Does Escheat Cheat Decedents?

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I. INTRODUCTION

"He left a fortune, to no one."[1] Thus began a 2013 New York Times article about Holocaust survivor Roman Blum.[2] Blum died at the age of 97, leaving behind no will, no heirs, and an estate valued at almost $40 million.[3] Blum's estate was the largest escheated estate in the history of the state of New York.[4] Blum's story epitomizes how escheat operates to benefit the state to the detriment of those who knew and loved the deceased.

In the United States, when a person dies with no will and no heirs, the intestate estate escheats, or reverts, to the state.[5] Although states define "heirs" differently, all fifty states provide for escheat to the state in the absence of heirs.[6] As a core principle, estate law aims to effectuate the intent of the decedent, regardless of whether a person dies with or without a will;[7] yet, in respect of this goal, the law of escheat may fall short. Whereas lawmakers could conceive of the state as the inevitable heir of last resort,[8] that result is by no means inevitable. For example, in Great Britain and other countries, courts have some discretion to distribute an estate when the deceased has died intestate, including instances where an escheat would otherwise occur.[9] Courts in these foreign jurisdictions may award a distribution from an estate to a person who is not an heir of the decedent.[10]

The idea that escheat is justified when property is ownerless and no one could reasonably take it[11]—for example, an estate of a decedent who dies intestate and without heirs— seems exaggerated for several reasons. That "no one could reasonably take [the property]" is rebutted by real-world examples, including that of Blum. Blum had friends who could have inherited his estate. In addition, the procedures used by courts in foreign jurisdictions to distribute an intestate estate in the absence of heirs demonstrates that alternatives to escheat do exist. Furthermore,

given the objective of intestacy law to effectuate the intent of the decedent, is it arguable that escheat is unjustified.

The differences between U.S. and foreign law raise a few interesting questions. First, does escheat effectuate intent? Second, should states broaden the definition of heirs, effectively reducing the likelihood that an escheat will occur? Third, would giving a court broad discretion to decide how to distribute an intestate estate in the absence of heirs effectuate intent? In an attempt to answer these questions, I have conducted the first-ever empirical study on the topic of escheat. In this paper, I present the results of this empirical study and an analysis of how the results help to answer the preceding questions. Prior to the discussion of the empirical study, I present background on escheat and a discussion of U.S. and foreign escheat law to set the stage for the empirical study.

II. BACKGROUND ON ESCHEAT

The roots of escheat lie in feudalism. Under feudalism, there could be "no gap in seisin."[12] In other words, the person who had a possessory interest in land had to be identifiable at all times.[13] As a result of the Conquest of England in 1066, whereby Duke William of Normandy became King William I, all land belonged to the king by conquest.[14] When the king granted land to vassals—holders of land by feudal tenure on condition of homage and allegiance—he retained a remainder interest.[15] If a vassal seised in fee simple died intestate without capable heirs, an escheat, or reversion to the Crown, occurred.[16] This continuity ensured that vassal-owed duties were discharged by the person with seisin at all times.[17]

Escheat from "defect of heirs" applied only to real property and not to personal property.[18] Personal property, or chattels, were owned freely and clearly of any encumbrances.[19] Ownerless chattels, termed *bona vacantia*,[20] were forfeited to the Crown—seized, rather than

seised—likely because the royal courts decided the matter.[21] In Great Britain, and in some other foreign jurisdictions, escheat has been abolished.[22] Instead, the Crown has the right to take land, along with chattels, as *bona vacantia*.[23]

III. CURRENT ESCHEAT LAW

A. U.S. Escheat Law

Escheat did not exist at the formation of the United States. The federal government—one of delegated powers—was not sovereign, as was the Crown. As such, it did not assert a claim to escheated property.[24] As states began to codify intestate succession, the standard practice was to list the state as the ultimate taker for simplicity's sake.[25]

Today, all fifty states provide for an escheat of an intestate estate in the absence of heirs.[26] Real property generally escheats to the state within whose jurisdiction it is located.[27] Under some statutes, property subject to escheat goes to the county, municipality, or town in which the property is situated.[28] Escheat may be custodial, whereby the state does not take immediate title, or absolute, whereby the state does take title.[29] Escheated property may be sold, and proceeds from the sale may be deposited in a general fund or a fund with a specific purpose, usually education.[30]

The definition of heirs differs from state to state. Lawmakers use the parentelic system to classify heirs. Under this scheme, the second parentela represent parents and their descendants, the third parentela represent grandparents and their descendants, and so on. Schemes of intestacy in some states track the Uniform Probate Code (UPC), but all of them divide into a category of either unlimited or limited inheritance.[31]

Under a rule of unlimited inheritance, an intestate estate escheats to the state only if the decedent leaves no surviving relatives, no matter how distant the relationship. These states follow the parentelic system through a specified parentela, then provide that the estate goes to the intestate's "next of kin" or "nearest kindred." If there are no kindred, the estate escheats to the state. Currently, eighteen states take this approach.[32]

The remaining thirty-two states have adopted a rule of limited inheritance.[33] Rules of limited inheritance follow the parentelic system through a specified parentela. If there is no taker, seventeen out of these thirty-two states provide for the estate to escheat to the state. The other fifteen states next allow step-relatives to inherit, and if no such step-relatives exist, only then does the estate escheat to the state.[34] The UPC prefers a rule of limited inheritance, followed by inheritance by step-relatives, but confined to step*children* of the intestate decedent.[35] In the absence of close blood relatives or stepchildren, the UPC provides for a conventional escheat "to the state."[36]

