier, *supra* note 161, at 275 n.173.

[180] The data presented below are available on request to the author. Additional published cases involving bequests to full- and half-siblings probably exist, but the algorithm only located opinions that identified individuals as half-siblings. Testators often describe half-siblings simply as siblings in their wills. *See, e.g.*, First Nat'l Bank of Toms River v. Levy, 195 A. 820, 822–23 (N.J. Ch. 1938). In other cases, half-siblings, full-siblings, or both might have been disinherited without being mentioned anywhere in either wills or the ensuing opinions.

[181] A forty-fourth case identified by the algorithm, concerning a will dividing between full- and half-siblings, was held void for lack of testamentary capacity and undue influence. *See* Shepherd v. Jones, 461 S.W.3d 351, 359 (Ark. Ct. App. 2015).

[182] *See infra* note 184.

[183] *See supra* note 164. In an odd apostrophe, one of these testators interrupted his will to address legislators: "This distinction between own and half brothers and sisters I believe to be right and should be incorporated in the statutes for the distribution of estate[s]." *In re* Shumway's Estate, 160 N.W. 595, 596 (Mich. 1916) (quoting will).

[184] *See* Roberts v. Kennealy (*In re* Miner's Estate), 288 P. 120, 121–22 (Cal. Dist. Ct. App. 1930) (disinheriting half-siblings in favor of full-siblings because, as the testator stated, "she hardly knew [her half-siblings] until a short time ago") (internal quotation marks omitted); Lee v. Polk (*In re* Will of Polk),

other reasons for discrimination. Either the disfavored siblings were insolvent, or they had less need than others.[185] In short, a testator was liable to have "had different relationships with his siblings," which led to their disparate treatment under wills.[186] Testators' propensities to treat their children equally, noted earlier, did not extend to their siblings.[187]

Ideally, we would supplement these data with a more authoritative electronic survey, although the cost of a study pinpointing respondents who have both full- and half-siblings (or stepsiblings) would be high. It is worth noting, however, that quantitative studies in the realm of sociology buttress the survey evidence regarding half-siblings. As summarized by the leading sociologists working in this area, "[h]alf siblings who live together all of the time or most of the time generally think of each other simply as siblings. The 'half' is a meaningless abstraction to these siblings," whereas "when children have little contact, distinctions between full- and half-siblings are more common; in these situations, the 'sibling' part of the label half-sibling is the meaningless abstraction."[188] Whether this analysis, and distinction, applies to stepsiblings is less clear. The same duo of sociologists report that "in general, stepsibling relationships are not as close as sibling relationships, both during childhood and as adults. . . . Those who have a sibling relationship likely shared a residence together over an extended period of time."[189]

No researcher has yet surveyed benefactors' preferences regarding stepsiblings.[190] Until such a study appears, stepsiblings should remain excluded from intestate succession under the Code. But as a window into preferences regarding half-siblings, the current mélange of survey evidence, case evidence, and sociological evidence ought to suffice. If the drafters insist on promulgating a single, simple rule, then these data support leaving

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497 So. 2d 815, 816 (1986) (leaving "monetary amounts" to half-siblings and the residue to the testator's full-sister, although her parents had divorced when the testator and her full-sister "were quite young," and her mother "remarried having five children in her second marriage.").

[185] *See* Rady v. Staiars, 168 S.E. 452, 452 (Va. 1933) (disinheriting a half-sibling because a bequest "would be taken for his debts."); King v. Gilson, 90 S.W. 367, 368 (Mo. 1905) (leaving only personal property to a half-sibling "as she and her family are well provided for.").

[186] *Shepherd*, 461 S.W.3d at 354; *see also id.* at 356 (noting testimony by one sibling that he and the testator "were not close" and by another sibling that "her relationship with [the testator] was closer than with her other siblings").

[187] *See supra* note 114 and accompanying text. Prior studies based on probate records, which failed to distinguish full- and half-siblings, likewise observed heterogeneity. *See* Dunham, *supra* note 17, at 254 (finding that 89% of testators with surviving siblings made unequal divisions between them); Schneider, *supra* note 55, at 432 (finding that out of 43 wills where testators' closest survivors were siblings, only 16 bequeathed to the siblings equally and the rest "gave their property to a named person, often giving little or nothing to their siblings.").

[188] LAWRENCE H. GANONG & MARILYN COLEMAN, STEPFAMILY RELATIONSHIPS 164 (2004) (citing to studies); *see also* Hirsch, *supra* note 2, at 1092 n.267 (collecting additional references). *But cf.* Melinda E. Baham, Amy A. Weimer, Sanford L. Braver & William V. Fabricius, *Sibling Relationships in Blended Families*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES 175, 200–01 (Jan Pryor ed. 2008) (finding statistical evidence that "[c]ontrary to prediction, the greater this length of time [since the child began living with the stepfather], the poorer was the child's relationship with his or her half-sibling.").

[189] GANONG & COLEMAN, *supra* note 188, at 168 (citing to studies).

[190] For a sociological study pertinent to the question, see Constance R. Ahrons, *Family Ties After Divorce: Long-Term Implications for Children*, 46 FAM. PROCESS 53, 61 (2007) (reporting that "[f]ewer than one third of the children in the study think of their stepsiblings as brothers and sisters. Those who do are more likely to have lived with them, either for partial weeks or for an extended period."). My algorithm identified only two cases in which testators were survived by siblings and stepsiblings. In one case, the testator benefited them equally. *See In re* Wood's Estate, 17 Pa. D. & C. 770, 771 (Orphan's Ct. 1932). In the other case, the testator gave larger shares to his full-siblings than to one stepsibling and disinherited the other stepsibling. *See In re* Todd's Estate, 33 Pa. Super. 117, 118–19 (1907).

the current provision in the Code unchanged. Yet, the data suggest that the Code's approach is insufficiently refined. The drafters ought to grant equal shares to full-siblings and to those half-siblings who were in the sole (or perhaps shared) custody of the parent whose marriage produced the intestate decedent during the intestate decedent's minority. Courts could apply this objective standard to a scheme of intestacy without the need for a costly investigation. Half-siblings who fail the test should not qualify as heirs under the Code.

Data concerning half-siblings simultaneously undermine the drafters' decision in 2019 to favor half-siblings over full-siblings when a parent also survives, granting nothing to full-siblings but a one-half share divided among half-siblings who were not descendants of the surviving parent.[191] If half-siblings unrelated to a surviving parent were raised in a different household, then we can infer from the data just presented that the intestate decedent would probably favor the surviving parent over them; whereas, if half-siblings unrelated to a surviving parent were raised together with the intestate decedent, then the decedent could assume that the parent would provide in turn for half-siblings because they comprised stepchildren raised as minors in the stepparent's household, as other data suggest.[192] The theory that an intestate decedent would want to protect half-siblings from disinheritance by a surviving parent is illogical in this context.[193] The drafters have no reason to distinguish full- from half-siblings raised in the same household for any purposes. Nonetheless, in light of recent data, the drafters could reasonably divide an intestate estate between a surviving parent and all siblings (full and half) raised in the same household, as we have seen.[194]

D. DISTANT RELATIVES AND ESCHEAT

If no heir survives the intestate decedent, then the estate escheats to the state.[195] No explanatory comment accompanies this provision.[196] Yet, we can infer that the drafters themselves doubted it would effectuate intent. Whereas the Code ordinarily requires an heir to survive the intestate decedent by 120 hours, thereby taking into account mutual catastrophes, the drafters waive this requirement when the alternative taker is the state.[197] The drafters sensed that intestate decedents would prefer to provide even for soon-to-be deceased heirs over a governmental beneficiary.

We now have empirical evidence on preferred distributions of estates in lieu of heirs, as reported in a study from 2018.[198] The author of the study conducted an electronic survey of 1,050 respondents about their preferred distributions should the respondents leave no heirs.[199] Only 1.9% (17 out of

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[191] *See* UNIF. PROB. CODE § 2-103(d)–(e) (UNIF. L. COMM'N, amended 2019); *supra* notes 155–157 and accompanying text.

[192] *See supra* notes 135–138 and accompanying text.

[193] *Cf. supra* note 157 and accompanying text.

[194] *See supra* notes 151–154 and accompanying text.

[195] *See* UNIF. PROB. CODE § 2-105 (UNIF. L. COMM'N, amended 2019).

[196] *See id.*

[197] *Id.* § 2-104 (c) .

[198] *See* Amanda Leckman, Does Escheat Cheat Decedents? 10 (2018) (unpublished study) (available at https://actecfoundation.org/wp-content/uploads/Does-Escheat-Cheat-Decedents-for-posting.pdf [https://perma.cc/6EBN-DQEZ]).

[199] The survey was conducted by Qualtrics. The question was phrased as a hypothetical: "Sometimes people die without leaving anyone behind to collect an inheritance. If this happened to you, who would you want to inherit your property?" *Id.* at 10–11.

903 respondents, eliminating 147 who were unsure of their preferences) would want the "state government" to receive their estates—the least popular of all the options presented in the survey.[200]

But what alternative beneficiary would respondents prefer? A follow-up question asked respondents whether, in the absence of heirs, they "would . . . be comfortable or uncomfortable with letting the court determine which choice of beneficiary is most important to you?"[201] This question explored whether a discretionary hearing on the issue would appeal to respondents, which could pave the way for a distribution to friends or a favorite charity.[202] Respondents reacted negatively to the idea. Eliminating the 14.5% of respondents who were unsure, 64.5% opposed a discretionary hearing and 35.5% favored one.[203]

Among the discrete options offered to respondents, the plurality choice (21.0%) was to distribute the estate to the respondent's "closest friends, as determined by a judge," notwithstanding general dissatisfaction with judicial discretion.[204] Even so, when two other choices—"a pool of charitable organizations" and "your favorite charity or charities, as determined by a judge"—are combined, they yield a larger plurality of 28.0%.[205] These findings call into question the drafters' decision to ratify the conventional doctrine of escheat. The Code has tradition on its side, but it fails to effectuate probable intent.[206]

The range of kinfolk who should comprise potential heirs, which in turn defines (and confines) the scope of escheat, represents a related problem. Under the Code, only blood heirs within the second collateral line—that is, first cousins and their descendants—can inherit by intestacy.[207] The drafters offer only the vaguest rationale for this cutoff, stating without citation that it is "in line with modern policy."[208] Under nonuniform legislation, however, the search for heirs can stretch to more distant branches of cousins, in some states without limit, thus minimizing escheat.[209]

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[200] *Id.* at 12. For circumstantial data supporting this finding, see Hirsch, *supra* note 2, at 1083 n.227. For older related data, see Contemporary Studies Project, *supra* note 46, at 1118; Glucksman, *supra* note 32, at 275–76, 294.

