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For decades, scholars have urged states to update their intestacy regimes.[1] This movement makes sense. Intestacy statutes are supposed to distribute a decedent's property according to her probable intent.[2] But some of these laws have been on the books for years, and arguably have grown stale in our era of multiple marriages, committed partnerships, and blended families.[3]

In *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, Danaya C. Wright and Beth Sterner make a valuable contribution to this debate by examining how testators divide their property upon death.[4] Wright and Sterner's goal is to "see if what people actually did in their wills can tell us anything about what dispositions intestate decedents would likely pre-

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1 *See, e.g.,* Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89 (2011); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787 (2012); Susan. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) [hereinafter Gary, *Adapting Intestacy*]; Neta Sazonov, Note, *Expanding the Statutory Definition of "Child" in Intestacy Law: A Just Solution for the Inheritance Difficulties Grandparent Caregivers' Grandchildren Currently Face*, 17 ELDER L.J. 401 (2010); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002); Carissa R. Trast, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 HOFSTRA L. REV. 857 (2006); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991); Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1 (2015).

2 *See, e.g.*, Gary, *Adapting Intestacy*, *supra* note 1, at 7.

3 *See, e.g.*, Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012) ("Intestacy is structurally unsuitable for the large and growing population of nontraditional families because heirship is limited to individuals related to the decedent by marriage, blood, or legal adoption.").

4 Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341 (2017).

fer . . . ."[5] In this short, invited reply, I explain why I admire their article. I also spot three minor objections that a skeptic might raise.

I'll start with a thumbnail sketch of Wright and Sterner's thought-provoking piece. Wright and Sterner analyze dispositive choices in 493 wills that were probated in 2013 in Alachua and Escambia Counties, Florida.[6] The authors discover that one-third of testators left their property entirely to their children.[7] They also observe that a quarter of testators gave all of their estate to their spouse, with their children as contingent beneficiaries.[8] In addition, they uncover the counter-intuitive fact that "the majority of decedents with stepchildren left at least some property to the[m] . . . ."[9] Finally, they note that about twenty percent of wills poured assets into a revocable trust.[10]

Based on this evidence, Wright and Sterner argue that intestacy statutes "may not be working . . . for certain populations, particularly those who cannot afford to do estate planning . . . ."[11] For instance, only a few states permit stepchildren to inherit in intestacy.[12] Likewise, although the Uniform Probate Code now includes stepchildren in its intestacy rubric, it is only as a last resort, before the decedent's assets escheat to the state.[13] Nevertheless, according to Wright and Sterner, a whopping eighty-two percent of decedents with stepchildren made bequests to them.[14] In turn, the authors suggest that intestacy laws are out of synch with contemporary norms.

One of piece's strengths is its focus on race, class, and gender. Wright and Sterner lay the foundation for this analysis by harvesting detailed demographic information about each decedent.[15] I know how tedious it can be to gather data from probate records,[16] and I admire the authors' willingness to drill down so deeply. For example, Wright and Sterner find that African-Americans account for twenty-two percent of the combined population of the counties, but only 5.8% of testate decedents.[17] Because scholars have catalogued the downsides of dying intes-

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5 *Id.* at 345.

6 *See id.* at 357.

7 *See id.* at 323.

8 *See id.*

9 *Id.* at 368.

10 *Id.* at 379.

11 *See id.* at 370.

12 *See, e.g.*, Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1496 (2013).

13 *See* UNIF. PROB. CODE § 2-103(b) (UNIF, LAW COMM'N 2010).

14 *See* Wright & Sterner, *supra* note 4, at 377.

15 *See id.* at 359-60.

16 *See, e.g.*, David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605 (2015).

17 *See* Wright & Sterner, *supra* note 4, at 356, 359.

tate,[18] it is sobering that the testacy rate among African-Americans is disproportionately low.

