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## **Surprised by the Inevitable: A National Survey of Estate Planning Utilization**

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*Surprised by the Inevitable:  
A National Survey of Estate Planning Utilization*

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# Surprised by the Inevitable: A National Survey of Estate Planning Utilization

Emily S. Taylor Poppe\*

*The laws governing the transfer of property at death — the laws of succession — give individuals broad freedom to control the administration and distribution of their property. To exercise this freedom, however, individuals must take affirmative steps during life, by executing a will, a revocable trust, or other ownership or transfer arrangements. Doing so can provide economic, social, and emotional benefits to both the decedent and his or her survivors, and represents a form of self-determination. Yet many individuals fail to undertake any estate planning, leaving it to the state to determine how their property is distributed without regard for their individual preferences. This failure to engage in estate planning not only has consequences for individual decedents and those who are close to them, but also for the design of law and policy. Several doctrines within the laws of succession rely on empirical assumptions about estate planning behavior, including both the overall incidence of estate planning and its distribution throughout the population. Similarly, policy proposals aimed at minimizing disparities resulting from unequal estate planning utilization also require an understanding of patterns of estate planning behavior. Variation in estate planning utilization also raises concerns regarding access to civil justice, and challenges our empirical and theoretical understanding of this concept.*

*Not surprisingly, scholars have long recognized the utility of empirical investigations of estate planning behavior. Yet despite this, we lack contemporary evidence of the incidence of various forms of estate planning or variation in their usage by demographic and socioeconomic*

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\* Copyright © 2020 Emily S. Taylor Poppe. Assistant Professor of Law, University of California, Irvine School of Law. I am grateful to the participants of the UC Davis Law Review and ACTEC symposium, the student editors of this volume, and to Menesh Patel for their helpful comments. I also appreciate the willingness of Cheryl Tilse and her coauthors to share their questionnaire with me. See Cheryl Tilse et al., *infra* note 31. I also thank Julia Chen and Allyssa Scheyer for their valuable research assistance.

characteristics. While several existing studies have investigated these questions, their findings are generally restricted to single jurisdictions and are further circumscribed by data and methodological limitations. This study offers a first step toward addressing this gap in the literature, drawing on unique data from a national survey (N=1,975) of estate planning utilization. The data confirm that while some adults in the United States do avail themselves of various forms of estate planning, nearly half (44%) report having no form of estate planning at all. Using multiple regression analysis, the Article moves beyond the bivariate descriptive results of earlier studies to investigate the interrelationship between estate-planning uptake and several demographic and socioeconomic characteristics. Finally, the Article considers the overlapping usage of multiple forms of estate planning and the means by which estate planning instruments are prepared to offer more nuanced perspectives on the use of estate planning. The Article offers foundational empirical evidence with significant implications for law and policy and identifies several topics that merit additional empirical investigation.

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#### INTRODUCTION

“[A]s sure as the candle burns  
 Every soul must return  
 Into the light . . .”

— Prince, “Into the Light”

On April 21, 2016, the artist Prince, born Prince Rogers Nelson, died.<sup>1</sup> In the summer of 2019, the Prince estate released an album containing songs from the artist’s “vault” recordings,<sup>2</sup> including fourteen never-before-released tracks.<sup>3</sup> Many suggested that Prince — famously controlling of his body of work<sup>4</sup> — would never have agreed to the

<sup>1</sup> See Jon Pareles, *Prince, an Artist Who Defied Genre, is Dead at 57*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/arts/music/prince-dead.html> [https://perma.cc/Z352-KDJC].

<sup>2</sup> See Althea Legaspi, *Prince Estate to Release New ‘Originals’ LP Featuring Previously Unreleased Songs*, ROLLING STONE (Apr. 25, 2019, 1:02 AM), <https://www.rollingstone.com/music/music-news/prince-originals-album-unreleased-songs-827084/> [https://perma.cc/Q4L4-QRR4]; *The Prince Official Store: Originals*, PRINCE, [https://store.prince.com/dept/originals?cp=103229\\_103233\\_105250](https://store.prince.com/dept/originals?cp=103229_103233_105250) (last visited Sept. 16, 2019) [https://perma.cc/FA93-JSBT] (selling “Originals” album in exclusive limited edition white vinyl, deluxe cd and purple vinyl set, vinyl, and cd formats).

<sup>3</sup> See Robin Hilton, *An Album from Prince’s Vault, and His Memoir, Are Coming*, NPR (Apr. 25, 2019, 9:26 AM), <https://www.npr.org/2019/04/25/717069561/an-album-from-princes-vault-and-his-memoir-are-coming> [https://perma.cc/A4V8-K9TT].

<sup>4</sup> See Pareles, *supra* note 1 (quoting Prince, at his induction into the Rock and Roll Hall of Fame in 2004, as saying, “When I first started out in the music industry, I was most concerned with freedom. Freedom to produce, freedom to play all the instruments on my records, freedom to say anything I wanted to.”).

release of these tracks.<sup>5</sup> Yet there is a suggestion of even more to come.<sup>6</sup> The decision to release these songs and other moves to increase the availability of the artist's music are the result of Prince's failure to prepare his business holdings for the eventuality of his death.<sup>7</sup> Had he executed an estate plan, Prince could have exerted greater control over his posthumous musical legacy. He did not.

In this, Prince was not alone. While the average American does not have an underground vault full of valuable music recordings, he or she is quite likely to die without having undertaken any estate planning.<sup>8</sup> By doing so, individuals forego the several potential benefits offered by estate planning.<sup>9</sup> Executing a will, a trust, or other legal ownership or transfer arrangements allows individuals to control the distribution of their property at death; appoint executors, trustees, or guardians for minors; and express last wishes and sentiments. Failure to do so means that an individual's property is distributed by the state pursuant to the laws of intestacy without regard to his or her preferences. For some decedents, this system is unlikely to yield the decedent's preferred distributions; even where it does, the lack of estate planning can have economic and social consequences and represents a loss of self-determination.

Moreover, variation in the use of estate planning has implications beyond its consequences for decedents and those close to them. Several doctrines within the laws of succession rest on empirical assumptions about estate planning behavior.<sup>10</sup> For example, the design of the laws of intestacy, the requirements to execute a valid will, and the rules

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<sup>5</sup> See Hasit Shah, *Prince Without Permission: On Preparing for a World Filled with New Music, but Missing the Man*, NPR (Apr. 21, 2017, 7:00 AM), <https://www.npr.org/sections/therecord/2017/04/21/524899985/prince-without-permission> [https://perma.cc/8HLH-DX54] ("The bank [administering Prince's estate] oversaw a rapid commercialization of his work, including a number of decisions that, for many people, seem contrary to what Prince himself would have wanted.").

<sup>6</sup> See *Price Discography Annotated*, PRINCE, [https://discography.prince.com/?utm\\_source=EstateHub&utm\\_medium=link&utm\\_campaign=Link-from-poster-on-hub](https://discography.prince.com/?utm_source=EstateHub&utm_medium=link&utm_campaign=Link-from-poster-on-hub) (last visited Sept. 16, 2019) [https://perma.cc/453A-V37C] ("Prince wrote hundreds of songs in his lifetime and released dozens of albums . . . Even with this robust catalog available, the world is only just beginning to understand the full scope of Prince's work, which also included countless unreleased recordings. This is the start of an evolving exploration of Prince's genius . . .").

<sup>7</sup> See Shah, *supra* note 5 (noting that the release of Prince's assets is the result of decisions made by entities appointed by the court to administer his probate estate that are driven in part by a massive tax bill).

<sup>8</sup> See *infra* Part II.A.1.

<sup>9</sup> See *infra* Part I.A.

<sup>10</sup> See *infra* Part I.B.

governing the administration of probate estates all implicate patterns of estate planning behavior.<sup>11</sup> In addition, the efficacy of policy interventions designed to ameliorate disparities in outcomes obtained by those with and without estate plans depends on estate planning behavior.<sup>12</sup> Finally, variation in the use of estate planning may also indicate inequalities in access to civil justice, raising theoretical and empirical challenges to popular understandings of this concept.<sup>13</sup>

Thus, estate planning behavior has important consequences for individuals as well as legal and policy implications. Yet our empirical understanding of estate planning is surprisingly limited. The observed rates at which estate planning instruments are utilized varies widely across existing studies,<sup>14</sup> reflecting, in part, biases inherent in datasets derived from probate records or selective surveys.<sup>15</sup> While several studies find that rates of estate planning utilization vary with socioeconomic and demographic characteristics,<sup>16</sup> investigation of these covariates has been limited to bivariate analyses that may overstate the relationship between individual characteristics and estate planning.<sup>17</sup> Moreover, nearly all existing studies are limited to single jurisdictions, leaving national patterns underexplored while changing trends in family structure, wealth holdings, and dispositive preferences suggest that these patterns may be evolving.<sup>18</sup>

This leaves open several questions regarding the prevalence and distribution of estate planning across the population. How many individuals are testate (meaning they have wills) and what forms of estate planning are most common among those who have estate plans? How are these instruments prepared? How do rates of estate planning utilization vary across socio-demographic status groups? This Article addresses each of these questions, using novel data drawn from a national survey of estate planning behavior (N=1,975). The findings confirm the limited use of estate planning nationwide, but offer new insights into patterns of estate planning utilization across socio-demographic groups. In addition, the results highlight the benefit of evaluating estate planning behavior more holistically, as patterns of overlapping usage of estate planning instruments may better measure

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<sup>11</sup> See *infra* Part I.B.1.

<sup>12</sup> See *infra* Part I.B.2.

<sup>13</sup> See *infra* Part I.B.3.

<sup>14</sup> See *infra* Part II.A.1.

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See *infra* Part II.A.1.

<sup>17</sup> See *infra* Part II.B.7.

<sup>18</sup> See *infra* Part II.B.

disparities in estate planning utilization. These findings offer empirical analysis foundational to our understanding of estate planning utilization and identify several areas that merit additional empirical investigation.

The Article proceeds as follows. In Part I, I describe the significance of estate planning behavior on the individual and systemic levels. Specifically, I consider the importance of empirical patterns of estate planning utilization for doctrinal debates, the design of policy interventions, and our conceptual and empirical understanding of access to civil justice. In Part II, I offer an overview of the existing empirical literature on estate planning, with a particular focus on the prevalence and distribution of will-making. This Part also highlights the gaps in our empirical understanding of estate planning behavior. In Part III, I present the empirical study, beginning with a description of the data and methods, followed by the presentation of the results. Finally, I conclude by discussing the implications of the empirical findings and identifying key areas for future research.

#### I. THE SIGNIFICANCE OF ESTATE PLANNING BEHAVIOR

It is true that you can't take it with you when you go: all property rights terminate at death and all property must be transferred.<sup>19</sup> However, American law recognizes the right to control the transfer of property at death.<sup>20</sup> With few exceptions — including protections for surviving spouses, constitutional and public policy restraints, and recognition of the rights of creditors — the laws of succession honor the freedom of disposition.<sup>21</sup> These laws give individuals the power to distribute whatever amounts or items of property they might select to the recipients of their choice.<sup>22</sup> In short: you can't keep it when you're gone, but you can decide who does.

Yet, to exercise this freedom, individuals must take affirmative steps during their lifetime to declare or effectuate their testamentary wishes.

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<sup>19</sup> See LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 3 (2009) (“The whole edifice of the law of succession, legally and socially, rests on one brute fact: you can't take it with you.”).

<sup>20</sup> See *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (noting, in finding unconstitutional legislation permitting the escheat of highly fractioned Indian lands without compensation, that “[i]n one form or another, the right to pass on property — to one's family in particular — has been part of the Anglo-American legal system since feudal times”).

<sup>21</sup> See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643-44 (2014).

<sup>22</sup> See *id.* at 644.

They may do so by arranging for joint ownership of property, designating beneficiaries for specific financial assets, transferring property into trust, or executing a will;<sup>23</sup> together, these and various other legal mechanisms comprise estate planning.<sup>24</sup> Any property not disposed of through one of these mechanisms will be distributed pursuant to the laws of intestacy.<sup>25</sup> Under these laws, an intestate decedent's property is distributed among his or her legally-recognized kin, with priority given to those individuals of closest relation.<sup>26</sup>

This system creates two broad categories of individuals: the “haves” who control the distribution of their property at death through estate planning and the “have-nots” whose estates are distributed by the state.<sup>27</sup> Of course, reality is often more complicated than these ideal types suggest.<sup>28</sup> For example, individuals may execute instruments to control the distribution of a portion of their property at death while the rest falls to intestacy.<sup>29</sup> Or, they may attempt to create an estate plan, but fail — either in whole or in part.<sup>30</sup> Plus, some individuals may intentionally choose *not* to create an estate plan because they prefer the distribution scheme mandated by intestacy; this effectively creates an estate plan through omission, blurring the line between the haves and have-nots.<sup>31</sup> However, for analytic purposes, it is helpful to put aside

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<sup>23</sup> See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109-15 (1984) [hereinafter *Nonprobate Revolution*].