B. Foreign Escheat Law

Although legislation in Great Britain, New Zealand, Australia, and Canada provides for the Crown to take an intestate estate as *bona vacantia* in the absence of heirs,[37] family maintenance statutes in these Commonwealth countries grant courts discretion in distributing intestate estates.[38] Restrictions apply to judicial discretion under these statutes, but some of them allow distribution in cases of intestacy to persons who are not heirs.[39]

The factors courts must consider when determining a distribution and the classes of persons eligible to apply for such a distribution vary under these statutes.[40] For example, in Great Britain, courts must consider numerous factors that do not include the decedent's intent.[41] By contrast, in New Zealand, the decedent's intent is the only factor that courts may take into

account when distributing the intestate's estate.[42] A New Zealand court may accept such evidence of the decedent's intent as it considers sufficient, whether or not the evidence would otherwise be admissible in a court of law.[43] In Ontario, Canada, the list of circumstances the court must consider in determining the amount and duration of support is extensive.[44] The Canadian province of Manitoba incorporates a similar, but less lengthy, list of circumstances into its statute.[45] In Manitoba, the court can consider the decedent's intent, and the court may allow such evidence as it deems proper, including any statement in writing signed by the decedent.[46] In Western Australia, the court may consider the dependant's character and conduct in determining whether to award a provision from the estate.[47]

Courts in these jurisdictions allow different classes of persons to apply for a distribution from an intestate estate. In Great Britain, the court in its discretion may provide for dependents of the intestate, whether or not related to him, and for other persons for whom the intestate might reasonably have been expected to make provision, out of the intestate estate.[48] New Zealand's statute, in addition to allowing several classes of persons related to the decedent to apply for a provision, also allows for persons unrelated to the decedent to apply for a provision out of the estate.[49] The unrelated persons include the civil union partner of the deceased, a de facto partner who was living in a de facto relationship with the deceased on the date of his or her death, and the stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death.[50] In Ontario, the court may award a provision out of the estate that it considers adequate when the decedent has not made adequate provision for the proper support of his dependants.[51] A dependant is defined as: "(a) the spouse of the deceased, (b) a parent of the deceased, (c) a child of the deceased, or (d) a brother or sister of the deceased, to whom the deceased was providing

support or was under a legal obligation to provide support immediately before his or her death."[52] In Manitoba, Canada, a dependent is defined in a similar fashion to the Ontario statute, but also includes a person divorced from the decedent and a common-law partner of the decedent.[53] In Western Australia, the list of persons who may apply for a provision includes a person divorced from the decedent and a de facto widow of the deceased.[54]

Considered overall, these statutes contemplate the possibility of expanding the range of takers from an intestate estate to persons other than blood relatives, of potential relevance as an alternative to seizure by the Crown. The statutes do not go so far as to allow a court to provide for institutions or causes to which an intestate decedent was emotionally or socially committed.

IV. EMPIRICAL STUDY

A. Previous Empirical Studies

Empirical studies conducted in the past few decades have made important contributions to intestacy law. A series of studies from the 1970s influenced the 1990 revisions of the UPC's intestacy distribution scheme by supporting an increase of the share of a surviving spouse.[55] At least one of these empirical studies revealed a general lack of awareness of intestacy laws, and consequently, a lack of reliance on those laws.[56] As a result, lawmakers could reform intestacy laws without creating confusion or uncertainty.[57] The UPC reforms ushered in rules that are better aligned with the preferences of the public at large.

An empirical study related to the area of intestacy must attempt to ascertain the probable intent of a decedent.[58] We can infer probable intent from either of two groups of people: (1) those who died with wills; and (2) living persons who express opinions about how they want

their property distributed at their deaths.[59] Accordingly, the data used in most of the empirical studies to date comes from one of two sources: probate records and telephone interviews.[60]

Each of these sources of data has its advantages and disadvantages. On the one hand, a telephone interview may not allow a respondent to put as much time and thought into how distributions should be made as a will drafting session with a lawyer would.[61] On the other hand, persons who have wills tend to be more educated and have a higher income than persons who lack wills. Thus, random surveys of living persons may be particularly useful for assessing rules of intestacy because they allow broader coverage of socioeconomic classes.[62]

B. Current Empirical Study Demographics

In March of 2018, I, with the assistance of Qualtrics,[63] conducted an empirical study in the form of an online survey. The goal of the empirical study was to identify preferences of a demographically diverse group of people in the United States with respect to intestacy generally and escheat specifically. The results of the empirical study include data from 1050 total respondents: 48.95% males and 51.05% females. The average age of respondents is 44.54 years. The regional residences of respondents are divided as follows: 18.67% in the Northeast, 21.71% in the Midwest, 22.47% in the West, and 37.14% in the South. Table 1 shows the annual income of respondents as compared to U.S. census data from 2016.[64]

Table 1 Income data of respondents compared to 2016 census data.

	Less than $25,000	**$25,000 to 49,999**	**$50,000 to $74,999**	**$75,000 to $99,999**	**More than $100,000**
Survey Respondents	18%	22%	18.95%	14%	27.05%
2016 Census Data	22.3%	23.1%	17.8%	12.2%	24.6%

Table 2 shows the racial demographic of respondents as compared to U.S. census data from 2017.[65]

Table 2 Racial demographic of respondents compared to 2017 census data.

	White/Caucasian	Black/African American	Hispanic/Latino	Asian	Other
Survey Respondents	68%	22%	13.43%	3.33%	2.86%
2017 Census Data	61.3%	13.3%	17.8%	5.7%	1.5%

The data in Table 1 and Table 2 indicate that income and racial demographics of the survey respondents closely track the 2016 and 2017 census data.