In addition, Wright and Sterner's hard work allows them to flag some divergences in the way that different cohorts leave their property. To give one example, men who had been married more than once were 2.5 times as likely as women who had been married more than once to leave everything to their surviving spouse.[19] Findings like this might pave the way for one of the most intriguing recent proposals about intestacy laws: replacing the one-size-fits-all approach with a scheme that is custom-tailored to a decedent's traits.[20]

Of course, the role of a commentator is also to point out a few soft spots in the paper, and I will briefly mention three. First, a critic might question the decision to draw inferences about intestacy from dispositive choices in wills. Wright and Sterner anticipate this existential challenge to their project by admitting that some decedents may not make wills because the intestacy statutes *already* reflect their wishes.[21] But in my eyes, there is an even more compelling reason why wills may not reveal what most decedents want. After the nonprobate revolution, wills are often only a tiny fraction of a decedent's estate plan. Instead, the ultimate disposition of a person's possessions depends on decisions made in documents that never surface in the probate files. Suppose a testator leaves nothing to her spouse and everything to her stepchild. At first blush, that might seem like powerful evidence of Wright and Sterner's thesis that attitudes have changed regarding stepchildren. But it would be far less meaningful if the decedent had also named their spouse as the sole beneficiary of her trust, life insurance policy, pension, and pay-on-death accounts.[22] Indeed, the overwhelming majority of decedents in the counties that Wright and Sterner study did not leave a probate estate.[23] Thus, the authors' research provides only a partial snapshot of decedents' dispositive preferences.

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18 *See generally* Weisbord, *supra* note 3. Likewise, I found that intestacies in Alameda County, California took longer to probate and were more likely to lead to litigation. *See* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1123 (2015).

19 *See* Wright & Sterner, *supra* note 4, at 365-66.

20 *See* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1419 (2014).

21 *See* Wright & Sterner, *supra* note 4, at 345.

22 *Cf.* Mary Louise Fellows et. al., *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 412 (2010) (hypothesizing that "will substitutes better predict how the decedent would want her probate estate to pass than does existing intestacy law").

23 *Compare* Wright & Sterner, *supra* note 4, at 357 (noting that there were 293 probate estates in Alachua County and 378 probate estates in Escambia County in 2013) *with* Florida Health, *All Causes Deaths*, http://www.flhealthcharts.com/charts/

Second, although I am very sympathetic to Wright and Sterner's efforts to expand the intestate rights of stepchildren, I wonder whether their data supports their conclusions. My understanding is that Wright and Sterner used the fact that a will *mentions* a stepchild as a proxy for whether the decedent *had* stepchildren.[24] But as the authors concede, "there may have been many other estates in which stepchildren were simply not mentioned and no bequest was given to them."[25] Indeed, it seems unlikely that a testator would mention a stepchild in her will *unless* she was going to give the stepchild a bequest. And if that is true, then many testators may *not* have dealt their stepchildren a slice of the estate. In turn, this drives a wedge between Wright and Sterner's understandable concern for stepchildren and their data.

Third, a hostile reader could take issue with Wright and Sterner's discussion of pour over wills. The authors use the fact that an estate contains a pour over will as evidence that the decedent engaged in relatively sophisticated planning. For example, they call trusts "the holy grail of estate planners"[26] and find it troubling that "no Black [or] Asian . . . decedent had a will that poured over into a trust."[27] But to me, the fact that a pour over will appears in the probate files is not necessarily probative of access to counsel, effort, or care. Instead, because pour over wills are designed *not* to be probated, it is a telltale sign that a decedent *failed* to transfer all of her property into the trust. Thus, although Wright and Sterner treat the existence of a pour over will as evidence of privilege, one could just as easily spin it counterclockwise.

I want to emphasize that these are friendly amendments, not attempts to besmirch this important article. Wright and Sterner have added a worthy chapter to the burgeoning empirical work in trusts and estates. The authors conclude that "[t]his has been a tremendously interesting project and one that we hope to continue. . . ."[28] I share their excitement about the piece, and I'll very much look forward to reading more.

DataViewer/DeathViewer/DeathViewer.aspx?indNumber=0086 (reporting 1,799 deaths in Alachua County and 3,2125 deaths in Escambia County in 2013).

24 The authors also rely on information contained in the Petition for Administration, which does not appear to require the personal representative to list the decedent's stepchildren. *See* Wright & Sterner, *supra* note 4, at 358 ("Also documented were any dispositions that were given to stepchildren or foster children, *if so designated in the will or Petition for Administration*.") (emphasis added).

25 *Id.* at 369.

26 *Id.* at 355.

27 *Id.* at 367.

28 *Id.* at 378.