<sup>24</sup> Estate planning also encompasses planning for incapacity. See Sitkoff, *supra* note 21, at 656.

<sup>25</sup> See UNIF. PROB. CODE § 2-101(a) (UNIF. LAW COMM'N 2019) (amended 2019) (“Any part of a decedent's estate not effectively disposed of by will passes by intestate succession . . .”).

<sup>26</sup> See *id.* §§ 2-102 to -103.

<sup>27</sup> See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 36 (2009) (“Intestacy is perhaps the final divide between the Haves and the Have-Nots.”). For the foundational socio-legal article on the distinction between the “haves” and “have-nots” in litigation, see Marc Galanter, *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974) (describing how a facially neutral legal system nevertheless exacerbates the advantages of the “haves” as opposed to the “have-nots”).

<sup>28</sup> See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 22 (Guenther Roth & Claus Wittich eds., 1968) (“It is often necessary to choose between terms which are either clear or unclear. Those which are clear will, to be sure, have the abstractness of ideal types, but they are none the less preferable for scientific purposes.”).

<sup>29</sup> See PROB. § 2-101.

<sup>30</sup> See *id.*

<sup>31</sup> See 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) (noting that intestacy is not always the result of agreement with the

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this complexity in order to compare the consequences of having, or not having, an estate plan.

In the Sections that follow, I first consider the implications of estate planning behavior for individuals. What benefits does estate planning provide? What are the costs of obtaining an estate plan? Then, I turn my attention to the implications of varied estate planning behavior more broadly and ask: What does the presence of the estate planning have and have-nots mean for doctrinal debates, the design of policy interventions, or our understanding of access to civil justice? How do socio-demographic patterns of estate planning behavior alter this analysis? Below, I address each of these topics to illustrate the significance of estate planning behavior.

#### A. *Implications for Individuals*

Estate planning offers individuals several potential benefits. Most obviously, an estate plan allows an individual to control the distribution of his or her property at death. This means naming the individuals or organizations that will receive property, as well as determining their relative shares. In addition, one can also dictate through an estate plan who will receive certain items of property, which may be especially important in the case of items of particular financial or sentimental value. Moreover, the freedom to name the objects of one's generosity also encompasses the inverse: the ability to restrict individuals from inheriting.<sup>32</sup> Through these mechanisms, individuals can support dependents, transmit wealth to future generations, comply with religious mandates, or satisfy more individualistic desires.<sup>33</sup>

Some estate planning vehicles — most commonly trusts — also allow individuals to control the distribution of property over time or to control the manner of distribution.<sup>34</sup> For example, beneficiaries may receive property outright or in trust, in a single lump-sum distribution

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statutory scheme); Cheryl Tilse et al., *Making and Changing Wills: Prevalence, Predictors, and Triggers*, SAGE OPEN, Jan.-Mar. 2016, at 1, 6 (finding that seven respondents out of a sample of 980 Australians reported not having a will because they “believed existing laws would divide their assets appropriately”).

<sup>32</sup> See PROB. § 2-101(b) (“A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession.”).

<sup>33</sup> See, e.g., Niraj Chokshi, *Choupette, Karl Lagerfeld's Cat, Has a Million Reasons to Purr*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/style/karl-lagerfeld-choupette-cat.html> [<https://perma.cc/HT92-QWKH>] (describing Lagerfeld's plan to leave millions of dollars to his cat).

<sup>34</sup> See Sitkoff, *supra* note 21, at 658.

or in portions, freely given or subject to conditions or standards.<sup>35</sup> This flexibility can be especially useful in situations where minor children or others who lack legal capacity stand to inherit; without them, the court may be required to appoint a guardian or conservator to oversee the property.<sup>36</sup>

Estate planning can also shape the administration of property in other ways. It allows individuals to appoint others to positions of trust, such as executor or trustee. Although the dire warnings of the ills of the probate process<sup>37</sup> are likely exaggerated, the process can be lengthy and does create a public record.<sup>38</sup> By transferring property into trust and using other will substitutes to transfer property outside of the probate process, individuals can avoid this process, either in whole or in part.

In addition, by expressing their preferences through any of these instruments, decedents offer guidance that may provide instrumental and emotional benefits to their survivors.<sup>39</sup> Estate planning offers an opportunity to convey last sentiments to survivors, either indirectly through distributive provisions or fiduciary appointments,<sup>40</sup> or directly through explicit statements.<sup>41</sup> And moving beyond property concerns, it allows individuals to nominate a guardian for minor children.

In addition to these benefits that accrue after death — and the peace of mind that it provides during life — some individuals may also receive additional lifetime benefits from putting in place transfers that will not occur until death. Many charities, for example, recognize planned

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<sup>35</sup> See *id.*

<sup>36</sup> See Reid Kress Weisbord, *Facilitating Homemade Wills*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 395, 398 (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter *Facilitating Homemade Wills*]; Sitkoff, *supra* note 21, at 656.

<sup>37</sup> See NORMAN F. DACEY, *HOW TO AVOID PROBATE* 7 (1965).

<sup>38</sup> See David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 *GEO. L.J.* 605, 609-10 (2015) [hereinafter *Defense of Probate*].

<sup>39</sup> See Naomi Cahn & Amy Zietlow, “*Making Things Fair*”: *An Empirical Study of How People Approach the Wealth Transmission System*, 22 *ELDER L.J.* 325, 339 (2015) (noting that where decedents had done any advance planning, respondents in a sample of survivors “reacted with appreciation,” while respondents reported feelings of confusion and conflict more frequently in the absence of advance planning).

<sup>40</sup> See Daphna Hacker, *Soulless Wills*, 35 *LAW & SOC. INQUIRY* 957, 979 (2010) (“[A] bequethal encompasses the giver’s preferences, decisions, and personality, as well as possibly reflecting the recipients’ gratitude, disappointment, remembrance, and, hopefully, respect for the giver’s choices and wishes.”).

<sup>41</sup> See *id.* at 962 (describing historical antecedents of the modern will that more frequently “included personal and emotional expressions or [were] accompanied by separate spiritual and ethical instruments and guidance”).

testamentary gifts during the donor's lifetime.<sup>42</sup> Less formal arrangements in which individuals receive the benefit of resources or labor during life in exchange for testamentary transfers also exist.<sup>43</sup>

By undertaking estate planning, individuals avoid having their property distributed by the laws of intestacy. While these laws are intended to effectuate the desire of the average decedent, they are unlikely to accurately capture the preferences of many individuals. In particular, individuals who are in second marriages, have step-children, have non-marital cohabitating partners, or are in other non-traditional families are less likely to be well served by the laws of intestacy.<sup>44</sup>

Of course, these benefits come with a cost. Professional advice and drafting impose fees, as do software or applications for DIY drafting. Even where financial costs are not incurred, estate planning — self-preparation in particular — takes time and effort. There is also a belief that estate planning imposes psychic costs, by forcing individuals to consider their own mortality. However, there has been little empirical interrogation of this claim, which is countered by the extensive use of many types of estate planning instruments.<sup>45</sup> Thus, estate planning can confer several benefits, but the extent to which these benefits outweigh the costs may vary.

### B. Implications for Law and Policy

Collectively, individual estate planning utilization has implications for law and policy. Several doctrines within the laws of succession rest on assumptions about aggregate estate planning behavior; empirical evidence challenging those assumptions could indicate the need for reform. In addition, understanding patterns of estate planning behavior is essential for the design of policy interventions to equalize estate

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<sup>42</sup> See *Resolve to Recognize Your Planned Giving Donors*, PG CALC (Dec. 3, 2013), <https://www.pgcalc.com/support/knowledge-base/stewardship/resolve-recognize-your-planned-giving-donors> [<https://perma.cc/PJ4Y-EW58>] (recommending that charities create heritage societies to recognize and steward planned giving donors).

<sup>43</sup> See, e.g., B. Douglas Bernheim et al., *Bequests as a Means of Payment 2* (Nat'l Bureau of Econ. Research, Working Paper No. 1303, 1984) (developing an econometric model of "exchange motivated" bequests).

<sup>44</sup> See Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 188 (2019) ("[I]ntestacy rules are premised on the normative nuclear family"); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 91 (2004); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 80 (2000) [hereinafter *Adapting Intestacy Laws*]; 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, 343-44 (2017).

<sup>45</sup> See Weisbord, *Facilitating Homemade Wills*, *supra* note 36, at 400-01.

planning uptake or minimize disparities in outcomes resulting from differential use of estate planning. Finally, evaluating estate planning behavior may illustrate inequalities that cause us to reconsider our understanding of access to civil justice.

### 1. Laws of Succession

The laws of succession have often evolved without the benefit of empirical support<sup>46</sup> and many of the laws of succession rest on assumptions about estate planning utilization. In some cases, these assumptions concern the use of estate planning directly; in others, it is the potential link between patterns of estate planning utilization and testamentary desires that influence the law. Below I offer illustrations of both, focusing on the laws governing intestacy, the validity of wills, and probate administration. While far from an exhaustive description of the ways in which beliefs about estate planning behavior influence legal doctrines regarding succession, the examples serve to illustrate the legal significance of estate planning behavior.

The laws of intestacy seek to approximate the distributions that the average decedent would have chosen had he or she expressed such desires during life.<sup>47</sup> Because it is impossible to satisfy every individual's unique set of preferences with a uniform distribution scheme, the laws of intestacy rely on probabilistic assumptions about testamentary desires.<sup>48</sup> For example, they embed assumptions about which intimate partners and relatives most decedents would want to be included among

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<sup>46</sup> See David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1101 (2015) [hereinafter *Wills Law*] (“One reason for [ongoing doctrinal debate] is the lack of information about the law’s real world impact.”); Jeffrey A. Schoenblum, *Will Contests — An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 607 (1987) (“Conclusions have been drawn and reforms proposed on the basis of certain assumptions about the law of wills for which there has been absolutely no supporting data.”).

<sup>47</sup> See UNIF. PROB. CODE, art. II, pt. I, general cmt. (UNIF. LAW COMM’N 2019) (amended 2019); Gary, *Adapting Intestacy Laws*, *supra* note 44, at 6-8 (summarizing support for testator intent as a theory underlying the laws of intestacy); Sitkoff, *supra* note 21, at 645 (“In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent . . .”). *But see* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1036 (arguing that the laws of intestacy have become a “theoretical grab-bag” that incorporate several motivating theories).

<sup>48</sup> See Sitkoff, *supra* note 21, at 645 (noting that designing an intestacy statute to reflect the wishes of the typical intestate decedent requires that “the disparate preferences of persons without a will must be aggregated into a model intestate decedent”).

their potential heirs<sup>49</sup> and the relative shares that most decedents would want each heir to have.<sup>50</sup>

Underlying these expressions of probable intent are assumptions about estate planning behavior. By equating the average decedent with the average intestate decedent, the laws of intestacy assume that these two groups share the same set of distributive preferences.<sup>51</sup> However, they may not. If, for example, distributive preferences vary systematically by wealth, family structure, or household composition, for example, and these same factors correlate with variation in estate planning, then laws of intestacy may be less likely to serve the needs of the average intestate decedent. In fact, in a truly perverse sense, it may be that the laws of intestacy are actually worst-suited to serving the needs of those most likely to be affected.

Laws governing the validity of wills also incorporate empirical assumptions about estate planning behavior. The formalism of the law of wills is notorious,<sup>52</sup> but has faced growing criticism.<sup>53</sup> Emboldened by the rise of nonprobate will substitutes that allow individuals to effectuate testamentary transfers without satisfying the traditional formalities attendant to the execution of a will, functionalist reformers have supported measures to reduce the formalities and the requisite level of compliance needed to generate a valid will.<sup>54</sup> The doctrinal debate has largely been framed in terms of probate courts' ability to maintain a proper balance between false positives (allowing illegitimate wills to stand) and false negatives (rejecting legitimate wills) in the face of these liberalizing reforms.<sup>55</sup>

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<sup>49</sup> See, e.g., UNIF. PROB. CODE § 2-105 (governing escheat); *id.* § 2-107 (including half-blood relatives as intestate heirs); *id.* § 2-115 (defining parents and children for purposes of intestacy).

<sup>50</sup> See, e.g., *id.* § 2-102 (defining share of surviving spouse); *id.* § 2-103 (defining shares for heirs other than the surviving spouse).

