Beyond Privity of Blood: Intestacy and Charity

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When an individual dies without leaving a will, the law of intestacy functions to distribute the decedent's estate to a surviving spouse and/or close blood relatives. Yet, this default regime fails to account for the possibility that some individuals wish to allocate part of their estates to charity. Drawing on empirical evidence, including data presented here for the first time, this Article advocates building a charitable component into intestacy in those cases where majorities of decedents prefer to establish estate plans transcending traditional heirs. Evidence suggests that this majority preference arises in four situations: (1) where the decedent was extremely wealthy, (2) where the decedent was less wealthy but died without descendants, (3) where the decedent died without descendants and had made charitable donations, irrespective of wealth, and (4) where the decedent died without any known relatives. The Article proposes personalizing the process of intestacy further by granting charitable shares, when called for, to those causes which decedents had individually supported during their lifetimes. The Article assesses the structural costs and benefits of these innovations and concludes that they would not prove excessively complex or administratively burdensome.

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INTRODUCTION

When an individual dies without a will, the intestacy statute determines which beneficiaries succeed to his or her estate. Whereas a will sets out a custom-made estate plan, the intestacy statute delineates an off-the-rack estate plan. It is "the will which the law makes" when individuals fail to make their own.[1]

Historically, lawmakers have limited intestate succession to family members—either the spouse and other relatives by marriage, or genetic kin, or relatives by adoption. In keeping with this limitation, courts sometimes describe the connection between intestate individuals and their heirs as "privity of blood."[2]

When executing wills, however, individuals often reach beyond the family, naming beneficiaries with whom they lack any formal kinship. Some testators bequeath to friends or employees. Others bequeath to charities. Americans are renowned philanthropists, and they sometimes cap a lifetime of giving with generosity to charitable causes upon their deaths.

Under current law, individuals can only benefit charities at death by executing an estate plan. None of the fifty state intestacy statutes provides for inheritance by charities to any extent, under any circumstances—with one narrow exception that we will address in due course.[3] Given, though, Americans' propensities for philanthropy, the possibility of integrating charity into intestacy, thereby opening the door to a new category of heirs, merits consideration—a possibility never heretofore assayed in the scholarly literature.[4]

In this Article, we shall explore possible entryways for charity into the realm of intestate succession. Part I begins by sketching the reasons why individuals make charitable transfers, either during their lifetimes or at death. Herein, we get our bearings for the analysis to follow. Part II considers how lawmakers could tailor intestacy law to fit the charitable inclinations of different cohorts of the population. We will examine data—some extant and some original—that pertain to this question. Part III goes a step further, addressing the possibility of personalizing intestacy law to accommodate the charitable preferences of each individual decedent. We will present evidence from an original survey designed to explore this issue. Part IV shifts to the problem of

1. PETER LOVELASS, THE WILL WHICH THE LAW MAKES (London, W. Strahan & M. Woodfall 1785) (retitled *The Law's Disposal of a Person's Estate Who Dies Without Will or Testament* in subsequent editions).

2. *E.g.*, Barkley v. Thomas, 17 S.E.2d 482, 485 (N.C. 1941).

3. *See infra* notes 189–196 and accompanying text.

4. Much the published data that we shall marshal for purposes of law reform was harvested to counsel charitable organizations on solicitation strategies, that is, for "more effectively targeting potential estate donors." Russell N. James III, *Health, Wealth, and Charitable Estate Planning: A Longitudinal Examination of Testamentary Charitable Giving Plans*, 38 NONPROFIT & VOLUNTARY SECTOR Q. 1026, 1040–41 (2009); *see also*, *e.g.*, *infra* notes 141–142 and accompanying text (quoting other solicitation-based studies).

charitable intent in those rare instances where no blood heirs survive the decedent. Herein, we will put forward original variations of previously published data. Finally, Part V weaves the evidence into a proposed reform of intestacy law.

I. PROSOCIAL BEHAVIOR

Private support for public charities has varied over space and time.[5] In some parts of the world, including China, citizens prioritize family above all else—in the vernacular of economics, the other-regarding preferences of some populaces are confined to their kin.[6] Americans are more social minded. In 2022, Americans donated $499.3 billion to charity, amounting to 2 percent of gross domestic product. $45.6 billion of these donations came via bequests, some 9.1 percent of the total.[7]

What explains Americans' propensity for charitable giving? Of course, persons may donate for all manner of reasons, but social norms must play a part, or else differences in transnational patterns of philanthropy would not exist.[8]

5. For historical data, see W.K. JORDAN, PHILANTHROPY IN ENGLAND 1480–1860, at 240–53, 367 (1959) (finding that the extent of charitable giving has waxed and waned in England); CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 48, 107 (1987) (reporting data from Bucks County, Penn.); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 47 (1964) (reporting data from another state); Kristine S. Knaplund, *Becoming Charitable: Predicting and Encouraging Charitable Bequests in Wills*, 77 U. PITT. L. REV. 1, 23–29 (2015) (comparing wills from Los Angeles and St. Louis); Leslie Moscow McGranahan, *Charity and the Bequest Motive: Evidence from Seventeenth-Century Wills*, 108 J. POL. ECON. 1270, 1288–89 (2000) (assessing data from Suffolk, England).

6. *See Charity Ends at Home*, ECONOMIST, Apr. 6, 1996, at 69 (remarking the absence of philanthropy in China); Seth Faison, *Who's Afraid of Wei Jingsheng?*, N.Y. TIMES, Nov. 23, 1997 (§ 4), at 5 ("Many Chinese people are perplexed[] . . . [that] an American might . . . contribute to a charity that benefits a complete stranger."); Reza Hasmath & Qian Wei, *Getting Rich But Not Giving? Exploring the Mechanisms Impeding Charitable Giving in China*, AM. POL. SCI. ASS'N ANN. MEETING 9–12 (Aug. 1, 2023), https://ssrn.com/abstract=4322716 (remarking the significance of a lack of "social trust" in China).

7. *See* Alexandra Pia Brovey, *Charitable Giving Trends: A Brief Overview*, TRS. & ESTS., Oct. 2023, at 25, 25–26. For data from the previous year, see GIVING USA, 2022 PHILANTHROPY REPORT (2022), https://givingusa.org/wp-content/uploads/2022/06/GivingUSA2022_Infographic.pdf. Statistics between 1955 and 1982 are similar. *See* CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 6 tbl.1.2 (1985). For modern trends confined to lifetime donations, see IND. UNIV. LILLY FAMILY SCH. PHILANTHROPY, THE GIVING ENVIRONMENT: GIVING TRENDS BY RACE AND ETHNICITY 5–8, 15–17 (2023) [hereinafter GIVING ENVIRONMENT II], https://scholarworks.indianapolis.iu.edu/server/api/core/bitstreams/6b8c2e97-ab05-4c0c-bf19-e7438953c53b/content (reporting a downturn in giving rates between 2000 and 2018, based on a panel study of over 9000 households); IND. UNIV. LILLY FAMILY SCH. PHILANTHROPY, THE GIVING ENVIRONMENT: UNDERSTANDING PRE-PANDEMIC TRENDS IN CHARITABLE GIVING 5–7, 14–16 (2021) [hereinafter GIVING ENVIRONMENT I], https://scholarworks.indianapolis.iu.edu/server/api/core/bitstreams/f5f188c8-285e-4ddd-ab10-6da930d82c6f/content (reporting the same).

8. *See* FRANCIE OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY 3, 12–16 (1995) (based on interview data from 99 wealthy New Yorkers); *see also* Alan Radley & Marie Kennedy, *Charitable Giving by Individuals: A Study of Attitudes and Practices*, 48 HUM. REL. 685, 687, 689 (1995)

From Andrew Carnegie in the nineteenth century to Bill Gates in the twenty-first, entrepreneurs have sought to inculcate philanthropic norms in their fellows, promoting a sort of virtuous cycle.[9] Today's great families line up to donate,[10] and celebrities among them face public criticism when they appear insufficiently munificent.[11]

A concern that leaving children too much money could morally debase them pushes the well-healed in the same direction. Carnegie took the lead in voicing this concern,[12] which has echoed down the decades to the present day.[13]

(discussing philanthropy in Great Britain); Paul G. Schervish & John J. Havens, *Social Participation and Charitable Giving: A Multivariate Analysis*, 8 VOLUNTAS 235 *passim* (1997) (suggesting the multiplicity of relevant factors).

9. Carnegie and Gates are "norm entrepreneurs," in the jargon of social norm theory. ERIC A. POSNER, LAW AND SOCIAL NORMS 30–32 (2000). Carnegie laid out his philosophy in a published text. *See* ANDREW CARNEGIE, *The Gospel of Wealth*, *in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 14, 23–25 (Edward C. Kirkland ed., 1962) (1889) (asserting a "duty of the man of wealth" to treat his wealth "simply as trust funds, which he is called upon to administer . . . in the manner which, in his judgment, is best calculated to produce the most beneficial results for the community"). Gates along with Warren Buffet have proselytized in China, seeking to convert its entrepreneurs to philanthropy. *See* Renee Haines, *We're More Likely to Give When We See How Easy It Is*, CHINA DAILY (BEIJING), Sept. 15, 2010; Michael Wines, *In China, Attitudes on Generosity Are Tested*, N.Y. TIMES, Sept. 24, 2010, at A4. This inculcation of values also occurs within families; parents' charitable propensities influence their children's. *See* Mark O. Wilhelm, Eleanor Brown, Patrick M. Rooney & Richard Steinberg, *The Intergenerational Transmission of Generosity*, 92 J. PUB. ECON. 2146 *passim* (2008).

10. *See generally* WALDEMAR A. NIELSEN, THE GOLDEN DONORS (1985). Rockefeller wealth funded the Rockefeller Foundation, Rockefeller University, the Museum of Modern Art, the Cloisters Museum, and Colonial Williamsburg, among other charitable causes. *See John D. Rockefeller Defended*, ECONOMIST, Apr. 18, 1998, at 11 (book review); *see also, e.g.*, Brian Fung, *Jeff Bezos Says He Will Give Most of His Money to Charity*, CNN (Nov. 14, 2022, 8:58 AM EST), https://www.cnn.com/2022/11/14/business/jeff-bezos-charity/index.html; *Paul Allen to Donate Majority of His Wealth to Charity*, PHILANTHROPY NEWS DIG. (July 16, 2010), https://philanthropynewsdigest.org/news/paul-allen-to-donate-majority-of-his-wealth-to-charity (concerning the estate plan of Microsoft's cofounder who died in 2018); David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES, Sept. 15, 2022, at B1.

11. *See* David Whitman, *Is Gore a Serial Cheapskate?*, U.S. NEWS & WORLD REP., May 18, 1998, at 10 (noting criticism of Vice President Al Gore's "stinginess," when his tax return disclosed that he "gave just $353 to charity" in 1997). Earlier in his life, Bill Gates was "criticized for not being more generous." Lawrence K. Altman, *Gates Giving $100 Million to Fight Childhood Disease*, N.Y. TIMES, Dec. 2, 1998, at A10.

12. *See* CARNEGIE, *supra* note 9, at 21 ("I would as soon leave my son a curse as the almighty dollar."); *see also* DAVID ROCKEFELLER, MEMOIRS 19–22 (2002) (quoting Carnegie's contemporary, John D. Rockefeller, Sr., as observing that "'there is no easier way to do harm than by giving money,' and he felt it applied most particularly to his own children," although Rockefeller ultimately concluded that his son possessed the force of character to handle a vast inheritance).

13. Bill Gates has pledged to leave 95% of his wealth to his foundation, asserting that he does not want to "burden[]" his children with his wealth. Nadine Brozan, *Chronicle*, N.Y. TIMES, Dec. 15, 1995, at B6. Warren Buffett similarly characterizes a sizeable inheritance as "debilitating" to one's children. JANET LOWE, WARREN BUFFETT SPEAKS 47–48 (1997). Buffett has pledged to leave 99% of his fortune to charity. *See* Anna Sulkin Stern, *What Will Happen to Warren Buffett's Fortune After His Death?*, WEALTHMANAGEMENT.COM (July 6, 2022), https://www.wealthmanagement.com/estate-planning/what-will-happen-warren-buffett-s-fortune-after-his-death; *see also* OSTROWER, *supra* note 8, at 105–07 (presenting interview data); Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 29, 1986, at 18 *passim* (presenting the same); Dana Wechsler Linden & Dyan Machan, *The Disinheritors*, FORBES, May 19, 1997, at 152 *passim* (presenting the

A survey in 2021 found that 67 percent of millionaires share Carnegie's anxiety, and it moves both self-made individuals and inheritors.[14]

The economics of philanthropy is more complicated.[15] If individuals were narrowly self-regarding, no giving would occur except to kinfolk (assuming *genes* are self-regarding).[16] And if, contrarily, individuals were purely altruistic, a different problem would arise: freeriding. On this assumption, individuals derive utility from knowing that charitable benefits exist, but individuals also know that other, likeminded individuals (and ultimately government) will provide those benefits if they themselves do not. Under this model, "in large economies virtually no one gives to the public good, hence making the Red Cross, the Salvation Army, and American Public Broadcasting logical impossibilities."[17]

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same). For statements by other celebrities, see Janelle Ash & Larry Fink, *Marie Osmond Doubles Down on Refusal to Leave Inheritance to Her Kids: "Self-Worth Can't Be Bought,"* FOX NEWS (Oct. 28, 2023, 4:00 AM EDT), https://www.foxnews.com/entertainment/marie-osmond-doubles-down-refusal-leave-inheritance-kids (also discussing other celebrities); Nicolas Vega, *'[My] Children Don't Need $500 Million': Mick Jagger Says Rolling Stones Have No Plans to Sell Music Catalog*, CNBC (Sept. 28, 2023, 4:00 PM EDT), https://www.cnbc.com/2023/09/28/mick-jagger-rolling-stones-discography-inheritance.html; Nicolas Vega, *Anderson Cooper Won't Leave his Fortune to his Son: Why 'I Don't Believe in Passing on Huge Amounts of Money,'* CNBC (Sept. 27, 2021, 5:29 PM EDT), https://www.cnbc.com/2021/09/27/why-anderson-cooper-wont-leave-an-inheritance-for-his-son.html#:~:text=I%20don't%20intend%20to,a%20person's%20drive%20to%20succeed; Nicolas Vega, *'James Bond' Actor Daniel Craig Says his Children Won't Be Receiving His Multimillion-Dollar Fortune*, CNBC (Aug. 20, 2021, 5:28 PM EDT), https://www.cnbc. com/2021/08/20/james-bond-actor-daniel-craig-on-inheritance.html.

14. *See* Jack Caporal, *Kevin O'Leary Is Concerned About Leaving Too Large an Inheritance—So Are Two-Thirds of High-Net-Worth Individuals*, THE MOTLEY FOOL (Oct. 12, 2021, 12:35 PM), https://www.fool.com/research/high-net-worth-inheritance (polling 2000 millionaires electronically in September 2021). This fraction jumped by around 10% among respondents who had themselves received inheritances of $100,000 or more, suggesting that their own experiences might have affected in their reactions. *See id.* But the same is true, in a different way, of self-made individuals. As one put it, "I want to give my kids the tremendous satisfaction of making it on their own." Kirkland, *supra* note 13, at 21 (internal quotation marks omitted); *see also id.* at 19–20 (presenting additional anecdotal evidence); Tom Coupe & Claire Monteiro, *The Charity of the Extremely Wealthy*, 54 ECON. INQUIRY 751, 760 (2016) (finding that self-made billionaires are significantly more philanthropic than inheritors).

15. For a review, see James Andreoni, *Philanthropy*, *in* 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM, AND RECIPROCITY 1201 *passim* (2006); *see also* Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1699–1712 (2015) (including interdisciplinary sources).

16. *See* Mikael Elinder, Per Engström & Oscar Erixson, *The Last Will: Estate Divisions as a Testament of to Whom Altruism Is Directed*, PLOS ONE, July 28, 2021, at 6–12 (finding evidence from probated wills that testators favor their closest genetic kin, based on Swedish data); Martin S. Smith, Bradley J. Kish & Charles B. Crawford, *Inheritance and Wealth as Human Kin Investment*, 8 ETHOLOGY & SOCIOBIOLOGY 171, 178–81 (1987) (finding the same, based on data from British Columbia); Gregory D. Webster, Angela Bryan, Charles B. Crawford, Lisa McCarthy & Brandy H. Cohen, *Lineage, Sex, and Wealth as Moderators of Kin Investment*, 19 HUM. NATURE 189, 200–05 (2008) (finding the same, based on a different data set from British Columbia); *see also* HELENA CRONIN, THE ANT AND THE PEACOCK 253–65 (1991) (addressing altruism in other species).

17. James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 465 (1990) [hereinafter Andreoni, *Impure Altruism*]. For economic models, see James

The failure of this model to explain reality suggests the limits of economics as a predictor of human behavior. At least in certain settings, social norms can overcome freeriding and, more broadly, the collective-action problem. Remarkably, that is true even where the actors involved are donors—a disparate group, unlike the sort of close-knit communities within which normative constraints on self-regarding behavior have typically been observed.[18]

Unsurprisingly, economists view the matter differently. Confronted with a behavioral anomaly, economists returned to their blackboards and posited a different theory: individuals donate to charity for egoistic reasons. They derive utility from knowing that they themselves are doing their part, which economists call "warm-glow giving."[19] Some individuals also have a taste for the prestige they derive from making charitable gifts; they regard such a gift as a trade of cash for cachet.[20] Large donors can associate their names with their gifts, whereas, ironically, "[l]arge anonymous donations are so rare that they are newsworthy events."[21]

Andreoni, *Warm-Glow Versus Cold-Prickle: The Effect of Positive and Negative Framing on Cooperation in Experiments*, 110 Q.J. ECON. 1 *passim* (1995); James Andreoni, *Privately Provided Public Goods in a Large Economy: The Limits of Altruism*, 35 J. PUB. ECON. 57 *passim* (1988); Russell D. Roberts, *A Positive Model of Private Charity and Public Transfers*, 92 J. POL. ECON. 136 *passim* (1984); Peter G. Warr, *Pareto Optimal Redistribution and Private Charity*, 19 J. PUB. ECON. 131 *passim* (1982).

18. *Cf.* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 176–78 (1991) (taking an agnostic view on whether norms can constrain behavior beyond close-knit groups).

19. Andreoni, *Impure Altruism*, *supra* note 17, at 464. For a neuroeconomic study, see William T. Harbaugh, Ulrich Mayr & Daniel R. Burghart, *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, 316 SCI. 1622, 1624 (2007) (finding neurological evidence of both pure altruism and warm glow).

20. *See* OSTROWER, *supra* note 8, at 36–42, 94–95 (citing interview data); William T. Harbaugh, *What Do Donations Buy? A Model of Philanthropy Based on Prestige and Warm Glow*, 67 J. PUB. ECON. 269, 272 (1998) ("Prestige could be valuable to individuals because it . . . increases . . . business opportunities"). Historically, donors have had other motives. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *375 (noting how persons often bequeathed to the clergy "who, according to the superstition of the times, could intercede for their happiness in another world").

21. William T. Harbaugh, *The Prestige Motive for Making Charitable Transfers*, 88 AM. ECON. REV. (PAPERS & PROC.) 277, 277 (1998); *see also* Robert D. McFadden, *Charles Feeney, Who Made a Fortune and then Gave It Away, Dies at 92*, N.Y. TIMES, Oct. 9, 2023, at A20 (discussing the philanthropy of a donor who preferred anonymity, "a course followed by only 1% of American givers"); Judith Miller, *He Gave Away $600 Million, and No One Knew*, N.Y. TIMES, Jan. 23, 1997, at A1 (unmasking Feeney). Like conspicuous consumption, "conspicuous giving" can signal the wealth of a donor. Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1020–24 (1996). Persons may wish to send this signal if they "prefer to socialize with individuals of the same or higher social status," *id.* at 1019, or even as a mating strategy. *See* Vladas Griskevicius, Joshua M. Tybur, Jill M. Sundie, Robert B. Cialdini, Geoffrey F. Miller & Douglas T. Kenrick, *Blatant Benevolence and Conspicuous Consumption: When Romantic Motives Elicit Strategically Costly Signals*, 93 J. PERSONALITY & SOC. PSYCH. 85 *passim* (2007) (comparing the phenomenon to conspicuous animal displays, such as the peacock's tail). For a further discussion of the signaling function of philanthropy and additional references, see Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 53–55 (1999).

Most discussions of charitability have focused on inter vivos transfers. Yet, the same considerations motivating those transfers could extend to bequests. For his part, Carnegie criticized those who were by turns stingy in life and generous at death. "Men who leave vast sums in this way may fairly be thought men who would not have left it at all had they been able to take it with them," he observed sardonically.[22] Carnegie asserted that benefactors could achieve greater charitable efficiency if they took a hand in how the funds they donated were administered.[23] So long as affluent individuals had donated all the while, though, Carnegie approved of charitable bequests as a final gesture, and they conform with modern social norms for the wealthy.[24]

Transfers to charity at death could once again produce egoistic benefits. Self-esteem helps to mitigate the terror of death, psychological studies suggest.[25] Because the "warm glow" of donating contributes to self-esteem, studies have found that when subjects are reminded of their mortality, they display a greater inclination to donate—a phenomenon researchers have dubbed the "Scrooge effect."[26] Of course, estate planning itself comprises a process that renders salient the testator's own mortality. Including charitable transfers in an estate

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22. CARNEGIE, *supra* note 9, at 21.