C. Current Empirical Study Design

The survey posed two questions to respondents. The first prompt inquired, "Sometimes people die without leaving anyone behind to collect an inheritance. If this happened to you, who would you want to inherit your property?" Respondents were given eight potential answer choices: 1) state government; 2) your closest friends, as determined by a judge; 3) distant relatives; 4) your place of worship; 5) schools; 6) a pool of charitable organizations; 7) your favorite charity or charities, as determined by a judge; 8) other; and 9) not sure. Respondents who selected "other" were presented with a text box to elaborate on their answer. The second prompt asked, "Sometimes people die without leaving anyone behind to collect an inheritance. If this happened to you, would you be comfortable or uncomfortable with letting the court determine which choice of beneficiary is most important to you?" Respondents were given potential answer choices of: "comfortable," "uncomfortable," and "not sure." Answer choices

for the second prompt rotated randomly across respondents in order to reduce any bias related to the ordering of the choices.

D. Current Empirical Study Results

Multiple demographic filters were used to examine patterns in the data. As one example, data was filtered by the following five categories of annual income before taxes: 0 to $24,999; $25,000 to $49,999; $50,000 to $74,999; $75,000 to $99,999; $100,000 and greater. As another example, data was filtered by gender.

Table 3 below shows the respondent count for each answer choice for the first prompt—takers whom respondents would want to inherit if they died without heirs—prior to any filtering. Because the first prompt provided a number of answer choices, it yielded a plurality response, rather than a majority response. In some cases, a given answer choice was not strongly preferred over another answer choice.

Table 3 Prompt 1 answer choice and respondent count.

Prompt 1 Answer Choice	Respondent Count
state government	17 (1.62%)
your closest friends, as determined by a judge	190 (18.10%)
distant relatives	152 (14.48%)
your place of worship	87 (8.29%)
schools	44 (4.19%)
a pool of charitable organizations	143 (13.62%)
your favorite charity or charities, as determined by a judge	110 (10.48%)
other	160 (15.24%)
not sure	147 (14.00%)
total	1050

The most popular choice at 18.10 % was "your closest friends, as determined by a judge." The least popular choice at 1.62 % was "state government." "Other" was chosen by 15.24 % of respondents. Out of the 160 text-based responses corresponding to "other," one specified a pet; one specified "N/A"; six specified someone close, e.g., a friend; eleven specified charitable organizations in general or a specific charity; and 141 specified family in general or specific family members. None of the text-based responses indicated that the respondent wanted the government to take in the absence of heirs.

Table 4 below shows the results from the first prompt after filtering by annual income.

Table 4 Prompt 1 answer choice and respondent count filtered by annual income.

Prompt 1 Answer Choice	Annual Income				
	Less than $25,000	$25,000 to 49,999	$50,000 to $74,999	$75,000 to $99,999	More than $100,000
state government	8 (1.69%)	2 (0.87 %)	4 (2.01%)	3 (2.04%)	7 (2.46%)
your closest friends, as determined by a judge	82 (17.34%)	35 (15.15%)	47 (23.62%)	26 (17.69%)	42 (14.79)
distant relatives	64 (13.53%)	46 (19.91%)	25 (12.56%)	17 (11.56%)	34 (11.97%)
your place of worship	44 (9.30%)	15 (6.49%)	18 (9.05%)	10 (6.8%)	30 (10.56%)
schools	20 (4.23%)	6 (2.6%)	7 (3.52%)	11 (7.48%)	16 (5.63%)
a pool of charitable organizations	72 (15.22%)	17 (7.36%)	25 (12.56%)	29 (19.73%)	55 (19.37%)
your favorite charity or charities, as determined by a judge	47 (9.94%)	23 (9.96%)	18 (9.05%)	22 (14.97%)	37 (13.03%)
other	64 (13.53%)	47 (20.35%)	33 (16.58%)	16 (10.88%)	28 (9.86%)
not sure	72 (15.22%)	40 (17.32%)	22 (11.06%)	13 (8.84%)	35 (12.32%)
Total	473	231	199	147	284

In general, the income-filtered data for the first prompt was consistent with the non-filtered data at one end of the spectrum; that is, for each category of annual income, the state government was

the least popular choice. At the other end of the spectrum, the most popular choice differed across income categories. The most popular choice for each income category was as follows: i) 0 to $25,000: “your closest friends, as determined by a judge” at 17.34%; ii) $25,001 to $49,999: “other” at 20.35% (with “distant relatives” a close second at 19.91%); iii) $50,000 to $74,999: “your closest friends, as determined by judge” at 23.62%; iv) $75,000 to $99,999: “a pool of charitable organizations” at 19.73%; and iv) $100,000 and greater: “a pool of charitable organizations” at 19.37%. Thus, for two highest income categories, the most popular choice was “a pool of charitable organizations.” For the lowest and median income categories, the most popular choice was “your closest friends, as determined by a judge.”

Table 5 below shows the results from the first prompt filtered by gender.

Table 5 Prompt 1 answer choice and respondent count filtered by gender.

Prompt 1 Answer Choice	Gender	
	Female	Male
state government	2 (0.37%)	15 (2.92%)
your closest friends, as determined by a judge	90 (16.79%)	100 (19.46%)
distant relatives	78 (14.55%)	74 (14.40%)
your place of worship	52 (9.70%)	35 (6.81%)
schools	14 (2.61%)	30 (5.84%)
a pool of charitable organizations	67 (12.50%)	76 (14.79%)
your favorite charity or charities, as determined by a judge	54 (10.07%)	56 (10.89%)
other	101 (18.84%)	59 (11.48%)
not sure	78 (14.55%)	69 (13.42%)
total	536	514

The “state government” was again the least popular choice for both genders. It was less popular for women than for men. The most popular choice differed between genders. For men, “your closest friends as determined by a judge” was the most popular choice at 19.46%, while for

women, “other” was the most popular choice at 18.84%, and “your closest friends, as determined by a judge” was a close second at 16.79%.