<sup>51</sup> It is true that the laws of intestacy also serve as gap-fillers for estate planning instruments and have implications for the distribution of government benefits. See Sitkoff, *supra* note 21, at 646. Because of this, they can apply to both the testate and intestate populations. See Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 720 (1976) (arguing that intestacy statutes apply broadly and should take into account "not only . . . [the interests] of intestates but also must analyze the statute's effect on the general society"). However, their primary goal is to distribute the property of those who die intestate.

<sup>52</sup> See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("The law of wills is notorious for its harsh and relentless formalism.").

<sup>53</sup> See Horton, *Wills Law*, *supra* note 46, at 1099.

<sup>54</sup> See *id.* at 1099-1100.

<sup>55</sup> See *id.* at 1100-01 (noting ongoing questions regarding "how often strict compliance jurisdictions reject near-miss wills").

However, changing the formalities required to make a will may affect not only the court's ability to assess the legitimacy of an instrument, but the likelihood that the instrument is ever created. That is, individuals' estate planning behavior may change if the strictures of the Wills Act formalities are loosened.<sup>56</sup> In this way, debates about the formalities required to make a valid will are inherently tied to empirical questions about estate planning behavior and how it is (or is not) shaped by these requirements.

Finally, the laws governing the administration of probate estates are also a function of estate planning behavior. In regulating the administration of decedents' estates, these laws must balance the competing interest of efficiency with the need to protect the interests of decedents, heirs, and creditors. Optimizing this process requires an understanding of the composition of matters that come before the probate court, as well as the burden imposed by each type of matter. Because probate administration is a function of estate planning — wills are administered through probate, while trusts and other will substitutes remove property from the jurisdiction of the probate court — rules governing probate administration necessarily incorporate knowledge (or untested empirical assumptions) regarding estate planning behavior.

## 2. Policy Interventions

In addition to influencing these debates, an understanding of the empirical realities of estate planning is also essential to the creation of effective public policy. In response to potential disparities in outcomes resulting from unequal use of estate planning, some scholars and policymakers seek to expand access to estate planning. For example, Reid Kress Weisbord suggests the development of a “testamentary schedule” that individuals could fill out while filing state income tax returns.<sup>57</sup> Other scholars herald the potential of technology to enhance access to wills and other estate planning instruments.<sup>58</sup>

Underlying these proposals are empirical assumptions about the barriers that generate current patterns of estate planning.<sup>59</sup> Do

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<sup>56</sup> See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012) (noting that wills formalities deter individuals from making wills, channeling them toward intestacy).

<sup>57</sup> Weisbord, *Facilitating Homemade Wills*, *supra* note 36, at 405.

<sup>58</sup> See, e.g., Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 960 (2019).

<sup>59</sup> See Weisbord, *Facilitating Homemade Wills*, *supra* note 36, at 401.

individuals forego estate planning because it is too costly? Too emotionally taxing? Too intimidating? Or, is it that individuals don't think that they need an estate plan in order to carry out their testamentary wishes? Are they accurate in that assessment? Different policy interventions are required to address each of these potential barriers, requiring that we understand which are the true barriers to estate planning.<sup>60</sup> An initial step toward addressing these questions is having an accurate understanding of which groups of individuals are least likely to have estate plans.

A different approach to ameliorating disparities resulting from variation in estate planning behavior is to improve the outcomes for those who are intestate and do not otherwise provide for the administration or distribution of their property at death. Proposals reflecting this orientation include those that seek to enhance the accuracy of intestacy, by updating the reach or structure of intestacy's distributive scheme,<sup>61</sup> incorporating greater discretion in the administration of intestate estates,<sup>62</sup> or even generating personalized intestacy provisions.<sup>63</sup> Each of these interventions requires an understanding of the distributive wishes of those who are without estate plans, which turns on an understanding of estate planning utilization.

### 3. Access to Civil Justice

Finally, empirical data about patterns of estate planning utilization may stretch our conceptualization and empirical understanding of access to civil justice. Rebecca Sandefur proposes that access to justice exists when the probability is the same for all groups in the population that "disputes and problems governed by civil law" will be resolved in ways that satisfy substantive and procedural legal norms, regardless of whether legal actors or institutions are involved.<sup>64</sup> This definition skillfully synthesizes the concerns embodied within the literature on access to civil justice. In doing so, it also makes clear what this literature has excluded.

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<sup>60</sup> See Tilse et al., *supra* note 31, at 9.

<sup>61</sup> See, e.g., sources cited *supra* note 44.

<sup>62</sup> See Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 819 (2012).

<sup>63</sup> See, e.g., Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 349 (2019); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1418-20 (2014) (proposing personalized intestacy provisions developed through artificial intelligence developed using currently nonexistent big data).

<sup>64</sup> Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 50-51 (2019).

By prioritizing problems or disputes, research on access to justice has paid less attention to legal needs for transactional and advisory ex ante legal work. As Gillian Hadfield writes, while discussing the failures of the market for individual legal services, “for ordinary citizens in the U.S. there is almost no functioning legal system in this ex ante sphere.”<sup>65</sup> This stands in sharp contrast to the extensive “before-the-fact” advice that corporate clients regularly receive from their lawyers<sup>66</sup> and can set individuals on a trajectory toward legal crises that are the primary focus of most access to justice research.<sup>67</sup>

Such crises do not explode, fully-formed, into people’s lives; rather, they emerge over time through a process in which the parties involved make sense of their experience and choose from among many possible actions in response.<sup>68</sup> We know that individuals’ legal consciousness,<sup>69</sup> their knowledge about law,<sup>70</sup> and their capacity to access legal expertise<sup>71</sup> all vary and can be consequential for the resolution of civil legal problems. However, we know less about how ex ante advice-seeking shapes the trajectory of disputes or the extent to which it can prevent them.

Research on the incidence of civil legal needs suggests that the potential impact could be quite broad. Many of the most common types of civil legal problems experienced grow out of transactions with legal implications or attributes, such as problems involving debt and housing.<sup>72</sup> In addition, the most recent American study on the prevalence of events or situations that raise civil legal issues or involve civil legal consequences finds that 22% of respondents reported having a problem involving insurance, including issues involving “confusion

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<sup>65</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 132 (2010).

<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 131-32.

<sup>68</sup> *See, e.g.*, William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631, 633-37 (1980-81).

<sup>69</sup> *See generally* PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45 (1998) (defining legal consciousness).

<sup>70</sup> *See* NIGEL J. BALMER ET AL., *KNOWLEDGE, CAPABILITY AND THE EXPERIENCE OF RIGHTS PROBLEMS* 37 (2010).

<sup>71</sup> *See* Erin York Cornwell & Benjamin Cornwell, *Access to Expertise as a Form of Social Capital: An Examination of Race- and Class-Based Disparities in Network Ties to Experts*, 51 *SOC. PERSP.* 853, 853, 864 (2008).

<sup>72</sup> *See* REBECCA L. SANDEFUR, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY* 7-8 (2014).

about policies and terms.”<sup>73</sup> In the same study, 16% of respondents reported having experienced a problem involving government benefits,<sup>74</sup> an arena notorious for its challenging bureaucratic requirements. If inequalities in individuals’ abilities to navigate interactions with law or transactions with legal implications — due to differential access in legal resources or otherwise — lead to variation in the incidence of civil legal problems, it represents an underappreciated component of access to civil justice.

Moreover, in addition to its potential to mitigate civil legal problems, access to ex ante legal resources might also serve to optimize other outcomes, including economic well-being and self-determination. We live in a “law-thick” world<sup>75</sup> in which we routinely interact with law in everyday life. In many cases, successfully navigating these interactions imposes a significant burden.<sup>76</sup> Inequalities in access to ex ante assistance may yield disparities in the outcomes obtained by otherwise similarly situated individuals, such as through a failure to optimize tax strategies, an inability to successfully apply for government benefits to which one is entitled, or the failure to undertake estate planning.

Although ex ante access to legal resources has implications for the incidence and resolution of civil legal problems and may generate unequal outcomes under the law, it has been afforded less attention in the access to justice literature. By investigating variation in estate planning behavior, this Article highlights this phenomenon. In doing so, it helps to broaden our conceptualization of what it means to achieve access to civil justice and expands the agenda for empirical scholarship on access to justice.

## II. ESTATE PLANNING UTILIZATION

Not surprisingly given the significance of estate planning behavior for individuals, as well as for legal doctrine and the design of policy interventions, there is a long history of empirical scholarship investigating the use of estate planning.<sup>77</sup> However, the quantity of empirical work is surprisingly limited.<sup>78</sup> The existing studies offer several important insights about the prevalence and distribution of

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<sup>73</sup> *Id.* at 7.

<sup>74</sup> *See id.*

<sup>75</sup> Hadfield, *supra* note 65, at 133.

<sup>76</sup> *See, e.g.,* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 1 (2018).

<sup>77</sup> *See, e.g.,* sources cited *infra* note 79.

<sup>78</sup> *See* Horton, *Defense of Probate*, *supra* note 38.

wills, but several data and methodological issues limit the inferences that may be drawn from them. This leaves open several key questions about contemporary national patterns of estate planning utilization.

### A. Existing Empirical Scholarship

In this Section, I offer a summary of the key findings of existing empirical scholarship on estate planning behavior. First, I describe what we know about the prevalence and distribution of testacy. Then, I turn my attention to the use of will substitutes and other estate planning instruments.

#### 1. The Prevalence and Distribution of Testacy

Although the empirical literature on estate planning behavior investigates a variety of issues, the most salient topic of investigation is the prevalence and distribution of wills. In Table 1, I provide a summary of the existing studies that address this topic.<sup>79</sup> For each study, I indicate

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<sup>79</sup> See MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 44-45, 64-81 (1970); Contemporary Studies Project, *supra* note 31, at 1070-72; DiRusso, *supra* note 27, at 40-41; Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 AM. B. FOUND. RES. J. 321, 321, 337 (1978); Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1453, 1465 (2007); Joel R. Glucksmann, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations*, 12 COLUM. J.L. & SOC. PROBS. 253, 255, 257, 285 (1976); Horton, *Defense of Probate*, *supra* note 38, at 626-27; Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 1, 4-6, 27 (2015); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 79 tbl.4.1, 82-83, tbls.4.3, 4.4, 4.5 & 4.6 (1985).

In addition, Schoenblum offers an estimate of testacy based on a comparison of the number of deaths reported in a given county and the number of testate probate estates opened; however, this is an imperfect estimate because there are explanations other than intestacy that could generate this gap. See Schoenblum, *supra* note 46, at 612.

There are several studies covering earlier time periods that are not included in the summary. See, e.g., REMI CLIGNET, *DEATH, DEEDS, AND DESCENDANTS: INHERITANCE IN MODERN AMERICA* 137 (Michael Useem & James D. Wright eds., 1992); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969); Stephen Duane Davis II & Alfred L. Brophy, "The Most Solemn Act of My Life": Family, Property, Will, and Trust in the Antebellum South, 62 ALA. L. REV. 757, 761 (2011); James W. Deen, Jr., *Patterns of Testation: Four Tidewater Counties in Colonial Virginia*, 16 AM. J. LEGAL HIST. 154, 154 (1972); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 34 (1964); Jason C. Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST.

the data relied upon, report the rate of testacy observed in the data, and present a list of the individual or estate characteristics associated with variation in testacy frequency observed in the data. I list the articles chronologically by date of publication; because the lag between the period of observation and publication date varies, this does not necessarily follow the chronology of the data. Below I describe what these studies tell us about the prevalence of testacy, the distribution of testacy, and the manner through which testate individuals obtain their wills.

Table 1. Empirical Studies of the Prevalence and Distribution of Testacy

Study	Data	Testacy Rate	Testacy Covariates
Sussman et al. (1970)	Probate records of random sample of estates closed in Cuyahoga County, Ohio in 1964-65 study period (N=659)	69%	gender, age, wealth, education, occupation, marital status, family structure
	Interviews of survivors of decedents in Cuyahoga County probate estate sample (N=1,234)	58%	gender, age, wealth, income, education, occupation, marital status, family structure
Glucksman (1976)	Random sample of decedents who died in Morris County, New Jersey in 1974-1975 study period for whom probate estates were opened (N=100)	53%	age, occupation, marital status, family structure

L.J. 479, 481 (2011); Richard R. Powell & Charles Looker, *Decedents' Estates: Illumination from Probate and Tax Records*, 30 COLUM. L. REV. 919, 923 (1930); T.P. Schwartz, *Durkheim's Prediction About the Declining Importance of the Family and Inheritance: Evidence from the Wills of Providence, 1775-1985*, 37 Soc. Q. 503, 503 (1996); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 Wis. L. REV. 393, 393 (1950).