23. *See id.* at 21, 24 (observing that "it requires the exercise of not less ability than that which acquires it, to use wealth so as to be really beneficial to the community," whereas charitable bequests "[i]n many cases . . . are so used as to become only monuments of [the testator's] folly"). For a modern empirical inquiry, see Brian Galle, *The Quick (Spending) and the Dead: The Agency Costs of Forever Philanthropy*, 74 VAND. L. REV. 757, 778–90 (2021) (finding both sharp increases in overhead and sharp drops in payout rates once donors to foundations die).

24. Carnegie himself followed this pattern. *See Carnegie's Estate, at Time of Death, About $30,000,000*, N.Y. TIMES, Aug. 29, 1919, at 1, https://timesmachine.nytimes.com/timesmachine/1919/08/29/103460462.pdf; *see also supra* text accompanying note 9.

25. *See* Eddie Harmon-Jones, Linda Simon, Jeff Greenberg, Tom Pyszczynski, Sheldon Solomon & Holly McGregor, *Terror Management Theory and Self-Esteem: Evidence that Increased Self-Esteem Reduces Mortality Salience Effects*, 72 J. PERSONALITY & SOC. PSYCH. 24 *passim* (1997). For reviews, see Jeff Greenberg, Sheldon Solomon & Tom Pyszczynski, *Terror Management Theory of Self-Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, 29 ADVANCES EXPERIMENTAL SOC. PSYCH. 61, 72–78, 93–94 (1997); Sheldon Soloman, Jeff Greenberg, & Tom Pyszczynski, *The Cultural Animal: Twenty Years of Terror Management Theory and Research*, *in* HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY 13, 20–24 (Jeff Greenberg, Sander L. Koole & Tom Pyszczynski eds., 2004); *see also* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1049–51 (2004) (describing and citing studies on terror management theory).

26. *See* Eva Jonas, Jeff Schimel, Jeff Greenberg & Tom Pyszczynski, *The Scrooge Effect: Evidence that Mortality Salience Increases Prosocial Attitudes and Behavior*, 28 PERSONALITY & SOC. PSYCH. BULL. 1342, 1348–49 (2002) (finding in an experiment that mortality salience prompted subjects to increased charitable giving, but only for causes of interest to subjects); Tomasz Zaleskiewicz, Agata Gasiorowska & Pelin Kesebir, *The Scrooge Effect Revisited: Mortality Salience Increases the Satisfaction Derived from Prosocial Behavior*, 59 J. EXPERIMENTAL SOC. PSYCH. 67, 67–68, 74–75 (2015) (replicating the results of the first study); *see also* Gilad Hirschberger, Shaul Almakias & Tsachi Ein-Dor, *The Self-Protective Altruist: Terror Management and the Ambivalent Nature of Prosocial Behavior*, 34 PERSONALITY & SOC. PSYCH. BULL. 666, 666–69, 672, 674 (2008) (finding subjects less inclined to support charitable causes that themselves aggravate mortality salience).

plan could thus prove a tonic for toxic fears aroused by the occasion of creating that plan. And the same could be true when intestate individuals formulate an intent regarding distributions at death, which requires them to imagine that occurrence.

In this connection, the absence of charitability during life may poorly predict charitability at death. Studies have sought to determine whether the Scrooge effect affected the behavior of diverse subjects differently. The studies found that whereas self-oriented individuals became more inclined to endorse prosocial values when their mortality became more salient, those who were already inclined to be prosocial did not become more so. In other words, mortality salience made each group more alike, rather than exaggerating their preexisting dispositions or enhancing the prosocial inclinations of both groups equally.[27]

And there exists an economic reason why we might predict an uptick in charitable donations at death: at that moment, individuals can better afford it. As early as the eighteenth century, Blackstone gleaned the point: "men are most liberal when they can enjoy their possessions no longer . . . ."[28] In economic terms, charitable giving represents a form of discretionary consumption. During life, wealthier persons have the means to be more philanthropic than poorer persons who spend mostly on necessities (or save as self-insurance against rainy days).[29] Across the socioeconomic spectrum, dead persons can afford greater benevolence, because they no longer need to make ends meet (or to fret about inclement weather)—although they may still prioritize the wellbeing of family members over charity.[30] Yet, at all events, they must benefit someone. *Shrouds have no pockets*. Even misers become generous when they die.

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27. *See* Jeff Joireman & Blythe Duell, *Mother Theresa Versus Ebenezer Scrooge: Mortality Salience Leads Proselfs to Endorse Self-Transcendent Values (Unless Proselfs Are Reassured)*, 31 PERSONALITY & SOC. PSYCH. BULL. 307, 307–08, 311–12, 316–18 (2005) (studying self-reported values rather than charitable behavior while predicting them to coincide); Jeff Joireman & Blyth Duell, *Self-Transcendent Values Moderate the Impact of Mortality Salience on Support for Charities*, 43 PERSONALITY & INDIVIDUAL DIFFERENCES 779, 783–84, 787 (2007) (replicating the results of the first study with regard to the evaluation of charities, without testing the impact on charitable giving while predicting that they would coincide).

28. 2 WILLIAM BLACKSTONE, COMMENTARIES *375.

29. *See* Crystal A. Evans, Gregory Evans & Lorin Mayo, *Charitable Giving as a Luxury Good and the Philanthropic Sphere of Influence*, 28 VOLUNTAS 556 *passim* (2017) (finding that increased spending on philanthropy is associated with increased income but varies with different types of charitable causes). At the same time, wealthy persons may prefer to preserve wealth for egoistic or other reasons. "For the very wealthy, charitable giving may compete less with consumption than with wealth-holding itself." C. Eugene Steuerle, *Charitable Giving Patterns of the Wealthy*, *in* 1 COMPENDIUM OF FEDERAL ESTATE TAX AND PERSONAL WEALTH STUDIES 113, 118 (1994), https://www.irs.gov /statistics/soi-tax-stats-compendium-of-federal-estate-tax-and-personal-wealth-studies-volume-1.

30. *See* Steuerle, *supra* note 29, at 120 ("[M]any top wealthholders may be much more willing to make charitable bequests simply because wealth accumulation or retention is no longer an alternative. In effect, at death some transfer must be made either to charity or to other persons."). For the same reason, if so minded,

The prestige derived from donating yet again translates into the realm of testamentary transfers. When endowed in the name of the testator, a charitable bequest outlives him or her, standing as a sort of intangible monument and signaling how he or she will be remembered.[31] In the words of one scholar, a charitable bequest allows a testator "to found a bloodless dynasty."[32] This prospect might appeal to those individuals who yearn for immortality.[33]

II. TAILORED DEFAULTS

A. THEORY

Intestacy statutes establish default rules. As such, orthodox theory dictates that the distributions ordained by the statutes should correspond with the preferences of a majority of individuals who are subject to them.[34] This correspondence makes *not* having a will more appealing, thus allowing individuals to give effect to the estate plans they want without lifting a finger,

decedents are better able to engage in frivolous consumption at death. For a discussion, see Hirsch, *supra* note 21, at 73–74.

31. For a further discussion and references, see Hirsch, *supra* note 21, at 53–55.

32. Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 589 (1964).

33. *See* OSTROWER, *supra* note 8, at 101 (presenting anecdotal examples from interviews); Robert N. Butler, *Looking Forward to What?*, 14 AM. BEHAV. SCIENTIST 121, 123 (1970) ("[O]lder people are very frequently increasingly preoccupied by leaving a mark or trace. . . . It is a search for identity beyond the grave."); Claire Routley & Adrian Sargeant, *Leaving a Bequest: Living on Through Charitable Gifts*, 44 NONPROFIT & VOLUNTARY SECTOR Q. 869, 877–82 (2015) (presenting focus-group data); Adrian Sargeant & Jen Shang, *Bequest Giving: Revisiting Donor Motivation with Dimensional Qualitative Research*, 28 PSYCH. & MKTG. 980, 989 (2011) (same); Adrian Sargeant, Walter Wymer & Toni Hilton, *Marketing Bequest Club Membership: An Explanatory Study of Legacy Pledgers*, 35 NONPROFIT & VOLUNTARY SECTOR Q. 384, 393 (2006) [hereinafter Sargeant et al., *Marketing*] (same); Adrian Sargeant, Toni Hilton & Walter Wymer, *Bequest Motives and Barriers to Giving: The Case of Direct Mail Donors*, 17 NONPROFIT MGMT. & LEADERSHIP 49, 59 (2006) [hereinafter Sargeant et al., *Bequest Motives*] (same); *see also, e.g.*, Allegheny Coll. v. Nat'l Chautaugua Cnty. Bank, 159 N.E. 173, 175 (N.Y. 1927) ("The promisor wished to have a memorial to perpetuate her name"); Schwartz v. Dr. Miriam and Sheldon G. Adelson Educ. Inst. (*In re* Estate of Schwartz), Nos. 78341, 79464, 2022 WL 970215, at *2 (Nev. Mar. 30, 2022) (unpublished table decision) (similar observation regarding a charitable bequest); Med. Soc'y of S.C. v. S.C. Nat'l Bank, 14 S.E.2d 577, 581–82 (S.C. 1941) (same); *In re* Weir Hospital [1910] 2 Ch 124, 138 (Eng.) ("One of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries."). But for a perceptive criticism of perpetual endowments by a philanthropist with different motivations, see Julius Rosenwald, *Principles of Public Giving*, 143 ATL. MONTHLY 599 *passim* (1929).

34. *See* Sveen v. Melin, 584 U.S. 811, 814 (2018) ("The legal system has long used default rules to resolve estate litigation in a way that conforms with decedents' presumed intent," being the intent of "the average person."). For a further discussion and references, see Hirsch, *supra* note 25, at 1039–42. This principle has actuated drafters of model laws from the beginning. *See* Proceedings in Committee of the Whole, Uniform Probate Code 9 (Aug. 8, 1963) (statement by William Pierce, President of the Uniform Law Commission) ("Should not the law of intestacy parallel as closely as possible what people have done with their estates . . . ?"), https://heinonline.org/HOL/Page?handle=hein.nccusl/nccpub00713&id=1&size=2&collection=nccusl&index=nccusl/nccuslptecd.

and without bearing the transaction cost of hiring professional counsel.[35] Empirical studies can identify which outcomes best represent popular preferences, and hence which rules are cost efficient. Although lawmakers have typically relied on educated guesses to determine those preferences, only hard data can gauge intent with any assurance of accuracy.[36]

Lawmakers armed with empirical evidence still have structural choices to make. When preferences vary among subsets of the population, as they often do, lawmakers must settle on an intestacy statute's level of generality.[37] The statute can operate across the board, reflecting the preferences of the average intestate individual. Alternatively, the statute can contain refinements, tailoring outcomes to the circumstances or characteristics of different cohorts of individuals.

By refining the rules of intestacy, lawmakers enable greater numbers of citizens to implement their preferences without executing estate plans. The statute can thereby achieve even greater cost efficiency. At the same time, introducing refinements into default rules has downsides. As default rules grow more intricate, they become more difficult for citizens—and for courts—to navigate. At some point down this path, a default rule grows so complex that it becomes opaque to citizens, precluding planning based on their comprehension of the rule. Likewise, once a rule becomes opaque to courts, they may fail to apply it correctly, generating error costs. The second problem represents a special concern in the inheritance realm because, in some states, laypersons with no training in law (or statutory construction) can nonetheless serve as probate judges.[38]

At the end of the day, it behooves lawmakers to strike a happy medium, striving for rules of intestate succession that are, so to say, reasonably simple—

35. One can identify instances of planned intestacy in the case law. For an early example, 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.").

36. For a further discussion and references, see Adam J. Hirsch, *A Battle of Wills: The Uniform Probate Code Versus Empirical Evidence*, 33 S. CAL. INTERDISC. L.J. 277, 279 & n.13 (2024).

37. For a recent discussion in the context of contracts, by analogy, see George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109 *passim* (2006) (citing to earlier discussions).

38. *See, e.g.*, GA. CODE ANN. § 15-9-2(a)(1)(D)–(E) (West 2025) (requiring probate judges to have graduated high school); S.C. CODE ANN. § 14-23-1040 (2025) (requiring probate judges either to have earned a bachelor's degree or to have worked for four years in a probate judge's office). For an early identification of the problem, see Md. Laws ch. 101 (1798), *in* 2 A DIGEST OF THE LAWS OF MARYLAND 94 (Thomas Herty ed., J.C. O'Reilly 1804) ("[T]he laws and regulations relative to estates of deceased persons . . . are becom[ing] complicated and difficult to be understood.").

and, by the same token, reasonably complicated. Lawmakers should tailor those rules to some degree, but not to the *n*th degree.

The drafters of the Uniform Probate Code have struggled to balance these competing concerns. With amendments promulgated in 1990 and 2008, the drafters set out to "fine tun[e] the various sections" of the Code.[39] At the same time, the drafters expressed unease that some of their revisions were so "elaborate and intricate" that they had made themselves "susceptible to the criticism of over-legislating."[40] Four years after promulgating the refinements of 2008, the Joint Editorial Board that oversees the Code lamented the paucity of adoptions of their revisions. Board members speculated that "a simplified act might have a better chance of enactment," and three members volunteered to "attempt to draft a simplified act for discussion" at a subsequent meeting—but nothing came of that endeavor.[41]

Lawmakers could, in turn, confine their empirical investigations to the preferences of Americans generally. They could then introduce rules of intestate succession that would apply to all intestate individuals. Were lawmakers to pursue this simple approach, they should lay emphasis on the preferences of poorer citizens, who are more likely to die intestate.[42] Alternatively, albeit with caution, lawmakers could refine their investigations, exploring whether different subsets of the population are prone to divergent preferences. Lawmakers could then enact different rules of intestate succession applicable to each cohort of intestate individuals.

39. UNIF. PROB. CODE art. 2, pt. 1 general cmt. (amended 2019), 8 pt. 1 U.L.A. 42 (2023). Not all refinements found in American intestacy law emanate from the Code; some states have introduced refinements of their own. *See, e.g.*, ARK. CODE ANN. § 28-9-214(2), (4) (West 2025) (reducing the share of a surviving spouse if the marriage had lasted for less than three years); MD. CODE ANN., EST. & TRUSTS § 3-102(b)–(e) (West 2023) (reducing the intestate share of a surviving spouse if (1) there is a surviving minor child as opposed to issue who have reached the age of majority, or (2) the marriage had lasted for less than five years); *cf.* UNIF. PROB. CODE § 2-102 (amended 2019), 8 pt. 1 U.L.A. 45 (2023) (drawing neither of these distinctions). At the same time, the Code, and most states, have wiped away distinctions that the Reporter for the Code described as "[c]uriosities from ancient sources"—distinctions in intestacy law between real and personal property, and between ancestral and non-ancestral property. Richard V. Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 U. ARK. LITTLE ROCK L.J. 1, 3 (1979).

40. Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1148 (1992).

41. Memorandum from Thomas Gallanis, Assoc. Exec. Dir., on Meeting Minutes to Joint Editorial Board for Uniform Trust and Estates Acts 2 (Oct. 26, 2012) (on file with Uniform Law Commission's website).

42. *See infra* note 69 and accompanying text. The drafters of the Uniform Probate Code thus intended its intestacy provisions "to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law." UNIF. PROB. CODE art. 2, pt. 1 cmt. (pre-1990 art. 2), 8 pt. 2 U.L.A. 422 (2023); *see also id.* § 2-102 cmt. (amended 2019), 8 pt. 1 U.L.A. 45 (2023) (justifying a rule of intestacy by pointing to empirical evidence regarding "testators in smaller estates (which intestate estates overwhelming tend to be)"); WIS. STAT. ANN. § 852.01 cmt. 1969 (West 2025) ("There is no such person as the 'average' intestate. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should therefore be designed with the moderate and small estate in mind.").

Viewed broadly, we might take one background fact to indicate that the rules of intestacy suffice as they are: intestacy represents a common phenomenon. Arguendo, its frequency signifies its popularity and implies its utility as a vehicle for effectuating the intent of most Americans.[43] In fact, data suggest that the number of intestate Americans is growing. In 2022, two surveys both reported that two-thirds of respondents lacked an estate plan,[44] although some of them might still execute one prior to death.[45] The latest survey in 2025 indicates that the fraction of respondents lacking an estate plan has inched upward since 2022.[46]

Yet, we should not draw an inference of the current law's efficacy too quickly. One of the recent surveys found that "nearly half" of all intestate respondents acknowledge the importance of having a will, "showing a major disconnect between people's beliefs . . . and their willingness to follow through and take the necessary steps."[47] Persons fail to execute wills for any number of reasons, and the extant data suggest that planned intestacy—despite its centrality to the economic model of default rules[48]—is relatively uncommon.

A recent study of the phenomenon of intestacy polled respondents about the reasons why they had failed to execute a will. Free to choose as many answers as applied, only 9 percent of respondents selected "[d]on't think I need one if I want all assets to go to next of kin."[49] By far the most popular answer, chosen by 43 percent of respondents, was procrastination—"I plan to but haven't

43. *See* Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1313 (1969) ("[A] willingness by almost half of . . . decedents to allow their property to pass by intestacy does not suggest serious dissatisfaction with the intestacy laws.").

44. *See* Rachel Lustbader, *2022 Wills and Estate Planning Study*, CARING (Feb. 27, 2025) [hereinafter CARING 2022], https://www.caring.com/caregivers/estate-planning/wills-survey/2022-survey (finding that 33.1% of respondents had an estate plan, but noting an uptick in planning among Covid survivors); CONSUMER REPS., AMERICAN EXPERIENCES SURVEY: APRIL 2022 OMNIBUS RESULTS 6 (2022), https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_AES_April_2022.pdf (finding that 33% of respondents had an estate plan); *see also How Many Americans Have a Will*, GALLUP (June 23, 2021), https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx (finding that 46% of respondents have a will and tracking data over time); 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); WEALTHCOUNSEL, WHAT DO AMERICANS THINK ABOUT ESTATE PLANNING? 2, 6 (2016), https://craft.wealthcounsel.com/images/downloads/Estate-Planning-Awareness-Survey-2016.pdf (reporting that 40% of respondents have wills and 17% more have trusts, without indicating the date of the survey).

45. *See* CARING 2022, *supra* note 44 (finding that 55% of respondents aged 55 and older had no estate plan, as opposed to the 66.9% of respondents of any age who had none); GALLUP, *supra* note 44 (finding that 76% of Americans aged 65 and older had a will).

46. Victoria Lurie & Matt Whittle, *2025 Wills and Estate Planning Study*, CARING (Feb. 18, 2025) [hereinafter CARING 2025], https://www.caring.com/caregivers/estate-planning/wills-survey.

47. CARING 2022, *supra* note 44.

48. *See supra* notes 34–35 and accompanying text.

49. CONSUMER REPS., *supra* note 44, at 8.

gotten around to it yet."[50] An earlier survey from 1978, based on random interviews of Iowans who could select only a single answer, produced similar responses: A total of 10 percent were satisfied that "[f]amily will get automatically," whereas 57 percent "[h]ave not gotten around to making a will."[51] Other factors not tested in polling may also play a role.[52]

The rarity of planned intestacy evidenced by these data fail to invalidate the economic model of default rules. The data merely suggest that majoritarian defaults produce limited benefits in this context. Unless we can identify other benefits that an alternative sort of default rule would generate—a matter to which we shall return presently[53]—we should still strive to put in place majoritarian defaults.

With all of this in mind, let us turn to the problem of Americans' preferences for charitable transfers at death. Here we might consider those preferences generally, or in a more refined analysis of discrete groups within the broader population.

Before we examine the data, however, we should explore preliminarily the sorts of distinctions lawmakers might draw and the practicality of doing so in respect of the instant problem. Some potential distinctions are conventional and appear within current intestacy statutes. Others are unorthodox, either involving intimate matters that have never figured in intestacy or resurrecting classifications that lawmakers have long since laid to rest.

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50. *Id.*; *see also* CARING 2025, *supra* note 46 (finding procrastination to be respondents' most common explanation for a lack of estate planning without polling respondents' satisfaction with intestacy as an alternative explanation).