[201] Leckman, *supra* note 198, at 11.

[202] A limited hearing is possible under British and New Zealand law, but not under any American statute. *See* Intestates' Estates Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 64, § 46(1)(vi) (Gr. Brit.); Administration Act 1969, s 77, subs 8 (N.Z.). For a proposal to import this rule into the Code, see William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1050 (1966).

[203] *See* Leckman, *supra* note 198, at 19 (adjusting the reported percentages to eliminate the unsure). This majority preference spanned all income categories. *See id.* at 19–20.

[204] *Id.* at 15.

[205] *Id.* (adjusting the reported percentages to eliminate the unsure). Other options were "distant relatives" (16.8%), the respondent's "place of worship" (9.6%), "schools" (4.9%), and "other" (17.7%). *See id.*

[206] Nonuniform acts in many states direct escheated funds to education, but this was not the plurality preference. *See id.* at 6 n.30. For a related survey, see Listokin & Morley, *supra* note 136, at 7, 10–12 (discussed, *infra* note 216).

[207] *See* UNIF. PROB. CODE § 2-103(i) (UNIF. L. COMM'N, amended 2019). Under the Code, in lieu of any surviving relatives within the second collateral line, stepchildren can take as heirs. *See id.* § 2-103(j).

[208] *Id.* § 2-103 cmt. The Model Probate Code, precursor of the Uniform Probate Code, established the same range of intestate succession in reliance on an unsubstantiated inference: "This is believed to accord with the wishes of the average person who dies intestate. Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives." LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 22(b) & cmt., at 60–62 (1946) (quotation at 62).

[209] *See, e.g.*, CAL. PROB. CODE. § 6402(f) (West 2023).

In an original survey undertaken for this Article, I have elicited preferences concerning this issue. In 2022, I polled electronically 1,005 respondents from throughout the United States, asking them the following question, phrased as clearly as possible for laypersons:

> If you die without a will, everything that you have goes automatically to your immediate family (spouse, children, mother, father). But, if none of your immediate family is alive when you die, which of the following more distant relatives would you want to get what you leave behind, even if you don't know all of your distant relatives? Assume that the alternative is for your state government to get everything you have when you die.

I simultaneously asked another, nonoverlapping group of 1,005 respondents the same question, changing only the taker of last resort: "Assume that the alternative is for a group of charities selected by your state to get everything you have when you die." Hence, the survey tested both the range of donative intent and the sensitivity of that range to the consequences of escheat. Respondents could choose to include or exclude "your brothers and sisters," "your nephews and nieces (descendants of your brothers and sisters), if your brothers and sisters die before you do," "your aunts and uncles, if . . . ," "your first cousins (descendants of your aunts and uncles), if . . . ," "your second cousins (descendants of your great aunts and great uncles), if . . . ," "your third cousins (descendants of your great-great aunts and great-great uncles), if . . . ," and "your distant cousins no matter how far removed from you." For each category, respondents could answer either "Yes," "No," or "This does not apply to me," indicating either that they had no relative of the type identified or for some other reason could not relate to the hypothetical, in which case I struck them from the data set.[210]

Given the unpopularity of the traditional rule of escheat, I hypothesized that respondents would react differently to the two alternatives.[211] The data tell their own story:

(1) *Brothers and sisters*: a supermajority (78.8%, or 663/841) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction remained unchanged (78.9%, or 686/869).

(2) *Nephews and nieces*: a majority (69%, or 546/791) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction did not budge (70.0%, or 566/808).

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[210] The two surveys were conducted by Ipsos in 2022. The data are weighted to provide a representative sample of the adult American population. Raw data are available on request to the author.

[211] Nearly a century ago, Professor David Cavers floated a similar proposition: if escheated property were devoted to "eleemosynary and educational institutions . . . localized in the decedent's domicil[e]," then "it is not unreasonable to suppose that many persons, having no relatives within the privileged degrees, would be content to allow their property to devolve upon the state." David F. Cavers, *Change in the American Family and the "Laughing Heir*," 20 IOWA L. REV. 203, 210–11 (1935) (footnotes omitted). *But cf*. Atkinson, *supra* note 14, at 196 (positing in the same year that escheat "to the public treasury . . . should not shock even the staunchest individualist. Many property owners without close relatives would enjoy the thought that their accumulation would be expended for the good of society at large.").

(3) *Aunts and uncles*: approximately half (49.6%, or 366/738) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction stayed the same (49.0%, or 372/759).

(4) *First cousins*: again, around half (50.4%, or 395/783) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction held fast (49.7%, or 400/804).

(5) *Second cousins*: only a minority (33.8%, or 256/757) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction fell slightly (31.4%, or 246/784).

(6) *Third cousins*: a smaller minority (28.2%, or 202/716) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction dropped further (24.0%, or 178/741).

(7) *More distant cousins*: a still smaller minority (25.4%, or 197/775) wanted these relatives to succeed as heirs versus escheat to the state. When the alternative taker switched to a pool of charities, the fraction sank (19.8%, or 152/768).

The credibility interval for this study was plus or minus 3.5%.[212] Therefore, the data are statistically significant to establish majority preferences regarding siblings, nephews and nieces, second cousins, third cousins, and more distant relatives. The data are not significant to establish majority preferences regarding aunts, uncles, and their descendants when the alternative taker was either the state or charity, suggesting an even split in respondents' preferences.

At the same time, the preferences of each group of respondents—although without overlap—stayed remarkably consistent. They cut off the family at the same point on the family tree, irrespective of whether the alternative taker was the state or charity. My hypothesis that this distinction would affect respondents' preferences was disconfirmed. Respondents cared more about their respective relationships with family members than who would take the estate in lieu of heirs.

There is only one way to interpret this symmetry. Respondents' desires to disinherit relatives with whom they have only an attenuated relationship, or none at all—"laughing heirs," in inheritance lore[213]—transcend other considerations. Within the field of behavioral economics, researchers have postulated the phenomenon of "inequity aversion," whereby human actors are prepared to sacrifice gains, if necessary, to thwart others from receiving an undeserved reward.[214] Here, we have stumbled upon a manifestation of inequity aversion in the realm of inheritance.

The data from this survey substantiate the drafters' decision to include siblings and their descendants as heirs under the Code, while sustaining their

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[212] *See* IPSOS, *supra* note 25, at 3.
[213] Cavers, *supra* note 211, at 208.
[214] DHAMI, *supra* note 13, at 34–36 (discussing research into the phenomenon).

decision to exclude second cousins and more distant relatives as heirs. The supporting evidence does not hinge on the consequences of escheat.[215] The data also suggest the reasonability of including aunts, uncles, and their descendants as heirs, irrespective of whether the drafters choose to reform the rules of escheat.[216]

At the same time, it bears noting that older studies of probate records found a great diversity of preferences regarding distributions in the absence of a surviving spouse and descendants. Testators often disinherited collateral kin, including siblings, in favor of other beneficiaries.[217] My study of wills allocating property between full- and half-siblings from reported cases likewise evinces diverse preferences.[218] Such diversity raises the possibility of mandating a discretionary hearing to determine the preferred beneficiaries of intestate decedents in those uncommon instances when they are survived only by collateral kin.[219] This approach would, however, reshape the structure of intestacy law, which has traditionally operated mechanically in all situations.[220] Furthermore, evidence from the recent escheat study that was noted earlier suggests a popular reluctance to entrust courts with such a power,[221] although earlier studies (dating to an era of greater public confidence in courts[222]) found respondents receptive to the idea.[223]

III. TESTATE ESTATES

Testators who execute their wills choose their beneficiaries. Within the boundaries of testation freedom, they have leeway to impose their intent, providing for whatever estate plan they wish, so long as they express their

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[215] Many states have taken a step in this direction by allocating escheated funds to education under nonuniform legislation. *See supra* note 206.

[216] Another recent survey asked each respondent "what percentage of her total assets she would give to a set of possible beneficiaries in the event of her death," which is an imperfect question for present purposes because it fails to frame the issue within the context of a mechanical intestacy statute. Among 461 respondents who only had relatives more distant than siblings, the average preferred transfer to "other relatives" (including stepchildren and nephews/nieces) was 34.2%, the average for "charities, churches, schools, or nonprofits" was 29.0%, and the average for "friends and acquaintances" was 36.8%. Listokin & Morley, *supra* note 136, at 7, 10–12. Because transfers to friends are impossible under a mechanical statute, these data appear compatible with the findings of my survey.

[217] *See* Browder, *supra* note 17, at 1311–12 ("[W]hen neither spouse nor issue survived, testators dispersed their estates among a great variety of beneficiaries . . . [with] too little regularity in the patterns of testamentary succession to justify their use as a frame of reference for intestate succession."); Dunham, *supra* note 17, at 251–55 ("[W]here a spouse is not involved, the deviations represent individual preferences of the testator depending on such a wide range of variables that no pattern capable of reduction to statute can be found.") (quotation at 254); Schneider, *supra* note 55, at 432–37 ("[N]o one can anticipate the variety of wishes of those decedents who die in this situation. No statute can provide that these various wishes be carried out.") (quotation at 433); *see also* SUSSMAN ET AL., *supra* note 27, at 103–04 (combining probate records with survey evidence).