Contemporary Studies Project (1978)	Probate records of all estates filed in 1973-1974 in six Iowa counties (N=295)	72%	age, wealth, marital status
	Surviving relatives of sample of decedents whose probate estates were filed 1973-1974 in six Iowa counties (N=94)	66%	wealth
	Representative sample of Iowans (N=600)	49%	age, wealth
Fellows, Simon, and Rau (1978)	Sample of panel of respondents in Alabama, California, Massachusetts, Ohio, and Texas (N=750)	45%	age, wealth, education, occupation, family structure, state of domicile
Stein and Fierstein (1985)	Probate records from sample of estates of decedents dying in 1972 in select counties in California, Florida, Maryland, Massachusetts, and Texas (N=5,959)	45% - 86%	gender, age, wealth, state of domicile
Friedman et al. (2007)	Probate records from Bernardino County, California for decedents who died during 1964 data period (N=513)	67%	gender, wealth

DiRusso (2009)	Online survey of national sample of respondents (N=324)	31%	age, gender, race/ethnicity, income, education, marital status
Horton (2015)	Court records for all probate administration matters in Alameda County, California for decedents who died in 2007 (N=571)	57%	wealth
James (2015)	Participants in national longitudinal Health and Retirement Study of individuals age 55+ (N=26,000) who have died (n=12,022)	59%	gender, age, cohort, race/ethnicity, wealth, education, marital status, family structure

Note: Table 1 summarizes the most recent legal studies offering empirical data on rates of testacy. For each study, the table describes the data source relied upon, reports the testacy rate observed, and identifies socio-demographic characteristics whose relationship with testacy is investigated.

As is clear from Table 1, these studies rely on different kinds of data from several geographic regions and legal jurisdictions observed at various points over nearly fifty years. It is not surprising then, that there is variation in the rates of testacy observed. However, the range of observed rates is extreme, from 31% to 86%.

The highest rates of testacy are observed in studies relying on probate records. These studies are skewed toward individuals who have a greater risk of mortality and increased likelihood of having probate estates. To the extent that these characteristics are also associated with greater rates of testacy, the testacy rates observed in these studies will be upwardly biased estimates of the overall testacy rate. Similarly, the testacy rate measured by the National Health and Retirement Study is also likely a positively biased estimate of the general rate, because the

sample is comprised of older adults: the survey sample as a whole is limited to individuals aged fifty-five and over, and the findings regarding testacy are based on the subsample of respondents who have died since the survey's inception.<sup>80</sup> Surveys of survivors of decedents are also likely to skew older since the ages of those who inherit will reflect the older average ages of most decedents.

In contrast, surveys of the general population find lower levels of testacy. For example, the lowest rate of testacy observed among the three studies undertaken in the Contemporary Studies Project — 49% — is found in the random sample of Iowans.<sup>81</sup> In her more recent national sample, DiRusso finds that less than one-third of respondents reported having a will.<sup>82</sup> Several non-academic surveys also provide estimates of the national rate of testacy, which are also somewhat lower than those in the probate studies. Surveys undertaken by Caring.com in 2017 and 2019 report rates of testacy of 42%<sup>83</sup> and 40%,<sup>84</sup> respectively. Gallup polls from 1990, 2005, and 2016 find rates of 48%, 51%, and 44%, respectively.<sup>85</sup>

Thus, the data suggest that the rate of testacy in the general population is lower than that among decedents, but there remains a wide range of estimates for the overall rate. These fluctuations are, in part, a function of variation in the rate of testacy across different segments of the population. As Table 1 indicates, several studies investigate this variation, measuring the frequency of testation across demographic characteristics, indicators of socioeconomic status, and family structures. Considering first individual demographic characteristics, several studies observe variation in rates of testacy by gender. However, the nature of the link between testacy and gender is somewhat tenuous. Some studies find higher rates of testacy among

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<sup>80</sup> See James III, *supra* note 79, at 3-12.

<sup>81</sup> See Contemporary Studies Project, *supra* note 31, at 1070.

<sup>82</sup> See DiRusso, *supra* note 27, at 41.

<sup>83</sup> See *More Than Half of American Adults Don't Have a Will, 2017 Survey Shows*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey/2017-survey/> (last visited Jan. 23, 2020) [<https://perma.cc/4VBN-58ZL>].

<sup>84</sup> See *2019 Survey Finds That Most People Believe Having a Will is Important, but Less than Half Have One*, CARING.COM, <https://www.caring.com/caregivers/estate-planning/wills-survey/> (last visited Jan. 23, 2020) [<https://perma.cc/NUG7-F9XQ>].

<sup>85</sup> Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2016), <https://news.gallup.com/poll/191651/majority-not.aspx> [<https://perma.cc/9QSE-MUZ7>]. These estimates are somewhat lower than the rate observed in a telephone survey of a national sample of Australians (N=2,405) which found that 59.4% of the sample had wills. Tilse et al., *supra* note 31, at 4.

men,<sup>86</sup> other studies find the opposite,<sup>87</sup> and some studies find no evidence of a gender difference.<sup>88</sup> Moreover, the magnitude of the difference in rates of testacy by gender also fluctuates.<sup>89</sup> Because socioeconomic status<sup>90</sup> and mortality risk<sup>91</sup> vary by gender, and are also linked to testacy, additional investigation is needed to clarify the association between gender and testacy.

In contrast, each of the studies that has measured variation in estate planning by age finds a positive relationship between age and will-making: older adults are more likely to report having wills<sup>92</sup> and the proportion of testate probate estates is higher among older decedents.<sup>93</sup> This is not surprising given both higher risks of mortality and greater wealth among older individuals. It does raise questions regarding the mechanisms generating the association, as well as the magnitude of the relationship with testacy independent of other covariates.

Our understanding of the relationship between race/ethnicity and estate planning is hindered by data limitations: probate records do not report the race or ethnicity of the decedent, preventing studies relying on administrative records from evaluating variation in testacy on these dimensions. In addition, small sample sizes have limited exploration of variation in testacy across racial and ethnic groups. DiRusso finds a statistically significantly higher likelihood of testacy among Whites relative to non-Whites,<sup>94</sup> which is consistent with the descriptive findings in several other studies,<sup>95</sup> but additional research is needed to offer more detailed conclusions.

Testacy is also found to vary with several indicators of socioeconomic status, whether measured at the level of the individual or the probate

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<sup>86</sup> See, e.g., DiRusso, *supra* note 27, at 45.

<sup>87</sup> See, e.g., Stein & Fierstein, *supra* note 79, at 84.

<sup>88</sup> See, e.g., Contemporary Studies Project, *supra* note 31, at 1076.

<sup>89</sup> See, e.g., Stein & Fierstein, *supra* note 79, at 84.

<sup>90</sup> See, e.g., JESSICA SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, 9 fig. 4 (2019), available at <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/U339-WZZW>] (reporting median earnings in 2018 among women of \$32,654 and among men of \$46,741).

<sup>91</sup> See JIAQUAN XU ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, MORTALITY IN THE UNITED STATES, 2018 (2020), <https://www.cdc.gov/nchs/products/databriefs/db355.htm> [<https://perma.cc/SSQ9-DV5H>] (reporting that the life expectancy for women is 81.2 years compared to 76.2 for males).

<sup>92</sup> See, e.g., Contemporary Studies Project, *supra* note 31, at 1071-72; DiRusso, *supra* note 27, at 51-52; Fellows et al., *supra* note 79, at 338.

<sup>93</sup> See, e.g., Contemporary Studies Project, *supra* note 31, at 1071-72; Stein & Fierstein, *supra* note 79, at 83.

<sup>94</sup> See DiRusso, *supra* note 27, at 44.

<sup>95</sup> See *id.* at 42-43; see also, James III, *supra* note 79, at 18.

estate. Key among these are measures of wealth, which are positively associated with testacy.<sup>96</sup> Although observed less frequently, income is also positively associated with will-making<sup>97</sup> as is education.<sup>98</sup> A few studies also report variation in rates of testacy across occupational categories.<sup>99</sup> However, all of these associations have been generated through bivariate analyses and have not considered the potential interrelationship between testacy and multiple measures of socioeconomic status.

Finally, a few studies find evidence of connections between testacy and family structure. Focusing first on marital status, and taking the relevant studies in chronological order, Sussman et al. find that the rates of testacy — although different in absolute terms — increase in relative terms in the same pattern for both the sample of decedents and survivors of decedents. The lowest rate of testacy is observed among those who are single, with rates increasing among those who are divorced, married, and widowed, respectively.<sup>100</sup> The Contemporary Studies Project found that rates of testacy increase across the study's four marital status categories in the same pattern: single, divorced, married, and widowed.<sup>101</sup> Comparing only those who are married and single, James found that married individuals in the Health and Retirement Survey were more frequently testate than those who were single, with the "married" category including "those who were married or living with a partner as if married."<sup>102</sup> Last, DiRusso found a statistically significant difference in the frequency of testation between those who were single/cohabitating, married, or separated/divorced/widowed, with the rates increasing across the three groups in that order.<sup>103</sup>

Together, these studies suggest that rates of testacy are higher among individuals who are married than those who are single, but the relative

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<sup>96</sup> See, e.g., SUSSMAN ET AL., *supra* note 79, at 73-74; Fellows et al., *supra* note 79, at 338; Friedman et al., *supra* note 79, at 1458-59; Stein & Fierstein, *supra* note 79, at 82; Contemporary Studies Project, *supra* note 31, at 1064; Horton, *Wills Law*, *supra* note 46, at 1121-22; James III, *supra* note 79, at 25.

<sup>97</sup> See, e.g., SUSSMAN ET AL., *supra* note 79, at 75; DiRusso, *supra* note 27, at 50-51; Fellows et al., *supra* note 79, at 336-37.

<sup>98</sup> See, e.g., SUSSMAN ET AL., *supra* note 79, at 78; DiRusso, *supra* note 27, at 48-49; Fellows et al., *supra* note 79, at 337; James III, *supra* note 79, at 34.

<sup>99</sup> See, e.g., SUSSMAN ET AL., *supra* note 79, at 77; Fellows et al., *supra* note 79, at 338; Glucksman, *supra* note 79, at 257-58.

<sup>100</sup> See SUSSMAN ET AL., *supra* note 79, at 70.

<sup>101</sup> See Contemporary Studies Project, *supra* note 31, at 1075.

<sup>102</sup> James III, *supra* note 79, at 23.

<sup>103</sup> See DiRusso, *supra* note 27, at 47-48.

frequency of testation among those who are separated or divorced is less clear.<sup>104</sup> Plus, because not all studies operationalize marital status in the same way, results are not directly comparable. As noted above, these comparisons also do not take into account other covariates, such as age or wealth, both of which pattern marital status and may also be shaping the observed variation in testacy.

In addition to marital status, some scholars suggest that family structure may also shape patterns of testacy. Stein and Fierstein document the proportion of decedents who were testate by survivorship pattern,<sup>105</sup> but as they note, “[t]his relationship was found to be complex and not amenable to easy summarization.”<sup>106</sup> Similarly, Sussman et al. report rates of testacy by survivorship for samples of decedents and survivors, but the rates for all groups are within eleven percentage points and the substantive meaning of the observed variation is not clear.<sup>107</sup>

In addition to these findings regarding the incidence and distribution of testacy, existing scholarship offers some insights into the manner in which testate individuals prepared their wills. While lawyers have historically been the dominant source of estate planning expertise and drafting,<sup>108</sup> a growing number of states recognize holographic (handwritten) wills.<sup>109</sup> In addition, doctrinal reforms driven by the use of pre-printed will forms suggest their increased use<sup>110</sup> and the success of Rocket Lawyer and LegalZoom indicate that a growing number of people are using computer programs to automate the drafting of estate planning documents.<sup>111</sup> Thus, there is reason to expect variation in the format and genesis of wills.

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<sup>104</sup> See Glucksman, *supra* note 79, at 288 (also addressing this topic and finding a higher rate of intestacy among those who are married, followed by those who were never married, followed by those who were widowed). Given the structure of his dataset and the use of the inverse outcome variable (intestacy versus testacy), it is difficult to draw a comparison to the other studies.

<sup>105</sup> See Stein & Fierstein, *supra* note 79, at 85.

<sup>106</sup> *Id.* at 84.

<sup>107</sup> See SUSSMAN ET AL., *supra* note 79, at 72.

<sup>108</sup> See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 367-68 (1966) [hereinafter *Law of the Living*].

<sup>109</sup> See, e.g., UNIF. PROB. CODE § 2-502 (UNIF. LAW COMM’N 2019); NATIONAL SURVEY OF STATE LAWS 765-73 (Richard A. Leiter ed., 2015).

<sup>110</sup> See, e.g., PROB. § 2-502 (requiring only the “material portions” of a will be handwritten to be a valid holograph).

<sup>111</sup> See Kristen E. Killian, Note, *The Long Tail and Demand Creation in the Legal Marketplace*, 11 HASTINGS BUS. L.J. 157, 173 (2015).