51. 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). In another early survey, 63.6% of respondents "cited laziness as the primary reason" for not having a will, whereas *no* respondents stated that they lacked a will because "they thought the intestacy statute of their states provided a satisfactory disposition." 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. For anecdotal observations by estate planners, see Hirsch, *supra* note 25, at 1047–48. It is not uncommon for testators to execute their wills at the last minute—or to miss the chance to do so by minutes. *See, e.g.*, *In re* Estate of Dellinger v. 1st Source Bank, 793 N.E.2d 1041, 1042 (Ind. 2003) (concerning a will executed one day before death); *In re* Estate of Robinson, 477 N.Y.S.2d 877, 878 (App. Div. 1984) (thirty-two minutes before death); *cf., e.g.*, Franicevich v. Peterson, No. A138435, 2014 WL 126098, at *1–2 (Cal. Ct. App. Jan. 14, 2014) (concerning a testator who died before she could execute an intended will); Babcock v. Malone, 760 So.2d 1056, 1056 (Fla. Dist. Ct. App. 2000) (same); *In re* Will of Kern, 158 N.Y.S.2d 454, 455 (Sur. Ct. 1956) (same).

52. Some would-be testators are deterred by the longstanding superstition that wills are destined to mature soon after they are executed. *See In re* Estate of Gutierrez, 11 Cal. Rptr. 51, 54 (Ct. App. 1961). This superstition has British roots. *See* Gillow v. Bourne (1831) 162 Eng. Rep. 1417, 1419; 4 Hagg. Ecc. 192, 196. For additional references and observations by estate planners, see Hirsch, *supra* note 25, at 1048 n.61.

53. *See infra* notes 81–88 and accompanying text.

Consider the variable of religious observance. Empirical evidence suggests that piety stimulates philanthropy, both during life and at death.[54] Although an individual's faith remains subjective and resists quantification, lawmakers could reduce it to objective criteria. Empirical evidence reveals a correlation between membership in a congregation and donating, whereas frequency of attendance at one's place of worship is positively correlated with the fraction of income donated to, and estates left to, charity.[55] Of course, neither of these metrics has ever played a role in schemes of intestacy, and—constitutional issues aside—any proposal to introduce them today, even in the name of intent effectuation, would be foolish. Lawmakers are not about to create separate rules of intestacy for the secular and the devout.

Another potential factor is gender. Empirical evidence suggests that women are nearly twice as likely as men to leave charitable bequests.[56] Although rules of intestate succession drew distinctions based on gender historically,[57] modern lawmakers have banished them from intestacy and all other areas of inheritance law.[58] Gender neutrality is so deeply engrained as a normative principle today that no amount of empirical evidence could shake lawmakers' adherence to it. We can exclude still other potentially relevant, but unconventional, factors on the ground of impracticality.[59]

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54. *See* OSTROWER, *supra* note 8, at 16, 50–68 (based on interview data from wealthy individuals); XIAONAN KOU, HAO HAN & HEIDI FREDERICK, IND. UNIV. CTR. ON PHILANTHROPY, GENDER DIFFERENCE IN GIVING MOTIVATIONS FOR BEQUEST DONORS AND NON-DONORS, 9, 20–23, 26 (2009), https://scholarworks.indianapolis.iu.edu/server/api/core/bitstreams/a6df7d06-ee1b-4d34-b7d0-351b5ece66f2/content (based on survey data from 2005 to 2008); Thomas Barthold & Robert Plotnick, *Estate Taxation and Other Determinants of Charitable Bequests*, 37 NAT'L TAX J. 225, 227–28, 231 (1984) (based on probate records from the 1930s and 1940s, tabulating wills with "a stated religious preference"); Cyril F. Chang, Albert Okunade & Ned Kumar, *Motives Behind Charitable Bequests*, 6 J. NONPROFIT & PUB. SECTOR MKTG. 69, 80 (1999) (based on survey data from 1992); *see also* McGranahan, *supra* note 5, at 1281–83, 1288–89 (analyzing historical data).

55. *See* Virginia A. Hodgkinson, Murray S. Weitzman & Arthur D. Kirsch, *From Commitment to Action: How Religious Involvement Affects Giving and Volunteering*, *in* FAITH AND PHILANTHROPY IN AMERICA 93, 93–95, 102–09 (Robert Wuthnow & Virginia A. Hodgkinson eds., 1990) (based on survey data from 1988 regarding lifetime donating, hence only of inferential relevance); James, *supra* note 4, at 1030–33, 1035 (based on survey data from 2006 regarding estate planning).

56. *See* Martha Britton Eller, *Charitable Bequests: Evidence from Federal Estate Tax Returns*, *in* 2 COMPENDIUM OF FEDERAL ESTATE TAX AND PERSONAL WEALTH STUDIES 521, 525 (2001), https://www.irs.gov/pub/irs-soi/11pwcompench4d95.pdf; Barry W. Johnson & Jeffrey P. Rosenfeld, *Examining the Factors that Affect Charitable Giving*, TRS. & ESTS., Aug. 1991, at 29, 30–31. *But see* Barthold & Plotnick, *supra* note 54, at 228 (finding no disparity between genders, based on older data); Michael J. Boskin, *Estate Taxation and Charitable Bequests*, 5 J. PUB. ECON. 27, 39 (1976) (same); Chang et al., *supra* note 54, at 79 (finding women *less* likely to leave charitable bequests, based on survey data); KOU ET AL. *supra* note 54, at 10, 13–18, 23–24 (finding no disparity between genders after controlling for other factors).

57. *See* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 287 (5th ed. 2019).

58. *See, e.g.*, UNIF. PROB. CODE art. 2, pt. 1 (amended 2019), 8 pt. 1 U.L.A. 42–73 (2023).

59. *See infra* note 103.

Other potential variables appear more plausible. One is childlessness—an objective category that, as we shall see, affects philanthropic propensities.[60] Another is wealth. Financial prosperity likewise represents an objective criterion, one that we will again find statistically associated with philanthropy.[61]

Lawmakers in every state already factor childlessness into rules of intestacy. The position of relatives on a decedent's family tree represents the fundamental contingency determining patterns of distribution under every state's intestacy statute.[62] To add as a potential heir within the formula of kinship some omnibus charity like the United Way, or a basket of charities, would not magnify the complexity of the statute—every statute is that complex already. Nor would doing so add to the administrative cost of intestacy. Administrators must examine the family tree of every intestate decedent in any event.

The Uniform Probate Code also factors wealth into the rules of intestacy as another contingency, albeit only on the downside. In states following this model, the intestate estates of poorer decedents are divided differently from those of more affluent ones.

Drafters accomplished this result by setting a minimum amount, sometimes called the "preferential" share, that a spouse inherits by intestacy on top of whatever fractional share he or she receives when dividing the estate with blood relatives.[63] Thus, for example, under the Code, if a spouse and descendants survive the intestate, and if one or more of those descendants are not also descendants of the spouse, then he or she receives the first $150,000 plus half the balance of the intestate estate.[64]

This formula ensures that surviving spouses receive larger portions of smaller estates.[65] Today, twenty-five states create preferential shares for

60. *See infra* Subparts.II.B, III.A. For historical evidence, see McGranahan, *supra* note 5, at 1282, 1284–85, 1288–89 (analyzing historical data).

61. *See infra* Subpart.II.B. For historical evidence, see McGranahan, *supra* note 5, at 1282, 1284, 1288–89 (analyzing historical data).

62. *See, e.g.*, UNIF. PROB. CODE art. 2, pt. 1 (amended 2019), 8 pt. 1 U.L.A. 42–73 (2023).

63. The Canadians developed this terminology. *See* B.C. LAW INSTITUTE, WILLS, ESTATES AND SUCCESSION: A MODERN LEGAL FRAMEWORK, at 13 (2006).

64. *See* UNIF. PROB. CODE § 2-102(4) (amended 2019), 8 pt. 1 U.L.A. 45 (2023); *see also id.* § 2-102(2)–(3) (creating preferential shares in other situations).

65. The drafters identified this result as consistent with empirical evidence. *See id.* § 2-102 cmt. This structural attribute of intestacy statutes appeared in the original version of the Code, promulgated in 1969, and before that in the Model Probate Code of 1946. *See id.* § 2-102(2)–(3) (pre-1990 art. 2), 8 pt. 2 U.L.A. 425 (2023); LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 22(a)(2) (1946). Its roots lie in still earlier intestacy statutes. In 1935, intestacy statutes in thirteen states already featured this attribute; its wellspring remains unknown. *See Intestacy Act: An Act Concerning the Descent and Distribution of Property of Persons Who Die Intestate*, 20 IOWA L. REV. 244, 249–51 (1935).

spouses.[66] The remaining twenty-five prefer simplicity, granting surviving spouses a fixed fraction of the intestate estate, regardless of its size.[67]

States could easily and thematically consider the metric of wealth at the opposite end of the economic spectrum—tying financial success to succession. If empirical evidence so warrants, intestate estates above a threshold could again include an omnibus charity, or a basket of charities, as a taker in intestacy. The statute could set aside for this purpose either a fixed share or a variable one, increasing with the size of the decedent's estate.

By adding a new contingency—or, in some states, the second edge of a preexisting contingency—this formula would complicate the rules of intestacy. But would it complicate them beyond citizens' or judges' abilities to comprehend and apply them? That appears unlikely. Lawmakers could lay out the thresholds and fractions in simple language in the statute.[68] Furthermore, the statute could flag in bold letters that this segment of the rule applies only to persons whose estates exceed a threshold, signaling to individuals of ordinary means who might plan for intestacy that they need not concern themselves with this part of the statute.

Still, it seems fair to ask, is the game worth the candle? Data confirm that greater wealth renders intestacy increasingly unlikely.[69] A tailored default pertaining to taxable intestate estates, for example, would come into play in only a paltry number of cases.

Nonetheless, we can find reason for going to the trouble. For one thing, the phenomenon of intestacy among rich persons—even immensely rich persons—

66. Although some of the statutes track the Uniform Probate Code, others are nonuniform. *See, e.g.*, ALA. CODE § 43-8-41 (West 2025) (nonuniform). The states employing some version of this formula are: Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Utah.

67. *See, e.g.*, GA. CODE ANN. § 53-2-1 (West 2025); OR. REV. STAT. §§ 112.025–.045 (West 2025). The states employing this simplified formula are Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

68. *See* UNIF. PROB. CODE § 2-203 (Alternative A) (amended 2019), 8 pt. 1 U.L.A. 86 (2023) (establishing such a framework for the surviving spouse's elective share, based on the variable of duration of the marriage).

69. For collected references, see Hirsch, *supra* note 25, at 1051 n.72; Hirsch, *supra* note 36, at 287 n.48.

does occur.[70] Procrastination can afflict anyone.[71] Moreover, the thought of perishing is terrifying—so we perish the thought. Most persons strive to avoid situations, such as estate planning, where they must confront their mortality.[72] Again, these psychological forces weigh on persons drawn from all strata of society.[73] And even those persons who *do* diligently plan their estates may wind up intestate anyway. Relatives sometimes challenge the validity of wills or living trusts following their authors' deaths, including the wills and trusts of wealthy persons.[74] In short, although the numbers of sizable estates subject to intestacy may be small, they are not vanishingly small.

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70. A survey of 750 millionaires conducted in 2015 by Spectrem Group found that, among those worth between $1–5 million, 39% currently lacked estate plans, whereas among those worth over $5 million, 32% lacked estate plans. Shelly Schwartz, *Wealthy Suffer from "Estate-Planning Fatigue,"* CNBC, (June 30, 2015, 6:08 AM EDT), https://www.cnbc.com/2015/06/29/wealthy-suffer-from-estate-planning-fatigue.html. For anecdotal examples, see *In re* Greenfield, 7 N.Y.S.3d 513, 515 (App. Div. 2015) (concerning an intestate decedent worth $30 million, with no surviving spouse or descendants); Fosler v. Collins (*In re* Estate of Fosler), 13 P.3d 686, 687 (Wyo. 2000) (concerning an intestate decedent worth over $19 million, with no surviving spouse or descendants); GEOFF SCHUMACHER, HOWARD HUGHES: POWER, PARANOIA & PALACE INTRIGUE 185–94 (2008) (discussing an intestate decedent worth over $6 billion with no surviving spouse or descendants); Ken Martin, *Prince Estate Value Set at $156.4M Years After His Death*, FOX BUS. (Jan. 15, 2022, 2:00AM EST), https://www.foxbusiness.com/lifestyle/prince-estate-value-milllions-minnesota-irs (discussing an intestate decedent worth over $156 million, with no surviving spouse or descendants); Ken Martin, *Former Zappos CEO Tony Hsieh Died Without a Will, Family Says*, FOX BUS. (Dec. 3, 2020, 12:04 AM EST), https://www.foxbusiness.com/business-leaders/former-zappos-ceo-tony-hsieh-died-without-a-will-family-says (discussing an intestate decedent worth $840 million, with no surviving spouse or descendants); *see also* Russell Flannery, *Taiwan Billionaire Wang Left No Will: Court Filing*, FORBES (May 26, 2009, 8:50 AM EDT), https://www.forbes.com/2009/05/26/wang-taiwan-inheritance-markets-equity-billionaire.html?sh=62dd21956b5e (discussing a foreign intestate decedent worth $7.5 billion); *infra* notes 73–74 and accompanying text.

71. *See* Madan Pal Sharma, *Task Procrastination and Its Determinants*, 33 INDIAN J. INDUS. RELS. 17, 19–20 (1997) (discussing personality traits associated with procrastination and citing to studies).

72. Terror management could reinforce procrastination; persons display a greater tendency to procrastinate "when tasks were regarded as unpleasant." *Id.* at 20 (citing to studies). Nonetheless, a lunatic fringe at the opposite extreme can become obsessed with will-making. *See, e.g.*, *In re* Burtt's Estate, 44 A.2d 670, 672 (Pa. 1945) (concerning a decedent with a "modest estate" who left "a mass of testamentary papers in decedent's handwriting consisting of between 50 and 60 sheets"); Hirsch, *supra* note 25, at 1048 n.62 (citing other examples).

73. The artist Pablo Picasso, worth between $100-250 million at his death, "died intestate, being terrified of confronting death." *Maya Widmaier-Picasso Helped to Revive Her Father's Creativity*, ECONOMIST (Feb. 16, 2023), https://www.economist.com/obituary/2023/02/16/maya-widmaier-picasso-helped-to-revive-her-fathers-creativity. Even wills-and-trust experts are susceptible to these psychological forces. *See* R.E. MEGARRY, MISCELLANY-AT-LAW 172 (1955) (noting that Thomas Jarman, author of a renowned nineteenth-century treatise on wills, died intestate).

74. One such case concerned Huguette Clark, who died in 2011 at the age of 104 with an estate valued at over $300 million. Clark was divorced and childless; her last will expressly disinherited her collateral relatives and devoted most of her estate to establishing a foundation for the arts. Her relatives contested the will, claiming that Clark lacked testamentary capacity and was a victim of undue influence and fraud. The parties settled on the eve of trial. *See* Anemona Hartocollis, *The Two Wills of the Heiress Huguette Clark,* N.Y. TIMES, Sept. 13, 2013, at MB1; Anemona Hartocollis, *Tentative Deal in Feud Over Will of an Heiress*, N.Y. TIMES, Sept. 20, 2013, at A15; *see also, e.g.*, Dolezal v. Gallagher (*In re* Estate of Dolezal), No. 20-0988, 2021 WL 1904687,

What is more, the estates at issue here are, in economic terms, important ones. If we are counting dollars rather than heads, then large intestate estates take on a significance out of proportion to their numbers. By refining intestacy law in relation to wealth, lawmakers would acknowledge the urgency of resolving higher-stakes cases correctly.[75]

Nor are significant costs implicated. Incorporating the variable of wealth into intestacy law would impose no burden on lawmakers. They need data to craft the rules, but this Article will provide them with relevant numbers. Although more data is always helpful, lawmakers could proceed without undertaking any more costly empirical studies.[76]

More importantly, incorporating a wealth component into intestacy would not amplify administrative costs. Of course, under such a scheme, administrators would have to compute a decedent's net worth before allocating shares of the estate. But administrators must already make this calculation in all cases involving multiple heirs. Including wealth as a variable would merely alter distribution of the shares.

Furthermore, norms of equality are (strangely) implicated. Commentators have asserted that all citizens should enjoy the benefits of freedom of testation—what one scholar, a trifle grandly, called "equal planning under the law."[77] This principle justifies care in setting inheritance defaults to match the wishes of citizens who are less able to afford professional counsel. In other words, default

at *1, *5–6 (Iowa Ct. App. May 12, 2021) (concerning an $11 million estate, where relatives unsuccessfully challenged a will benefitting charity to the exclusion of family members on grounds of incapacity and undue influence); *In re* Herman Earl Goodwin Revocable Tr., 871 S.E.2d 355, 364 (N.C. Ct. App. 2022) (concerning an almost $2 million estate, where relatives challenged a living trust and will on grounds of incapacity and undue influence, litigation ongoing). The will of the wealthiest American of his era, Cornelius Vanderbilt, was challenged by three of his children on the ground of incapacity and undue influence. Following two years of litigation, the parties settled out of court. *See* Swasey v. Berger, 25 N.E. 1062, 1062 (N.Y. 1890); EDWARD J. RENEHAN, JR., COMMODORE: THE LIFE OF CORNELIUS VANDERBILT 313–15 (2007). In a recent case, where a decedent left an $11 million estate, set to be divided among 119 distant heirs who never met him, a suspicious will ultimately appeared and is being contested. *See* Mitch Dudek, *SW Side Recluse's Record-Setting $11 Million Unclaimed Estate Thrown into Chaos by Newly Surfaced Will*, CHI. SUN-TIMES (Oct. 21, 2023, 4:00 AM PDT), https://chicago.suntimes.com/2023/10/21/23922831/joseph-stancak-chicago-recluse-unclaimed-estate-will-found; Mitch Dudek, *South Side Millionaire's Wealth Set to Ripple Through Lives Around the Globe*, CHI. SUN-TIMES (Dec. 23, 2022, 1:04 PM PDT), https://chicago.suntimes.com/2022/12/23/23502144/unclaimed-property-joseph-stancak-millionaire-heirs-found.

75. The same policy has influenced rules in other areas of law, such as the amount-in-controversy threshold for federal jurisdiction. *See* Steven Gensler & Roger Michalski, *The Million Dollar Diversity Docket*, 47 BYU L. REV. 1653, 1665 (2022) (suggesting that the threshold is supposed to ensure better outcomes in high-worth cases).

76. *See infra* Part.V. (proposing law reform on the basis of existing empirical evidence).

77. Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 613 (1988); *see also* Megan Doherty Bea & Emily S. Taylor Poppe, *Marginalized Legal Categories: Social Inequality, Family Structure, and the Laws of Intestacy*, 55 LAW & SOC. REV. 252, 265–66 (2021) (concluding that intestacy law produces "inequality" by failing to take account of nontraditional family structures that predominate among disadvantaged groups).

rules that effectuate intent serve a levelling function, making up for poorer persons' want of access to the services sophisticated estate planners offer their clients.

A default rule that is more appealing to poorer than to richer decedents would implicate a sort of reverse discrimination. Of course, richer decedents are less likely to fall prey to default rules that contradict their wishes. Any discrimination against them within intestacy statutes would probably prove inconsequential. That said, equality is a reciprocal concept. If poorer persons deserve equal treatment with wealthier ones, then the same principle operates in reverse.

Finally, another consideration comes into play at this juncture. By definition, charitable transfers serve the public interest.[78] If a contingent of intestate individuals wished to provide for charities, then lawmakers ought to bend over backward to accommodate them. This overarching policy of facilitating charitable transfers whenever possible is already reflected in a host of mandatory rules.[79] As one court put the matter, charities represent "favored creatures of the law."[80] Extending the law's favoritism from mandatory rules to default rules of intestacy appears a natural step for lawmakers to take.

An argument could be made for treading farther down this path. Given the public benefits of charitable transfers, lawmakers might include charities as heirs even when they did not reflect popular preferences. Lawmakers could conceptualize this move as creating a "social default"—one created to benefit

78. *See* Dye v. Beaver Creek Church, 26 S.E. 717, 718 (S.C. 1897) ("[T]he object and effect of every charitable bequest is to confer a public benefit, else it would be no charity.") (internal quotation marks omitted) (quoting trial court opinion). *But cf.* Miranda Perry Fleischer, *The Morality of Charitable Bequests*, *in* INHERITANCE AND THE RIGHT TO BEQUEATH 36, 39–53 (Hans-Christoph Schmidt am Busch, Daniel Halliday & Thomas Gutmann eds., 2023) (arguing that charitable purposes vary in the extent to which they serve the public interest); Eric Kades, *The Charitable Continuum*, 22 THEORETICAL INQUIRIES L. 285 *passim* (2021) (same, and arguing that gradations in the social benefits that charities provide should be reflected in a sliding scale of tax deductibility).