[218] *See supra* notes 180–189 and accompanying text.

[219] In one probate study, 53 out of 223 wills (23.8%) in the data set concerned testators who had no surviving spouse or children. *See* Browder, *supra* note 17, at 1304, 1311. In a later probate study, 61 out of 449 wills (13.6%) dealt with testators who had no surviving spouse, children, or parents. *See* Schneider, *supra* note 55, at 412, 432–35.

[220] *See supra* note 99.

[221] *See supra* text accompanying notes 201–203.

[222] *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/SYJ2-GTAT] (reporting annual Gallup polling from 1973 onward).

[223] *See* Contemporary Studies Project, *supra* note 46, at 1129–30, 1147 app.K (compiling data in 1977) (finding 62% of respondents in favor of judicial discretion); Glucksman, *supra* note 32, at 261, 276, 294 (compiling data in 1975) (finding 46% in favor, an additional 18% in favor "with reservation," and 30% "strongly opposed").

intent in an executed writing.[224] The difficulty remains that testators may fail to anticipate all of the myriad circumstances that can alter intent. Default rules fill whatever gaps appear in wills by virtue of the testator's failures to account for contingencies.[225] Once again, so far as possible, the Code's drafters ought to ground those default rules in hard data rather than expert impressions.

A. PERSONAL REPRESENTATIVES

Every estate that enters probate must have a personal representative who steps into the decedent's shoes to wind up their affairs. A testator can name an executor under the will. If the decedent fails to name one because they leave no will, then the court appoints one, now styled an administrator. If a decedent executes a will but neglects to name an executor, then the court again appoints an administrator with the will annexed.[226]

Because a testator is free to choose a personal representative, laws governing the appointment in the absence of a testamentary provision constitute default rules.[227] Under the Code, a surviving spouse who is a beneficiary under the will has top priority, followed by any other beneficiary under the will, followed by a surviving spouse who is not a beneficiary under the will, followed by other heirs of the decedent, followed by any creditor of the decedent.[228] Notably absent from this litany are both corporate fiduciaries and attorney-scriveners.

The accompanying comment says nothing about how the drafters arrived at these priorities.[229] Conceptualized as a majoritarian default, priorities for appointment should correspond with popular preferences. Data on this question appeared in a recent study presenting evidence from 249 wills probated in Sussex County, New Jersey in 2015.[230] Every one of those wills sought to name an executor.[231] The study found testators averse to employing professionals as personal representatives. Only one of the wills in the sample named an attorney as executor, and none named a corporate fiduciary.[232] Overwhelmingly, testators preferred to appoint family members, with children or grandchildren heading the list at 56.2% of the wills sampled.[233] Spouses came in second, at 28.9%.[234] An earlier study of probate records

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[224] *See generally* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011).

[225] *See generally*, Hirsch, *supra* note 2.

[226] *See* KURTZ ET AL., *supra* note 160, § 13.1, at 566.

[227] Under the Code (and varying state by state), mandatory rules limit the eligibility of persons to serve as personal representative irrespective of the decedent's wishes. *See* UNIF. PROB. CODE § 3-203(f) (UNIF. L. COMM'N, amended 2019). So long as an executor qualifies under statutory guidelines, however, courts have no discretion to override his or her appointment by will. *See* Araguel v. Bryan, 343 So. 3d 1236, 1237–39 (Fla. Dist. Ct. App. 2022).

[228] *See* UNIF. PROB. CODE § 3-203(a) (UNIF. L. COMM'N, amended 2019).

[229] *See id.* § 3-203 cmt.

[230] *See* Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 U.C. DAVIS L. REV. 2561, 2589–91 (2020).

[231] *See id.* at 2589.

[232] *See id.*

[233] *See id.*

[234] *See id.*

from San Bernardino County, California in 1964 confirmed this ordering of preferences.[235]

These data suggest that the drafters of the Code should rearrange their priorities in selecting a personal representative. Children ought to take precedence over spouses, not the other way around. In addition, the drafters should strike creditors from the list of eligible personal representatives, given their absence from probated wills. The notion that testators would ever want a creditor—likely viewed as an adversary of beneficiaries—to control their estates is counterintuitive. Professional fiduciaries should instead comprise the personal representatives of last resort given their occasional, albeit rare, appearance within wills.

B. NEGATIVE WILLS

Suppose a will explicates that "*A* is to receive no part of my estate," or words to that effect. Suppose further that the will fails to dispose of the entire estate, either because the will lacks a residuary clause or because the residuary beneficiary predeceases the testator, producing a partial intestacy. If *A* qualifies as an heir, does the disinheritance clause in the will affect distributions dictated by the intestacy statute so that *A* forfeits *A*'s intestate share?

Clauses of this sort are known as "negative wills."[236] Under the Code, negative wills are effective in modifying distributions under the intestacy statute, contrary to common law.[237] As the drafters remark, the common-law rule (in contrast to their own) "defeats a testator's intent for no sufficient reason."[238]

The matter is, however, more complicated than that. The motivations prompting testators to make a negative will vary, and these could dispose testators either to supersede the intestacy statute or to leave it in place. Some negative wills stem from hostility toward the disinherited heir.[239] In such instances, as the drafters of the Code infer, a testator would likely intend to prevent the heir from benefitting from either the will or intestate succession. But the drafters overlooked the fact that other negative wills derive from a judgment that the disinherited heir has less need than another heir or has been provided for during life, unlike another heir.[240] In such instances, a negative will signals only an intent to prefer one heir over another. If that other heir

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[235] *See* Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1469–70 (2007). Among the 119 probate files sampled, 13% named a corporate fiduciary as executor. Children comprised the predominant choice, but no statistical breakdown appears in the study. *See id.* at 1469. A still earlier study of 170 probate proceedings initiated in 1953 and 1957 found a slight disparity in favor of the surviving spouse (37%) over children (30%), with corporate fiduciaries serving in 8%, although it is unclear how many of these personal representatives were prioritized by the testator and how many served by appointment by the court. *See* Dunham, *supra* note 17, at 275.

[236] UNIF. PROB. CODE § 2-101 cmt. (UNIF. L. COMM'N, amended 2019).

[237] *See id.* § 2-101(b). For common law cases, which have conflicted historically, see Hirsch, *supra* note 29, at 1434–35.

[238] UNIF. PROB. CODE § 2-101 cmt. (UNIF. L. COMM'N, amended 2019).

[239] *See, e.g.*, King v. Gilson, 90 S.W. 367, 368 (Mo. 1905) ("[B]ecause of the behavior of . . . my nephews . . . towards me . . . it is my will that neither . . . shall receive anything from my estate; and . . . almost my only object and intention in making this will is to prevent the said [nephews] from inheriting . . . in any manner, any of my property . . . . ").

[240] *See, e.g.*, Slaughter v. Gaines, 71 So. 2d 760, 761 (Miss. 1954) ("I have specifically excluded my brother . . . from this devise . . . because he has been well provided for and not because of any disfavor or ill will.").

were to predecease the testator and a partial intestacy were to ensue, then the testator would not want more distant relatives to supersede the disinherited heir. Hence, for example, if a will provided that "my child, *A*, is to receive nothing from my estate because I have already bought him an expensive house," and the testator's other child, *B*, as sole beneficiary, were to predecease the testator without leaving descendants, then we can safely assume that the testator would want *A* to take the estate as heir ahead of the testator's cousins, notwithstanding the negative will.

The key, then, to formulating a default rule for negative wills is to determine the probability that one or the other motivation prompted its inclusion in an estate plan. In an empirical study from 2013, I investigated this question.[241] Rather than examine probate records, I developed a data set of 206 published cases from throughout the United States in which negative wills had appeared.[242] I identified language in 42 (20.4%) of the wills as hostile, and language in 53 (25.7%) of the wills as nonhostile.[243] In the remaining 111 cases (53.9%), evidence failed to reveal what circumstances had triggered the negative will.[244]

These data show the problem with negative wills in a new light. Most testators who executed negative wills and expressed a motivation for them in published cases harbored no ill feelings toward disinherited heirs. To be sure, published cases may fail to concern a random sample of wills, and in any event, the data set is small.[245] Nonetheless, taken as a rough barometer of the scattering of motivations for negative wills, the data suggest that a blanket assumption of hostility toward explicitly disinherited heirs is unwarranted.

The data therefore call into question the Code's default rule giving automatic effect to negative wills. In many, perhaps most, instances, testators would likely prefer that courts take no account of negative wills. Yet, given the nearly equal divide between hostile and nonhostile negative wills in this data set, the common-law rule that ignores negative wills when an intestacy statute comes into play also appears undesirable as a means of effectuating intent.

As an alternative to both rules, lawmakers could grant courts authority to introduce extrinsic evidence case-by-case, along with intrinsic evidence from the will itself, to evaluate whether a testator would or would not prefer to enforce a negative will within the domain of the intestacy statute. Despite the testator's inability to testify, courts should have little difficulty reconstructing a testator's relationship with disinherited beneficiaries through the testimony of third parties, even if the will is silent on the matter (as it frequently is). Courts could then infer a testator's preferences regarding the implications of a negative will with reasonable assurance.

This rule of evidence would not preclude planning for the possibility of partial intestacy. A testator could state in the will whether a negative will was intended to supersede rules of intestate succession, thereby ensuring certainty. The only apparent drawback of the rule is that it would increase

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[241] Hirsch, *supra* note 29, at 1439–46.
[242] *See id.* at 1442.
[243] *See id.*
[244] *See id.*
[245] For a further discussion of the limitations of this data set, see *id.* at 1430–32, 1442–44.

decision costs.[246] Yet, partial intestacy arises so infrequently that this cost is likely to be marginal.

Under the Code, a court can already override several default rules applicable to wills by resorting to extrinsic evidence.[247] The Code's default rule for negative wills is not among them.[248] Yet, if any default rule should give way to extrinsic evidence of contrary intent, it is this one. In few instances could we imagine preferences to divide more evenly, or evidence to offer the prospect of illuminating intent more convincingly.