In her national survey, DiRusso found that 64% of those who were testate reported having had a lawyer draft their will, compared to 36% who reported having drafted their own.<sup>112</sup> Presumably, these self-drafted wills include fully handwritten wills, holographic wills that incorporate pre-printed forms, and attested wills generated using preprinted forms or automated systems. In contrast, several other studies focused exclusively on holographic — handwritten — wills found lower rates of self-drafting. For example, in his study of probate records in Alameda County, Cal., in 2007, Horton found that 42 of the 399 wills filed (11%) were holographs,<sup>113</sup> and a study of “approximately 10,000” probate estates opened from 1990-1995 in Alleghany County, Pa., found that 145 estates involved holographic wills.<sup>114</sup> An earlier investigation of probate records filed from 1976 to 1985 in Nashville (Davidson County), Tenn. found that seventeen of the sixty-six estates where will contests were filed involved holographs;<sup>115</sup> however, because holographs are more likely to be involved in will contests,<sup>116</sup> it is impossible to estimate from this result the total number of holographs. Finally, in their study of probate records from Bernardino County, Cal., from the 1960s, Friedman et al. found that 11% of wills observed were holographs.<sup>117</sup>

## 2. Other Estate Planning Instruments

While our empirical understanding of testacy might fairly be labeled as incomplete, our knowledge of the use of other estate planning instruments is truly limited. These include instruments other than wills that govern the transfer of property at death — so-called will substitutes — such as trusts, joint ownership arrangements, and beneficiary designations. Many estate plans also include powers of attorney that transfer decision-making authority over one’s property and health care to another individual in the event of one’s incapacity.

Studies of Americans’ wealth holdings indicate the increasing importance of will substitutes.<sup>118</sup> The Health and Retirement Survey traces the use of revocable trusts among its sample of older adults, with

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<sup>112</sup> See DiRusso, *supra* note 27, at 42 n.11.

<sup>113</sup> See Horton, *Defense of Probate*, *supra* note 38, at 653.

<sup>114</sup> Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 42 (2008).

<sup>115</sup> See Schoenblum, *supra* note 46, at 652.

<sup>116</sup> See Horton, *Defense of Probate*, *supra* note 38, at 653.

<sup>117</sup> See Friedman et al., *supra* note 79, at 1465.

<sup>118</sup> See generally Langbein, *Nonprobate Revolution*, *supra* note 23.

James reporting lower rates of usage relative to testacy, but many other similar patterns of variation.<sup>119</sup> However, we lack more detailed information about the use of these instruments.

Empirical evidence regarding the use of estate planning instruments that address incapacity is also limited. Medical researchers find that only a minority of the population has a living will,<sup>120</sup> with one study reporting that 9.8% of decedents in a national sample of those dying in 1986 had executed a living will during their lifetime.<sup>121</sup> Empirical evidence on the prevalence of powers of attorney for finances is lacking. Thus, much remains unknown about the prevalence and distribution of estate planning instruments dealing with incapacity and will substitutes, as well as potential overlapping usage of multiple estate planning instruments.

### B. Data and Methodological Limitations

In this Section, I discuss how several data and methodological issues constrain our empirical understanding of estate planning. Existing studies illustrate the challenges of relying on data drawn from administrative records or selective surveys to investigate estate planning utilization. This Section highlights the need for an alternate research design to identify contemporary national patterns of estate planning behavior.

#### 1. Timing

As a preliminary matter, many of the existing studies are now quite dated.<sup>122</sup> Estate planning practices have evolved over time<sup>123</sup> suggesting that older studies may not accurately reflect current behaviors. In addition, there is reason to believe that there are cohort effects in estate planning, meaning that behavior is linked not only to age but to generation.<sup>124</sup> For example, generational variation in demographic

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<sup>119</sup> See James III, *supra* note 79, at 15-16.

<sup>120</sup> See Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, 34 HASTINGS CTR. REP. 30, 32 (2004).

<sup>121</sup> See Laura C. Hanson & Eric Rodgman, *The Use of Living Wills at the End of Life: A National Study*, 156 ARCHIVES INTERNAL MED. 1018, 1019 (1996).

<sup>122</sup> See Horton, *Defense of Probate*, *supra* note 38, at 610 (noting that existing studies “are decades out of date”).

<sup>123</sup> See, e.g., Friedman, *Law of the Living*, *supra* note 108, at 366-68; Langbein, *Nonprobate Revolution*, *supra* note 23, at 1108.

<sup>124</sup> See James III, *supra* note 79, at 7, 15-16 (tracing cohort changes in population and estate planning).

patterns and wealth may portend variation in estate planning behavior.<sup>125</sup> Differing behavior across generations will shift aggregate patterns as generations age and the composition of the population shifts. Thus, there is a need for novel data to investigate current patterns of estate planning behavior.

## 2. Scope

A second general point is the limited scope of most of the existing studies, which have overwhelmingly focused on testacy. While this is consistent with the historical primacy of wills as mechanisms of donative transfers at death, it is at odds with the rising import of nonprobate will substitutes.<sup>126</sup> And while it is also an understandable response to the relative availability of probate records compared to the absence of any publicly-available administrative data on the use of will substitutes,<sup>127</sup> it limits our understanding of estate planning more broadly. This means that new data on estate planning utilization is needed to evaluate the overlapping usage of wills and will substitutes and the comprehensiveness of modern estate plans.

## 3. Sample Representativeness

Sample representativeness refers to the ability of a sample of observations to accurately describe the larger population from which it is drawn. While a random sample of sufficient size is likely to describe the population from which it is drawn, a sample that systematically excludes certain observations will be biased and unrepresentative.<sup>128</sup> As scholars in this area have long recognized, selection into probate is non-random.<sup>129</sup> As a result, studies relying on probate records are unlikely to describe the estate planning behavior of *all* decedents within the population of a given jurisdiction at a specific point in time. Similarly, surveys of non-random samples of individuals are also likely to be

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<sup>125</sup> See *id.* at 11, 13.

<sup>126</sup> See generally Langbein, *Nonprobate Revolution*, *supra* note 23.

<sup>127</sup> See Horton, *Defense of Probate*, *supra* note 38, at 654 (“[T]rust administration is a black box: we can only guess how long it normally takes, how much it usually costs, and how often trustees and beneficiaries are able to resolve thorny issues without resorting to judicial intervention.”).

<sup>128</sup> See DARRELL HUFF, *HOW TO LIE WITH STATISTICS* 18 (1954) (“A river cannot, we are told, rise above its source . . . . It is equally true that the result of a sampling study is no better than the sample it is based on.”).

<sup>129</sup> See, e.g., Horton, *Defense of Probate*, *supra* note 38, at 626; Schoenblum, *supra* note 46, at 612.

biased estimates of estate planning behavior among the general population. For this reason, an alternate source of data is necessary to generate estimates of the behavior of the national adult population.

#### 4. Sample Generalizability

In addition, sample generalizability is also a concern. Even if a sample perfectly represents its population of interest, the behaviors observed within that population may not tell us anything about behavior anywhere else.<sup>130</sup> If probate practices in a given jurisdiction are unique, for example, then estate planning behaviors are likely to be different elsewhere. As David Horton notes, “statistics from a single county are a pinprick of light in the vast darkness of probate.”<sup>131</sup> Thus, a more generalizable sample is needed to assess large-scale national patterns of behavior.

#### 5. Sample Size

In addition to sample composition, sample size can also be a limiting factor. Having a greater number of observations increases statistical power, meaning that it is less likely that observed results are a function of sampling variation.<sup>132</sup> In addition, a greater sample size can provide subsamples of sufficient size for analysis. For example, an investigation into rates of estate planning among non-White populations requires a subsample of non-White individuals that is sufficiently large to be representative of the group. Larger sample sizes also facilitate statistical analysis of the relationship between multiple covariates of estate planning simultaneously.<sup>133</sup> Moreover, because only a portion of the population engages in estate planning, any sample must be large enough to capture population variation among those with and without estate plans.

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<sup>130</sup> See Schoenblum, *supra* note 46, at 608 (“The data obtained is in no way probative of conditions in Davidson County during other historical periods or in any other county.”).

<sup>131</sup> Horton, *Wills Law*, *supra* note 46, at 1122.

<sup>132</sup> See HUFF, *supra* note 128, at 39-40 (offering a humorous and approachable introduction to sampling methodology and statistical power); see also JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 6-8 (2d ed. 1988) (noting that the reliability of a statistic is “always dependent upon the size of the sample”).

<sup>133</sup> For a discussion of the potential, and pitfalls, of overcoming omitted variable bias, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* 59-68 (2009).

## 6. Statistical Significance

Because of sampling error, we know that a single sample offers only an estimate of the population parameters. When we compare two subgroups within a sample, we may observe differences that are the result of sampling error, whereas if we could observe the two groups within the population, we would not find such differences. Statistical analysis allows us to determine how likely it is that the differences we observe between two groups within a sample are the result of this type of error.<sup>134</sup> While several existing studies illustrate variation in levels of testacy across socio-demographic characteristics, most studies rely on cross-tabulated counts, while only a few provide statistical analysis of these distributions.<sup>135</sup> This leaves open several questions regarding the robustness of these associations, which should be addressed in future work.

## 7. Bivariate Analyses

Finally, we know that many of the observed covariates of estate planning are themselves correlated. For example, education and income are positively correlated, with those who have more education earning, on average, more than those with lower levels of education. If both education and income are also correlated with the propensity to make a will, then we must account for their interrelationship to understand the association between testacy and either education or income alone. Without doing so, it is impossible to know how much of an observed association between education and testacy is the result of education and not variation in income. All of the existing studies rely on bivariate analyses, meaning that they compare rates of testacy across values of one other variable at a time. Thus, there is a need for multiple regression analysis to evaluate multiple covariates simultaneously.

### *C. Open Empirical Questions*

Reviewing the existing scholarship in light of these data and methodological considerations reveals several open empirical questions regarding estate planning behavior. A first set of questions surrounds the prevalence of various forms of estate planning, including not only wills but also trusts, other will substitutes, and instruments that address the need for health and financial decision-making in the event of

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<sup>134</sup> See HUFF, *supra* note 128, at 42.

<sup>135</sup> See generally DiRusso, *supra* note 27; Fellows et al., *supra* note 79.

incapacity. Relatedly, there is a need for more information regarding the means through which individuals obtain these instruments. Probate practice is often portrayed as an area of law that is ripe for automation and other technological intervention.<sup>136</sup> However, there is little evidence of how extensively such innovations are being used or the types of instruments they are used to generate. Another series of questions concerns variation in rates of estate planning utilization across individual characteristics. While prior studies document variation in the frequency of testacy across several such characteristics, we lack statistical analysis of these relationships in data drawn from a nationally representative sample of sufficient size to yield robust results.

### III. EMPIRICAL STUDY

This study offers a first step toward addressing these open questions. Specifically, the study offers national data on the prevalence of testacy and other forms of estate planning, the means through which individuals obtain estate planning instruments, variation in the likelihood of testacy across socio-demographic groups, and an analysis of the interplay in the use of estate planning instruments. In this Section, I describe the data and methods relied upon by the study and present the empirical findings.

#### A. Data and Methods

##### 1. Survey Design

This Article relies on a custom online survey that was administered to a national sample (N=1,975) drawn from a proprietary panel of potential respondents. Online surveys are a cost-effective means of generating national data and have been used to investigate estate planning behavior and preferences.<sup>137</sup> The median survey duration was 11.5 minutes.<sup>138</sup> The survey included questions on basic demographic and socioeconomic characteristics, family structure, estate planning utilization, attitudes toward estate planning, and distributive

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<sup>136</sup> See Emily S. Taylor Poppe, *The Future is Bright Complicated: AI, Apps, and Access to Justice*, OKLA. L. REV. 185, 192-93 (2019).

<sup>137</sup> See, e.g., DiRusso, *supra* note 27, at 38-39; Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 249 (2018).

<sup>138</sup> Average survey duration was 16.5 minutes (SD 26.5 minutes). The large variation reflects, in part, the influence of a number of surveys that were open for hours but did not likely involve active participation for the entire duration.

preferences.<sup>139</sup> This Article relies only on data drawn from the questions regarding individual characteristics and estate planning utilization.

The survey was administered by Qualtrics,<sup>140</sup> which screened potential respondents to generate a sample that is consistent with the U.S. population by gender, age, race/ethnicity, household income, education, and geographic region.<sup>141</sup> Quotas were set for each of these characteristics individually, with potential respondents excluded from the survey if any applicable quota had been exceeded by more than 5%. Appendix Table 1 provides a comparison of the sample and census distributions, which indicates that sample is quite consistent with national parameters. Thus, while the survey was not administered to a probability sample, the sampling frame was designed to approximate the adult population of the United States.