79. The immunity of charitable trusts from the rule against perpetuities and the rule against perpetual purpose trusts (and relaxation of the related rule against accumulations), from the definite-beneficiaries requirement, and from the void-for-vagueness doctrine, together with their exclusive eligibility for revision under the *cy pres* doctrine, the enforceability of promises to make them (known as charitable subscriptions) despite the absence of consideration or detrimental reliance, and their exemption from income, estate, and capital gains taxes each demonstrates lawmakers' partiality toward philanthropy. *See* 26 U.S.C. §§ 170, 501(a), (c)(3)–(4), 642(c), 2055(a)(2)–(3), 2522 (2018); UNIF. PROB. CODE § 2-904(5) (amended 2019), 8 pt. 1 U.L.A. 218 (2023); UNIF. TR. CODE §§ 402(a)(3)(A), 405(b), 413 (amended 2010), 7D U.L.A. 138, 144, 170 (2018); RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. L. INST. 1981); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2(2) (AM. L. INST. 1983); RESTATEMENT (THIRD) OF TRUSTS §§ 28 cmt. d, 47(2) (AM. L. INST. 2003). This partiality extends to segments of the legal landscape beyond the realms of inheritance law and tax law. *See, e.g.*, 11 U.S.C. §§ 544(b)(2), 548(a)(2), (d)(3)–(4) (2018) (protecting certain charitable contributions from avoidance as fraudulent conveyances in a bankruptcy proceeding). *But cf.* Friedman, *supra* note 32, at 590 n.156 (observing historical prejudice against charitable trusts in the U.S., reflected in a variety of restrictive rules regarding charitable bequests and trusts that no longer exist in any state).

80. Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 790 (Va. 1951).

the community rather than the intestate individual—or as an "expressive default," introduced to encourage intestate individuals to alter their preferences.[81]

The difficulty with social defaults is that they are toothless. Parties who dislike their outcomes can avoid social defaults by executing wills, thereby incurring unnecessary transaction costs. A social default would benefit society only in those instances where parties did not care enough to pay to circumvent the rule.[82] And even then, social defaults would discriminate, operating primarily to thwart the intent of poorer, less sophisticated parties.[83] When intestacy law contradicts popular preferences, "it creates a trap for the ignorant or misinformed."[84]

If a default rule could function to convert those who were subject to it to the preferences it expressed, then social defaults would cease to be costly and discriminatory. Yet, we have little reason to believe that default rules will affect anyone's preferences, at least in the inheritance realm. To be sure, preferences are endogenous, and all individuals are impressionable to a certain extent. But individuals do not look to the state as a trusted authority when they form preferences regarding beneficence.[85] Nor do many individuals know enough about the details of intestacy laws to be influenced by them, even if individuals could be persuaded of their virtues.[86]

And we can offer a larger criticism here of both social and expressive defaults. If implemented, they would operate to politicize inheritance law. Scholars advocating expressive defaults have proposed them to advance cultural

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81. Expressive defaults have advocates in the scholarly literature. *See* Mary Louis Fellows, Monica Kirkpatrick Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 8–10, 22, 90–91 (1998); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1100–01 (1999); Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 259–61 (2011). For early observations, see WIS. STAT. ANN. § 852.01 cmt. 1969 (West 2025) (positing that prior rules of intestacy "had been accepted by people for years, and therefore affected attitudes"); Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 364 (suggesting that rules of intestacy "anticipate what the majority of dying men would probably want, and what society would want them to want").

82. For a further discussion and a mathematical model, see Hirsch, *supra* note 25, at 1042–46, app. I.

83. For a further discussion, see *id.* at 1046–52.

84. Fellows et al., *supra* note 51, at 324.

85. For a further discussion and references, see Hirsch, *supra* note 25, at 1053–56; Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 352–53 (2017).

86. *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 (presenting survey evidence that "an overwhelming majority of the citizenry are not aware of the present pattern of distribution provided under the intestate succession statutes"); Fellows et al., *supra* note 51, at 339–40 (similar findings); Joel R. Glucksman, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 261–66 (1976) (presenting survey evidence suggesting that respondents had a general understanding of intestacy but "little knowledge of [its] precise terms").

agendas—putting forward rules that express *their own* preferences.[87] Once we open the door to these sorts of defaults, however, lawmakers might be tempted to codify all manner of values they consider politically expedient, be they liberal or conservative, woke or reactionary.

Make no mistake: inheritance law can never wholly break free from politics. Some values are so widely shared, so deeply engrained, as to have become sacrosanct. Inheritance law will remain gender neutral, for example, no matter what the data indicate. But even if we cannot cleave unswervingly to probable intent, we can hold departures from it to a minimum. By encouraging lawmakers to stay out of 'culture wars,' inheritance scholars further that end.[88]

In sum, we have found sufficient cause to tailor rules of intestacy regarding charity according to metrics of childlessness and wealth. The question remains whether empirical evidence warrants this level of subtlety. When, if ever, is blood thinner than water? We must comb through the data to explore this matter.

B. EVIDENCE

Studies suggest broad participation in the economy of charitable giving in the United States. Around half of all American households contribute.[89] This widespread generosity does not extend to testation, however. No social norm encourages charitable bequests by Americans of ordinary means,[90] in contradistinction to the wealthy,[91] and only around 5 percent of wills overall include such bequests.[92] If lawmakers were to establish an untailored rule of

87. *See supra* note 81.

88. For a further discussion, see Hirsch, *supra* note 25, at 1057–58.

89. *See* IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, OVERVIEW OF OVERALL GIVING 3 (2021), https://generosityforlife.org/wp-content/uploads/2021/07/Overall-Giving-2019-PPS.pdf (finding that 49.6% of American households contributed to charity in 2018, based on a panel study of over 9,000 households); *see also* GIVING ENVIRONMENT II, *supra* note 7, at 7–8, 15–17 (comparing ethnic patters of giving); GIVING ENVIRONMENT I, *supra* note 7, at 7, 14–16 (charting declines over time in the percentage of American households that donate to charity).

90. *See* Marilyn Coleman & Lawrence W. Ganong, *Attitudes Toward Inheritance Following Divorce and Remarriage*, 19 J. FAM. & ECON. ISSUES 289, 296, 302, 307 (1996) (surveying public attitudes about testation in different scenarios, finding that only 1–2% of respondents favored charitable bequests); Annell Zerbe Weymuth, Attitudes About Intergenerational Family Obligations Related to Providing Inheritance 15, 22, 33 (May 1987) (Ph.D. dissertation, Univ. Missouri-Columbia) (on file with author) (same); *see also* Russell N. James III & Claire Routley, *We the Living: The Effects of Living and Deceased Donor Stories on Charitable Bequest Giving Intentions*, 21 INT'L J. NONPROFIT & VOLUNTARY SECTOR MKTG. 109, 112–15 (2016) (suggesting the feasibility of inculcating norms of testamentary philanthropy among non-wealthy individuals).

91. *See supra* notes 8–11 and accompanying text.

92. *See* Sargeant & Shang, *supra* note 33, at 980–81 (observing that these data have "remained remarkably static" historically); *see also* DAVID JOULFAIAN, THE FEDERAL ESTATE TAX: HISTORY, LAW, AND ECONOMICS 77 tbl.5.6 (2019) (reporting data for 1982–2014, finding that 14.1–26.2% of decedents made charitable bequests, but limited to those wealthy enough to file estate tax returns); MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 114–15 (1970) (finding that 6% of decedents made charitable

intestacy intended to effectuate the intent of the average citizen, then they could not justify including charities as heirs.

With simple tailoring, however, data support the inclusion of charities in a scheme of intestacy for subsets of decedents. A key metric is wealth. The larger the estate, quantitative evidence shows, the more likely it becomes that decedents will wish to provide for charitable beneficiaries. Whereas poorer individuals tend to do most of their giving during life, wealthier ones do the lion's share of their donating at death.[93]

Evidence on point comes partly from tax records. Wills that include charitable bequests are eligible for an estate tax deduction, and the Internal Revenue Service compiles statistics on the number of estate tax returns that claim the deduction. These data have fluctuated over time, perhaps due to inflation and changes in estate tax schedules. In common, data from all years suggest that a majority of decedents bequeath to charity beyond a threshold of wealth.[94]

Figures for Americans dying between 1996 and 1998 indicate that 46.67 percent of decedents worth between $50 and $100 million made charitable bequests.[95] For decedents worth over $100 million, the fraction rose to 80.56 percent.[96] Data from 2003 are similar. For decedents worth between $10 and $20

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bequests, based on probate records, and 4% of testate individuals intended to leave charitable bequests, based on a survey); Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. SOC. PSYCH. 347, 351 (1937) (8.4%, based on probate records); Browder, *supra* note 43, at 1314 (16%, based on probate records); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 254 (1963) (8.8%, based on probate records); 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, 1463–64 (2007) (7.9%, based on probate records); James, *supra* note 4, at 1031 tbl.1 (5.7%, based on survey data); Kim Porter, *The Will of the Wealthy*, TRS. & ESTS., Aug. 1999, at 56, 56 (reporting results from a survey in 1999 of an unspecified number of "affluent individuals" with annual incomes of $125,000 or more, or assets of at least $500,000, finding that just over 20% "planned to leave anything to charity"); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 317 (1975) (6.78% making "substantial" charitable bequests, based on probate records); T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences*, 34 SOCIO. Q. 337, 344–45 (1993) (10.66%, based on probate records).

93. *See* David Joulfaian, *Charitable Giving in Life and at Death*, *in* RETHINKING ESTATE AND GIFT TAXATION 350, 360–61 (William G. Gale, James R. Hines Jr. & Joel Slemrod eds., 2001) (presenting data from income tax returns filed between 1987 and 1996 and estate tax returns for the same individuals filed between 1996 and 1998); Paul G. Schervish & John J. Havens, *Gifts and Bequests: Family or Philanthropic Organizations?*, *in* DEATH AND DOLLARS 130, 138–41 (Alicia H. Munnell & Annika Sundén eds., 2003) (based on data from 1998 and 1999). Older data confirm this correlation. *See* Barthold & Plotnick, *supra* note 54, at 228; Boskin, *supra* note 56, at 37. In at least one published case, a testator conditioned a charitable bequest on the size of his estate. *See In re* Frankenheimer, 88 N.E. 374, 374 (N.Y. 1909).

94. Some data are not current. *See* CLOTFELTER, *supra* note 7, at 229–32 (presenting data from estate tax returns filed in 1977, reporting that 51.6% of estates worth $5–10 million made charitable bequests, whereas 72.2% of estates worth above $10 made charitable bequests).

95. *See* Joulfaian, *supra* note 93, at 361 tbl.8-8.

96. *See id.*

million, 38.1 percent of decedents made charitable bequests.[97] For decedents worth over $20 million, the fraction rose to 46.7 percent.[98] The tabulation fails to differentiate decedents above that net worth, who doubtless exceed 50 percent after a certain point. The most recent published data, from 2013 to 2017, suggest that a majority of decedents make charitable transfers upon death when they are worth $50 million or more.[99]

These data suggest that the inclusion of charities as heirs alongside relatives is likely to appeal only to the wealthiest decedents. Few of them die intestate, of course. Nonetheless, some do.[100] Data from a second source—the Health and Retirement Study, a longitudinal panel study of over 20,000 Americans[101]—reveals that the family circumstances of different individuals also affect their generosity.[102] Under certain genealogical conditions, factoring charity into schemes of intestacy should hold broader appeal.[103]

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97. *See* David Joulfaian, *Basic Facts on Charitable Giving* 26 (U.S. Dep't of the Treas., Working Paper No. 95, 2005), https://papers.ssrn.com/ sol3/papers.cfm?abstract_id=909342.

98. *See id.*

99. *See* Russell N. James III, *American Charitable Bequest Transfers Across the Centuries: Empirical Findings and Implications for Policy and Practice*, 12 EST. PLAN. & CMTY. PROP. L.J. 235, 256–57 (2020) (finding that for these five years, the fraction of estates containing charitable bequests were 52%, 48%, 49%, 49%, and 48%, respectively).

100. *See supra* notes 70, 73 and accompanying text; *infra* note 237 and accompanying text.

101. The Health and Retirement Study is conducted via questionnaire by the University of Michigan in conjunction with the National Institute on Aging and the Social Security Administration. HEALTH AND RETIREMENT STUDY, https://hrs.isr.umich.edu/about (last visited Feb. 1, 2025).

102. Evidence from the study will be presented hereinafter. *See infra* notes 107–113, 117–118 and accompanying text.

103. Subjective factors that lawmakers cannot incorporate into intestacy statutes, such as the perceived prosperity or profligacy of family members, can also affect propensities to make charitable bequests. *See* Sargeant & Shang, *supra* note 33, at 988 (presenting focus-group data); Sargeant et al., *Bequest Motives*, *supra* note 33, at 58 (same); *cf.* Gerald Auten & David Joulfaian, *Charitable Contributions and Intergenerational Transfers*, 59 J. PUB. ECON. 55, 65–67 (1996) (finding no significant impact of childrens' incomes on charitable bequests); *see also* Sargeant et al., *Marketing*, *supra* note 33, at 388–92 (suggesting other individual traits that can prompt charitable bequest). Another factor that affects propensities to make charitable bequests is age at death. The older the testator, the likelier it is that he or she will bequeath to charity, although even for the oldest testators, those aged ninety and above, less than a majority made charitable bequests, indicating that this factor alone would not justify incorporating charity into intestacy for any age category. In 2003, the fraction of all estates making charitable bequests peaked at 29.7% for decedents aged over 85, according to tax data. *See* Joulfaian, *supra* note 97, at 12, 27 tbl.12. For decedents aged 21 to 35, the comparable fraction was 3.7%. *See id*. Decedents aged over 85 made up 54.6% of the tax returns, and decedents aged 21 to 35 made up 0.06% of the returns. *See id.* Data from 1995 similarly show that charitable bequests peaked at 37.9% for decedents aged ninety and above at death. *See* Eller, *supra* note 56, at 528–29; *see also* Boskin, *supra* note 56, at 46 (finding the same association in older data and attributing it to the fact that "younger persons have more, and more dependent, dependents"); James, *supra* note 4, at 1032 (reporting the same association in survey data); RUSSELL N. JAMES III, AMERICAN CHARITABLE BEQUEST DEMOGRAPHICS (1992–2012), at 53–55 (2013), https://www.encouragegenerosity.com/ACBD.pdf (same). *But see* KOU ET AL., *supra* note 54, at 11, 23 (finding age an insignificant indicator of charitable bequests). In theory, age could be combined with other factors, although it has never figured into rules of intestacy historically, and it would add to the complexity of those

Data suggest a correlation between childlessness and charitability. A benefactor's progeny comprise "the most natural potentially competing beneficiaries for intergenerational transfers . . . ."[104] Unsurprisingly, then, childlessness proves "the single strongest demographic predictor of including a charitable recipient in one's estate plan."[105]

Previously reported data fail to suggest that childlessness alone signals charitable intent. Among childless respondents reporting estate plans between 2004 and 2006, 36.4% intended to bequeath to charity.[106] This percentage is nearly triple the fraction of respondents with children making equivalent plans (13.0%), but it still fails to constitute a majority preference.[107]

That is not the end of the matter, however. Another possibility is to combine the characteristics of childlessness and wealth. Like childlessness, wealth correlates with charitability, as we have seen.[108] Previously reported data have not, however, assessed the impact of these two characteristics in concert.

At my request, Professor Russell James III, a leading scholar on philanthropy and nonprofits, has generated original data for charitable intent among childless persons sorted by wealth category.[109] He was able to furnish me these data for 2018, a more recent snapshot than years reported in previous studies. Professor James found that, overall, 35.4 percent of childless respondents, aged fifty-five and older,[110] included charitable provisions in their

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rules. Still another factor positively correlated with charitable bequests is the testator's level of education. *See* James, *supra* note 4, at 1033 tbl.2; KOU ET AL., *supra* note 54, at 11, 23, 26. Once again, lawmakers have never incorporated this variable into intestacy law, and they appear unlikely ever to do so. For other potentially relevant variables that lawmakers cannot realistically incorporate into intestacy law, *see supra* notes 54–58 and accompanying text.

104. James, *supra* note 4, at 1039.

105. 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, 13 (2015); *see also* James, *supra* note 4, at 1034, 1039–40 (similar observation and analysis). Professor Ostrower came to the same conclusion from her data set of wealthy New Yorkers: "donors who had no children were more likely (37.5%) than others (4.4%) to do most of their giving by bequest. Donors themselves drew connections between their not having children and leaving wealth to philanthropy." OSTROWER, *supra* note 8, at 102–03 (footnotes omitted). The case law includes countless anecdotal examples of testators who bequeathed to charity in want of children. *See, e.g.*, Shea v. Arnold (*In re* Estate of O'Connell), 105 Cal. Rptr. 590, 591–92 (Ct. App. 1972); *In re* Estate of Reeder, 217 N.E.3d 1071, 1073 (Ill. App. Ct. 2023).

106. *See* James, *supra* note 4, at 1040 tbl.4 (based on Health and Retirement Study data).

107. *See id.*; *see also* Sean Fahle, What Do Bequests Left by Couples with a Surviving Member Tell Us About Bequest Motives?, 7, 89 tbl.G1 (Jan. 26, 2023), https://ssrn.com/abstract=4338835 (presenting Health and Retirement Study data from 2004–2016).

108. *See supra* notes 93–99 and accompanying text.

109. Special thanks to Professor James for running these data, which again derive from the Health and Retirement Study.

110. Average life expectancy in the United States in 2023 is 79.11 years. *See U.S. Life Expectancy, 1950–2024*, MACROTREANDS, https://www.macrotrends.net/countries/USA/united-states/life-expectancy (last visited Feb. 1, 2025).

estate plans—a fraction consistent with his previous study.[111] When, however, he divided the data by wealth category, a majoritarian preference for charitable bequests came into view. Here are the data:[112]

TABLE 1

	(%)
Childless respondants (in 2018):	
Bottom half of wealth (< $156,000)	21.95
50th to 75th percentile ($156,000–$519,000)	28.25
75th to 90th percentile ($519,000–$1,276,499)	37.87
90th percentile or above (≥ $1,276,500)	49.64

As these data reveal, childless respondents cross the threshold to a majority preference in favor of charitable bequeathing at around $1.3 million in wealth, a point sufficiently low to implicate a sizable number of intestate decedents.[113]

Earlier studies have reported that Americans' donative preferences are sensitive to taxability, suggesting that philanthropic inclinations might rise steeply at the point where estates become subject to the estate tax and the accompanying deduction for charitable bequests.[114] Tax efficiency does not appear critical in setting majoritarian preference in the present context, however.

111. *See* e-mail from Russell N. James III, Dir. of Graduate Stud. in Charitable Fin. Plan., Tex. Tech Univ., to author (Sept. 4, 2023) (on file with author); *see also supra* note 105 and accompanying text.

112. *See id.*

113. *See infra* note 252.

114. The data are not uniform, however. As Professor Lawrence Friedman quipped, "Human behavior is even more complicated than the Internal Revenue Code." Friedman, *supra* note 32, at 550. For studies suggesting sensitivity, *see* Jon M. Bakija, William G. Gale & Joel B. Slemrod, *Charitable Bequests and Taxes on Inheritance and Estates: Aggregate Evidence from Across State and Time*, 93 AM. ECON. REV. PAPERS & PROC. 366 *passim* (2003); Boskin, *supra* note 56, at 49–55; Michael J. Brunetti, *The Estate Tax and Charitable Bequests: Elasticity Estimates Using Probate Records*, 48 NAT'L TAX J. 165 *passim* (2005); Eller, *supra* note 56, at 530–32; David Joulfaian, *Estate Taxes and Charitable Bequests by the Wealthy*, 53 NAT'L TAX J. 743, 746–61 (2000); Wojciech Kopczuk, *Taxation of Intergenerational Transfers and Wealth*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 329, 379–80 (2013) (citing and summarizing studies); Wojciech Kopczuk & Joel Slemrod, *Tax Consequences on Wealth Accumulation and Transfers of the Rich*, *in* DEATH AND DOLLARS, *supra* note 93, at 213, 223–30. *But cf.* Gerald E. Auten, Charles T. Clotfelter & Richard L. Schmalbeck, *Taxes and Philanthropy Among the Wealthy*, *in* DOES ATLAS SHRUG? 392, 414 (Joel B. Slemrod ed., 2000) (finding that benefactors do not tend to substitute lifetime donating for bequeathing, even though lifetime donating is more tax-efficient because of the income tax deduction); Barthold & Plotnick, *supra* note 54, at 228, 235 (finding charitable bequests to be insensitive to tax deductibility); Natalie Behring, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES, Sept. 15, 2022, at B1 (remarking a billionaire whose philanthropic transfer generated "no tax benefit . . . whatsoever") (internal quotation marks omitted); BNY MELLON WEALTH MGMT., CHARITABLE GIVING STUDY 8, 22 (2022), https://www.daffy.org/docs/charitable-giving-report-final.pdf (presenting survey data from 200 high net worth individuals, finding tax planning a strong motivator for charitable giving among only 27% of respondents); Johnson & Rosenfeld, *supra* note 56, at 32–34 (citing conflicting evidence, including survey and focus-group data denying that tax incentives affect philanthropy);

Other combinations of criteria are, of course, possible. The effect of marriage on propensities to bequeath to charity merits attention. We might predict that marriage would dampen the philanthropic tendencies of childless individuals.[115] They might prefer to leave everything to their spouses in want of children. *Or perhaps not*. Individuals with no offspring might dislike the idea of spouses bequeathing in turn to their own family members; individuals might favor charities over in-laws as ultimate recipients of their property.[116]

Running data from 2018 at my request, Professor James found only small differences between the charitable planning of childless individuals aged 55 and older in different relationship categories.[117] Among married respondents, 35.5 percent planned charitable bequests. Among widowed respondents the equivalent fraction was 36.4 percent. Among divorced respondents, the equivalent fraction was 38.8 percent. And among respondents who had never married, the equivalent fraction was 38.1 percent.[118] None of these results could justify including charities as heirs based on the criteria of childlessness and relationship status alone.