C. REVIVAL OF WILLS

Suppose a testator executes a first will and later executes a second will, functioning to revoke the first will by subsequent executed writing. Thereafter, the testator revokes the second will by physical act. Does this action reinstate the terms of the first will? Or, once revoked, does the first will remain ineffective, causing the testator to become intestate following the act of revoking the second will? Similarly, suppose a testator executes a will and later executes a codicil to that will, functioning partially to revoke the will by virtue of its amendment. Thereafter, the testator revokes the codicil by physical act. Does this action reinstate whatever terms of the will the codicil had overridden? Or do those terms remain ineffective, notwithstanding the revocation of the codicil?

This is known as the problem of revival of wills.[249] It has a long history in the case law, tracing back to eighteenth-century England, where common-law courts and ecclesiastical courts divided over the issue.[250] American courts, too, have offered divergent solutions, as have legislators, who now address revival by statute in forty states.[251]

As revised in 1990, the Code takes its own, unique approach to revival. If a will is followed by another will that the testator later revokes by physical act, the Code creates a presumption that the first will remains ineffective, rebuttable by extrinsic evidence showing that the testator intended to reinstate the first will by revoking the second will.[252] If, however, a will is followed by a codicil, revocation of the codicil creates a rebuttable presumption that the testator *did* intend to reinstate the overridden terms of the will.[253] The two rules are diametrically opposed under the Code, leading to a catastrophic discontinuity at the margin when a codicil becomes so extensive that it *almost* becomes a second will, supplanting nearly all of the original estate plan.[254]

The drafters offer only a formalistic rationale for the Code's approach to revival.[255] Yet, revival comprises a default rule that testators can preempt by

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[246] For a further discussion, see *infra* note 351 and accompanying text.

[247] *See* UNIF. PROB. CODE §§ 2-601, 2-701 (UNIF. L. COMM'N, amended 2019); *see also infra* note 350.

[248] *See id.*. These sections only cover default rules appearing in parts 6 and 7 of Article 2, whereas the default rule for negative wills appears in part 1 of Article 2. *See id.* § 2-101(b).

[249] *See* Hirsch, *Waking the Dead*, *supra* note 42, at 2271.

[250] *See id.* at 2272.

[251] *See id.* at 2273–76.

[252] *See* UNIF. PROB. CODE § 2-509(a)–(b) (UNIF. L. COMM'N, amended 2019).

[253] *Id.*

[254] For further discussion, see Hirsch, *Waking the Dead*, *supra* note 42, at 2289–91.

[255] *See* UNIF. PROB. CODE § 2-509 cmt. (UNIF. L. COMM'N, amended 2019) ("[T]he testator understood or should have understood that Will #1 had no continuing effect . . . . ").

republication, even if extrinsic evidence is inadmissible. As such, the drafters should have based the Code's rules of revival on an empirical hypothesis and, once available, on corroborative data.

A study cannot readily identify a majoritarian default regarding revival. A search for respondents who have executed, and then revoked, second wills or codicils—doubtless, a tiny subset of the population—would prove costly. Nor could a hypothetical scenario clarify intent, because a testator's preferences depend on the particular circumstances and developing facts of each estate plan. Researchers can, however, poll respondents as to their assumptions about rules of revival and then adopt an error-minimizing default reflecting those assumptions.

I conducted such a study in 2017. In an electronic poll, I asked 1,046 respondents from across the country to respond to a scenario, phrased to be as clear as possible for laypersons:

> Suppose you wrote a will, and then a few years later you changed your mind about some things and wrote a new will. You later decided that the second will was not to your liking and destroyed it, but you never destroyed your original will. When you die, which of these do you think would govern your estate?[256]

Among the respondents, 74.2% believed that their first wills would take effect under these conditions.[257] Only 25.8% assumed they would have "no effective will."[258] A follow-up study conducted two years later with a different set of 1,009 respondents posited an analogous scenario for a will followed by a codicil that was later revoked.[259] Data from the follow-up study proved remarkably consistent with data from the original study. Among the respondents, 75.4% believed that the revocation of a codicil would revive the original will, and 24.6% thought otherwise.[260]

By an overwhelming margin, these data indicate that the Code's revival rules need revising. Most testators assume that revocation by physical act of a subsequent executed writing, be it either a second will or a codicil, revives the original will. Whereas the Code distinguishes rules of revival for will-will and will-codicil sequences, empirical evidence supports a unified rule of revival in all cases. The drafters should amend the Code accordingly.

D. OMITTED CHILDREN

Suppose a testator has children who are unprovided for in the will. Under the Code's provision on "omitted children," they may nonetheless receive a share of the estate in some circumstances.[261] This provision applies unless "it appears from the will that the omission was intentional," making the applicable doctrine a default rule.[262]

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[256] Hirsch, *Waking the Dead*, *supra* note 42, at 2288. This survey was conducted by Qualtrics. The answer choices were randomized to control for order bias. *See id.* at 2288 n.90.

[257] *See id.* at 2288.

[258] *Id.*

[259] *See id.* at 2288–89. This electronic survey was conducted by Ipsos. The answer choices were again randomized. *See id.* at 2288 n.92.

[260] *See id.* at 2289.

[261] UNIF. PROB. CODE § 2-302 (UNIF. L. COMM'N, amended 2019).

[262] *Id.* § 2-302(b)(1).

Under this provision, children who already exist when a testator executes a will cannot claim a share if the will fails to benefit them. Only children born or adopted after the execution of the will can do so.[263] All afterborn and after-adopted children are entitled to co-equal shares of what the testator left to other children.[264]

As the accompanying comment indicates, this provision endeavors to update a testator's estate plan to allow for a consequential event that was "not foreseen" when the will was executed—here, the birth or adoption of a child.[265] The drafters failed, however, to envision all forms of testamentary obsolescence regarding children. A male parent of a nonmarital child might also exclude the child *because the father was not yet aware of the child's existence or never learned of the child's existence*. An unknown child can claim a share as an omitted child under this provision only if the child happens to have been born after the will was executed—a chance event unrelated to testamentary intent as it concerns unknown children.[266]

We addressed earlier the problem of nonmarital children in connection with intestacy. Empirical studies confirm that most intestate decedents want to provide co-equal shares for nonmarital children.[267] By the same token, we can infer that most testators would want to include in their wills nonmarital children of whom they were unaware when they executed their wills. An additional empirical study suggests that most testators—including ones who are married with children born in wedlock—would even want to include co-equal shares for nonmarital children whom they never learn they have.[268] To take this body of empirical evidence into account, the drafters need to amend the Code to allow claims not only by children "born or adopted after the execution of the will," but also by *after-known* and *never-known* children, whenever they were born.[269]

Children entitled to part of the estate under this provision receive a pro rata share of the amount allocated to children named under the will rather than an intestate share as under the original version of the Code.[270] As the comment observes, an intestate share "might be substantially larger or substantially smaller than [the amount] given to the living children."[271] This rule maintains parity, assuming other children receive equal bequests. Although uncited in the comment, empirical evidence confirms that most parents wish to provide equal shares to their children.[272] The Code's rule is not the only route to equality, however. Instead of a pro-rata share, omitted children could receive per capita shares, matching what the will gives to other children, assuming they receive fixed amounts rather than fractional shares. The question of which approach would carry out the intent of the typical testator has never been studied empirically.

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[263] *Id.* §§ 2-118–19, 302(a).
[264] *See id.* § 2-302(a)(2). Nonuniform laws vary on this point. *See* Hirsch, *supra* note 122, at 180–82.
[265] UNIF. PROB. CODE § 2-302 cmt. (UNIF. L. COMM'N, amended 2019).
[266] *See id.* § 2-302(a).
[267] *See supra* note 116.
[268] *See supra* notes 122–124.
[269] UNIF. PROB. CODE § 2-302 cmt. (UNIF. L. COMM'N, amended 2019); *cf.* Hirsch, *supra* note 122, at 223–24 (noting nonuniform statutes that address this problem).
[270] *See* UNIF. PROB. CODE § 2-302(a)(2) (UNIF. L. COMM'N, amended 2019); *cf. id.* § 2-302(a) (UNIF. L. COMM'N, pre-1990 art. 2).
[271] *Id.* § 2-302 cmt. (UNIF. L. COMM'N, amended 2019).
[272] *See supra* note 114.

Under the original version of the Code, if the testator had no children when the will was executed, after-born and after-adopted children could still claim an intestate share.[273] As revised in 1990, the Code grants nothing to afterborn or after-adopted children under these circumstances if the other parent of the omitted child receives "all or substantially all of the estate" under the will and if that parent survives the testator.[274] Hence, the rule currently operates to consolidate the estate in the spouse rather than to divide it between the spouse and afterborn children.

The drafters justify this change by pointing, for the third and final time, to quantitative studies. The accompanying comment states: "The rationale for the revised rule is found in the empirical evidence . . . that suggests that even testators with children tend to devise their entire estates to their surviving spouses, especially in smaller estates."[275] The comment refers to the studies cited in the Code's intestacy provision, which we noted earlier.[276]

Yet, as discussed in foregoing pages, those studies are out-of-date. More recent research suggests that the social pendulum has swung back, and that today's testators would prefer to divide their estates between spouse and children.[277] The drafters should restore the rule found in the original version of the Code to reflect this new evidence.

At the same time, the size of the estate adds a complication. The drafters' comment alludes to the early studies' findings that only testators with "smaller estates" tended to bequeath all to the spouse[278]—thus undermining their analogy between the preferences of testators, of relevance here, and the preferences of intestate decedents, who on average are poorer.[279] Ironically, a more recent study suggests that this variable now cuts the other way and that the wealthiest individuals *do* prefer to leave everything to their spouses, in line with the Code's provision for omitted children.[280] Given differences in testator wealth, the drafters could vary the rights of omitted children with the size of the estate (as other provisions of the Code already do),[281] looking again to existing data to select the appropriate thresholds.[282] The drafters could thereby create a more nuanced—but also more complex—provision for omitted children.