A “not sure” answer to the first prompt effectively represents no answer to the prompt. Thus, in order to more accurately reflect the popularity among answer choices, the results of the first prompt were further adjusted by filtering out the “not sure” responses. Table 6 shows the first prompt responses with “not sure” responses filtered out.

Table 6 Prompt 1 answer choice with “not sure” filtered out.

Prompt 1 Answer Choice	Respondent
state government	1.88%
your closest friends, as determined by a judge	21.04%
distant relatives	16.83%
your place of worship	9.63%
schools	4.87%
a pool of charitable organizations	15.84%
your favorite charity or charities, as determined by a judge	12.18%
other	17.72%

Table 7 shows the results from the first prompt based on annual income when “not sure” responses are filtered out.

Table 7 Prompt 1 answer choice based on annual income with "not sure" filtered out.

Prompt 1 answer choice	Respondents by Annual Income				
	Less than $25,000	$25,000 to 49,999	$50,000 to $74,999	$75,000 to $99,999	More than $100,000
state government	2.00%	1.05%	2.26%	2.24%	2.81%
your closest friends, as determined by a judge	20.45%	18.32%	26.55%	19.40%	16.87%
distant relatives	15.96%	24.08%	14.12%	12.69%	13.65%
your place of worship	10.97%	7.85%	10.17%	7.46%	12.05%
schools	4.99%	3.14%	3.95%	8.21%	6.43%
a pool of charitable organizations	17.96%	8.90%	14.12%	21.64%	22.09%
your favorite charity or charities, as determined by a judge	11.72%	12.04%	10.17%	16.42%	14.86%
other	15.96%	24.61%	18.64%	11.94%	11.24%

As Table 7 indicates, with the "not sure" responses filtered out, the relative popularity of answer choices increases. The graph in Figure 1 below provides an alternative way to view the percentages from Table 7.

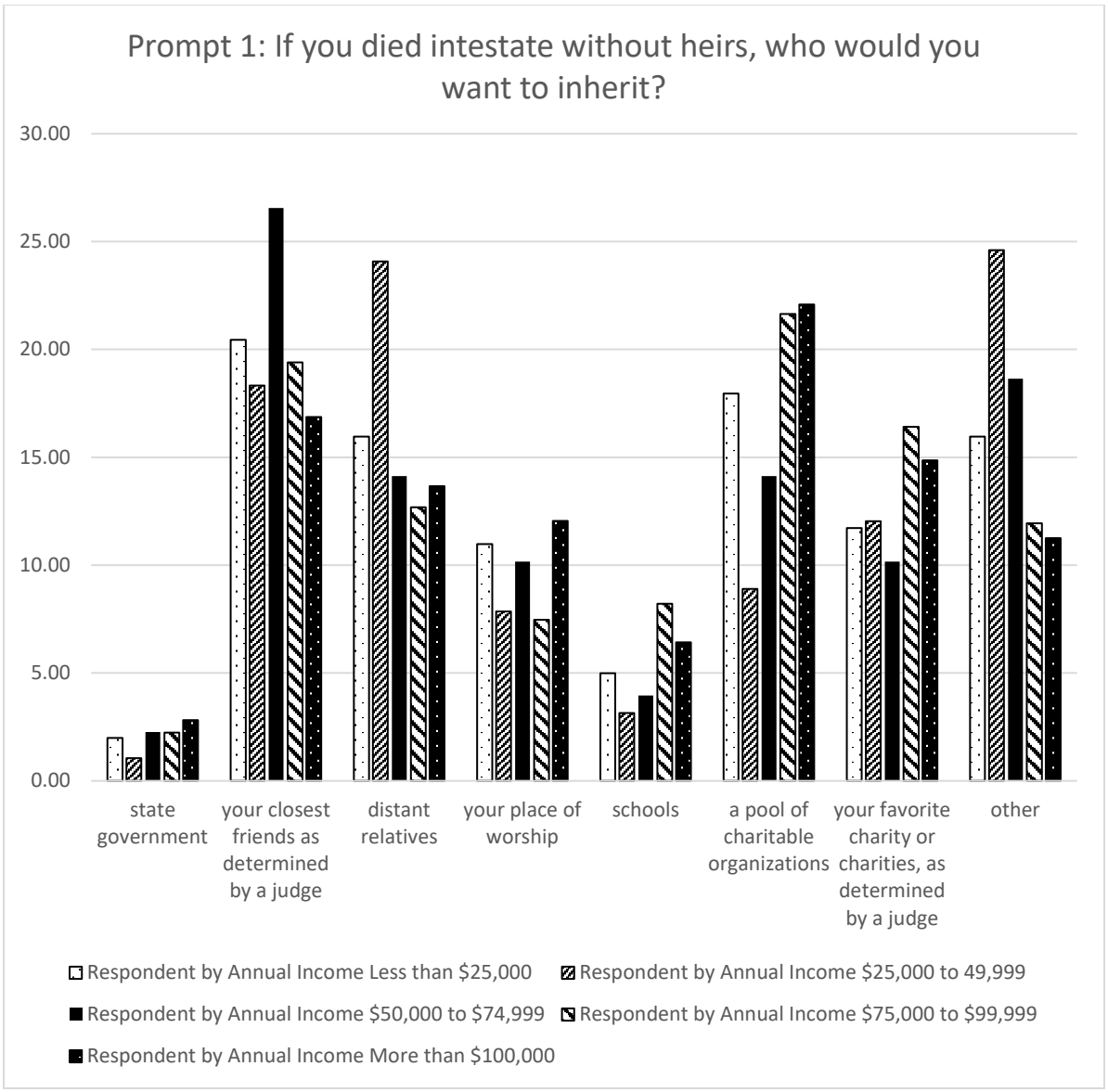

Figure 1 Prompt 1 distribution of answer choices as a percentage of the total within each income category with "not sure" responses filtered out.