Sargeant et al., *Marketing*, *supra* note 33, at 392–93 (focus-group data showing tax deductibility significant "in some cases", but not overwhelmingly so); Sargeant & Shang, *supra* note 33, at 988–99 (presenting additional focus-group anecdotes); IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, THE 2023 BANK OF AMERICA STUDY OF PHILANTHROPY: CHARITABLE GIVING BY AFFLUENT HOUSEHOLDS 89 (2023), https://scholarworks.indianapolis.iu.edu/server/api/core/bitstreams/2fd1581e-c1a0-43de-a174-a3080d019fc2/content (reporting in a 2022 survey that 73.1% of affluent households would bequeath the same amount to charity if the estate tax were abolished); *see also id.* at 88 (reporting that 74.1% of affluent households would donate the same amount inter vivos if the income tax deduction for donations were eliminated). For a review of extant studies, see JOULFAIAN, *supra* note 92, at 135–47.

115. To the extent that tax avoidance represents a motivation for bequests, the marital deduction ensures that bequests to spouses are exempt from estate taxes to the same extent as charitable bequests. *See* 26 U.S.C. § 2056(a).

116. *Cf.* OSTROWER, *supra* note 8, at 110 tbl.5.2 & 171 n.21 (reporting that rich, married New Yorkers planned larger charitable bequests than unmarried ones, the reason for which "is less clear and would be of interest for future research").

117. Some older data conflict with these findings. *See* Auten et al., *supra* note 114, at 411 (finding that marriage diminished charitable bequests); Barthold & Plotnick, *supra* note 54, at 228–29 (same); Boskin, *supra* note 56, at 45–46 (same); Chang et al., *supra* note 54, at 80 (same); Eller, *supra* note 56, at 526 (same). *But cf.* KOU ET AL., *supra* note 54, at 11, 23 (finding marriage insignificant for earners above $100,000 per year after controlling for other factors); IND. UNIV. LILLY FAMILY SCH. PHILANTHROPY, WHAT AMERICANS THINK ABOUT PHILANTHROPY AND NONPROFITS 19, 45 (2023), https://scholarworks.indianapolis.iu.edu/server/api/core/bitstreams/b5904a8a-5081-42cd-bd44-56740b98fb67/content (finding in a 2022 survey that married persons were likelier to self-identify as philanthropists than unmarried ones but were equally likely to donate and volunteer).

118. *See* e-mail from Russell N. James III, Dir. of Graduate Stud. in Charitable Fin. Plan., Tex. Tech Univ., to author (Sept. 6, 2023) (on file with author) (based on Health and Retirement Study data). Intriguingly, far fewer *partnered*, childless respondents planned charitable bequests: 9.9%. The fraction for childless respondents *separated* from their spouses was also low: 15.4%. *See id.* Previous research by Professor James had suggested that more married, childless respondents than unmarried childless respondents planned charitable bequests, see James, *supra* note 105, at 32–33 tbl.13, but he now believes those data might have resulted from a coding error. *See* e-mail from Russell N. James III, Dir. of Graduate Stud. in Charitable Fin. Plan., Tex. Tech Univ., to author (Sept. 4, 2023) (on file with author).

The Health and Retirement study only reports the fractions of respondents who plan to make charitable bequests—it fails to inquire into the share of estates that respondents intend to bequeath to charity.[119] Tax records do include relevant data, however. Data from 1997 and 2003 both show that the fraction of estates testators bequeath to charity grows steadily with wealth.[120] In 1997, among estates valued at $20 million or more, testators bequeathed on average 49 percent their estates to charity.[121] Remarkably, that fraction exceeded the percentages allocated to heirs (21%) and the amounts paid in taxes (30%).[122]

Data from 2003 suggest less exuberant benevolence. For testators worth under $1 million, average bequests to charity totaled 2.2 percent of estates.[123] For those worth $1 to $1.5 million—the level at which half of childless testators make these bequests—the comparable fraction was 3.6 percent.[124] For those worth over $20 million—a level at which, farther up the scale, half of all testators make these bequests—the comparable fraction was 16.3 percent.[125] This percentage probably underestimates the fraction of estates bequeathed to charity for those worth $50 million or more, given the positive correlation between wealth and proportions of estates bequeathed to charity. In 2003, the average part of estates bequeathed to charity among testators in all wealth categories was 7.8 percent.[126] Among the subset of testators who made charitable bequests, the comparable fraction was 28.7 percent.[127]

These data fail to break down the averages for childless testators versus those with children, an attribute not revealed by tax records.[128] The only existing data appear within two surveys of the estate plans of living respondents. The first was a survey conducted in 1987 and 1988 of ninety-nine wealthy donors of

119. *Cf. infra* text accompanying note 256.

120. *See* JOULFAIAN, *supra* note 92, at 76–80 & tbls.5.6, 5.7 (2019); Joulfaian, *supra* note 97, at 12, 26 tbl.11; PAUL G. SCHERVISH, THE MODERN MEDICI: PATTERNS, MOTIVATIONS, AND GIVING STRATEGIES OF THE WEALTHY 4, 6 (2000), https://dlib.bc.edu/islandora/object/bc-ir:104124/datastream/PDF/view.

121. *See* SCHERVISH, *supra* note 120, at 4.

122. *See id.* For all 1997 estates, 14% of their value went to charity, 65% went to heirs, and 21% was paid in taxes. *See id.*; *see also* CLOTFELTER, *supra* note 7, at 229–32 (reporting 1977 tax data, finding that decedents worth $5–10 million left on average of 10.6%, and those worth above $10 left on average 48%, of their estates to charity).

123. *See* Joulfaian, *supra* note 97, at 11–12, 26 tbl.11.

124. *See id.* at 26 tbl.11.

125. *See id.*

126. *See id.*

127. *See id*. at 12, 28 tbl.13; *see also* Joulfaian, *supra* note 93, at 360 tbl.8–7 (contrasting fractions of total giving by donors while living and via bequest, finding that the fraction transferred at death increased with wealth).

128. Tax records disclose decedents' marital status and who their beneficiaries were but not whether decedents were childless, a circumstance that researchers cannot infer with certainty. *See* I.R.S. Form 706, pt. 4 (estate tax return).

$1000 or more to charity, either residing or working in New York City.[129] Among the full group of donors, 59.2 percent planned to make charitable bequests.[130] And among the full group, the amount they planned to devote to charity averaged 24.2 percent of their estates (with a median of 8.8 percent).[131] Among the subset of donors who had created estate plans that included charitable bequests, the amount devoted to charity rose to an average of 33.4 percent of their estates (with a median of 23.8 percent).[132]

Crucially for our purposes, the author then stratified the data by the presence or absence of offspring. Among all wealthy donors with children, bequests devoted to charity averaged 20.6 percent of estates (with a median of 7.5 percent). Among the subset that planned charitable bequests, the average rose to 29.2 percent of estates (with a median of 20 percent). Among all wealthy donors without children, bequests devoted to charity averaged fully 50.4 percent of estates (median 33.0 percent). Among the subset that planned charitable bequests, the average was 58.8 percent (median 60.3 percent).[133]

The second, more recent and far larger survey polled a nationally representative sample of 9,000 American adults about their estate planning preferences, factoring out the possibility of bequeathing to a spouse or partner.[134] Those respondents with living descendants, parents, and siblings wished to allocate just 2 percent of their estates to charity, on average (among a cohort of 2,019). For those with living descendants but no parents, the fraction of the estate that respondents would allocate to charity rose just slightly, to 3.1 percent (among a cohort of 2,332). But among those respondents who lacked descendants, a leap in benevolence occurred. For those with living parents and siblings but no descendants, the average allocation for charity increased to 10.1 percent (among a cohort of 2,033). For those with only siblings, the comparable fraction of the estate was 16.6 percent (among a cohort of 528). And for those

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129. *See* OSTROWER, *supra* note 8, at 19–25, 143–44 (describing the survey's methodology). The author fails to state the parameters of wealth dictating eligibility for participation in the survey, although 82% of those appearing on the Forbes list of wealthiest Americans who came from New York were included in the sampling base. *See id.* at 22. Among the respondents, one-quarter had donated $500,000 or more, nearly half had donated $100,000 or more, and over three-quarters had donated $20,000 or more. *See id.* at 21.

130. *See id.* at 103.

131. *See id.* at 109 tbl.5.1.

132. *See id.* at 103, 109 tbl.5.1.

133. *See id.* at 108–09 & tbl.5.1. The author also found a positive correlation between the scale of charitable bequests and wealth, with respondents worth $20 million or more bequeathing the largest percentages of their estates. *See id.* at 110. These data confirm statistics drawn from tax records. *See supra* notes 120–127 and accompanying text.

134. *See* Yair Listokin & John Morley, *A Survey of Preferences for Estate Distribution at Death, Part 2: Children and Other Beneficiaries* 2 (Yale L. & Econ. Rsch. Paper Series, Jan. 20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332182. The data set included single respondents and married or partnered respondents who did not plan to bequeath to their spouses or partners; all other respondents were asked to assume that their spouse or partner predeceased them. *See id.* at 9.

with no surviving relatives of the first degree, the average fraction allocated to charity shot up to 29.0 percent (among a cohort of 461).[135] Amalgamating these results, childless respondents wish on average to allocate 14.12 percent of their estates to charity.

Data reported in both of these studies indicate that the variable of childlessness increases not just the propensity to make charitable bequests, as already shown,[136] but also the relative size of those bequests.

And what were the preferred objects of charitable bequests? Tax data indicate that testators favor a wide variety of charitable beneficiaries—including arts and humanities, education medicine and science, social welfare, and religion—suggesting that a charitable share in intestacy should combine causes rather than focus on any one object.[137] Patterns of charitable bequests also vary by size of the estate. Most dramatically, fractional amounts testators allocate to religion decline steadily with wealth.[138] Lawmakers could conceivably modify the basket of charities benefited in intestacy via a wealth-based formula. Doing so would complicate the statute to the point of opaqueness, however. Given the high threshold at which a majority favors charitable transfers, lawmakers should simply minimize the share going to religious charities under intestacy law, assuming any share could withstand constitutional scrutiny.

III. PERSONALIZED DEFAULTS

A. THEORY

With a tailored default, lawmakers fit the rule to the preferences of groups of intestate individuals who share a given characteristic. Lawmakers need not stop there, however. They could endeavor to personalize defaults down to the

135. *See id.* at 9, 11. Note that the data reported in the second survey was not confined to wealthy respondents, and also excluded the possibility of making an allocation to a surviving spouse.

136. We presented these data earlier. *See supra* notes 104–113 and accompanying text.

137. *See* JOULFAIAN, *supra* note 92, at 81 tbl.5.9; Boskin, *supra* note 56, at 28, 36–37, 42–44, 52, 54; Eller, *supra* note 56, at 523–24; Joulfaian, supra note 97, at 13, 31 tbl.16; Johnson & Rosenfeld, *supra* note 56, at 31–32.

138. Tax data from 1995 indicates that testators leaving estates valued below $1 million allocated 29.3% of their charitable bequests to religion; for testators leaving estates above $20 million, the comparable fraction was 2.5%. *See* Eller, *supra* note 56, at 524–25; *cf.* Auten et al., *supra* note 114, at 414–15 & tbl.12.8 (reporting slightly different fractions based apparently on the same data set); *see also* Boskin, *supra* note 56, at 36–37, 42–44 (finding the same tendency in older data). Support for other charitable objects also varied with wealth. Support for private foundations grew steadily, whereas support for education, medicine and science grew but then declined. *See* Auten et al., *supra* note 114, at 415; Eller, *supra* note 56, at 524–25; *see also* Boskin, *supra* note 56, at 36–37 (older data). Relatively small variations appear on the basis of gender; for instance, women favored religious charities somewhat more strongly than men. *See* Auten et al., *supra* note 114, at 415; Eller, *supra* note 56, at 525–26. Once again, though, the idea of incorporating gender-based differences into intestacy law is untenable. *See supra* text accompanying notes 56–59. Data based on lifetime giving indicate a decline in religious donations relative to secular donations between 2000 and 2018. *See* GIVING ENVIRONMENT II, *supra* note 7, at 17–21; *see* GIVING ENVIRONMENT I, *supra* note 7, at 17–19.

granular characteristics of each intestate. This idea has floated in the air for the past decade.[139] It represents the *ne plus ultra* of default tailoring, taking that approach to its logical extreme.

Theorists contend that lawmakers can personalize default rules, including intestacy law, with the assistance of computer algorithms, relying on "big data" to identify the propensities of legal actors.[140] Researchers have already performed this sort of analysis, albeit for a different purpose—they aim to pinpoint individuals whom philanthropic organizations should solicit to make charitable bequests.

In furtherance of this end, studies have connected testamentary philanthropy with a variety of personal characteristics. The picture that emerged from big data is of an individual who:

> is[] stable in residence, is an unmarried, self-employed, non-Jewish white male, who believes strongly that charitable organizations are both needed and are unwasteful in funds; he also believes in a moral duty to help others and puts the goals of others before his.[141]

And again, based on a different data set:

> a basic profile of a bequest pledge maker is one who tends to be single, is highly educated, frequently attends religious services, or has an annual household income of $100,000 or above.[142]

The notion that lawmakers might introduce either of these composites into an intestacy statute appears far-fetched. Such a statute would stand no chance of enactment in any American state.

In the alternative, lawmakers might personalize intestacy law on a more limited basis by focusing on a single, individual trait indicative of charitable intent. Such a rule could rely on *small* data—not a default rule tailored to manifest criteria, although those could impose additional limitations on the

139. *See* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 *passim* (2014); Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349 *passim*. *See generally* Symposium, *Personalized Law*, 86 U. CHI. L. REV. 217 (2019).

140. *See* Porat & Stahilevitz, *supra* note 139, at 1434–35; *see also* Cass R. Sunstein, *The Use of Algorithms in Society* (Harvard Pub. L., Working Paper No. 23–46, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4310137 (addressing the strengths and weaknesses of legal algorithms generally). Recent breakthroughs in artificial intelligence might enhance our ability to personalize law. *See* Omri Ben-Shahar & Ariel Porat, *How to Evaluate Personalized Law*, U. CHI. L. REV. ONLINE (Mar. 9, 2022), https://lawreviewblog.uchicago.edu/2022/03/09/bp-series/#evaluate-personalized-law (suggesting in 2022 that "although some promising steps are already being designed, at present AI technology is not yet up to the task" of implementing "full-fledged personalized law").

141. Chang et al., *supra* note 54, at 81 (emphasis and parenthesis omitted).

142. KOU ET AL., *supra* note 54, at 27; *see also* JAMES, *supra* note 103, at 62, 64 (presenting multi-factor models).

scope of the rule, but rather one requiring some narrow, personal investigation not routinely undertaken in the context of intestacy.[143]

A promising line of inquiry in the present context is the philanthropic history of each intestate individual. Empirical evidence indicates that those who donated $500 or more in the year they were surveyed are more motivated to close out their lives with charitable bequests than nondonors—but still nowhere near a majority of lifetime donors intend to make such bequests.[144] Among *childless* donors, however, the fraction planning charitable bequests soars to 50 percent.[145] This combination of characteristics could justify a rule of intestate succession by charities.

These data reinforce data presented earlier suggesting that childless decedents would want to provide part of their estates to charity, at least if they were sufficiently wealthy.[146] Irrespective of whether they were wealthy, childless *donors* would want to do so, these data suggest.

Investigation of decedents' donative patterns could serve to personalize intestacy in even greater depth. Individuals donate to different charities in consequence of their varied experiences and enthusiasms.[147] Most donors continue to support the same charities throughout their lives and are therefore unlikely to switch to new ones when they plan their estates.[148] The same records that identify whether decedents had donated during life also reveal which

143. The distinction drawn here between a tailored default and a personalized default relying on small data is abstract and, in a sense, circular. The administrator must investigate whatever variables intestacy law creates. But what I am labelling a tailored default relies on traditional distinctions; a personalized default relies on unconventional types of data that nonetheless fall within the bounds of plausible inquiry.

144. Whereas 5.7% of all testators plan charitable bequests, 9.4% of donors do. *See* James, *supra* note 4, at 1030, 1031 tbl.1 (based on Health and Retirement Study data).

145. *See id.* at 1039, 1040 tbl.4 (based on Health and Retirement Study data).

146. *See supra* notes 109–113 and accompanying text.

147. *See* BNY MELLON WEALTH MGMT., *supra* note 114, at 10, 23, 35–36 (presenting survey data for 200 high net worth individuals, finding that "personal satisfaction" and "personal connections" most strongly influence which charities respondents chose to support); Schervish & Havens, *supra* note 93, at 132–38 ("[D]onors tended to support the causes which addressed the concerns that they, their families, and those with whom they had been associated, had experienced . . . .") (based on interview data).

148. *See* CLASSY, WHY AMERICA GIVES 2022, at 23 (2022), https://www.classy.org/why-america-gives (reporting survey data from over 1,000 donors, finding that "85% of traditional donors are loyal to specific causes or organizations"); *see also* Getty v. Getty (*In re* Estate of Getty), 149 Cal. Rptr. 656, 658 (Ct. App. 1978) (concerning the billionaire oil magnate who bequeathed the residue of his estate to the art museum he had founded during his lifetime); Schwartz v. Dr. Miriam and Sheldon G. Adelson Educ. Inst. (*In re* Estate of Schwartz), Nos. 78341, 79464, 2022 WL 970215, at *1 (Nev. Mar. 30, 2022) (concerning a testator who had donated to a school during life and then bequeathed to the school under his will); Dan Clarendon, *Bob Barker's Estate to be Donated to 40-Plus Nonprofits*, N.Y. DAILY NEWS (Aug. 29, 2023, 5:03 P.M. EDT), https://www.nydailynews.com/snyde/ny-bob-barker-estate-charity-donations-20230829-ned55i6civfsdbsot5ocpcn3la-story.html (concerning the estate of the game-show host Bob Barker, unmarried and childless, who bequeathed most of his $70 million fortune to animal-rights organizations after supporting them throughout his lifetime).

charitable cause or causes those decedents had favored. Courts could then designate those discrete causes, rather than a pool of charities, as heirs.[149]

Lawmakers need not confine these investigations to childless decedents. Intestacy law could mandate the same investigations with respect to decedents who were wealthy enough to want to provide for charity, regardless of whether they left descendants. Evidence that those decedents had made donations, and had favored specific causes, would almost invariably emerge. Among the wealthy, the absence of any charitable history is exceedingly rare.[150]

A case in point: Howard Hughes, the multi-billionaire who died intestate with no spouse or children in 1976, was close to none of his twenty-two blood heirs, all cousins.[151] But during his lifetime, he had endowed the Howard Hughes Medical Institute in 1953, originally centered at the University of Miami, and he had also helped to establish the University of Nevada School of Medicine with a twenty-year pledge of support in 1969.[152] Hughes was nothing if not eccentric, but can anyone doubt that he would have provided for these charitable entities had he created an estate plan?

This sort of extrapolation is possible for the substance, but not the scale, of charitable preferences. As discussed earlier, the Scrooge effect could cause benefactors to increase their charitable giving when they plan their estates.[153] Empirical evidence reveals no clear correlation between the extent of donating during life and at death. One interview survey of 99 wealthy donors in New York found that only 10.4 percent planned to donate comparable amounts during their lifetimes and under their estate plans (or they did not lean one way or the other).[154] By contrast, 59.7 percent planned to donate more during life, whereas

149. *See* Joulfaian, *supra* note 97, at 13, 31 tbl.16 (identifying the types of charitable entities benefited by testators by examining tax records). Auditors need not limit themselves to these sources of information. Also relevant is any will or will substitute decedents had executed leaving them only *partially* intestate. More than any other source, a will or will substitute reveals decedents' charitable preferences, or even the *absence* of charitable intent, at death. *Cf.* 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, 415, 441–42 (2010) (finding that respondents in a survey objected to granting probate assets to charitable beneficiaries of will substitutes when close family members were present).

150. *See* Joulfaian, *supra* note 93, at 361 (reporting tax data showing donation rates between 94.15–100% for wealth categories above $1 million). *But cf. In re* Estate of Rivera, 121 N.E.3d 930, 931 (Ill. App. Ct. 2018) (noting that an intestate decedent worth $12 million due to a personal injury settlement was "permanently and profoundly disabled by birth injuries. . . . has never married, has not had or adopted children, and has never had testamentary capacity.").

151. *See* SCHUMACHER, *supra* note 70, at 191.

152. *See id.* at 203–04.