E. SATISFACTION OF LEGACIES

Suppose a testator executes a will that provides bequests for the testator's children. The testator subsequently makes an inter vivo gift to one of those children. Under the common-law doctrine of ademption by satisfaction, any

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[273] *See* UNIF. PROB. CODE § 2-302(a) (UNIF. L. COMM'N, pre-1990 art. 2).
[274] *Id.* § 2-302(a)(1) (UNIF. L. COMM'N, amended 2019).
[275] *Id.* § 2-302 cmt.
[276] *See id.* (referring to citations "in the Comment to Section 2-102"); *see supra* notes 53–55.
[277] *See supra* notes 56, 59–63 and accompanying text.
[278] *See supra* note 275 and accompanying text.
[279] *See supra* note 48 and accompanying text.
[280] *See* Poppe, *supra* note 56, at 168–71. Another recent study found the same correlation between preferences and income, without studying the variable of wealth. *See* Listokin & Morley, *supra* note 56, at 12, 24.
[281] *See* UNIF. PROB. CODE §§ 2-102(2)–(4) (UNIF. L. COMM'N, amended 2019).
[282] "[A]mong those [with] . . . wealth less than $50,000 . . . splitting the estate between the spouse and child is the most common preference," whereas "among those . . . with wealth of at least $150,000 . . . allocating all . . . to the surviving spouse is the most popular." Poppe, *supra* note 56, at 169. Those in-between "are almost perfectly split" between those two preferences. *Id.* The Code could adjust these thresholds for inflation. *See supra* note 71.

substantial, nonrecurring gift to one of a number of children is presumed to be an advance on the child's inheritance and is deducted from the bequest to that child unless the testator makes a declaration to the contrary when the gift occurs.[283] The Code reverses this rule and presumes that all gifts augment bequests unless either the testator states otherwise in a contemporaneous writing or the beneficiary acknowledges the gift as an advance in a writing.[284] The will can also anticipate this issue and specify whether gifts to beneficiaries are to be subtracted from bequests.[285]

Why did the drafters see fit to alter the common-law rule? A comment in the Code states that "[i]n an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare."[286] The drafters add authoritatively: "Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan."[287]

No citation to evidence accompanies this assertion. Nor did any pertinent data exist when the assertion was made. A presumption either for or against treating gifts as advances has a plausible basis in logic. Whereas a presumption of advancement accords with empirical evidence that most parents intend to provide equally for their children,[288] inter vivos gifting—if it occurs covertly—offers parents a means of varying transfers to children without triggering resentment by other children.[289]

The subject was addressed empirically for the first time in a study in 2020.[290] Its author conducted an electronic survey of 1,032 respondents, subsequently pared down to 318 respondents who had more than one child.[291] Those respondents were asked to react to a hypothetical scenario:

> Let's assume you made a substantial gift to one of your children—but not to other children—during your lifetime. For example, you gave one of your children money for a house. Would you want that amount to be subtracted from their inheritance upon your death? Or would you

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[283] *See* 1 FRANCIS BARLOW, WILLIAMS ON WILLS §§ 44.1–44.4 (11th ed. 2021).

[284] *See* UNIF. PROB. CODE § 2-609(a) (UNIF. L. COMM'N, amended 2019); *see also id.* § 2-109(a) (applying the same rules to gifts to heirs by intestate decedents under a statutory doctrine analogous to ademption by satisfaction known as the doctrine of advancements).

[285] *Id.* § 2-609(a) (UNIF. L. COMM'N, amended 2019).

[286] *Id.* pt. 1 cmt. (UNIF. L. COMM'N, pre-1990 art. 2). The reporter for the original version of the Code elaborated that the drafters' motivations transcended intent-effectuation: "The framers believed and hoped that this added formality would relieve fiduciaries of the burden of probing a decedent's lifetime history of gifts to his children in order to be safe in distributing [inheritances] in compliance with the statute," which otherwise would have constituted an "unrealistic burden for personal representatives." Richard V. Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 U. ARK. LITTLE ROCK L. REV. 1, 5–6 (1979).

[287] UNIF. PROB. CODE § 2-109 cmt. (UNIF. L. COMM'N, amended 2019).

[288] *See supra* note 114. Courts based the common-law doctrine of ademption by satisfaction on this assumption. *See* Carmichael v. Lathrop, 66 N.W. 350, 352 (Mich. 1896) ("[T]he father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one . . . . ").

[289] *See* B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 J. POL. ECON. 733, 735, 752–55 (2003) (presenting this hypothesis); *see also* Cox & Rank, *supra* note 118, at 308–11 (finding that inter vivos gifts are positively correlated with services by children and citing earlier studies); Norton & Van Houtven, *supra* note 114, at 164, 167–71 (same).

[290] *See* Linda Nelte, Advancement and Ademption by Satisfaction: An Empirical Study of Parental Intent 10–11 (2020) (unpublished study) (available at https://actecfoundation.org/wp-content/uploads/Advancement-and-Ademption-by-Satisfaction-An-Empirical-Study-of-Parental-Intent.pdf [https://perma.cc/44UL-SFQ2]).

[291] *See id.* The survey was conducted by Qualtrics in 2019. *See id*. at 10.

want that amount to be in addition to what they would receive upon your death?[292]

Among the respondents, 57.5% answered that they would prefer to make the gift absolute, rather than an advance on the child's inheritance.[293] This proved the majority preference for respondents whether they had a will, a living trust, or neither.[294] The data lend empirical support for the Code's approach to the doctrine of satisfaction, which applies the same rule to testate and intestate decedents.[295]

F. EXONERATION OF LIENS

Another issue of construction arises when a testator makes a specific bequest of property that is either already, or subsequently becomes, subject to a lien—either a real property mortgage, an Article 9 security interest in personal property (such as an automobile), or an involuntary judicial or statutory lien of some sort. Does the property go to the beneficiary subject to the lien, or is the lien paid off with residual assets of the estate?

Crystalizing long before the advent of statistical analysis, the common law mandates that liens are "exonerated," that is, paid out of the residuary estate, so that the beneficiary takes the encumbered property free and clear unless the will expresses a contrary intent.[296] The Code reverses this default rule, switching to a doctrine of "nonexoneration."[297] What justifies this about-face? The accompanying comment offers no rationale whatsoever. It states that the common-law rule "is abolished by this section, and the contrary rule is adopted."[298] That is all.

Historically, courts and commentators justified the common-law rule on the grounds that testators favor beneficiaries of real estate, and that money derived from an encumbrance had swelled the residue inadvertently.[299] These assertions are speculative. But arguments for reversing the common-law rule—as some states had done prior to the appearance of the Code[300]—are no less speculative. Courts and commentators asserted that testators'

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[292] *Id.* at 10–11. The last two sentences in the survey, and answer choices, were alternated to control for order bias. *See id.* at 11.

[293] *See id.* at 11.

[294] Among respondents with wills, 52 out of 98 (53.1%) preferred to treat gifts as absolute. Among respondents with living trusts, 21 out of 34 (61.8%) preferred to treat gifts as absolute. Among respondents who were intestate, 110 out of 186 (59.1%) preferred to treat gifts as absolute. *See id.*

[295] *See* UNIF. PROB. CODE §§ 2-109(a), 2-609(a) (UNIF. L. COMM'N, amended 2019). For no stated reason, the Code fails to establish a rule applicable to living trusts. *See id.* pt. 6 general cmt. In the sole case raising this issue, the court held that the Code's rule does not pertain by extension to living trusts, adding that the holding might differ in a jurisdiction that has adopted an optional provision in the Uniform Trust Code that expands, "as appropriate," rules of construction from wills to trusts. *See In re* Estate of Radford, 933 N.W.2d 595, 598–99 (Neb. 2019); UNIF. TR. CODE § 112 (UNIF. L. COMM'N, amended 2000). On this basis, the court concluded that no rule of satisfaction applies to living trusts, rendering all gifts absolute even if the testator or beneficiary states otherwise in a writing; the court neglected to consider whether a judicial rule of satisfaction, paralleling the common-law rule applicable to wills, exists for trusts. *See Estate of Radford*, 933 N.W.2d at 599.

[296] *See* KURTZ ET AL., *supra* note 160, § 6.4, at 262–63 (citing cases).

[297] UNIF. PROB. CODE § 2-607 (UNIF. L. COMM'N, amended 2019).

[298] *Id.* § 2-607 cmt.

[299] *See* ATKINSON, *supra* note 18, § 137, at 764; 3 AMERICAN LAW OF PROPERTY § 14.25, at 668–69 (1952) [hereinafter AM. L. PROP.]; 6 PAGE ON THE LAW OF WILLS § 52.17, at 211 (William J. Bowe & Douglas H. Parker eds., 2005) [hereinafter PAGE]; John C. Paulus, *Exoneration of Specific Devises: Legislation vs. the Common Law*, 6 WILLAMETTE L.J. 53, 55–56 (1970); Frances M. Ryan, *Exoneration of the Specific Devise at the Expense of the Residue*, 44 MARQ. L. REV. 290, 290–91 (1960–1961).

[300] *See* Paulus, *supra* note 299, at 70–76.

favoritism for beneficiaries of encumbered property is "not as convincing" in modern society where "real and personal assets play an equally important part"[301]—to which we might add that because the exoneration doctrine also applies to Article 9 security interests, the issue need not even pit beneficiaries of real property against other beneficiaries; a testator might make a bequest of personal property encumbered by a lien. Furthermore, as regards a purchase-money lien, the residuary beneficiary gains no funds from the encumbrance, and commentators surmised that "the average person" is "unlikely" to intend to bequeath a lien-free title that the testator never enjoyed.[302] By contrast, property "mortgaged subsequent to its acquisition had been held by the testator in a cloudless state and he probably intends to give it to a named devisee free and clear of encumbrances, the condition most familiar to him."[303]

The issue cries out for empirical study, but the form such a study should take is problematic. Although examination of probated wills can reveal what percentage of testators overrode a state's rule of exoneration, researchers could not be sure how many other testators who ignored the issue in their wills were advised about, and relied on, the state's rule. A study might seek to control for this problem by contrasting statistics on testators' directives regarding liens from two states with conflicting rules of exoneration, laborious though that would be.