In addition, attempts were made to limit potential sources of bias. The survey was designed to encourage both testate and intestate individuals to participate.<sup>142</sup> It is important to note, however, that eligible respondents self-selected into the survey. If individuals' propensity to answer the survey is related to estate planning behavior or attitudes, it may introduce selection bias in the results. For example, if individuals who are averse to thinking about estate planning were also less likely to answer the survey, this group would be underrepresented in the survey data.<sup>143</sup> In addition, the dataset is also limited to subjects who provided valid answers to all required questions.<sup>144</sup> If rates of survey completion

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<sup>139</sup> The format of some questions regarding attitudes regarding estate planning is based on questions used by Cheryl Tilse et al. in their Australian survey regarding estate planning behavior. See generally Tilse et al., *supra* note 31.

<sup>140</sup> Qualtrics is a market research and survey administration company. The representativeness of samples for online studies by Qualtrics compare favorably to other providers of online survey panels. See MILIAKEALA SJ. HEEN ET AL., UNLV CTR. FOR CRIME & JUSTICE POL'Y, A COMPARISON OF DIFFERENT ONLINE SAMPLING APPROACHES FOR GENERATING NATIONAL SAMPLES 6 (2014).

<sup>141</sup> The quotas for age, gender, race/ethnicity, education, and geographic region were developed by Qualtrics using data from the 2010 Census; the quotas for household income were developed using the 2015 American Community Survey.

<sup>142</sup> The introduction to the survey included the following description, "This survey is about will-making. We are hoping to find out more about why people do or do not have a will." The goal of alluding to both testacy and intestacy was to decrease bias resulting from intestate individuals opting out of the survey at disproportionate rates.

<sup>143</sup> See Tilse et al., *supra* note 31, at 4 (noting, in reporting results of a survey regarding estate planning, that "it is possible that most people unwilling to contemplate [mortality and estate planning] did not agree to participate in the survey").

<sup>144</sup> For most respondents, all questions presented were required; the number and content of questions presented is a function of the survey's internal structure and respondents' answers to several questions (i.e., respondents who reported being intestate were not asked how their will was prepared). However, due to an oversight by

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varied systematically with estate planning behavior, this could also introduce bias into the sample.

It is impossible to investigate these possibilities because the estate planning behavior and attitudes of individuals who opted out of the survey or failed to complete it are not observed. However, any such selection effects would most likely positively bias the results, as individuals with estate plans would be more likely to be included in the sample. This means that the results likely represent a best-case-scenario measure of estate planning utilization, and a conservative measure of intestacy.

## 2. Variables

Variables for several individual characteristics and estate planning behaviors were created using the resulting dataset. Individual demographic characteristics include self-reported gender,<sup>145</sup> age,<sup>146</sup> and race/ethnicity. Categories for race/ethnicity are non-Latino White, non-Latino Black, non-Latino Asian, Latino, and other.<sup>147</sup> The other category includes non-Latinos who selected “other” race, multiple races, or Native American.<sup>148</sup> Respondents also reported their current marital status: never married, married, separated, divorced, and widowed. Parental status is operationalized using an indicator variable that is equal to one if respondents reported having any children.<sup>149</sup>

Variables indicating socioeconomic status are income, wealth, and education. Income is operationalized using a categorical variable

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the survey administrators, there were a few instances in which respondents were not forced to answer certain questions or were not forced to answer questions in a particular format. Any missing data generated as a result is indicated in the results.

<sup>145</sup> The survey included three responses for gender: male, female, and other. Respondents who selected other (n=6) were excluded from the analytic sample because of insufficient subsample size.

<sup>146</sup> The age variable is computed from a question that asked respondents in what year they were born. Because of an error in survey administration, this variable is missing for twenty respondents; these respondents are included in a missing category in all analyses.

<sup>147</sup> These data were gathered using separate questions for Hispanic/Spanish/Latino ethnicity and race, following the U.S. Census format. Due to an error by the survey administrators, respondents who indicated that they were of Latino ethnicity were not asked their race. Accordingly, Latino ethnicity and race are treated as mutually-exclusive categories.

<sup>148</sup> As is common in surveys that do not incorporate oversamples of minority populations, the number of respondents in these categories is too small to allow for statistical analysis.

<sup>149</sup> The question asked, “Do you have any children (including biological, adopted, or step)?”

measuring household income over the past twelve months and is top-coded at \$200,000. The variable for wealth is a categorical variable indicating negative wealth, zero net wealth, and bracketed amounts of positive wealth top-coded at \$500,000. The education variable reflects the highest level of education completed by the respondent and is comprised of categories for those with less than a high school diploma, a high school diploma or equivalent, some college or an associate's degree, a bachelor's degree, and a graduate degree (including master's, doctoral, and professional degrees).

Estate planning variables report respondents' use of several estate planning instruments as well as their methods of preparation. Specifically, respondents were asked whether they had executed a will, a revocable trust, a power of appointment for healthcare, or a power of appointment for finances. For each instrument a respondent reported having, the respondent was asked to indicate how the instrument was prepared. Additional questions addressed the possibility that subjects could have had more than one will over their lifetime.<sup>150</sup>

### 3. Analytic Methods

Using these data, the Article presents descriptive results and relies on logistic regression to estimate the relative associations between individual characteristics and estate planning outcomes. Logistic regression is an appropriate method for predicting binary dependent variables. In this case, the models are used to predict the probability of having a will relative to the probability of not having a will across values of the independent variables. Where these associations are statistically significant, it indicates that it is unlikely that an association that extreme would be observed if there were no relationship between the predictor and testacy. The statistical models presented should not be interpreted as evidence of causal relationships between individual-level predictors and estate planning outcomes as the research design employed does not support this type of inference.<sup>151</sup>

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<sup>150</sup> The survey asked respondents whether they had more than one will and, if so, recorded the preparation method for both the respondent's first will and current will.

<sup>151</sup> For an introduction to research designs that support causal inference in the legal context, see generally Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17 (2011). For broader treatments, see generally ANGRIST & PISCHKE, *supra* note 133; STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, *COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH* (2d ed. 2015).

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B. *Patterns of Estate Planning Utilization*

Using these data, I describe national patterns of estate planning utilization. First, I present results regarding the prevalence of estate planning, measured by the use of wills, trusts, and powers of appointment. I then evaluate the ways in which individuals obtained these instruments, whether from a lawyer or through some form of self-preparation. In the second Subsection, I present results regarding variation in estate planning across demographic characteristics, indicators of socioeconomic status, and family structure. Here, I focus on variation in rates of testacy, through both descriptive statistics and multiple logistic regression. Finally, in the third Subsection, I describe estate planning more holistically, exposing the overlapping usage of multiple estate planning instruments.

1. The Prevalence of Estate Planning

Table 2 indicates the prevalence and manner of preparation of wills, revocable trusts, and powers of attorney for health and finance. As Table 2 indicates, 43% of respondents report having a will, 26% have a revocable trust, 44% have a power of attorney for health care, and 38% have a power of attorney for finances.<sup>152</sup> As expected given the national sample, the testacy rate is lower than that observed in most studies based on probate records; however, it is also higher than that observed by DiRusso in her earlier survey of a national sample.<sup>153</sup> Among those who report having a will, 193 (23% of testate respondents) report that their current will is not their first will, offering a preliminary measure of the rate at which individuals update existing estate plans.

Not surprisingly, the use of wills continues to outpace the use of revocable trusts, which are not necessary to accomplish the goals of all individuals, are generally more difficult to draft, and require lifetime administration. At the same time, the results indicate that more than one-quarter of adults have a revocable trust, confirming their importance as will substitutes. The prevalence of powers of attorney for health is somewhat surprising, with the results indicating that a greater proportion of adults have a power of attorney for healthcare than have a will. This may reflect public awareness of issues surrounding medical care in cases of incapacity and end-of-life decision-making; it may also be a function of the multiple stakeholders — including medical

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<sup>152</sup> See *infra* Table 2.

<sup>153</sup> See DiRusso, *supra* note 27, at 41-42.

professionals — who have an interest in expanding the use of these instruments.

Table 2. Prevalence and Preparation Method of Estate Planning, By Instrument

	Will	Trust	Powers of Attorney, Health	Powers of Attorney, Finance
	<i>Frequency (Percent)</i>			
Incidence	841 (43%)	516 (26%)	873 (44%)	742 (38%)
<i>Preparation Method</i>				
Lawyer	445 (53%)	242 (47%)	354 (41%)	352 (47%)
Self-Drafted	181 (22%)	130 (25%)	196 (22%)	169 (23%)
Fill-In Form	74 (9%)	51 (10%)	136 (16%)	81 (11%)
Software/App	85 (10%)	53 (10%)	86 (10%)	77 (10%)
Non-Lawyer Assistance	48 (6%)	38 (8%)	82 (9%)	57 (8%)
Other	8 (1%)	2 (<1%)	19 (2%)	6 (1%)

Note: Table 2 shows the frequency (number and rate) of wills, trusts, powers of attorney for health, and powers of attorney for finance among survey respondents. It also shows the frequency (number and rate) with which each instrument was prepared by a lawyer, self-drafted, drafted using a fill-in form, drafted using software/a computer application, prepared with assistance from a non-lawyer, or other method.

Table 2 also indicates, for each instrument, whether it was prepared by a lawyer, self-drafted, created using a fill-in form, generated with software or a computer application, developed with assistance from a non-lawyer, or created in some other way. For each type of instrument, lawyers are the most common method of preparation, accounting for 53% of wills, 47% of revocable trusts, 41% of powers of attorney for

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healthcare, and 47% of powers of attorney for finances.<sup>154</sup> However, if all forms of self-preparation are consolidated, they account for a larger share of the preparation than lawyers for every instrument except wills: 46% of wills, 53% of trusts, 57% of powers of attorney for health, and 52% of powers of attorney for finances.

A few findings are of particular note. First, lawyers prepare a greater share of wills than revocable trusts, suggesting higher rates of self-preparation of trusts than anecdotal evidence might have suggested. Second, the frequency of the use of fill-in forms to prepare powers of attorney for healthcare — while not surprising — is notable for its policy implications. Given the existence of similar fill-in forms for powers of attorney for finances, the lower rate at which individuals report having such powers of attorney and the lower rate at which those who do used fill-in forms to prepare them, suggests that these fill-in forms may be underutilized. Finally, software and computer applications account for the preparation of about 10% of each type of instrument; this offers an important benchmark against which future measures might be compared to track potential growth in the use of legal technology in the probate context.

## 2. Patterns of Testacy

I next investigate the relationship between individual characteristics and estate planning utilization. Following earlier research, this analysis focuses on testacy. Table 3 first offers a descriptive assessment, by providing summary statistics for the full sample (N=1,975) and for those who report having a will (n=841).

As Table 3 indicates, wills are more prevalent among females, individuals aged sixty-five and over, non-Latino Whites and Latinos, those who report wealth equal to or greater than \$50,000, individuals who have a college or graduate degree, those who are married, and parents. The average household income is also higher among testate individuals than those without wills. Chi-squared tests of independence indicate that the relationships between testacy and gender,<sup>155</sup> race and

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<sup>154</sup> For those individuals who reported having multiple wills, the values in Table 2 report the preparation method for their first will.

<sup>155</sup>  $X^2(1) = 52.96$ ,  $p = 0.00$ .

ethnicity,<sup>156</sup> age,<sup>157</sup> wealth,<sup>158</sup> education,<sup>159</sup> marital status,<sup>160</sup> and parental status<sup>161</sup> are all statistically significant. A logistic regression indicates a statistically significant positive association between household income and the probability of testacy.<sup>162</sup> These results are consistent with the findings of many earlier studies.