Table 8 shows the results from the first prompt based on gender when "not sure" is filtered out.

Table 8 Prompt 1 answer choice based on gender with "not sure" filtered out.

Prompt 1 answer choice	Respondents by Gender	
	Female	Male
state government	0.44%	3.37%
your closest friends, as determined by a judge	19.65%	22.47%
distant relatives	17.03%	16.63%
your place of worship	11.35%	7.87%
schools	3.06%	6.74%
a pool of charitable organizations	14.63%	17.08%
your favorite charity or charities, as determined by a judge	11.79%	12.58%
other	22.05%	13.26%

The graph in Figure 2 below provides an alternative way to view the percentages from Table 8.

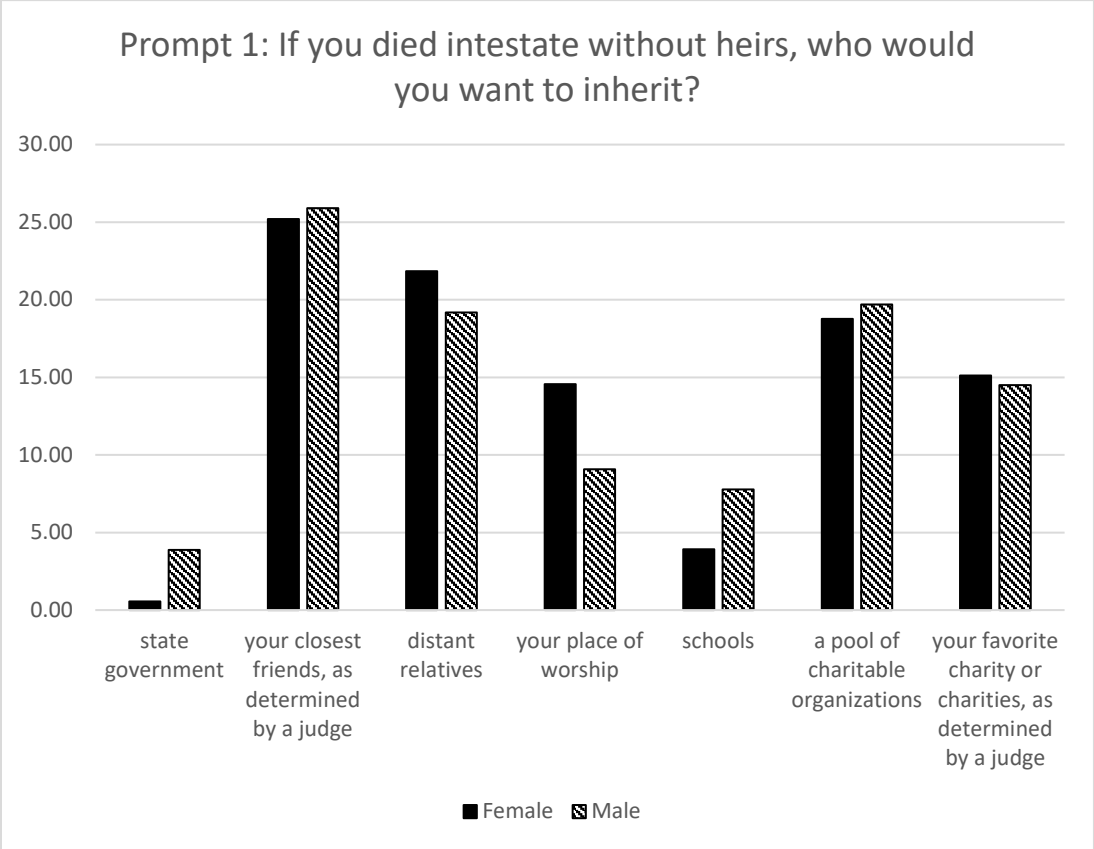

Figure 2 Prompt 1 distribution of answer choices as a percentage of the total within each income category with "not sure" responses filtered out.

As to the second prompt—whether respondents would be comfortable with letting the court determine the beneficiary most important to them—a 28.48% minority of respondents indicated that they would be comfortable, whereas a 57.05% majority of respondents indicated that they would be uncomfortable, and 14.48% indicated that they were not sure. When results from the second prompt were filtered by annual income, there was little change in the distributions between answer choices. Table 9 shows the income-filtered results.

Table 9 Prompt 2 answer choice based on annual income.

Prompt 2 answer choice	Respondents by Annual Income				
	Less than $25,000	$25,000 to 49,999	$50,000 to $74,999	$75,000 to $99,999	More than $100,000
comfortable	30.16%	25.54%	30.15%	29.93%	27.82%
uncomfortable	50.26%	60.61%	54.27%	58.50%	59.86%
not sure	19.58%	13.85%	15.58%	11.56%	12.32%

One difference between the income-filtered responses and the non-filtered responses was that the lowest income group chose "not sure" more often than the other income groups (19.58% compared to 11.56%-15.58%) and chose "uncomfortable" less often than the other income groups (50.26% compared to 54.27%-60.61%). Females indicated that: 23.5% were "comfortable"; 59.5% were "uncomfortable"; and 17% were "not sure." Males indicated that: 34% were "comfortable"; 54% were "uncomfortable"; and 12% were "not sure."