153. *See supra* notes 26–27 and accompanying text.

154. *See* OSTROWER, *supra* note 8, at 101–02 (based on seventy-seven responses).

7.8 percent planned to donate more at death.[155] The rest either did not know or gave other responses.[156]

Given the difficulty of personalizing the scale of benevolence at death, lawmakers must fall back on broader empirical evidence, presented earlier, to set this variable.[157] In other words, lawmakers can combine elements of tailoring and personalization when limits on the potential for personalizing intestacy come to light.

Lawmakers could delegate responsibility for conducting investigations into decedents' charitable histories to the administrator of the estate. This appears a logical choice—administrators already enjoy access to an intestate's financial records and, as fiduciaries, they have a duty of good faith in serving the estate. The danger remains that, because administrators often comprise heirs themselves, they will have a conflict of interest with any charities that might benefit from the investigation. Courts could circumvent this conflict by appointing corporate fiduciaries as administrators in those instances where an estate becomes eligible for a philanthropic investigation. Alternatively, courts could appoint independent auditors to pursue the matter. But either way, personalization would entail both costs and benefits.

Some of the potential objections to personalization fail to arise or are easily parried in respect of this form of personalized default. One concern is whether a personalized default would be opaque to individuals contemplating a planned intestacy. Personalized defaults relying on big data could well pose this problem. Few citizens could understand an algorithm embedded in an intestacy statute. They would need to trust its accuracy before making a conscious decision to forego testation.[158] This problem recedes when lawmakers impose a personalized default relying on small data. Lawmakers could describe the investigation built into the intestacy statute in simple language, and individuals could then decide whether the prospect of such an investigation appealed to them. They would have to engage in no leap of faith regarding the nature of the investigation, although they would have to ponder its reliability.

155. *See id.*

156. *See id.*; *see also* Joulfaian, *supra* note 93, at 360 (comparing cumulative contributions during life with amounts of bequests for different wealth categories); Pamala Wiepking & Russell N. James III, *Why Are the Oldest Old Less Generous? Explanations for the Unexpected Age-Related Drop in Charitable Giving*, 33 AGEING & SOC'Y 486, 487, 490 (2013) (remarking evidence that donations rise with age but then decline in extreme old age, and suggesting as a possible explanation that superannuated individuals substitute bequests for donations to charity).

157. *See supra* notes 120–136 and accompanying text.

158. *See* Porat & Strahilevitz, *supra* note 139, at 1458 ("Assuming that Big Data does what it is supposed to do . . . then the consumer will be able to intuit the law's contents based on what he himself would want . . . ."). *But cf.* Cass R. Sunstein & Jared H. Gaffe, An Anatomy of Algorithm Aversion (June 15, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4865492 (addressing public wariness of algorithms).

A second concern is invasion of privacy.[159] Citizens might rebel at the prospect of any sort of investigation into their personal histories. That is less likely, though, in the context of philanthropy. As discussed earlier, most donors relish publicity, and they wish to associate themselves with the causes they support.[160] Courts could accommodate those few who prefer anonymity, as revealed by their pattern of giving during life. Transfers from an intestate estate could go to charities anonymously. And although probate records are public, courts retain authority to seal those records at their discretion.[161] That would remain an option in exceptional instances where a decedent had evinced an intense desire for confidentiality during life.

At the same time, it is undeniable that personalization would add to the cost of intestacy. Whoever conducts the investigation, whether an administrator or an auditor, could demand compensation for that service. The investigation would take time to complete, possibly delaying probate. And the risk exists that courts would misjudge the evidence regarding a decedent's charitable intent—another form of cost. That said, an investigation of this sort would appear straightforward, objective, and not otherwise impractical.[162]

Personalization would also preclude amicable division of intestate estates, which serves to avoid the expense of probate. Amicable division becomes impossible if the identities of the interested parties—possibly including charities—require court proceedings to establish. Lawmakers would therefore have to impose on survivors a duty to probate the estates of those intestate decedents whose characteristics (*viz*. wealth and childlessness) made them eligible for personalization.

On the other side of the ledger, personalization would allow courts to channel intestate decedents' property to those charities that mattered most to them, or in which they had been individually invested. Among the wealthiest few, it might be a family foundation that either they or their relatives had established. A tailored default could never achieve this level of precision.

Historically, lawmakers have never personalized rules of intestacy. Those rules have traditionally operated mechanically, streamlining probate. Yet, lawmakers have made exceptions before, and they could do so again. The eligibility of posthumously conceived or implanted children to take as heirs

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159. *See* Porat & Strahilevitz, *supra* note 139, at 1467–69; Kreiczer-Levy, *supra* note 139, at 361.

160. *See supra* notes 20–21, 31–32 and accompanying text.

161. *See, e.g.*, CAL. CT. R. 2.551 (2024).

162. But compare the decision by the drafters of the Uniform Probate Code who, when crafting a statutory doctrine of advancement, mandated deductions of lifetime gifts to heirs from their shares under the intestacy statute only when those gifts were recorded in a writing. *See* UNIF. PROB. CODE § 2-109(a) (amended 2019), 8 pt.1 U.L.A. 60 (2023). The reporter for the Code commented: "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," which would comprise an "unrealistic burden for personal representatives." Wellman, *supra* note 39, at 5–6.

depends in some states on whether the deceased parent "consented" to the conception, "considering all the facts and circumstances" of signed records, for example.[163] This and other rules require investigation into actions taken by individual decedents.[164]

Whether decedents themselves would wish to trade the benefits for the costs of personalization remains an open question. Yet, here, an intriguing possibility presents itself. Lawmakers could endeavor to personalize the preference for personalization—what we might call *meta*-personalization. Data could reveal which individuals are more inclined to entertain the idea of personalized distributions upon intestacy and which ones are more apt to reject it, given its costs. Thus far, researchers have not explored this character trait. We now proceed to examine preferences regarding personalization in a new empirical study of the issue.

B. EVIDENCE

In order to gauge public preferences regarding personalization of charitable heirs, I have undertaken an original survey on the issue.[165] Ipsos, an electronic polling firm, conducted the survey on my behalf in September, 2023, drawing on its large panel of adult Americans. The survey presented 1,005 respondents with a hypothetical scenario under which intestacy law dictated that 10 percent of their estates would go to charity and the rest to their families.[166] Respondents then had to choose between the following options: (1) "I would prefer that 10

163. This language, appearing in Colorado, Hawaii, Minnesota, New Mexico, and North Dakota, derives from a former section of the Uniform Probate Code. *See* UNIF. PROB. CODE § 2-120(f) (2010 art. 2), 8 pt. 2 U.L.A. 128 (2023).

164. For other examples of intestacy statutes requiring factual investigations in connection with adultery, abandonment, or abusive conduct by an heir, see Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N. U. L. REV. 975, 978–79, 983–87 (2007).

165. Raw data are available on request to the author. We must post a sign of caution applicable here and elsewhere in this Article. Surveys of unconsummated preferences regarding estate planning could fail systematically to reflect the intent of testators when confronted with actual decision-making. As one court observed, "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." Strong v. Fitzpatrick, 169 A.3d 783, 789 (Vt. 2017); *see also* Roewen Wishart & Russell N. James III, *The Final Outcome of Charitable Bequest Gift Intentions: Findings and Implications for Legacy Fundraising*, 26 J. PHILANTHROPY & MKTG., no. 4, 2021, at 1, 5 (noting Australian data that "[a]mong 700 decedents who reported having a gift in place during life to charity, 35% generated no actual bequest gift at death"). In addition, "many individuals [are] reluctant to talk candidly about [the topic of bequests]." Sargeant & Shang, *supra* note 33, at 981. Still, in this regard, an impersonal electronic survey might generate franker responses than a traditional telephonic survey. For an additional discussion and references, see Hirsch, *supra* note 36, at 282 n.26.

166. Composed to make the question understandable by laypersons, the fact pattern read in its entirety: "If people don't write out a document, called a will, explaining how they want their property (money, stocks and bonds, home, etc.) to be distributed when they die, legal rules determine who inherits from them. Suppose you died without a will and legal rules determined that most of your property would go to your family members, but 10% of your property would go to charity. Which of the following choices would best reflect your preferences?" The credibility interval for this electronic survey (akin to the margin of error for random surveys) was ± 3.5%.

percent of my property went to my favorite charity or charities, as determined in an official investigation of the charities I supported while I was alive. Such an investigation might involve some additional costs and delays."; or (2) "I would prefer that 10 percent of my property went to a pool of charitable organizations." Respondents could also respond "Neither of the above, or not sure." The two substantive responses appeared in random order to minimize survey order bias.[167]

A majority of respondents preferred personalization, notwithstanding its costs. This preference predominated across the full spectrum of income categories, as well as other categories differentiated by Ipsos.

Overall, omitting 376 respondents who were unsure, 66.6 percent preferred a personalized inquiry, whereas 33.4 percent preferred to benefit a pool of charities. A preference for personalization was positively correlated with income. Among the poorest respondents, those earning less than $50,000 per year, 61.5 percent preferred personalization. Among those earning between $50,000 and $100,000 per year, the fraction rose to 66.4 percent. And among those earning above $100,000 per year, the fraction climbed again, to 70.9 percent.

This distribution is significant if a rule granting a share of estates to charity in intestacy only applies to wealthy decedents.[168] Among those with deeper pockets, the majority preference edges upward. Why preferences scatter in this way can only be guessed. Perhaps wealthier individuals feel they can more easily afford to bear costs serving to effectuate their intent more exactly in probate.

Breaking down the data by age produced no consistent progression. Among respondents aged 18 to 34, 65.0 percent preferred personalization. Among those aged 35 to 54, the fraction dipped slightly to 63.2 percent. But among those aged 55 and older—the age at which individuals are most likely to die[169]—the fraction leaped to 71.2 percent. Neither gender nor regional differences (which might justify differentiating rules of intestacy state by state) dislodged majority preferences for personalization.[170]

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167. *See* Glenn D. Israel & C.L. Taylor, *Can Response Order Bias Evaluations?*, 13 EVALUATION & PROGRAM PLAN. 365 *passim* (1990) (discussing this phenomenon). I borrowed the cautionary note about costs and delays from a prior survey of preferences for judicial discretion generally within intestacy law. *See* Contemporary Studies Project, *supra* note 51, at 1129. I chose the 10% fraction arbitrarily, although it corresponds with the ancient tithe, which I thought might resonate with respondents. *See Matthew* 23:23.

168. At the same time, lawmakers need not define the subcategories of intestate decedents with charitable heirs exclusively on that basis. *See supra* text accompanying notes 144–146.

169. *See supra* note 110 and accompanying text. Albeit also the age at which they are more likely to have an estate plan. *See supra* note 45.

170. Among men, 65.4% preferred personalization. Among women, the comparable fraction was 67.7%. Among northeasterners, 63.5% preferred personalization. Among Midwesterners, the comparable fraction was

The results of this electronic survey echo elements of a telephonic one conducted in a single state—New Jersey—half a century ago. In 1975, a researcher asked respondents to answer the following question:

> We believe that if a person dies without a will and has no spouse, no parents, no children or grandchildren living, a judge should take control of the estate. The judge should discover which of the remaining relatives or friends the deceased was close to or cared about and which charities and organizations the deceased worked for or gave money to. The judge should allow these parties to come to court and explain their relationships with the deceased. He should divide the estate on that basis. What is your opinion of this?[171]

46 percent of respondents either "strongly favored" or "favored" this proposal, and an additional eighteen percent "favored it with reservations, fearing that the courts were already too crowded, not wanting lawyers to get involved, or wanting to restrict charity's share."[172] At the same time, thirty percent "strongly opposed it; they felt it would be too expensive, too impractical, and probably corrupt. They feared the judge's power and felt that only the family should inherit, not friends or charity."[173]

These two surveys differed structurally. Whereas my 2023 survey presupposed a charitable component in intestacy, and thereby isolated the issue of personalization, the 1975 survey combined the issue of broad judicial discretion with the possibility that a court might exercise it in favor of charity. Some respondents' negative reactions in 1975 traced to a desire to "restrict charity's share," or to reject charity altogether.[174] We shall return forthwith to the issue of judicial discretion in another context.[175] The point to note here is that charity's inclusion within a personalized law of intestacy—despite some opposition—did not cause a majority of respondents to reject the scheme.

Neither of these surveys explored the number of charities among which respondents would prefer to divide the charitable portion of their hypothetical intestate estates. Obviously, this decision would involve a modicum of discretion on the part of courts. Data from tax records indicate that courts should restrict the number of charitable distributees. A study based on tax records from 2003 found that decedents making charitable bequests divided them, on average, among 3.54 charities.[176] The number of charities benefited rose with the fraction

66.9%. Among southerners, the comparable fraction was 69.2%. Among westerners, the comparable fraction was 64.5%. One might speculate that the uptick in the fraction of southerners preferring personalization traces to the higher religiosity of southern regions, leading respondents to favor charitable transfers to their individual places of worship. *See* Jim Norman, *The Religious Regions of the U.S.*, GALLUP (Apr. 6, 2018), https://news.gallup.com/poll/232223/religious-regions.aspx (reporting data from a Gallup poll).

171. Glucksman, *supra* note 86, app. 2.

172. *Id.* at 276.

173. *Id.* (noting that the remaining 6% had no opinion).

174. *Id.*

175. *See infra* Subpart.IV.B.

176. *See* Joulfaian, *supra* note 97, at 12, 28 tbl.13.

of estates decedents devoted to charity, although the number peaked at an average of 6.68 charities for those who bequeathed 20–30 percent of their estates to charity and then declined thereafter.[177] Likewise, the number of charities benefited by all decedents (not just philanthropic ones) rose with the wealth of decedents, from an average of 2.50 charities for decedents worth less than $1 million to an average of 4.55 charities for decedents worth over $20 million.[178] Considered overall, though, "[v]ery few [testators] give to more than a handful of organizations."[179]

To be sure, investigating the charitable preferences of individual decedents would contravene the traditions of intestacy, which normally operates mechanically. Yet, no less than a *super*majority of wealthier respondents—to whom the rule would usually apply—coupled with a *super*majority of older respondents—whose property is likelier to require division in intestacy—preferred case-by-case investigation of their charitable inclinations. If lawmakers require an extraordinary justification to break with tradition, then these data provide such a justification.

IV. ESCHEAT

A. THEORY

In one situation, individuals have no choice but to look beyond families when distributing property upon death—namely, when they have no families. Although the circumstance seldom arises, some decedents leave no surviving relatives who fall within the scope of the intestacy statute. In that event, *propter defectum sanguinis*, the law of escheat applies and, under current law in many states, the decedent's property goes to the state.[180]

Lawmakers have never justified escheat as an intent-effectuating doctrine. Rather, they have looked upon it as a means of recouping public assistance provided to individuals during their lifetimes, or simply as a means of raising revenue.[181] Given that intestate persons tend to be disadvantaged relative to the

177. *See id.*; *see also id.* at 13, 30 tbl.15 (finding that 38.1% of testators making charitable bequests benefited a single charity and 17.9% benefited two charities, whereas only 5.2% of testators bequeathed to ten or more charities).

178. *See id.* at 26 tbl.11.

179. *Id.* at 13.

180. *See, e.g.*, UNIF. PROB. CODE § 2-105 (amended 2019), 8 pt. 1 U.L.A. 56 (2023).

181. *See* New Jersey v. Elsinore Shore Assocs., 592 A.2d 604, 606 (N.J. Super. Ct. App. Div. 1991) ("The purpose of all escheat law is . . . to enrich the state . . . ."); Kardaszewski v. Michigan (*In re* Estate of Jurek), 428 N.W.2d 774, 777 (Mich. Ct. App. 1988) ("[T]he Legislature preferred the state to those claiming through great-grandparents and beyond. . . . [One reason is because] the state [is] more likely to care for decedent than are the decedent's more remote relatives."). In Maryland, "[i]f an individual was a recipient of long-term care benefits under the Maryland Medical Assistance Program . . . [escheated property goes] to the Maryland

general population, this vision appears flawed.[182] Seizure of escheated property by the state comprises a form of regressive taxation, which theorists have disfavored.[183]

A reformed rule of escheat would instead bestow property on beneficiaries whom the decedent would have preferred. Plainly, such a change of perspective would call for a different taker of escheated property. Celebrated counterexamples notwithstanding, few individuals want to make the state their heirs.[184]

Yet, once again, lawmakers could structure a rule aimed at intent-effectuation in alternative ways. It could take the form of a one-size-fits-all default, naming a beneficiary the individual probably would have preferred over the state. Under the Uniform Probate Code, and in twenty-eight states, blood heirship ends at the second collateral line (*viz*. grandparents and their descendants).[185] By contrast, six states expand heirship to the third collateral line, and one more to the fifth.[186] In the remaining fifteen states, blood heirship extends to any branch up the family tree, no matter how remote from the decedent.[187] These rules could rest on the assumption that individuals would prefer to treat distant relatives as beneficiaries of last resort, and lawmakers in one state have voiced this desideratum explicitly. North Carolina's intestacy statute provides that "collateral succession shall be unlimited to prevent any

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Department of Health . . . for the administration of the program." MD. CODE ANN., EST. & TRUSTS § 3-105(a)(2)(i) (West 2024). Similarly, under federal law, escheated funds of a veteran (or dependent or survivor) who died in a veteran's facility goes to a federal trust fund supporting veterans' facilities. *See* 38 U.S.C. § 8520(a) (2018). The original reporter for the Uniform Probate Code approved "the policy of directing undevised assets to public needs" upon escheat. Richard V. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L.F. 536, 537.

182. *See supra* note 69 and accompanying text.

183. "It is so clear no one today favors any tax because it is regressive that the term itself has become colored. . . . [A] regressive tax on income is not a serious alternative . . . ." Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 419 (1952). *But cf.* Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. 1451, 1509–11 (2022) (addressing regressive taxation as a means of funding progressive government programs).

184. *See infra* note 226 and accompanying text. Justice Oliver Wendell Holmes, Jr. left the bulk of his estate to the United States. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 472–73 (1993). Despite being British, James Smithson did the same, although, unlike Holmes, Smithson dictated how the United States was to use the bequest—whence the Smithsonian Institution. *See* WILLIAM J. RHEES, JAMES SMITHSON AND HIS BEQUEST 23–25 (1880).

185. *See* UNIF. PROB. CODE § 2-103 (amended 2019), 8 pt. 1 U.L.A. 47 (2023). The twenty-eight states are: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

186. Heirship extends to the third collateral line in Arkansas, Maine, Maryland, Missouri, Rhode Island, and South Carolina. Heirship extends to the fifth collateral line in Kansas, as well as in the District of Columbia.

187. The fifteen states are: California, Connecticut, Delaware, Illinois, Kentucky, Louisiana, Massachusetts, Mississippi, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Vermont, and Virginia.

property from escheating."[188] Of course, escheat can still occur under this system, for no distant heirs may appear, but rules expanding blood heirship function to minimize the incidence of escheat.

Alternatively, lawmakers could name a charity as beneficiary of last resort. Twenty-seven states and the District of Columbia have made this move, directing escheated property to charitable entities affiliated with the state, either by statute or constitutional provision.[189] State schools,[190] and in two instances state universities, have comprised the usual beneficiaries.[191] In the District of Columbia, however, escheated property goes to fund "emergency assistance grants."[192]

Still another option is to turn escheat into a tailored default, dictating a different result for different categories of individuals. No state currently employs this formula. Or escheat could become a personalized default, using either big data or small data to infer the preferences of the decedent. Five additional jurisdictions currently pursue this course. In Massachusetts, escheated property passes to the state with one exception: "if such intestate is a veteran who died

188. N.C. GEN. STAT. § 29-7 (2012).

189. Nine of these jurisdictions simultaneously allow unlimited blood heirship. They are Kentucky, Massachusetts, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Vermont, and Virginia.