Table 3. Summary Statistics, for Full Sample and Testate Respondents

	Full Sample	Testate Individuals
	<i>Proportion or Mean (SD)</i>	
Female	0.52	0.42
<i>Age</i>		
Under 25	0.07	0.05
25-34	0.18	0.15
35-44	0.18	0.16
45-54	0.20	0.17
55-64	0.17	0.18
65 and Over	0.18	0.27
Missing	0.01	0.01
<i>Race and Ethnicity</i>		
Non-Latino White	0.62	0.66
Non-Latino Black	0.13	0.10
Non-Latino Asian	0.05	0.04
Latino	0.17	0.18
Non-Latino Other	0.03	0.02
Household Income (\$1,000)	67.19 (49.65)	85.54 (53.87)
<i>Wealth</i>		
Negative Wealth	0.20	0.07
Zero Wealth	0.24	0.17
<\$50,000	0.18	0.15
\$50,000 to <\$150,000	0.16	0.21
\$150,000 to <\$500,000	0.13	0.20

<sup>156</sup>  $X^2(4) = 17.84, p = 0.001.$

<sup>157</sup>  $X^2(6) = 88.41, p = 0.00.$

<sup>158</sup>  $X^2(9) = 397.66, p = 0.00.$

<sup>159</sup>  $X^2(4) = 191.24, p = 0.00.$

<sup>160</sup>  $X^2(4) = 122.77, p = 0.00.$

<sup>161</sup>  $X^2(1) = 53.31, p = 0.00.$

<sup>162</sup>  $\beta = 0.01$  (SE = 0.00),  $p < 0.001.$

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2548	<i>University of California, Davis</i>	[Vol. 53:2511
\$500,000 +	0.10	0.20
<i>Education</i>		
Less than High School	0.04	0.02
High School Diploma	0.28	0.20
Some College, Assoc. Degree	0.32	0.26
College Degree	0.23	0.28
Graduate Degree	0.14	0.24
<i>Marital Status</i>		
Never Married	0.28	0.18
Married	0.52	0.65
Separated	0.02	0.02
Divorced	0.11	0.08
Widowed	0.06	0.07
Parent	0.67	0.76
N	1,975	841

Note: Table 3 provides summary statistics — mean and standard deviation or proportion — for the full sample and for testate individuals.

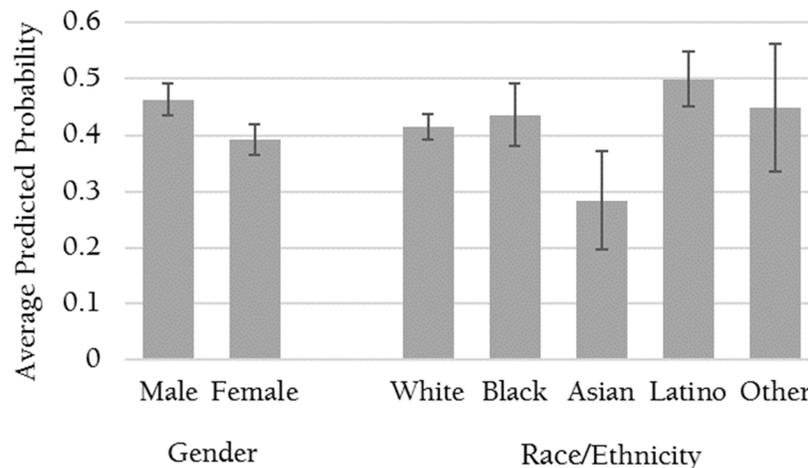
However, the descriptive analysis does not account for the potential interrelationship of these covariates. To investigate the relationship between testacy and each independent variable after adjusting for other covariates, Appendix Table 2 presents the estimated odds ratios and 95% confidence intervals from a series of logistic regression models predicting testacy using individual characteristics. Model 1 includes only gender, age, and race/ethnicity as independent variables. Model 2 adds three variables measuring components of socioeconomic status: household income, wealth, and education. Finally, Model 3 incorporates variables for marital and parental status.

To make the interpretation of these results more intuitive, I also estimate the average predicted probability of testacy across several individual characteristics using Model 3. The average predicted probabilities are generated by calculating the predicted probability of testacy for each observation with the independent variable of interest set to each possible value, with the values of all other independent variables taken as observed. In the figures below, the average predicted probability for each value of the independent variable is indicated by a bar. Confidence intervals are shown for each of the average predicted probabilities, indicating the range within which the true value would fall in 95% of repeated samples. Where the confidence intervals for different values of the independent variables do not overlap, the

differences in the average predicted probabilities are statistically significant at the 0.05 level.

Across all three models, being female is statistically significantly associated with a decrease in the probability of testacy, although the magnitude of this relationship declines as additional covariates are incorporated. Figure 1 presents the average predicted probability of testacy by gender and by race/ethnicity. As the figure illustrates, women, on average, have a lower probability of being testate than men (women: probability = 0.39, SE = 0.01; men: probability = 0.46, SE = 0.01).

Figure 1. Average Predicted Probability of Testacy, by Gender and Race/Ethnicity



Note: Figure 1 shows the average predicted probability of testacy by gender and race/ethnicity. Results are generated from Model 3 in Appendix Table 2 and take all other independent variable as observed. Error bars indicate the 95% confidence interval.

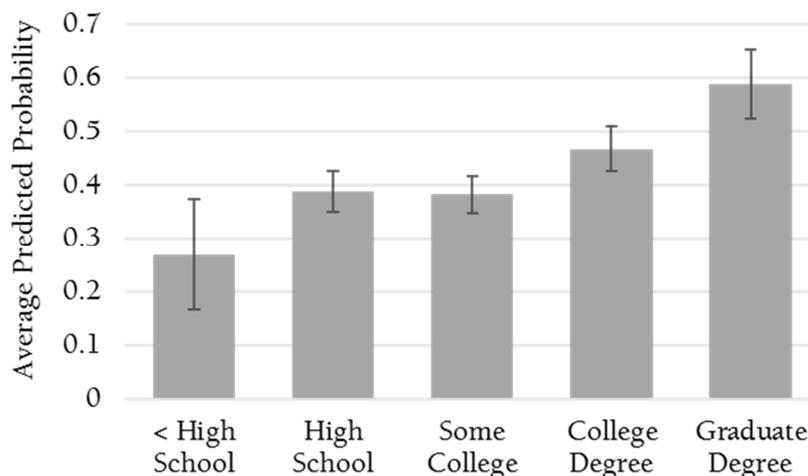
The regression models indicate that non-Latino Asians are less likely than non-Latino Whites to be testate, after adjusting for all other covariates. In contrast, being Latino is associated with increased probability of testacy relative to that of non-Latino Whites. While Model 1 estimates that non-Latino Blacks have a lower rate of testacy than that of non-Latino Whites, this association is diminished in later models that adjust for socioeconomic status and family structure. These patterns are illustrated by Figure 1. After controlling for other individual characteristics, it is the relatively lower probability of testacy among Asians (probability = 0.28, SE = 0.04) that stands out as the most robust

result. Latinos have the highest average predicted probability of testacy (probability = 0.50, SE = 0.02), but this value is statistically significantly distinguishable only from non-Latino Whites and Asians.

Both household income and wealth are positively associated with testacy. More specifically, negative wealth is associated with a decrease in the odds of testacy, relative to having zero wealth, while all categories of positive wealth are associated with an increase in the odds of testacy. The magnitude of these positive associations increases across categories of positive wealth; it is important to recall that as wealth increases, these categories include larger ranges of wealth.

In addition, several categories of educational attainment are associated with testacy. Having less than a high school education is negatively associated with testacy, relative to having some college or an associate's degree. In addition, having a college degree or graduate degree is associated with an increase in the odds of having a will. Figure 2 provides the average predicted probability of testacy by education level and helps to illustrate the uneven nature of the relationship between education and testacy. While those with less than a high school diploma have the lowest average predicted probability of being testate (probability = 0.27, SE = 0.05), this is not statistically significantly different from the average predicted probability of testacy for those with a high school diploma ( $p = 0.39$ , SE = 0.02) or some college (probability = 0.38, SE = 0.02). In contrast, those who have a college degree do have a higher average predicted probability of being testate (probability = 0.47, SE = 0.02) and those with graduate degrees have an average predicted probability of testacy that is higher still (probability = 0.59, SE = 0.03). Thus, the results suggest that while testacy may be positively associated with education generally, it is particularly collegiate and post-graduate education that are most strongly associated with testacy.

Figure 2. Average Predicted Probability of Testacy, by Education



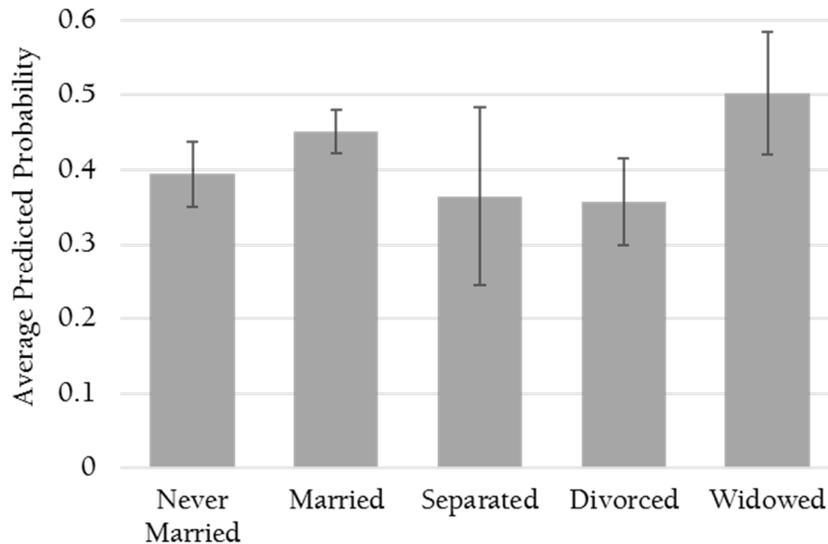
Note: Figure 2 shows the average predicted probability of testacy by education. Results are generated from Model 3 in Appendix Table 2 and take all other independent variable as observed. Error bars indicate the 95% confidence interval.

The association between marital status and testacy is also complex. The model indicates that both being married and being widowed are statistically significantly associated with a higher probability of being testate, relative to never having been married. Figure 3 illustrates the average predicted probability of testation by marital status. The wide confidence interval for those who are separated is likely a function of limited sample size ( $n=49$ ) and means that it is impossible to conclude with confidence that the probability of testacy for this group differs from those observed among other marital status groups. Similarly, the overlapping confidence intervals for those who are widowed and those of the other marital status groups also prevents us from concluding that there is a statistically significant difference in the probability of testacy across these groups.<sup>163</sup> In contrast, there is only slight overlap in the range of average predicted probabilities of testacy among those who are married (probability = 0.45, SE = 0.01) and both those who have never married (probability = 0.39, SE = 0.02) and those who are divorced (probability = 0.36, SE = 0.03). While the difference in the probability

<sup>163</sup> In comparison, the statistically significant coefficient rejects the null hypothesis that there is no association between being widowed and testacy, relative to never having been married.

of testacy across these groups does not achieve statistical significance, the results are suggestive of a higher probability of testacy among those who are married relative to individuals who are divorced or have never been married.

Figure 3. Average Predicted Probability of Testation, by Marital Status



Note: Figure 3 shows the average predicted probability of testacy by marital status. Results are generated from Model 3 in Appendix Table 2 and take all other independent variable as observed. Error bars indicate the 95% confidence interval.

Finally, consistent with the descriptive finding that testacy is more prevalent among parents, the regression analysis indicates that parenthood is positively associated with testacy, even after adjusting for all other covariates. The average predicted probability of testacy is higher for parents (probability = 0.45, SE = 0.01) than for non-parents (probability = 0.38, SE = 0.02).

Thus, the descriptive results and regression models indicate that several individual characteristics are associated with testacy. However, it is also important to note that even the most inclusive model — Model 3 — accounts for only about 20% of the observed variation in testacy.<sup>164</sup>

<sup>164</sup> See *infra* Appendix Table 2.

Thus, there are likely several additional unobserved explanations for variation in estate planning utilization.

### 3. Estate Planning Overlaps

Because estate planning instruments are not used in isolation, but can together form a comprehensive estate plan, I also analyze patterns of overlapping usage of wills, trusts, and powers of attorney. Table 3 presents the estimated correlation coefficients for utilization of each of the four estate planning instruments observed. A correlation coefficient indicates the strength of the association between two variables and can range from -1 (indicating a perfect negative association) to 1 (indicating a perfect positive association) with 0 indicating no association. A larger absolute value for the correlation coefficient indicates a stronger association.

In Table 3 below, the coefficient describes whether respondents who have one type of estate planning instrument are more or less likely to have a second type of estate planning instrument. Each of the correlations is positive, indicating a positive relationship in the usage of multiple instruments and each is statistically significantly different from zero. The magnitudes of the correlations are relatively strong, particularly between the two forms of powers of attorney.

Table 3. Estimated Correlation Coefficients for Estate Planning Instruments

	Will	Trust	Power of Attorney, Health	Power of Attorney, Finance
Will	1			
Trust	0.51***	1		
Power of Attorney, Health	0.59***	0.52***	1	
Power of Attorney, Finance	0.64***	0.59***	0.76***	1

Note: Table 3 provides the estimated correlation coefficients for each pair of estate planning instruments. Statistical significance is noted by \*\*\* indicating that  $p < 0.001$ .