The results of the second prompt were adjusted by filtering out the "not sure" responses. Table 10 shows the results from the second prompt based on annual income when "not sure" is filtered out.

Table 10 Prompt 2 answer choice based on annual income with "not sure" filtered out.

Prompt 2 answer choice	Respondents by Annual Income				
	Less than $25,000	$25,000 to 49,999	$50,000 to $74,999	$75,000 to $99,999	More than $100,000
comfortable	37.50	29.65	35.71	33.85	31.73
uncomfortable	62.50	70.35	64.29	66.15	68.27

As Table 10 indicates, a stronger majority response emerges with the "not sure" responses filtered out. Overall, a strong majority of respondents were "uncomfortable" with giving a court broad discretion to distribute an intestate estate.

V. ANALYSIS

A. Escheat Discriminates Against the Poor

One proposed characterization of escheat is that it functions as a penalty default that prods benefactors to disclose their preferences in an estate plan.[66] Penalty defaults do not necessarily achieve efficiency, and they tend to discriminate against poorer benefactors, as poor individuals are more likely to die intestate.[67] For this reason, it is important to mind the desires of lower income individuals, to the extent that their preferences diverge from those of higher income individuals.

A Gallup poll taken in 2016 reported that a majority of Americans do not have a will, highlighting the importance of intestacy laws.[68] In addition, the poll reveals that the number of individuals who have a will has diminished significantly from 2005 to 2016 across all income categories,[69] suggesting that intestacy laws in general are growing in importance. Exceptional cases such as that of Roman Blum aside,[70] the poll indicates that individuals with lower annual incomes are less likely to have a will than individuals with higher annual incomes.[71] A rule of

escheat contrary to probable intent is bad for everyone, but especially for the poorer individuals whose estates are more apt to be governed by such a rule.

B. Escheat Does Not Effectuate Decedent Intent

My empirical study shows that, in the absence of surviving family members, an escheat to the state fails to effectuate decedents' probable intent. In fact, distribution to the state government was the *least* popular choice among respondents in this survey. Existing American statutes offer no viable alternative to this framework. Although many states direct escheated funds to education-related purposes,[72] "schools" was the *second least* popular choice of taker among respondents in this study.

These findings remained the same across income categories. There was also little divergence between male and female respondents, except that females more strongly opposed an escheat to the state. Individuals overall and individuals in the lowest and median income categories preferred that their "closest friends, as determined by a judge" inherit in the absence of heirs.

C. States Should Not Broaden the Scope of Heirship

Broadening the scope of heirs could provide a practicable alternative to escheat in some instances. Although giving distant relatives inheritance rights would effectively reduce the opportunity for an escheat to occur, it could make probate administration more complex. As relatives become more remote in kinship from the decedent, proving heirship becomes more difficult.[73] In addition, the more distant the decedent's relatives, the more likely they are to be persons with whom the decedent had no personal or social ties.[74] The administration of testate estates could also be complicated by giving distant relatives inheritance rights because the law

requires heirs to be identified and located so that they might have the opportunity to contest wills.[75]

Whereas the results of my empirical study strongly support the argument that escheat does not effectuate intent, they do not lend commensurate support for the proposition that states should broaden the scope of heirship. Although the answer choice "distant relatives" was not specifically defined, it was somewhat average in terms of popularity. Respondents indicated stronger preferences that close friends inherit in the absence of immediate family members. Among the alternative categories of takers, "your closest friends, as determined by a judge" was a more popular choice than "distant relatives" for four out of five income categories.

Respondents' favoring of close friends over distant relatives suggests that at least some states are not effectuating intent by allowing distant relatives to inherit as heirs. In particular, states that follow the rule of unlimited inheritance, whereby the search for heirs can continue up a family tree without end, would do better to confine heirship to nearer branches of a family. The only conceivable justification for unlimited inheritance is that it reduces the incidence of escheat under circumstances where the law of escheat achieves undesirable results. My study confirms that respondents prefer distant relatives over *the state* as takers in intestacy. Still, by reforming the law of escheat to provide for a more popular taker of last resort, legislators could better effectuate intent than by benefitting distant cousins whom the decedent may hardly have known, or may never even have met.

D. Giving a Court Broad Discretion Would Not Effectuate Intent

Giving a court broad discretion to effectuate intent of a decedent who dies intestate with no heirs could serve as a viable alternative to an escheat. Foreign jurisdictions that provide versions of this alternative have served principally to benefit dependant nonrelatives over the

Crown when intestate decedents lack close relatives. States in the United States could enact similar statutes, effectively reducing the opportunity for an escheat to occur.

Yet, the results from my empirical study do not support the prospect of giving courts broad discretion as an alternative to fixed rules of escheat. Respondents were generally uncomfortable with letting a court determine what beneficiary was most important to them. This was true among all income categories and was more pronounced among female respondents than among male respondents.

Interestingly, this finding at least partially contradicts the results of the first question posed in my study. The plurality preference among the lowest and median income respondents for "your closest friends, as determined by a judge" as takers in the absence of close family members assumes that a court will have discretion to determine who those closest friends are. Thus, the popularity of distribution to "your closest friends, as determined by a judge" among a large segment of respondents conflicts with the sentiment expressed by the same segment of respondents that they felt "uncomfortable" with "letting the court determine which choice of beneficiary is most important to you."