Polling poses different challenges. Ideally, researchers would create a data set of testators who have executed wills bequeathing encumbered property and then inquire whether testators intend to exonerate those liens. Such a study would be costly. Only a small fraction of respondents would fit the necessary parameters, requiring polling of an enormous pool of respondents to generate a statistically significant data set—a search for needles in a haystack.

In lieu of such an undertaking, researchers cannot explore intent via polling with hypotheticals. Preferences would hinge on unique features of the estate plan—that is, on the relationship a given respondent has with the beneficiary of encumbered property versus the residuary beneficiary, and possibly on the value of the bequest relative to the value of the encumbrance. As in connection with the doctrine of revival, the response to any hypothetical would appear indeterminate to respondents.[304]

Researchers can, however, investigate laypersons' assumptions about the rules of exoneration at a reasonable cost and propose a rule that is likely to correspond with those assumptions. Such a rule would install an error-minimizing default grounded in data. Whereas the Code's rule of nonexoneration might follow from the unspoken inference that individuals conceive liens, logically, as attributes of the property they encumber, we need to determine whether individuals do so *psycho*logically. The matter requires quantitative analysis.

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[301] Ryan, *supra* note 299, at 291; *see also* ATKINSON, *supra* note 18, § 137, at 764; AM. L. PROP., *supra* note 299, § 14.25, at 668.

[302] Paulus, *supra* note 299, at 60–61; *see also* ATKINSON, *supra* note 18, § 137, at 764; AM. L. PROP., *supra* note 299, § 14.25, at 668; PAGE, *supra* note 299, § 52.17, at 211; Ryan, *supra* note 299, at 290–91.

[303] Paulus, *supra* note 299, at 61.

[304] *See supra* Section III.C.

In an unpublished study, a researcher has begun to examine this question.[305] The study polled 1,005 respondents electronically nationwide in 2021, asking the following question:

> Suppose you owned a house, but it was subject to a mortgage on which you were making payments to a bank or other source of financing. Suppose further that you made a will in which you left the house to a particular beneficiary. When you die, which of the following would you assume would happen?[306]

The answer choices, which appeared in random order, were: (1) "The beneficiary of the house would have to take responsibility for the mortgage and continue making payments on the house," or (2) "Your estate would pay off the mortgage and the beneficiary would receive the house outright."[307] A second survey, polling a different group of 1,005 respondents, repeated the question, changing the hypothetical to concern "a car, [on which] you were still making payments . . . to the car dealership that sold it to you."[308]

Data from the first survey support the Code's rule of nonexoneration as it applies to real property mortgages. Among the respondents, 57% assumed that the beneficiary of the house would have to pay off the mortgage and 43% assumed that a rule of exoneration would apply.[309] Data from the second survey, however, favors the common-law rule of exoneration, albeit by only a slender margin. Among the respondents, 51% assumed that "the beneficiary would receive [the car] free and clear," whereas 49% of respondents assumed that "the beneficiary of the car would have to continue making payments on the car until it was fully paid for."[310]

These data raise concerns that the Code's rule lacks adequate refinement. Assumptions about the applicable rule appear to depend on the type (or perhaps the value?) of the property at issue. Although data from the second survey were too closely divided to provide conclusive evidence of majority preferences as concerns Article 9 security interests,[311] other distinctions could prove more significant. Whereas both hypotheticals posed in the instant study concerned voluntary liens, assumptions concerning property to which an involuntary lien attaches merit exploration. So do hypotheticals concerning voluntary liens that function to leverage purchases, versus those granted to raise cash for other purposes. As noted earlier, a commentator posits that individuals are less prone to conceive a bequest of property subject to a purchase-money lien as implicating a right of exoneration.[312] In the same vein, hypotheticals distinguishing liens imposed before or after a will is executed call for study. The same commentator conjectures that if a lien predates a will, the testator is more likely to conceive of it as diminishing the value of what the beneficiary of encumbered property receives.[313]

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[305] *See* Angela M. Silva, Exoneration of Liens: An Argument for Extrinsic Evidence 1 (2021) (unpublished manuscript) (on file with author).

[306] *Id.* at 18. The survey was conducted by Ipsos. *See id*. at 17.

[307] *Id.* at 18.

[308] *Id.*

[309] *Id.* at 19–20.

[310] *Id.* at 18–19.

[311] The credibility interval for this study was 3.5%. *See* IPSOS, *supra* note 25, at 3.

[312] *See supra* notes 302–303 and accompanying text (quoting Paulus and referring to additional commentators).

[313] *See* Paulus, *supra* note 299, at 67–68.

Once again, conjectures cannot substitute for hard data. Respondents in the instant study tended to believe that a rule of exoneration applies to liens encumbering automobiles. Yet, those liens almost invariably are purchase-money liens imposed before the testator executes the will. In forming lay expectations, the type of property at issue might prove the dominant consideration. Statutory precedent exists for targeting rules of exoneration to discrete forms of property.[314]

Whereas the instant study lends some support for the Code's rule of nonexoneration, it fails to do so unequivocally. In some circumstances, the common-law rule of exoneration might better reflect the assumptions of unadvised testators. This initial batch of data suggests the need for follow-up studies to clarify whether the Code's rule of nonexoneration is oversimplified.

G. LAPSE AND ANTILAPSE

One of the issues most frequently encountered in inheritance cases concerns the disposition of bequests to beneficiaries who predecease the testator. One study of probate records found this circumstance to arise in connection with no fewer than 21% of wills admitted to probate.[315]

Under the Code, as in all states, testators are free to name an alternative taker in the event that a beneficiary predeceases them.[316] In the absence of such a contingency clause, bequests to predeceasing beneficiaries "lapse" into the residue, as a general rule.[317] But the Code carves out an exception for certain bequests under its "antilapse" provision.[318] Under the Code's version of this default rule, a bequest goes to the descendants (if any) of a predeceasing beneficiary if they are blood relatives of the testator within the second collateral line (*viz*., a descendant, ascendant, sibling, first cousin, or the descendant of a sibling or first cousin, but not the spouse, of a testator), or if the predeceasing beneficiary is a stepchild of the testator.[319]

The drafters state no rationale for these rules.[320] Legislative history suggests that they set the scope of the Code's antilapse provision by reference to rules of intestacy.[321] Empirical evidence played no part in its formulation.

In 2022, I conducted a quantitative study of lapse and antilapse that serves as a point of comparison to the Code's rules. The study presented results from electronic surveys of five non-overlapping groups of 1,005 respondents each, regarding how they would prefer to treat bequests to different categories of predeceasing beneficiaries: (1) spouses, (2) children, (3) siblings, (4) distant relatives, and (5) unrelated friends or employees.

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[314] The first statute in New York that switched to a rule of nonexoneration of liens applied only to mortgages on real property. *See* 3 REVISED STATUTES, CODES, AND GENERAL LAWS OF THE STATE OF NEW YORK ch. 46, art. 7, § 215, at 2637–38 (Clarence F. Birdseye ed., 2d ed., 1896).

[315] *See* Horton, *supra* note 46, at 1152–53.

[316] *See* UNIF. PROB. CODE § 2-603(b)(4) (UNIF. L. COMM'N, amended 2019).

[317] *Id.* § 2-604. This rule applies in all states except Maryland, where bequests to predeceasing beneficiaries go to residuary takers under their own wills, or to their heirs in the absence of a will. *See* Hirsch, *supra* note 21, at 322.

[318] *Id.* § 2-603(b).

[319] *See id.* For a 50-state survey of antilapse statutes, which vary widely, see Hirsch, *supra* note 21, at 322–24.

[320] See UNIF. PROB. CODE § 2-603 cmt. (UNIF. L. COMM'N, amended 2019).

[321] Hirsch, *supra* note 21, at 329 n.128.

Answer choices were randomized and respondents who could not identify with each scenario were stricken from each survey's data set.[322]

The results of the study support the Code's lapse provision. Most testators prefer to redirect to the residue bequests to beneficiaries who predecease them, as a general proposition.[323] At the same time, the results contradict the scope of the exceptions to that rule set out in the Code's antilapse provision. The study found that most respondents prefer to treat as exceptional only bequests to predeceasing spouses and children, sending bequests instead to descendants. Most respondents would rather consign to the residue bequests to predeceasing siblings, distant relatives, and friends or employees.[324]

Here, we again find empirical evidence confounding the best guesses of the Code's drafters, despite their self-assurance in the matter.[325] The drafters' intuitions turned out to be both over- and under-inclusive. On one hand, they extended the antilapse concept to predeceasing siblings and first cousins.[326] Respondents in the instant study disagreed, and evidence from earlier studies of probate records in Kentucky and Illinois had already raised doubts about the wisdom of this extension.[327]

On the other hand, the drafters excluded predeceasing spouses from antilapse,[328] contrary to data presented in the instant study,[329] along with prior studies of probate records in Kentucky, Illinois, Ohio, and Florida.[330] In this respect, incidentally, the Code is hardly peculiar: most nonuniform statutes provide that bequests to predeceasing spouses flow into the residue.[331] Several judicial opinions expressed concern that otherwise children of a predeceasing spouse who are not children of the testator could take in the

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[322] *See id.* at 356–66 (describing the architecture and results of the five surveys in detail, which were conducted by Ipsos).

[323] In the instant study, respondents were offered the option of directing lapsed bequests to the spouses of predeceasing beneficiaries or to the heirs or devisees of predeceasing beneficiaries, along with the option of sending lapsed bequests to the residue or to the children of predeceasing beneficiaries. The first two options proved less popular than the last two for all categories of beneficiaries. *See id.* at 381–83 app.

[324] *See id.* at 356–66.

[325] The drafters fancied their antilapse provision to effectuate testators' "highly probable intentions." Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1099 (1992).

[326] *See* UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N, amended 2019).