Considering the overlapping usage of estate planning instruments in another way, I also measure patterns of usage. Every possible permutation of usage for the four estate planning instruments investigated appears in the data, although at differing rates. As Figure 4 indicates, the most common pattern is the absence of any estate planning instruments, which describes 44% of the population. The second most frequent pattern is having a complete estate plan, including a will, revocable trust, and both types of powers of attorney; this pattern accounts for 19% of respondents. Another 11% of respondents have a slightly less comprehensive plan, which includes a will and both kinds of powers of attorney. The last two most commonly observed patterns are having a will only (6%) or having a power of attorney for healthcare only (5%). The remaining 14% of respondents have at least one estate planning instrument in some alternate pattern.

These results bolster the traditional use of testacy as a measure of estate planning, as most individuals who have any form of estate plan have a will. However, they also highlight a distinction between those individuals whose estate plans also plan for incapacity and those whose plans focus exclusively on testamentary transfers. Additional research is needed to better understand the mechanisms that generate this variation.

Figure 4. Prevalence of Estate Planning Patterns

Will	Trust	POAH	POAF		N	%
○	○	○	○	No Estate Plan	876	44%
○	○	●	○	POAH Only	107	5%
●	○	○	○	Will Only	126	6%
●	○	●	●	No-Trust Plan	208	11%
●	●	●	●	Comprehensive Plan	377	19%
—	—	—	—	Other	281	14%

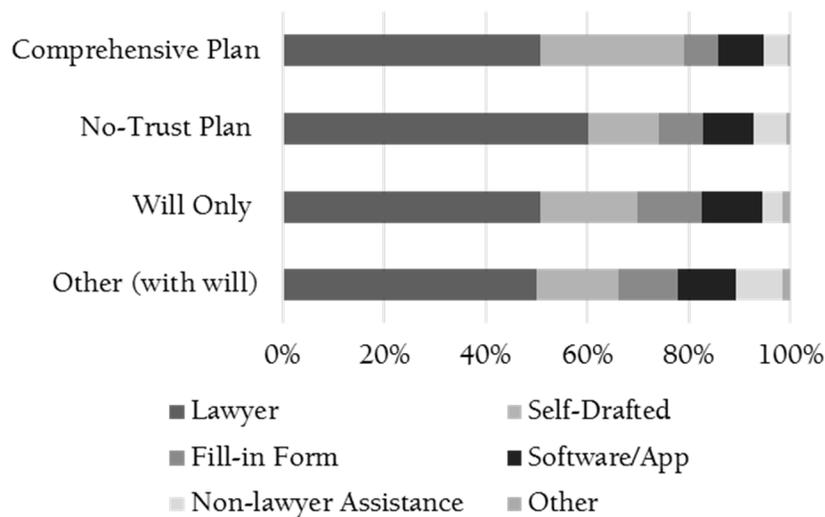
Note: Figure 4 indicates the prevalence of estate planning patterns (frequency and rate) comprising various combinations of estate planning instruments: Will; Trust; Power of Attorney, Health (“POAH”); and Power of Attorney, Finances (“POAF”).

As a first step in this direction, Figure 5 reports the distribution of will preparation method for each of the patterns of estate planning utilization that includes a will. While lawyers are the most common method of preparation for respondents who reported having a

comprehensive plan (N = 191, 51%), this rate does not differ greatly from the rate of lawyer preparation for the other patterns. Of the respondents with a no-trust plan, 60% reported that a lawyer prepared their will, as did 51% of respondents with a will-only plan, and 50% of those with an alternate pattern that included a will. Moreover, 19% (n=24) of respondents with a comprehensive plan reported having self-drafted their will.

A comprehensive plan offers several benefits beyond simply distributing the decedent's assets, including planning for incapacity, flexibility in future distributions, privacy, and ongoing management and administration. However, it requires greater effort to draft the multiple components of such a plan. Therefore, the observed rates of self-preparation for this type of plan challenge common perceptions of estate planning utilization and suggest important directions for future investigation.

Figure 5. Method of Preparation of Will, by Estate Planning Pattern



Note: Figure 5 indicates the percent of wills that were prepared by a lawyer, self-drafted, drafted using a fill-in form, drafted using software/an application, prepared with non-lawyer assistance, or drafted in another way, by estate planning pattern. Estate planning patterns are comprehensive plans (will, trust, powers of attorney for health and finance), no-trust plans (will and powers of attorney for health and finance), will only plans (will), and other patterns that include a will.

## CONCLUSION

This study provides the most comprehensive current description of the incidence of estate planning across the American population, including measures of multiple estate planning instruments. It describes variation in estate planning by demographic and socioeconomic characteristics, and marital and parental status. By leveraging a large national sample and multiple logistic regression analysis, it evaluates these covariates simultaneously. The novel data offer a contemporary perspective that serves as a benchmark against which future empirical findings may be compared.

Thus, this study offers a much-needed empirical foundation for our understanding of contemporary estate planning behavior. However, it is only a starting point for deepening our theoretical understanding of estate planning. While theories of estate planning exist, none offers a comprehensive explanation for observed patterns of behavior.<sup>165</sup>

For example, it is often assumed that the failure to engage in estate planning is an intentional choice reflecting a rational cost-benefit analysis.<sup>166</sup> The suggestion is that for individuals with small estates, it is simply not cost-effective to draft an estate plan. Indeed, this study confirms that estate planning is more prevalent among those with higher incomes and greater wealth. This is consistent with the greater ability of these individuals to bear the costs associated with estate planning, as well as the potential for economic benefits that may not apply to those with less wealth or fewer assets, such as tax minimization. Yet income and wealth account for only a portion of variation in estate planning utilization, suggesting that this account is incomplete.

An alternate theory is that estate planning is a function of age, with older adults engaging in estate planning because they are more cognizant of their mortality and their increasing mortality risk.<sup>167</sup> Again, the data support this theory, partially. Age is positively associated with testacy and the highest rates of testacy are observed among the oldest members of the sample. However, the data also suggest that something

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<sup>165</sup> See, e.g., Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 863 (2012) (noting that economic analysis of succession has focused on trusts and bequest motivations, to the exclusion of other topics); Marvin B. Sussman et al., *Will Making: An Examination of Client and Lawyer Attitudes*, 23 U. FLA. L. REV. 25, 26-27 (1970).

<sup>166</sup> See, e.g., Clowney, *supra* note 114, at 28-29 (including attorneys' fees among the top reasons for intestacy).

<sup>167</sup> See, e.g., Fellows et al., *supra* note 79, at 336 ("Imminence of death accounts for the differences in testacy between the young and the old.").

more complex is at work. The relationship between age and testacy is not linear; rather, the probability of testacy begins to increase at a greater rate after age 45. Is this the result of an accurate reflection of a non-linear mortality rate? Or is it the result of a cultural understanding of age and the life-course? If so, this raises interesting comparative questions about variation in this pattern across different settings or groups of individuals.

Another interesting question is raised by the finding that college and graduate education is highly positively associated with estate planning, even after adjusting for income and wealth. Is the greater propensity toward estate planning among those who are highly educated the result of a greater awareness of estate planning, or a greater facility to self-prepare estate plans or access legal resources? Or, is the finding spurious, reflecting unobserved wealth or family dynamics that correlate with educational attainment? Additional investigation is needed to assess these possibilities.

Finally, a topic not addressed in the current study due to sample size limitations but which merits greater attention, is the role of state probate law in shaping estate planning behavior. How do patterns of estate planning utilization vary among similarly-situated individuals in different state jurisdictions, particularly across community- and separate-property states? This, of course, raises the question of whether individuals take into account — or are even aware — of the probate laws that apply to them.

At the heart of many of these patterns are questions about what it is that individuals hope to achieve through their estate plans and whether estate planning is required to accomplish this. This study illustrates the utility of large survey data for addressing some aspects of these questions and future work could build upon this study to further investigate variation in dispositive preferences and perceptions of need. At the same time, this study also illustrates the limitations of survey data for unpacking the more individualistic and contextual aspects of this phenomena. Qualitative data may be better suited to increasing our understanding of how, and to what extent, cultural understandings, beliefs, and obligations influence the estate planning process.

This study cements estate planning's place as a topic of both legal and social significance. It offers new insights into the who and how of estate planning. Additional empirical inquiry could lead to the development of a deeper theoretical model of estate planning utilization, addressing the why (or why not) of estate planning. Such a model could help to guide the development of law and policy.

## APPENDIX

Appendix Table 1. Sample and Census Distributions

	Census	Sample
	<i>Proportion</i>	
Female	0.51	0.52
<i>Age</i>		
18-24	0.06	0.07
25-35	0.19	0.19
35-45	0.18	0.18
45-55	0.20	0.20
55+	0.36	0.36
<i>Education</i>		
Less than High School	0.05	0.04
High School Diploma	0.28	0.28
Some College, Assoc. Degree	0.32	0.32
College Degree	0.22	0.23
Graduate Degree	0.13	0.14
<i>Race and Ethnicity</i>		
Non-Latino White	0.63	0.64
Non-Latino Black	0.13	0.13
Non-Latino Asian	0.05	0.05
Native American	0.02	0.01
Latino	0.17	0.17
<i>Income</i>		
< \$25,000	0.13	0.15
\$25,000 - <\$50,000	0.36	0.34
\$50,000 - <\$100,000	0.29	0.30
\$100,000 +	0.22	0.20
<i>Region</i>		
Midwest	0.21	0.18
Northeast	0.19	0.20
South	0.37	0.40
West	0.23	0.21

Note: Appendix Table 1 provides distributions for gender, age, education, race/ethnicity, income, and region for the study sample and the national population. Census figures for gender, age, and race/ethnicity are drawn from the 2010 Census; the household income distribution is drawn from the 2015 American Community Survey. Sample proportions for age are based on the total number of respondents who provided valid data on birth year (N=1,955). Sample

proportions for race/ethnicity exclude individuals who selected “Other” race (n=54) or who selected more than one race (n=26).

Appendix Table 2. Odds Ratios from Logistic Regression Models Predicting Testacy

	Model 1			Model 2			Model 3		
	Odds Ratio	Confidence Interval		Odds Ratio	Confidence Interval		Odds Ratio	Confidence Interval	
Female	0.53	0.44	0.64	0.74	0.60	0.91	0.68	0.55	0.85
<i>Race and Ethnicity</i>									
White ( <i>ref.</i> )	—	—	—	—	—	—	—	—	—
Black	0.77	0.57	1.04	1.07	0.76	1.50	1.12	0.80	1.58
Asian	0.59	0.37	0.96	0.45	0.25	0.80	0.45	0.25	0.82
Latino	1.50	1.15	1.95	1.58	1.16	2.14	1.60	1.17	2.17
Other	0.94	0.53	1.65	1.16	0.59	2.27	1.21	0.64	2.31
Age	1.03	1.02	1.03	1.02	1.02	1.08	1.02	1.01	1.03
Household Income (\$10,000)				1.05	1.02	1.07	1.03	1.00	1.06
<i>Wealth</i>									
Negative Wealth ( <i>ref.</i> )				—	—	—	—	—	—
Zero Wealth				2.44	1.72	3.48	2.52	1.76	3.60
<\$50,000				3.75	2.60	5.42	3.91	2.70	5.68
\$50,000- <\$150,000				5.57	3.82	8.12	5.60	3.82	8.21
\$150,000- <\$500,000				7.39	4.89	11.16	7.42	4.88	11.27
\$500,000 +				12.87	7.69	21.54	13.28	7.83	22.54
<i>Education</i>									
<High School				0.54	0.27	1.06	0.52	0.27	1.02
High School				1.03	0.79	1.35	1.03	0.78	1.35
Some College/Assoc. Degree ( <i>ref.</i> )				—	—	—	—	—	—
College Degree				1.53	1.15	2.03	1.56	1.17	2.08
Graduate Degree				3.06	2.08	4.48	2.89	1.97	4.25
<i>Marital Status</i>									
Never Married ( <i>ref.</i> )							—	—	—
Married							1.36	1.00	1.85
Separated							0.85	0.41	1.75
Divorced							0.81	0.53	1.24

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Widowed							1.79	1.08	2.98
Parent							1.43	1.10	1.86
Constant	0.30	0.21	0.43	0.04	0.02	0.08	0.04	0.02	0.08
R <sup>2</sup> <sub>McFadden</sub>		0.05			0.21			0.22	
N		1,955			1,955			1,955	

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Note: Appendix Table 2 provides odds ratios from three logistic regression models predicting the probability of testacy. For a one-unit change in the independent variable, the odds are expected to change by a factor equal to the odds ratio. For categorical variables, these changes are measured relative to the omitted category. Odds ratios greater than one indicate a positive association between the individual characteristic and the likelihood of having a will, while odds ratios less than one indicate a negative association. Where the confidence interval for the odds ratio does not include zero, the association between the individual characteristic is statistically significant at the 0.05 level. The analytic sample excludes respondents missing data on age.