Because this sentiment in response to the second question represents a majority response, while the preference for distribution to friends represents a plurality response, the results of the second question should have priority. That still leaves possibilities for reform of the law of escheat. The results of the first question indicated a preference for "a pool of charitable organizations" and also for "your favorite charity or charities, as determined by a judge" over "schools" for all income categories. One possible way to better effectuate intent in the case of an escheat without relying on judicial discretion would be to allocate escheated funds to a pool of charities. This choice is supported by the fact that "schools" was selected by 4.19% (4.87% with

"not sure" filtered out) of respondents, while "a pool of charitable organizations" was selected by 13.62% (15.84% with "not sure" filtered out) of respondents. These fractions remain slightly lower than the preference for distant relatives—another nondiscretionary option—which was selected by 14.48% (16.83% with "not sure" filtered out). Still, these results probably undercount respondents' preferences for charities when one considers that the discretionary version of the charities option—distribution to "your favorite charity or charities, as determined by a judge"—was selected by an additional 10.48% (12.18% with "not sure" filtered out) of respondents.

In sum, my study suggests that states could better effectuate intent by adjusting the destination of escheated funds without building discretion into the law of escheat. A pool of charities appears the optimal recipient of last resort.

VI. CONCLUSION

In the future, a more complete analysis of escheat could be accomplished by expanding on the hypothetical questions asked of respondents in the current empirical study as well as by an examination of probate records, specifically of people who died with wills but without heirs. In addition, given that the law of escheat can vary among states, studies relying on local data could yield more insightful results. While an online survey of the sort I have conducted has advantages over a telephone interview, including quick turnaround time and automatic gathering of results, it also has disadvantages, such as lack of interaction between interviewer and interviewee. This lack of interaction could skew results when respondents do not fully understand or appreciate the questions they are being asked. Thus, a telephone or in-person interview might be more ideal for questions that are potentially confusing to respondents.

Even without follow-up studies, one point appears clear. The law of escheat would benefit from reform. Its current framework in the United States ill-serves the core purpose of inheritance law generally, and of rules of intestacy in particular: the effectuation of decedents' probable intent.[76]

[1] Julie Satow, *He Left a Fortune, to No One*, N. Y. Times, Apr. 27, 2013, at MB1.

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] Restatement (Third) of Property: Wills and Other Donative Transfers § 2.4 (Am. Law Inst. 1999).

[6] *Id*. § 2.4 statutory note.

[7] *E.g., id.* forward.

[8] John V. Orth, *Escheat: Is the State the Last Heir?*, 13 Green Bag 73, 77 (2009).

[9] Parry and Kerridge, The Law of Succession, § 2-48 (13th ed. 2016).

[10] *Id*.

[11] David C. Auten, *Modern Rationales of Escheat*, 112 U. Pa. L. Rev. 95. Nov. 1963.

[12] Orth, *supra* note 8, at 74.

[13] *Id*. at 74.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 74-75.

[18] *Id*. at 76.

[19] *Id*.

[20] Bona vacantia is a Latin phrase meaning "vacant goods." *Bona Vacantia*, Black's Law Dictionary (10th ed. 2014).

[21] Orth, *supra* note 8, at 77.

[22] *See, e.g.,* Administration of Estates Act 1925, c. 23, § 45, https://www.legislation.gov.uk/

[23] Orth, *supra* note 7, at 74.

[24] *Id*. at 75.

[25] *Id*. at 76.

[26] Restatement (Third) of Property: Wills and Other Donative Transfers § 2.4 stat. note (1999).

[27] 30A C.J.S. Escheat § 4 (2018).

[28] *Id*.

[29] *Id*.

[30] *E.g.,* Ala. Const.. Art. XIV, § 258 ("the furtherance of education"); Ariz. Const. Art. XI § 8 ("[a] permanent state school fund for the use of the common schools"); Colo. Const. Art. IX, § 5 ("[t]he public school fund"); Idaho Const. Art. IX, § 4 ("[t]he public school permanent endowment fund"); Ind. Const.. Art. VIII, § 2 ("[t]he Common School fund"); Iowa Const. Art. IX, § 3 ("the support of common schools throughout the state"); Miss. Const. Art. VIII, § 6 ("a common school fund"); Mo. Const. Art. XI, § 5 ("a public school fund"); Mont. Const. Art. X, § 2 ("[t]he public school fund"); Neb. Const. Art. VII, § 7 ("perpetual funds for common school purposes, including early childhood educational purposes operated by or distributed through the common schools"); Nev. Const. Art. XI, § 3 ("for educational purposes"); N.M. Const. Art. XII, § 4 ("the current school fund"); N.D. Cent. Code § 30.1-04-05 ("for the support of the common schools"); Okla. Const. Art. X, § 32 ("a State Public Common School Building Equalization Fund"); Or. Const. Art. VIII, § 2 ("the Common School Fund"); S.D. Const. Art. VIII, § 2 ("a perpetual fund for the maintenance of public schools in the state"); Wash. Const. Art. IX, § 3 ("the common school fund") ; W. Va. Const. Art. XII, § 4 ("School Fund"); Wis. Const.. Art. X § 2 ("the school fund"); Wyo. Const.. Art. VII § 2 ("perpetual funds for school purposes"). *Cf.* Mass. Gen. Laws ch. 190B, § 2-105 (directing escheated funds of veterans who died in a "Soldiers' Home" to that home); N.D. Cent. Code § 37-15-17 (similar provision for decedent members of a "veterans' home"); D.C. Code § 19-701 ("for the benefit of the poor").

[31] Restatement (Third) of Property: Wills and Other Donative Transfers § 2.4 stat. note (Am. Law Inst. 1999).