[327] In my study, only 30.0% of respondents wished to send lapsed bequests for siblings to their children, whereas 19.7% of respondents wished to do the same for more distant relatives. *See* Hirsch, *supra* note 21 at 382 app. An earlier study of probate records in Kentucky found that out of 21 wills that included a contingency clause for predeceasing siblings, only one will named the siblings' issue as alternative takers. *See* Schneider, *supra* note 55, at 432. An earlier study of probate records in Illinois found that out of 12 wills bequeathing to relatives more distant than siblings, four named the remaining distant relatives as alternative takers, one named the spouse of the beneficiary as alternative taker, two named the residuary beneficiaries as alternative takers, three named other persons as alternative takers, and two named the children of the beneficiary as alternative takers. *See* Dunham, *supra* note 17, at 283–84.

[328] *See* UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N, amended 2019).

[329] *See* Hirsch, *supra* note 21, at 381 app.

[330] Out of the 167 wills surveyed in Kentucky that included a contingency clause in case the spouse predeceased the testator, 144 (86.2%) directed "all or substantially all" of the spouse's bequest to the testator's children as alternative takers. Schneider, *supra* note 55, at 424. In Illinois, the comparable fraction was 60%. *See* Dunham, *supra* note 17, at 283. In Ohio, the comparable fraction exceeded 70%. *See* SUSSMAN ET AL., *supra* note 27, at 196–97. In Florida, in a more recent probate study of 493 wills, this pattern again predominated. *See* Wright & Sterner, *supra* note 138, at 357, 362–63 (tabulating no alternatives to this pattern).

[331] Antilapse can apply to predeceasing spouses in just seven states. *See* Hirsch, *supra* note 21, at 323 nn.84, 87.

spouse's place, even though the testator might have lacked a parental relationship with them.[332] The Code applies the antilapse doctrine to stepchildren only if they are named in the testator's will, thereby signaling the existence of a parental relationship.[333] Nevertheless, this concern—assuming it swayed the drafters, who remained silent on the matter[334]—is easily dealt with. In the instant study, respondents were given the choice of redirecting bequests for a predeceasing spouse to the *testator's* children rather than children of the spouse. Thus defined, this option proved the majoritarian default, selected by 65.5% of respondents.[335]

In fact, empirical evidence presented earlier suggests the need for an additional refinement here. If they redirect a predeceasing spouse's bequest to children of the testator, then the drafters should define "children" for purposes of antilapse to include stepchildren raised in the testator's household, as previously discussed in the context of intestacy.[336] Such a definition would complement the Code's existing rule applying antilapse to predeceasing stepchildren named as beneficiaries in a testator's will.[337]

IV. ANALYSIS

We have completed our tour of the Code and its correlation with empirical evidence. Fortunately, some of the Code's provisions are compatible with that evidence, even when the drafters neglected to refer to it. Yet, at the end of the day, we cannot but lament the mismatch between many of the Code's provisions and the body of evidence detailed in this Article. Although some of the relevant studies emerged only recently, many others appeared some time ago. Sadly, the drafters' failure to cite existing studies in any but a few of the comments attached to the Code speaks volumes.[338] For all appearances, the drafters either ignored the literature or neglected to keep abreast of it. If they believed that doing so was unnecessary—that they could gauge probable intent accurately from their armchairs[339]—then data presented in this Article should cause them to think again.

The drafters' successors on the Joint Editorial Board that oversees the Code have focused attention on empirical studies only in recent years, as the minutes of their meetings attest.[340] No revisions to the Code have yet

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[332] *See, e.g.*, Keniston v. Adams, 14 A. 203, 204 (Me. 1888); Sackman v. Campbell (*In re* Renton's Estate), 39 P. 145, 147 (Wash. 1895); Cleaver v. Cleaver, 39 Wis. 96, 102–03 (1875).

[333] *See* UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N, amended 2019).

[334] *See id.* § 2-603 cmt.

[335] *See* Hirsch, *supra* note 21, at 381 app.

[336] *See supra* notes 133–139 and accompanying text.

[337] *See* UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N, amended 2019).

[338] *See supra* note 8 and accompanying text.

[339] *See supra* note 11 and accompanying text.

[340] A review of the minutes of Board meetings since 1999 reveals that it does regularly review scholarship pertinent to the Code. *See, e.g.*, Uniform Law Commission, Joint Editorial Board for Uniform Trust and Estate Acts, Meeting Minutes 2 (Dec. 2, 2022), https://www.uniformlaws.org/viewdocument/meeting-minutes-dec-2-2022?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213&tab=librarydocuments [https://perma.cc/77UV-87S3] [hereinafter Meeting Minutes]. Nonetheless, prior to 2021, the Board referred to published data at only a single meeting. *See id.* at 11 (Dec. 15, 2003), https://www.uniformlaws.org/viewdocument/meeting-minutes-110703-pdf?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213&tab=librarydocuments [https://perma.cc/AVW8-K7FK]. More recently, the Board heard a presentation on empirical legal studies by Professor Emily Poppe in 2021, and it reviewed a number of newly-published empirical studies in 2022 and 2023, although the minutes do not indicate that the Board plans to take any steps in response to

appeared on the basis of those studies. But in response to this Article, which the Joint Editorial Board discussed at a recent meeting, "[t]he Board resolved to continue monitoring empirical studies for possible future revision projects."[341] Time will tell whether the Board follows through and hearkens to the data that is welling from those studies, or merely pays lip service to them.

If the Board does become more receptive to data, then as an institutional matter the Uniform Law Commission should allocate funds to verify evidence adduced in empirical studies, especially ones based on relatively small samples of the population. Academic researchers have a greater incentive to undertake novel studies than to corroborate prior ones. Therefore, the Board will likely have to replicate prior surveys on its own, and the cost of doing so (especially via electronic means) is now modest.[342]

Again, as an institutional matter, the Uniform Law Commission needs to recognize the importance of deploying its resources—human as well as financial—toward refurbishing existing acts, as opposed to promulgating new ones. Like academics, and perhaps managers generally, the Uniform Law Commission gains more notoriety and prestige from novel projects, however urgently needed. Too often, innovation crowds out more mundane custodial activities.[343]

Identifying and highlighting discrepancies between rules and data are, however, only the beginning. Of course, those charged with the Code's maintenance must not treat its provisions as sacrosanct, nor have we reason to fear adamantine entrenchment of existing rules. Even so, mutability raises its own problems.

One issue concerns how granular the Code ought to become in response to empirical evidence. The drafters of the revised Code of 1990 sought to improve it "by fine tuning the various sections"—anticipating the current movement to "personalize" default rules.[344] This Article, in turn, has identified several more provisions that would benefit from refinement in

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data presented in those studies. *See id.* at 2 (Dec. 3, 2021), https://www.uniformlaws.org/viewdocument/meeting-minutes-dec-3-2021 [https://perma.cc/QN9Y-VPRP]; *id.* at 2 (Dec. 2, 2022), https://www.uniformlaws.org/viewdocument/meeting-minutes-dec-2-2022?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213&tab=librarydocuments [https://perma.cc/77UV-87S3]; *id.* at 2–3 (Apr. 14, 2023), https://www.uniformlaws.org/viewdocument/meeting-minutes-april-14-2023?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213 [https://perma.cc/J7LX-JGFH].

[341] *Id.* at 2 (Nov. 17, 2023), https://www.uniformlaws.org/viewdocument/meeting-minutes-november-17-2023?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213 [https://perma.cc/ZNZ7-B56G] (reviewing a version of this Article posted on SSRN).

[342] The Uniform Law Commission has failed thus far to subsidize empirical research relevant to the design of the Uniform Probate Code. *See supra* note 14 and accompanying text. Nonetheless, at a recent meeting, the Joint Editorial Board "discussed whether further empirical and nonempirical studies could help guide the Uniform Law Commission's law reform efforts, and whether the Board should take an active role in shaping *and funding* the research," so this possibility is on the table, at least. Meeting Minutes, *supra* note 340 at 2–3 (Apr. 14, 2023), https://www.uniformlaws.org/viewdocument/meeting-minutes-april-14-2023?CommunityKey=b8aed336-27d8-460b-818d-9c20fb64a213 [https://perma.cc/J7LX-JGFH] (emphasis added). The polling firm Ipsos currently charges $900 per question for an electronic survey of 1,000 respondents. *See Ipsos Knowledge Panel Omnibus Services*, IPSOS (2020), https://www.ipsos.com/sites/default/files/knowledgepanel-omnibus-info-1.pdf [https://perma.cc/NMH3-2BWU].

[343] The phenomenon has been dubbed "shiny object syndrome," although it has yet to be studied rigorously. *See* Isaac Dumet, *Shiny Object Syndrome: Tips to Avoid & Overcome*, EVERHOUR BLOG (Oct. 11, 2023), https://everhour.com/blog/shiny-object-syndrome/#:~:text=Shiny%20object%20syndrome%20is%20when,the%20rounds%20within%20the%20industry [https://perma.cc/TSU7-XL37].

[344] UNIF. PROB. CODE, art. 2, pt. 1 general cmt. (UNIF. L. COMM'N, amended 2019); *supra* note 40 and accompanying text.

response to data.[345] Yet, simultaneously, the drafters ought not embellish provisions to the point where they become difficult to understand and administer.[346]

If the drafters truly wish to personalize a default rule, they have an alternative move at their disposal. They could transform the rule into a standard, giving courts discretion to find whatever result accords with the individual's probable intent. A standard delivers personalized outcomes *in excelsis*. To a degree, this sort of discretion could prove handy in every case, regardless of the circumstances. "No will has a brother" is one of inheritance law's abiding maxims.[347] Still, the extent of preference heterogeneity may vary, amplifying or lessening the virtues of discretion.[348] It could happen that, in some situations, preferences vary so prolifically that not even a complex rule could capture probable intent in a manner that the drafters deemed acceptable. In such instances, standards would do a better job of effectuating intent than any rule could. Scholars have proposed them from time to time in the inheritance realm,[349] and the drafters of the Code have taken one step in that direction, but not two.[350]

Were the drafters to transform default rules into default standards, empirical evidence would become secondary to evidence from the case. But, of course, standards implicate problems of their own, even though they lack complexity. They entail decision costs, error costs, and uncertainties of outcome that hamper parties' abilities to plan (although means exist to mitigate those costs[351]). The merits of rules versus standards have been endlessly debated in the annals of jurisprudence, confronting lawmakers with the horns of a dilemma that could belong to the devil himself.[352] Yet, for present purposes, we can cut the dilemma down to size. If parties *prefer* to establish default standards, then lawmakers ought to accommodate them.