190. *See* ALA. CONST. art. XIV, § 258, *amended by* ALA. CONST. amend. 111 ("to the furtherance of education"); ARIZ. REV. STAT. ANN. § 37-521(A)(2) (2025) ("permanent state school fund"); ARK. CODE ANN. §§ 6-20-202(2)–203(a)(1) (West 2025) ("Public School Fund"); COLO. REV. STAT. § 15-12-914(3) (2025) ("public school fund"); FLA. STAT. ANN. § 732.107(2) (West 2025) ("State School Fund"); GA. CODE ANN. § 53-2-51(c) (2025) ("educational fund"); IDAHO CONST. art. IX, § 4 (amended 2000) ("public school permanent endowment fund"); IDAHO CODE ANN. § 14-5-801(2)(a) (West 2025) (same); IND. CONST. art. 8, § 2 ("Common School fund"); IND. CODE § 20-42-1-3(4) (2025) ("common school fund"); IOWA CODE § 257B.1A(3) (2025) ("permanent school fund"); MO. CONST. art. IX, § 5 ("public school fund"); MO. ANN. STAT. §§ 470.020(3), 470.020(5) (West 2025) (same); MONT. CONST. art. X, § 2(5) ("Public school fund"); MONT. CODE ANN. § 72-14-403(2) (2025) ("public school permanent fund"); NEB. CONST. art. VII, § 7 ("common school purposes"); N.M. CONST. art. XII, § 4 ("school fund"); N.M. STAT. ANN. § 22-8-32(A)(2) (West 2025) (same); OHIO REV. CODE ANN. § 2105.07 (West 2025) ("support of the common schools"); OKLA. STAT. ANN. tit. 70, § 3-104(A)(21) (2025) ("State Public Common School Building Equalization Fund"); OKLA. STAT. ANN. tit. 84, § 213(B)(3) (2025) ("support of the common schools"); OR. CONST. art. VIII, § 2(1)(b) ("Common School Fund"); OR. REV. STAT. ANN. § 98.389(4)(a) (West 2025) (same); S.C. CODE ANN. § 59-69-20 (2025) ("educational purposes"); S.D. CODIFIED LAWS § 29A-3-914 (2025) ("support of the common schools"); TEX. PROP. CODE ANN. §§ 71.201(b)(2), 71.202(a) (West 2025) (distinguishing personal property, which goes to the "State Treasury," from real property, which goes to the "foundation school fund"); UTAH CODE ANN. § 75-2-105(2) (2025) ("permanent state school fund"); VA. CONST. art. VIII, § 8 ("permanent and perpetual school fund"); WASH. CONST. art. IX, § 3 ("common school fund"); WASH. REV. CODE ANN. § 11.08.160 (West 2025) (same); W. VA. CODE ANN. § 42-1-3c (LexisNexis 2024) ("the general school fund"); WIS. CONST. art. X, § 2(1) ("support and maintenance of common schools"); WIS. STAT. ANN. § 852.01(3) (2025) ("school fund"); WYO. CONST. art. VII, § 2 ("support of public schools"); WYO. STAT. ANN. § 9-5-205(b) (2025) ("common school permanent land fund").

191. *See* NEV. CONST. art. XI, § 3 ("support of the state university"); NEV. REV. STAT. ANN. § 134-120 (2025) ("educational purposes"); N.C. CONST. art. IX, § 10 ("to aid worthy and needy students . . . enrolled in public institutions of higher education in this State"); N.C. GEN. STAT. ANN. § 116B-7 (West 2025) (same).

192. D.C. CODE ANN. § 19-701(a)(3) (West 2025).

while a member of a state-operated veterans' home, the intestate estate shall inure to the benefit of the legacy fund or legacy account of the veterans' home of which the intestate was a member."[193] North Dakota follows a similar rule, but with education as the default taker if the decedent failed to reside in a veterans' home.[194] In Vermont, escheated property supports education, but with a refinement: benefits are limited to the town where the intestate resided or where real estate was located "for the use of schools in [those] towns."[195] Kentucky and Maryland have instituted similar provisions.[196]

These five states create personalized defaults relying on small data—easily accessed—benefitting a charitable entity. The Massachusetts and North Dakota rules appear predicated, perhaps intuitively, on the sociological theory of "open" or "wider" families, whereby individuals substitute kith for kin, "creat[ing] their own relatives as needed."[197] Residents of a retirement community can function as substitutes for relatives.[198] So can an organization, whether or not charitable, if an individual becomes involved in its activities and develops bonds with its other members or volunteers.[199] Similarly, the rules found in Vermont, Kentucky, and Maryland follow from the ties individuals forge with their local communities.[200]

Finally, the law of escheat could switch from a rule to a standard of intent-effectuation. Lawmakers could authorize courts to order whatever distributions they conclude decedents would have preferred, based on all available evidence presented at a hearing. This approach would again allow courts to name charities

193. MASS. GEN. LAWS ch. 190B, § 2-105 (2025).

194. *See* N.D. CENT. CODE ANN. §§ 30.1-04-05, 37-15-16 to -17, 54-01-02 (West 2025) (the default being "the support of the common schools").

195. VT. STAT. ANN. tit. 14, § 683 (West 2025).

196. *See* KY. REV. STAT. ANN. § 162.040 (West 2025) ("So much property in each school district as escheats to the state . . . for the use and benefit of the public schools in the district."); MD. CODE ANN., EST. & TRUSTS § 3-105 (West 2025) ("public schools in the county" where the decedent was domiciled).

197. Barbara H. Settles, *A Perspective on Tomorrow's Families*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 157, 160 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1st ed. 1987).

198. *See* Jeffrey P. Rosenfeld, *Bequests from Resident to Resident: Inheritance in a Retirement Community*, 19 GERONTOLOGIST 594, 595–97 (1979).

199. *See* Alfred Aversa, Jr., *Neptune Yacht Club: A Family Wider Than Kin*, *in* WIDER FAMILIES: NEW TRADITIONAL FAMILY FORMS 45, 45–50 (Teresa D. Marciano & Marvin B. Sussman eds., 1991) (examining a club "whose members see themselves as belonging to a large 'family' and who behave toward each other as though they were actually related by blood ties," and whose members are often alienated from or bereft of natural kin); Rosenfeld, *supra* note 198, at 596–97 (noting the incidence of "bequests to local organizations . . . made in gratitude for the involvements [testators] had enjoyed"); *see also, e.g.*, *In re* Strittmater's Estate, 53 A.2d 205, 205 (N.J. 1947) (concerning a childless, unmarried testator who bequeathed her entire estate to the National Women's Party, an organization for which she had performed volunteer work).

200. *See* Luxuan Wang, Michael Lipka, Katerina Eva Matsa, Christopher St. Aubin & Elisa Shearer, *Community Attachment and Local Political News*, PEW RSCH. CTR. (July 24, 2024), https://www.pewresearch.org/journalism/2024/07/24/community-attachment-and-local-political-news (finding that 65% of adult Americans feel "at least somewhat attached to their local community," and 17% "feel very attached").

as heirs, although it would also pave the way for romantic partners, godchildren, caretakers, friends, employees, or other constructive kin to become heirs.

Lawmakers could go further. They could build judicial discretion into all intestacy cases where no immediate family members survive, thereby acknowledging lawmakers' inability to predict decedents' intent in such cases.[201] Or lawmakers could go the distance and introduce discretion into all cases of intestacy. Scholars have proposed this idea from time to time,[202] and even courts have raised the possibility.[203] A system of intestacy leavened with discretion would comprise the most comprehensive form of personalization—premised not on big data, but on *all* data associated with a decedent. Given, however, the frequency with which intestacy occurs,[204] a discretionary regime would impose burdens on the probate system that, for the most part, lawmakers have declined to bear.[205] Such a system would occasion "infinite disputes," as Jeremy Bentham observed centuries ago.[206] On top of that, because intestate decedents are poorer

201. Empirical evidence confirms the scattering of donative intent in the absence of a surviving spouse or children. *See* Browder, *supra* note 43, 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 92, 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."); Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 432–37 (1987) ("[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.").

202. *See* 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); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 548–51, 559–60 (1977). Neither of these studies considered the possibility of granting judicial discretion to appoint charities as heirs. *See* Gary, *supra* note 202, at 822–24 (describing potential claimants under a discretionary regime of intestacy); *see also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 264–68 (2001) (analyzing the possibility of a discretionary scheme of intestacy); Wellman, *supra* note 39, at 3 (noting that the drafters of the Uniform Probate Code had considered, but rejected, a system of intestacy granting "variable shares for spouse and dependents, based on need as determined by a court").

203. *See* Labine v. Vincent, 401 U.S. 532, 537 (1971) ("Many will think that it is unfortunate that the rules [of intestacy] are so rigid. Others will think differently.") (Black, J., dictum). In Great Britain and several other Commonwealth countries, courts can deviate from rules of intestacy, but not in favor of charities. *See* Inheritance (Provision for Family and Dependents) Act 1975, c. 63, § 1(1) (Eng.); Family Protection Act 1955, ss 3–4 (N.Z.).

204. *See supra* note 44–46 and accompanying text.

205. *See, e.g.*, UNIF. PROB. CODE § 2-101(a) (amended 2019), 8 pt. 1 U.L.A. 43 (2023) (allowing no deviation from the rules of intestate succession except by will). A few jurisdictions nonetheless incorporate elements of discretion into intestacy law. *See* 33 R.I. GEN. LAWS § 33-1-6 (West 2024) (granting courts discretion to award up to $150,000 worth of real estate to a surviving spouse from an intestate estate); *see also* 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West 2021) (granting judicial discretion to reward caregivers from both testate and intestate estates); Gary, *supra* note 202, at 812–13 (noting discretionary rules for altering intestate shares in several other states).

206. JEREMY BENTHAM, *Principles of the Civil Code*, *in* 1 WORKS OF JEREMY BENTHAM 297, 334 (John Bowring ed., 1962) (c. 1775–1802). Cognizant of this danger, Professor Gary proposes a regime under which courts exercise discretion not upon a blank slate, but against a backdrop of presumptive defaults. *See* Gary, *supra*

on average than the general population,[207] discretionary hearings would occur within a significant number of less significant cases.

If confined to instances of escheat, discretion would again arise primarily in insignificant cases, but the cumulative cost of the resulting hearings would stay low, given escheat's rarity.[208] In fact, both Great Britain and New Zealand have taken a step in this direction (but not two).[209] Thus far, no American state has followed suit, although this possibility, too, has been raised before.[210]

B. EVIDENCE

Fortunately, we have a trove of data that is pertinent to escheat. Harvested in 2018, these data emerge from an electronic survey of 1,050 respondents conducted by Qualtrics, a polling firm, examining popular preferences in respect of inheritance in lieu of heirs. The results appeared initially in an empirical study published online.[211] Because the university with which I am affiliated funded this study, its data remain accessible to me; I have taken the opportunity to subject some of the data to more in-depth analysis.[212]

The survey asked respondents two questions. One question explored respondents' comfort level with judicial discretion to determine individuals' preferred beneficiaries in lieu of heirs. Worded for laypersons, the inquiry began:

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note 202, at 819–24. Under Gary's proposal, courts could assess costs against parties who sought to deviate from a presumptive default, thereby discouraging frivolous petitions, although the feasibility of this plan remains uncertain. *See id*. at 826.

207. *See supra* note 69 and accompanying text.

208. The frequency of escheat varies with the scope of blood heirship at state law. In a majority of states, heirship terminates at the second collateral line (viz., grandparents and their descendants). *See supra* note 185 and accompanying text. One study found that only 1.3% of probate estates sampled (6 out of 449) concerned a testator lacking any blood relatives within the second collateral line. *See* Schneider, *supra* note 201, at 412, 435. Death in the absence of immediate family members is less rare but still uncommon, making a discretionary regime restricted to such cases appear administratively manageable. *See id.* at 412, 432–35 (finding that 13.6% of probated wills concerned testators with no surviving spouse, children, or parents); Browder, *supra* note 43, at 1304, 1311 (finding that 23.8% of probated wills concerned testators who had no surviving spouse or children).

209. Under legislation in Great Britain and New Zealand, escheated property goes to the Crown, which can at its discretion grant some or all escheated property to "dependents, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision." Intestates' Estates Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 64, § 46(1)(vi) (Eng.); Administration Act 1969, s 77, subs 8 (N.Z.). Charitable entities favored by a decedent cannot benefit under this rule. Nonetheless, the Crown voluntarily gives a portion of escheated funds to its own charities. *See* Maeve McClenaghan, Rob Evans & Henry Dyer, *King's Estate to Transfer £100m into Ethical Funds After Bona Vacantia Revelations*, GUARDIAN (Nov. 25, 2023, 5:00 PM EST), https://www.theguardian.com/uk-news/2023/nov/25/kings-estate-transfer-cash-ethical-funds-bona-vacantia-revelations.

210. *See* William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1050 (1966) (proposing to import Britain's rule of discretion into the American law of escheat).

211. *See* Amanda Leckman, *Does Escheat Cheat Decedents?*, ACTEC FOUND. 10 (2018), https://actecfoundation.org/wp-content/uploads/Does-Escheat-Cheat-Decedents-for-posting.pdf. The credibility interval for this survey was ± 3.5%.

212. In those instances where the published study failed to indicate data reported hereinafter, I will cite the data as Qualtrics Survey Data. Raw data are available on request to the author.

"Sometimes people die without leaving anyone behind to collect an inheritance. If this happened to you, would you be *comfortable* or *uncomfortable* with letting the court determine which choice of beneficiary is most important to you?" The italicized words were rotated randomly to avoid survey order bias, as were the answer choices: "comfortable," "uncomfortable," or "not sure."

Among the full set of 1,050 respondents, 299 (28.48%) were comfortable with judicial discretion, 599 (57.05%) were uncomfortable with it, and 152 (14.48%) were unsure.[213] Omitting those respondents who were unsure, 66.7 percent opposed judicial discretion, and 33.3 percent favored it—an exact two-thirds, one-third split.[214] In an era of declining confidence in courts, this display of mistrust appears to echo the public mood.[215]

Segregating these data by gender, one finds that majorities of both men and women disapproved of judicial discretion, but women expressed stronger opposition. Whereas 59.5 percent of women were "uncomfortable" with judicial discretion, 23.5 percent were "comfortable" with it, and 17 percent were "not sure," the comparable fractions for men were 54 percent, 34 percent, and 12 percent respectively.[216] Eliminating those who were unsure, 71.7 percent of women indicated discomfort with judicial discretion and 61.8 percent of men expressed the same sentiment.[217]

Alternatively, limiting the data set to respondents aged 60 and older, a group more representative of individuals at the time of death,[218] discomfort with judicial discretion stood at 71 percent (eliminating the unsure), a slightly greater fraction than for all respondents.[219] Another way to sift the data is to confine them to respondents whose estates are more likely to escheat. For every one of its studies, Qualtrics asks respondents whether they are currently married and whether they have children under 18 in their households. Eliminating respondents in both of those categories gets us a step closer to escheat. Attitudes toward judicial discretion among the remaining respondents nonetheless stayed unchanged: eliminating the unsure, 67.1 percent opposed discretion, a fraction nearly identical to that of all respondents.[220]

Still another way to parse the data is to search for regional differences. Qualtrics separates its respondents into northeasterners, mid-westerners,

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213. *See* Leckman, *supra* note 211, at 19.

214. *See* Qualtrics Survey Data, *supra* note 212.

215. *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 (reporting annual Gallup polling from 1973 onward).

216. Leckman, *supra* note 211, at 19.

217. *See* Qualtrics Survey Data, *supra* note 212.

218. *See U.S. Life Expectancy*, *supra* note 110.

219. *See* Qualtrics Survey Data, *supra* note 212.

220. *See id.*

westerners, and southerners. All four groups expressed approximately the same level of discomfort with judicial discretion. Eliminating the unsure, 65.0 percent of northeasterners, 64.6 percent of mid-westerners, 66.2 percent of westerners, and 69.0 percent of southerners opposed judicial discretion upon escheat—an interregional consensus.[221]

Finally, we can segregate the data by income, another item of background information that Qualtrics solicits. Income, in turn, can serve as a proxy for wealth, which is a simple and uncontroversial metric for refining rules of intestacy.[222] Once again, though, the data suggest uniform discomfort with judicial discretion, with no continuous progression along the metric. Eliminating the unsure, 62.5 percent of respondents with annual incomes below $25,000 per year, 70.35 percent between $25,000-$49,999, 64.29 percent between $50,000-$74,999, 66.15 percent between $75,000-$99,999, and 68.27 percent over $100,000 opposed judicial discretion.[223] We could read these data to suggest a mild increase in opposition to discretion as income rises, if we dismiss the intermediate category of $25,000-$49,999 of income per year as an outlier. Even so, supermajorities in all five wealth categories, including the lowest, disfavored judicial discretion.

These data carry implications for the larger debate over flexibility within intestacy law. Although surveys from the 1970s had suggested popular support for a system conferring discretion on courts regarding distributions in intestacy,[224] Americans appear to have soured on the idea in succeeding decades, at least when discretion is wide-ranging.[225] These data are sufficiently lopsided as to cast doubt on the popularity of such a scheme.

The second question posed in the instant survey, put to the same group of 1,050 respondents, called for a substantive response. If the respondent left no heirs, "who would you want to inherit your property?" The answer choices were again randomized to avoid survey order bias. Eliminating the 14.0 percent of respondents who were unsure, out of the seven choices offered by the survey, respondents' preferred recipients, from most popular to least, were: (1) their closest friends, as determined by a judge (21.04%), (2) their distant relatives (16.83%), (3) a pool of charitable organizations (15.84%), (4) their favorite

221. *See id.*

222. *See supra* pp. 368–69.

223. *See* Leckman, *supra* note 211, at 19–20 (also reporting data for those who were "not sure").

224. *See* Contemporary Studies Project, *supra* note 51, at 1053 n.65, 1129–30, 1147 app. k (compiling data in 1977) (finding 62% of respondents in favor of judicial discretion); Glucksman, *supra* note 86, at 261, 276, 294 (compiling data in 1975). Whereas the 1977 survey made no mention of charity, but only contemplated "special needs or circumstances that might occur in a person's family," Contemporary Studies Project, *supra* note 51, at 1129, the 1975 survey did contemplate including charities as possible heirs. *See supra* note 171 and accompanying text.

225. Compare the results of my survey regarding the narrower determination of charitable heirs. *See supra* Subpart.III.B.

charity or charities, as determined by a judge (12.18%), (5) their place of worship (9.63%), (6) schools (4.87%), and (7) the state government (1.88%). 17.72 percent more had "other" preferences.[226]

Although the responses were scattered, these data are informative. First, we can conclude—if there was ever any doubt—that the traditional rule granting escheated property to the state fails to effectuate probable intent. This option proved the least popular of the seven choices available to respondents. More surprisingly, the alternative found in many states of granting escheated property to schools proved nearly as unpopular. The other current alternative of searching for distant heirs was relatively more favored by respondents.[227]

The most popular of the seven options, a distribution to friends, would require the sort of judicial investigation that respondents rejected when that possibility was posed to them separately. At the same time, if we combine the two charitable choices available—either a pool of charities or the respondents' favorite charity—then we find that 28 percent of respondents preferred distribution to charity in some form, outnumbering those who preferred distribution to friends.

We can again parse these data. Gender had little impact on preferences.[228] Age reinforced the partiality for charities but also augmented support for distant relatives. Among respondents aged sixty or older, 39.1 percent preferred distributing escheated property either to a pool of charities (23.1%) or favorite charities (16.0%), whereas 29.5 percent favored distant relatives and 15.4 percent favored friends.[229]

In one of the four regions, however, preferences shifted just barely: westerners were particularly partial to friends. Among westerners, 32.7 percent of respondents favored distribution to friends, as opposed to 32.1 percent who preferred distribution either to a pool of charities (17.3%) or favorite charities (14.8%). This distinction is far too close, however, to demonstrate a change of preferences within the credibility interval for this study.[230] Friends also topped charities among those respondents who had no spouse and no children under the age of eighteen—hence more likely candidates for an escheat. Among this cohort, 31.2 percent favored friends, 25.6 percent favored distant relatives, and 29.3 percent preferred either a pool of charities (19.1%) or favorite charities (10.2%).[231]

226. *See* Leckman, *supra* note 211, at 12, 15.
227. *See supra* text accompanying notes 187–191.
228. *See* Leckman, *supra* note 211, at 14–15, 18.
229. *See* Qualtrics Survey Data, *supra* note 212.
230. The credibility interval for this subset of data is ±7.8%.
231. *See* Qualtrics Survey Data, *supra* note 212.

All the while, the most significant factor in altering preferences appears to be income and, by extension, wealth. If we look at the full data set or exclude those respondents who were unsure of their preferences, no sharp pattern emerges.[232] But if we also exclude those respondents who had "other" preferences, the differences prove more dramatic. Among the poorest respondents, those earning less than $25,000 per year, a plurality of 34.5 percent preferred to provide for their friends. Distant relatives came second at 25.8 percent whereas only 23.3 percent favored either a pool of charities (14.7%) or favorite charities (8.6%). At the other extreme, respondents earning over $100,000 per year, the statistical tables were turned. Now 41.62 percent preferred either a pool of charities (24.9%) or favorite charities (16.7%), whereas 19.0 percent favored friends and 15.4 percent favored distant relatives.[233] These differences exceed the credibility interval for this study.[234] Even among the penultimate earning cohort, those respondents with incomes between $75,000 and $100,000 per year, the same switch in preferences appeared and was statistically credible.[235]

These data suggest that if lawmakers wish to tailor the default rules of escheat, they should do so along the metric of wealth. Among the poorest individuals, courts should distribute escheated property to the individual's friends, as determined by a court. Among the richest, either a pool of charities or those charities that, upon investigation, the decedent favored during life should receive escheated funds.

Empirically, escheats of small estates predominate.[236] Yet, exceptional cases do arise. In 2012, a real estate developer in New York died intestate without any known heirs, leaving a $40 million estate.[237] Lawmakers have no reason to disregard those cases simply because of their rarity.[238]

In light of the instant study, lawmakers could draw a line between the two alternative rules based on the metric of income. A line dependent on wealth would require a follow-up study. Focusing on income, however, the line should

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232. *See* Leckman, *supra* note 211, at 13, 16–17.

233. *See* Qualtrics Survey Data, *supra* note 212.

234. The credibility interval for the subset of data for persons earning under $25,000 per year is ±8.7%. The credibility interval for the subset of data for persons earning over $100,000 per year is ±7.1%.

235. Among these respondents, 43.2% preferred either a pool of charities (24.6%) or favorite charities (18.6%), whereas 22% favored friends and 14.4% favored distant relatives. *See* Qualtrics Survey Data, *supra* note 212 (excluding both the unsure and those with "other" preferences). The credibility interval for this subset is ±9.9%.

236. *See* JEFFREY P. ROSENFELD, THE LEGACY OF AGING: INHERITANCE AND DISINHERITANCE IN SOCIAL PERSPECTIVE 106–07 (Gerald M. Platt ed., 1979) (presenting data from the state of New York).

237. *See* James Nye, *New York Holocaust Survivor's $40m Fortune Set to Be Inherited by the Government After He Died Unmarried and Childless*, DAILYMAIL.COM (May 1, 2013 7:19 EDT) https://www.dailymail.co.uk/news/article-2316357/Roman-Blum-heirs-40m-fortune-Holocaust-survivors-estate-set-inherited-New-York-state.html.

238. *See supra* text accompanying notes 69–80.

fall somewhere between an income of $25,000 and $75,000 per year. Data for the cohorts of income from $25,000 to $50,000 and $50,000 to $75,000 yielded roughly equal numbers of respondents preferring friends and charities. The differences between those numbers were not statistically credible.[239]

Yet, because many of the individuals whose property is subject to escheat are "loners or drifters," they may have no identifiable friends.[240] In that event, we need an alternative taker to fall back on. Either beneficence to charitable interests or distant relatives (again, if identifiable) would accord roughly equally with intent under these circumstances.[241]

These data raise, but do not resolve, another issue. If lawmakers switch to a charitable heir in the event of escheat, should they simultaneously alter the scope of escheat? If charitable heirs replace the state as takers of last resort, at what point along the family tree would individuals prefer to cut off blood relatives? Would individuals prefer to do so at a different point than if the taker of last resort were the state?

I explored this question in a different electronic survey that I conducted in 2022.[242] One group of 1,005 respondents nationwide expressed their preferences on where to draw the line between blood heirship and escheat if the taker of escheated property were the state. A second, nonoverlapping group of 1,005 respondents answered the same question where the taker of escheated property was instead a pool of charities.

The two surveys yielded remarkably consistent results. In both cases, respondents favored cutting off blood heirs at the second collateral line (identified as first cousins and their descendants), irrespective of whether the alternative taker was the state or charity.[243] I surmised that hostility to "laughing heirs" drove respondents' preferences, overwhelming their attraction to charitable heirs.[244]

At the same time, the impact we have discovered wealth to have on substantive preferences in the event of escheat suggests the possibility of some sort of parallel impact on the scope of escheat. I therefore reexamined the data harvested in the 2022 study in relation to this metric. But in fact, the wealth of

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239. For respondents earning incomes between $25,000 and $50,000 per year, 24.3% favored friends and 27.8% preferred either a pool of charities (11.8%) or favorite charities (16.0%), with a credibility interval of ±7.9% for this subset of data. *See* Qualtrics Survey Data, *supra* note 212 (excluding both the unsure and those with "other" preferences). For respondents earning incomes between $50,000 and $75,000 per year, 32.6% favored friends and 29.9% preferred either a pool of charities (17.4%) or favorite charities (12.5%), with a credibility interval of ±8.5%. *See id.* (same exclusions).

240. ROSENFELD, *supra* note 236, at 105–06 (identifying as "exceptional" a case where "a friend of the deceased person had been located").

241. *See supra* note 226 and accompanying text.

242. *See* Hirsch, *supra* note 36, at 306–08.

243. *See id*. at 306–07.

244. *See id*. at 307.

respondents did not move the needle. Apart from minor fluctuations, the results remained unchanged in all wealth categories.[245]

We should bear in mind that the 2022 study offered respondents a choice between benefiting distant blood heirs and a pool of charities. The study failed to compare preferences between distant blood heirs and charities that respondents had personally supported. Should lawmakers adopt that formula, a follow-up study examining preferences regarding the scope of escheat in connection with personalized charitable heirs would become desirable.

V. ANALYSIS

We have scavenged and highlighted existing data, and we have also presented original data, suggesting that a rule that injects charity into the law of intestacy would coincide with the probable intent of some decedents. Plainly, a rule creating charitable heirs should not operate across the board. But within certain bands of circumstance, most individuals bequeath to charity, empirical evidence reveals. These findings imply analogous preferences among intestate decedents.

More exactly, a majority of testators worth $50 million or more bequeath to charity.[246] Although published data fail to furnish precise statistics for this wealth category, they suggest that an allocation of 20 percent of decedents' estates to charity would accord with probable intent.[247] To be sure, a rule including charities as heirs of such an elite class of decedents would come into effect in just a smattering of cases. Nonetheless, instances of hyper-wealthy intestacy have occurred before and could arise again.[248]

If lawmakers consider additional variables, they can extend charitable heirship to a larger number of decedents. A majority of childless individuals worth just $1.3 million or more plan to bequeath part of their estates to charity.[249] Likewise, a majority of childless individuals who donated $500 or more in the

245. Among all respondents, where the default taker was the state, 50.4% favored a cutoff at first cousins and their descendants. The respective fractions for incomes below $50,000, $50,000 to $100,000, and above $100,000 per year were 53.8%, 49.2%, and 49.3%. Among all respondents, where the default taker was a pool of charities, 49.8% favored a cutoff at first cousins. The respective fractions for incomes below $50,000, $50,000 to $100,000, and above $100,000 per year were 48.5%, 50.4%, and 50.0%. The credibility interval for this survey was ±3.5%. In no wealth category did a majority of respondents prefer to grant heirship to second cousins and their descendants, irrespective of whether the default taker was the state or a pool of charities. Likewise, in no wealth category did a majority of respondents prefer to deny heirship to nephews, nieces, and their descendants, irrespective of whether the default taker was the state or a pool of charities.

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

247. *See supra* text accompanying notes 125–126. The fraction of estates left to charity among the subset of testators who made any charitable bequests is higher, averaging nearly 29%. *See supra* note 127 and accompanying text. We should not focus on these data, however, because some intestate individuals would prefer not to make transfers to charity at all, and this possibility should be factored into the fraction lawmakers select.

248. *See supra* notes 70, 73, 237 and accompanying text.

249. *See supra* text accompanying note 113.

year of the survey plan to bequeath part of their estates to charity, irrespective of their level of wealth.[250] Among all donors of $500 or more, not just childless ones, the fraction planning charitable bequests plummets.[251] But among the childless, it would appear, habits of generosity affect testation no less powerfully than the accumulation of riches. And either category would encompass more than a miniscule numbers of intestate individuals.[252]

At present, we lack sufficient data with which to pinpoint the share lawmakers should allocate to charity under either of these circumstances. One of the relevant studies concerned a relatively small sample of immensely wealthy New Yorkers, all of whom were also lifetime philanthropists.[253] The other study was based on a larger sample but failed to differentiate the data either on the basis of wealth or on the basis of lifetime donative patterns, and also assumed the absence of a spouse—an assumption not made in the first study.[254] Given uncertainty, lawmakers might reasonably err on the side of simplicity and allocate 20 percent of intestate estates to charity consistently, in those circumstances where empirical evidence indicates that a charitable share is warranted.[255] At the same time, lawmakers should treat the magnitude of those shares as provisional, awaiting more persuasive empirical studies.[256]

A rule creating a charitable share in intestacy for childless donors appears trickier to translate into legislation. Because the data suggesting the rule date to 2004–2006, the threshold of $500 in donations needs to be adjusted for inflation

250. *See supra* text accompanying note 145.

251. *See* James, *supra* note 4, at 1032.

252. Over half of all Americans die intestate, and even 39% of millionaires die intestate. *See supra* notes 44–46, 70. Still, only 7.8% of Americans over the age of fifty are childless. *See* James, *supra* note 4, at 1039.

253. *See supra* note 129 and accompanying text.

254. *See* Listokin & Morley, *supra* note 134, at 9. The authors believed that this assumption would significantly affect distributive preferences generally, *see id.* at 9–10, but its impact on charitable propensities more narrowly is unclear, *see supra* notes 115–118 and accompanying text.

255. This fraction appears liberal apropos the geographically broad study (which was not confined to millionaires or prior donors) but conservative vis-à-vis the New York study. *See supra* text accompanying notes 129–135. Instead of setting a fixed fraction of the estate that goes to charitable heirs for those intestate individuals who meet the criteria, lawmakers could establish a sliding scale: the greater the wealth of the decedent, the greater the share of the estate reserved for charity under the statute. In theory, this structural attribute appears sensible. Evidence shows that wealthier individuals assign progressively larger fractions of their estates to charity. *See supra* text accompanying note 120. A sliding scale would add to the complexity of the statute, however. Furthermore, we currently lack data with which to fix such a scale with precision. Lawmakers would have to tolerate a large degree of arbitrariness to establish a sliding scale, given the present state of our empirical knowledge.

256. One potential source for such an analysis is the deceased survey component of the Health and Retirement Study, which interviews survivors following respondents' deaths. Those interviews compile information on the scale of charitable bequests, although thus far no scholar has presented evidence regarding the fractions of estates allocated to charity by respondents who display different characteristics. *See* James, *supra* note 103, at 47, 63–64, 80.

to around $800 in 2025 dollars.[257] But which donative year or years should matter? The data are based on surveys answered some time before death, and evidence suggests that individuals close to death become less generous—donating tapers off late in life, without indicating a change of testamentary preferences.[258]

Lawmakers could adopt as a reasonable solution, again wanting empirical precision, a rule granting a 20 percent share of intestate estates to charity for those childless individuals who had donated at least $800 per year to charity *on average* over the previous ten years, irrespective of wealth. Individual tax and banking records should divulge this information reliably and expeditiously. To avoid conflicts of interest, lawmakers could assign the investigation to an independent auditor, or they could mandate appointment of a corporate fiduciary to serve as administrator in those cases where an investigation must take place.[259] The investigation would become an additional item in the ledger of probate expenses. The cost should nonetheless prove nominal and would only weigh upon a small fraction of intestate estates.

Legislation creating charitable shares in intestacy should allocate those shares to whatever causes decedents had personally shown an interest in aiding during their lifetimes, as assessed by the court, rather than to a fixed pool of statutory charities. In accord with empirical evidence of testamentary patterns, courts ought to confine the circle of charitable heirs to a small number of takers, a stipulation easily built into the statute.[260] Original data presented earlier suggest strong support for this sort of personalization, despite its cost, among all subsets of respondents.[261]

The same investigation that reveals whether childless decedents had demonstrated a pattern of donating during their lifetimes would disclose which charities those decedents had benefitted. Personalizing charitable heirs for all eligible decedents would require extending the investigation from less wealthy childless decedents to all childless decedents, together with fabulously wealthy decedents regardless of their family circumstances. Nonetheless, these cases would continue to comprise a small fraction of intestate estates.

Lawmakers might take personalization still another step further. Anecdotal evidence suggests that donors prefer to attach their names to their donations.[262] Named donations flatter the egos of donors and give them the opportunity to

257. *See* CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/2004?amount=1 (last visited Feb. 1, 2025).

258. *See* Wiepking & James, *supra* note 156, at 487, 490.

259. *See supra* p. 386.

260. *See supra* notes 176–179 and accompanying text.

261. *See supra* Subpart.III.B.

262. *See supra* notes 20–21, 31–33 and accompanying text.

memorialize themselves.[263] Empirical evidence confirms this preference among the wealthy. A majority of testators choose to bequeath to private foundations rather than to charities at a threshold somewhere between $10 and $20 million in wealth.[264] Lawmakers might establish guidelines or a standard (*viz.*, "so far as possible . . . .") for associating decedents' contributions with the charitable heirs they benefit.

Finally, lawmakers need to revisit the matter of escheat. Data presented earlier suggest that individuals would object to granting courts discretion to choose alternative takers in the absence of blood heirs.[265] Although this wariness might appear inconsistent with data showing a popular preference in favor of case-by-case investigation into individuals' favorite charities,[266] the two preferences concern different issues. A hearing into an intestate individual's favored takers would necessarily be open-ended. An investigation into the same individual's lifetime pattern of donating would be limited and objective, by comparison.

Data suggest that an across-the-board rule of escheat ought to provide either for a pool of charities or (if discoverable) the individual's favorite charities.[267] Alternatively, lawmakers could differentiate rules of escheat along the metric of wealth. Whereas data indicate that affluent individuals would want charitable heirs, poorer ones would prefer to make close friends their heirs.[268] Although an inquiry into who qualifies would require a hearing, its scope—along with the court's license—would remain narrowly defined. Switching to charitable heirs in the event of escheat need not cause lawmakers to redraw the line between inheritance by blood heirs and escheat, according to the extant data,

263. For a judicial recognition, see Judge Cardozo's discussion in Allegheny Coll. v. Nat'l Chautaugua Cnty. Bank, 159 N.E. 173, 175–76 (N.Y. 1927) ("The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial."). *See also* cases cited *supra* note 33. But this preference is not universal. *See supra* note 21 and accompanying text. For a further discussion by a billionaire philanthropist who is skeptical of the value of having "my name on the side of a building," see Lulu Garcia-Navarro, *The Interview: Melinda French Gates Is Ready to Take Sides*, N.Y. TIMES (July 28, 2024), https://www.nytimes.com/2024/07/28/magazine/melinda-french-gates-interview.html.

264. *See* Joulfaian, *supra* note 93, at 361–62 & tbls.8–9. These data might overstate the preferences of intestate decedents for private foundations, however. Fiduciaries have an incentive to recommend them to clients, because fiduciaries can continue to derive fees from services to foundations after clients create them, in contradistinction to outright bequests to charities. Uncounseled intestate decedents might therefore be somewhat less likely to select this option. Other evidence nonetheless suggests the financial scale of charitable transfers that are tied to naming rights. *See* William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 54–55 (2011).

265. *See supra* notes 213–223 and accompanying text.

266. *See supra* Subpart.III.B.

267. *See supra* notes 226–231 and accompanying text.

268. *See supra* notes 232–239 and accompanying text.

although more study of this question is called for if lawmakers allocated escheated property to individuals' favorite charities.[269]

CONCLUSION

Inheritance law is a field crawling with old vines. Today's rules often reflect the thinking, and social verities, of yesteryears.[270] Of late, the appearance of new quantitative evidence has called old learning in the field into question.[271] It behooves lawmakers to review inheritance law with greater frequency—especially now, given the burgeoning body of evidence.

As clusters of default rules, intestacy statutes should conform with popular preferences. Nowadays, lawmakers can base those statutes on hard data; they need no longer rely on conjecture.[272] Whether current intestacy statutes could withstand an empirical stress test is scarcely assured.

A venerable argument in defense of static rules of intestacy is the ease with which individuals can avoid them. If they disapprove of the statute's dictates, well, individuals can always substitute their preferred estate plans by making a will, lawmakers contend.[273] This logic, suggesting that all's well that ends well, won't sit well with economists. They aim to reduce the circumstances under which estate planning becomes necessary—that is, to minimize transaction costs. Data shows lawmakers how to accomplish that end. They ought to dig into the data, not dig in their heels.

Yet, the possibility of installing charities as heirs faces impediments beyond lawmakers' general reluctance to tamper with rules. The novelty of such

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269. *See supra* pp. 401–02.

270. *See, e.g.*, Fosler v. Collins (*In re* Estate of Fosler), 13 P.3d 686, 689 (Wyo. 2000) (observing that "Wyoming's intestacy provisions have remained essentially unchanged since their initial enactment in 1869," yet "[t]here have been significant changes in the organization of families and communities in this passage of time marked by the transition from primarily agrarian to predominantly urban lifestyles"); Russell Niles, *Probate Reform in California*, 31 HASTINGS L.J. 185, 188 (1979) ("[T]here unfortunately has been no thorough revision of the substantive provisions of the [California Probate Code] for over a century. . . . In its phraseology, in its excessive detail, even in many of its premises, it is a nineteenth century code.").

271. For an attempt to synthesize many of the extant empirical studies, see Hirsch, *supra* note 36, at 277 *passim*. *See also* Symposium, *Empirical Analysis of Wealth Transfer Law*, 53 U.C. DAVIS L. REV. 2083 *passim* (2020).

272. Lawmakers have overestimated their ability to glean majoritarian intent without data. For further discussions and references, see Hirsch, *supra* note 36, at 279, 316–17, 321 & n.325; Adam J. Hirsch, *When Beneficiaries Predecease: An Empirical Analysis*, 72 EMORY L.J. 307, 379–80 (2022).

273. *See* UNIF. PROB. CODE pt. 1 cmt. (pre-1990 art. 2), 8 pt. 2 U.L.A. 422 (2023) ("[T]he prescribed patterns . . . may in some cases defeat intent . . . [but] the decedent may always choose a different rule by executing a will."). Jeremy Bentham had made the same point over a century earlier:

> It will happen, however, that the presumptions of affection . . . will often be defective in practice; and that consequently the rules themselves will diverge from their object. But the power of making a will . . . offers an efficacious remedy to the imperfection of the general law; and this is the principal reason for preserving it.

BENTHAM, *supra* note 206, at 334–35.

a rule would upset tradition more profoundly. In an old turn of phrase, charities comprise "strangers of the blood."[274] To introduce them as a new variety of heir would require legislative creativity, not mere tinkering with distributions among established categories of heirs.

If lawmakers find the prospect too daunting, they could begin by reforming the law of escheat. To benefit charitable heirs in the absence of blood heirs would only tweak existing law. Small steps are better than nothing. Still and all, lawmakers could make greater strides with a bold set of reforms.

Legally assimilating unorthodox kinds of heirs does have precedents. Upstarts have found their way into intestacy statutes before. Neither nonmarital children nor half-blooded siblings used to qualify as heirs.[275] Once upon a time, even the notion that a *widow* could comprise an heir seemed a strange and radical idea.[276] Most recently, unadopted stepchildren have become heirs in some states—a status hitherto denied them.[277] In historical context, then, we should view the prospect of charitable heirs as more evolutionary than revolutionary—for rules of intestacy have undergone significant transformation, intermittently but persistently.[278]

In pursuit of reform, we should encourage lawmakers to follow the evidence, wherever it leads. And with each new quantitative study, more numbers stream into the literature. Charitable heirs could be only the beginning.

274. *In re* Burnham's Will, 189 N.Y.S. 182, 184 (Sur. Ct. 1921).

275. *See* BAKER, *supra* note 57, at 288, 528–29; *see also, e.g.*, 1 THE REVISED STATUTES OF THE STATE OF NEW-YORK ch. 2, § 19, at 744 (Albany, Packard & Van Benthuysen 1836) ("Children and relatives who are illegitimate, shall not be entitled to inherit, under any of the [intestacy] provisions of this Chapter.").

276. "A woman is not Heire to hir husband but only hath A title of Dowry as our law provides." Statement of Appeal, Patten v. Dyer (Suffolk Cnty. Ct., Mass. Bay Colony, 1672), *quoted in* Zecheriah Chafee, Jr., *Professor Beale's Ancestor*, *in* HARVARD LEGAL ESSAYS 39, 46 (1934); *see also, e.g.*, 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 195 (John Byrne 1795) (observing that if a husband "never disposes of [property by will] in his life time, it shall at his death go to his heirs, and not to his wife, tho she survive him.").

277. Stepchildren first appeared in the Uniform Probate Code as potential heirs in 2008. *See* UNIF. PROB. CODE § 2-103(j) & cmt. (amended 2019), 8 pt. 1 U.L.A. 47 (2023) (allowing stepchildren to take as heirs in the absence of surviving blood relatives). Enacted in 1985, California's statute governing inheritance by stepchildren is more innovative. *See* CAL. PROB. CODE § 6454 (West 2024) (treating stepchildren as equivalent to, and co-heirs of, natural and adopted children for purposes of intestacy under some circumstances).

278. Children born posthumously comprise still another grouping whose intestacy rights have evolved over time. "Originally, a child does not seem to have been considered for any purpose as living before his birth." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 39 n.2 (2d ed. 1921). By the late seventeenth century, however, courts acknowledged posthumous children as heirs. *See* Reeve v. Long (1694) 87 Eng. Rep. 395, 395; 4 Mod. 282, 282 (dicta); Ball v. Smith (1698) 22 Eng. Rep. 1178, 1178; 2 Freeman 230, 230; *see also* An Act to enable Posthumus Children to take Estates as if borne in their Fathers Life time 1698, 10 Will. 3. c. 22 (Eng.) (pertaining to remainders). In a modern twist on this issue, the intestacy rights of posthumously *conceived or implanted* children are gradually taking shape under judicial and statutory doctrine. *See* Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38 ACTEC L.J. 187 *passim* (2012).

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