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[345] *See supra* text at notes 67–71, 79–82, 133–140, 143–144, 166–179, 190, 278–282, 311–313.

[346] *See supra* note 41 and accompanying text.

[347] *See In re* Clark, 151 N.Y.S. 396, 399 (Sur. Ct. 1914) (noting that "we never find two wills exactly alike in language and attending circumstances").

[348] For example, preference heterogeneity rises when a decedent leaves no spouse or descendants. *See supra* note 217 and accompanying text.

[349] *See* Fratcher, *supra* note 202, at 1050 (regarding escheat); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J. L. REFORM 787, 810–27 (2012) (regarding intestacy); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 548–51, 559–60 (1977) (same); John Elden Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748, 768, 779–80 (1929) (regarding children omitted from wills).

[350] *See* UNIF. PROB. CODE, §§ 2-601 & cmt., 2-701 (UNIF. L. COMM'N, amended 2019) (as revised in 1990, permitting courts to deviate from certain default rules for wills if either "evidence extrinsic to the will" or "the content of the will itself" reveals that the testator had a "contrary intention"). Simultaneously, extrinsic evidence remains inadmissible to override any of the default rules of intestacy under the Code. *See id.* § 2-101(a). *Cf. id.* § 2-114(a)(2) (creating an exception only where intestacy becomes a mandatory rule because the decedent is ineligible to create a will). Still, courts have not construed the Code thus far to allow extrinsic evidence to override any of its default rules, despite the drafters' stated intention to the contrary. *See In re* Leete Estate, 803 N.W.2d 889, 902 (Mich. Ct. App. 2010).

[351] Lawmakers can shift decision costs from the state to survivors by ending their subsidy of judicial proceedings. Lawmakers can also facilitate planning by allowing testators to bar extrinsic evidence under the terms of their wills. The Code's provisions opening the door to extrinsic evidence fail to state whether they themselves comprise mandatory or default rules. *See* UNIF. PROB. CODE, § 2-601 cmt. (UNIF. L. COMM'N, amended 2019).

[352] For the earliest recorded discussion, see ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 179–80 (J.E.C. Welldon trans. 1987) (c. 335–322 b.c.). For a classic modern discussion, see ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 59–71 (Yale Univ. Press rev. ed. 1954) (1922). For a more recent perspective, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 *passim* (1992).

That, too, is an empirical question, and researchers have begun asking it, as we have observed.[353]

A related issue concerns regional variations in empirical evidence, should studies uncover them.[354] To the extent that preferences vary from state to state, the drafters must deal with the variation either by regression to the mean (or the plurality), or by looking for ways to account for pluralism within the rule itself. For example, the Code's intestacy provisions are ostensibly designed for decedents leaving "smaller estates"—but what constitutes a smaller estate in impoverished regions differs from affluent ones.[355] In order to respond to this variable, the drafters can establish different rules for different estate valuations, as earlier discussed,[356] although even that strategy might fail to capture local differences in preferences.

Alternatively, drafters can capitulate to pluralism by inviting states to establish some of their own rules. The original drafters envisioned that their work product would attract such variations. They described the Code as "a nonuniform uniform Code, or a uniform plus model Code" and were untroubled by the prospect of tinkering by individual states.[357] Although their successors have set greater score by uniformity,[358] even the current version of the Code brackets certain default provisions, offering states leave to adapt them to local preferences[359]—hopefully based on geographical variations in hard data.

Finally, there remains the matter of statutory dynamics. New empirical studies are continually calling into question default rules found in the Code.[360] Its stewards cannot afford to ignore those studies—but neither should they overreact to them. If the Code became a carousel of ever-changing rules, the information costs to attorneys and laypersons, coupled with the transaction costs of revising wills executed in reliance on default rules prevailing at any given time, would soar. Legislators would balk. The drafters must strive for a happy medium. They should not adjust the Code at each annual meeting of the Uniform Law Commission.

Up to now, societal change (and, I dare say, generational change within drafting committees) has inspired the Code's occasional revisions.[361] But

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[353] *See supra* notes 201–203, 221–223 and accompanying text.

[354] Researchers have typically confined probate studies to records from discrete locations, revealing local patterns of testation, and even national surveys performed by electronic polling firms provide researchers with data that they can disaggregate by region, among other variables. *See, e.g.*, Hirsch, *supra* note 21, at 361 nn.304 & 307, 362–63 nn.313–14, 364 n.319, 365 n.324.

[355] *See supra* note 69.

[356] *See* UNIF. PROB. CODE §§ 2-102(2)–(4) (UNIF. L. COMM'N, amended 2019); *see also supra* notes 70–72 and accompanying text.

[357] Wellman, *supra* note 9, at 203; *see also* Richard V. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L.F. 536, 542 (1970) (observing that the drafters "assume that local study and redrafting will occur in every state accepting the Uniform Probate Code.").

[358] See John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 878–79 (1992) (opposing "local variations").

[359] *See, e.g.*, UNIF. PROB. CODE §§ 2-102(2)–(4) (UNIF. L. COMM'N, amended 2019).

[360] *See, e.g.*, *supra* note 56 and accompanying text.

[361] New drafters have wished to make their mark by marking up the Code, even when they could have left well enough alone. *See* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 640 (1993) (criticizing the revised Code of 1990 as "much less clear and much wordier" than the original version). The latest amendments of 2008 and 2019 "reflect changes in the U.S. family and advance the UPC's purposes and policies." Fellows & Gallanis, *supra* note 148, at 127–31 (quotation at 127) (describing the drivers of recent revisions of the Code).

given the steady drumbeat of empirical studies, enlightening lawmakers on a track, and at a clip, that is distinct from more gradual shifts in social mores, the drafters ought to subject the Code to a revision cycle. At regular intervals, every *n* years, the Joint Editorial Board should synthesize the latest raft of empirical studies and integrate their insights into the Code. Such a process would ensure systematic attention to those studies, yet would not overwhelm legislatures with a constant stream of amendments.

As an operational guideline, the drafters should flag in their comments which of the Code's default rules were or were not premised on empirical evidence. This sort of transparency would help to identify the Code's weaknesses, but also its strengths—for in at least scattered instances, legislative history reveals, the drafters relied on data that they neglected to cite.[362] In any event, state lawmakers need to know which provisions are grounded in data and which ones reflect expert impressions. States have greater cause to modify default rules that lack an empirical foundation, especially if data exist that the Code's stewards are ignoring.

CONCLUSION

In 1946, the drafters of the Model Probate Code—precursor of the Uniform Probate Code—characterized the assessment of decedents' probable intent as "a highly speculative matter."[363] Thankfully, that is no longer the case. Today's legislators can seek out oases of data, even if they do not yet cover the field.[364] Empirical evidence takes the guesswork out of lawmaking.

But only if legislators heed the data. And here, we may observe, the Uniform Law Commission could play a uniquely constructive role, given the challenges posed by inheritance law as a matter of public choice. In some areas of law, special interest groups wield disproportionate sway, crafting rules to their liking.[365] In the realm of substantive inheritance law, we confront the opposite problem: the field has no constituency at all pressing for innovation.[366] Consequently, legislators often relegate inheritance law to the backburner, allowing its rules to become timeworn. In this inauspicious environment, the Code can function as a catalyst for change, with Commissioners in each state serving as advocates—not for their self-interest, but for reform.[367] Even if they fail in their efforts to promote the Code as a

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[362] *See supra* note 54.

[363] SIMES & BAYSE, *supra* note 208, § 22 cmt., at 63. Hence, "any scheme of intestate succession is, to a certain extent, arbitrary." *Id.*

[364] Among the remaining areas calling for empirical inquiry are (1) as regards intestacy, adoptees' rights to take as heirs of a natural relative when they are adopted as adults or when adoption is open, and the implications of partial intestacy; and (2) as regards testacy, the doctrines of ademption by extinction, accession, abatement, and shares for omitted spouses. For preliminary data relevant to these doctrines, see Hirsch, *supra* note 29, at 1476–77 (regarding partial intestacy); Horton, *supra* note 46, at 1147–51 (regarding ademption by extinction); *see also* Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 421–48 (2010) (presenting preliminary data on the potential of will substitutes to signal their creators' preferences in the event of intestacy).

[365] *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 23–24 (1991).

[366] *See* Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 194 (1969) (ascribing the sluggish reform of inheritance law to "a vacuum of consumer interest").

[367] Commissioners have an institutional obligation to lobby for adoption of all uniform acts in their respective state legislatures. *See* Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 247 (1965).

whole, the Commissioners can spur legislators to revisit individual rules that have grown obsolete—*or* that have been discovered to conflict with empirical evidence.

For this process to work properly, though, the Code itself needs to stay current. No sooner had the Commissions promulgated the Code in 1969 than complaints about its inconsistencies with empirical evidence began to appear.[368] More complaints have reverberated through the pages of this Article. It now behooves the Commissioners to swing into action. Yet, their attention to data, and calls to respond to it, is scarcely assured. Historically, empirical evidence has proven incidental, not fundamental, to the Code's craftsmanship.

Old conceits die hard—but die they must. No matter how expert they are, no matter how many years of experience they have clocked up, the drafters of the Code cannot compete for compositional quality with the humble statistician, painting by the numbers.

[368] *See* Thomas J. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 U. MICH. J.L. REFORM 301, 331 (1970) (published under the former journal title, Prospectus).