[32] The following states follow some form of the rule of unlimited inheritance: Connecticut: Conn. Gen. Stat. §§ 45a-438, -439; Delaware: Del. Code Ann. tit. 12, § 503; Massachusetts: Mass. Gen. Laws ch. 190B, § 2-103; Nevada: Nev. Rev. Stat. § 134.040 to .210; Vermont: Vt. Stat. Ann. tit. 14, §§ 551, 552; California: Cal. Prob. Code §§ 6402, 6404; Mississippi: Miss. Code Ann. §§ 91-1-3, -11; Nebraska: Neb. Rev. Stat. Ann. §§ 30-2303, 2305; New York: N.Y. Est. Powers & Trusts Law § 4-1.1; N.Y. Abandoned Prop. Law § 200; Ohio: Ohio Rev. Code Ann. §§ 2105.03, .06, .061, .07; Oklahoma: Okla. Stat. Ann. tit. 84, §§ 213, 217 to 221; Wisconsin: Wis. Stat. §§ 852.01. .02; Illinois: 755 Ill. Comp. Stat. Ann. 5/2-1; Kentucky: Ky. Rev. Stat. Ann. §§ 391.010, .030, 393.020; Texas: Tex. Prob. Code Ann. §§ 38, 45; Virginia: Va. Code Ann. §§ 64.1-1, -11, -12. Louisiana: La. Civ. Code arts. 880 to 902 (providing that if the decedent is not survived by descendants, parents or descendants of parents, spouse not judicially separated, or ascendants, the decedent's separate property passes to collaterals in the "nearest in degree" under the rules of the civil law; if none, to the state). North Carolina: N.C. Gen. Stat. §§ 29-5 to -16;

[33] Twenty-six states follow a rule of limited inheritance through the third parentela: *E.g.,* Florida: Fla. Stat. Ann. §§ 732.103, .107; Georgia: Ga. Code Ann. §§ 53-2-1, -8 (if the estate passes to the third parentela, and if the decedent is not survived by any grandparent, the statute deviates from the parentelic system by providing that deceased uncles or aunts are only represented by their surviving children, not by their surviving descendants); Indiana: Ind. Code § 29-1-2-1; Iowa: Iowa Code § 633.219; Pennsylvania: 20 Pa. Cons. Stat. § 2103; Tennessee: Tenn. Code Ann. §§ 31-2-104, -110; Washington: Wash. Rev. Code §§ 11.04.015, .095; Wyoming: Wyo. Stat. Ann. §§ 2-4-101, -105. Five states follow a rule of limited inheritance through the fourth parentela: Arkansas: Ark. Code Ann. § 28-9-214, -215; Maryland: Md. Code Ann. Est. & Trusts §§ 3-103 to -105; Missouri: Mo. Rev. Stat. § 474.010; Rhode Island: R.I. Gen. Laws §§ 33-1-1, -2, -3, -7, -10, 33-21-1; S.C. Code Ann. § 62-2-103.

One state follows a rule of limited inheritance through the sixth parentela: Kansas: Kan. Stat. Ann. §§ 59-506 to -509, 59-514 (providing that if the decedent is not survived by issue or parents, the estate passes to the parent's "heirs" "(excluding their respective spouses)," but also provides that none of the decedent's property "shall pass except by lineal descent to a person further removed from the decedent than the sixth degree"; if there is no taker, the estate passes to "the living heirs of the intestate's last spouse and, if none, the estate escheats to the state").

[34] Statutes allowing step-relatives to take as heirs in want of blood relatives vary widely in structure and in the range of step-relatives who can so qualify. Arkansas: Ark. Code Ann. § 28-9-215(2); California: Cal. Prob. Code §§ 6402(e), 6454; Connecticut: Conn. Gen. Stat. § 45a-439; Florida: Fla. Stat. Ann., § 732.103(5); Iowa: Iowa Code Ann., § 633.219(6); Kansas: Kan. Stat. Ann. § 59-514; Maryland: Md. Code Ann., Est. & Trusts § 3-104(e); Missouri: Mo. Rev. Stat. § 474.010(3); New Mexico: N.M. Stat. Ann. §§ 45-2-103; North Dakota: N.D. Cent. Code § 30.1-04-03; Ohio: Ohio Rev. Code Ann. § 2105.06(J); Rhode Island: R.I. Gen. Laws § 33-1-3; Utah: Utah Code Ann. §§ 75-2-103; Virginia: Va. Code Ann. § 64.2-200(B); Washington: Wash. Rev. Code Ann. § 11.04.095.

[35] Unif. Probate Code § 2-103 (amended 2010), 8 pt. 1 U.L.A. 104 (2013).

[36] *Id*. § 2-105, 8 pt. 1 U.L.A. 108 (2013).

[37] *E.g.*, Administration Act 1969, pt 3 s 77 (N.Z.).

> If a person (the intestate) dies intestate as to any real or personal estate and leaves the other person or people referred to in column 1 of the following table, that estate must be distributed in the manner or held on the trusts set out in column 2 of that table opposite the reference to the other person or people:
>
> | Person or people intestate leaves | How estate to be distributed |
> |---|---|
> | … | … |
> | 8 No one who takes an absolute interest under items 1 to 7 | All of the estate belongs to the Crown as bona vacantia, and the Crown may (without prejudice to any other powers), out of all or any part of the estate, provide for—
• dependants (whether kindred or not) of the intestate; and
• other persons for whom the intestate might reasonably have been expected to make provision. *Id*. |

[38] Jennifer R. Boone Hargis, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 Wash. U. Global Stud. L. Rev. 447, 456 (2003).

[39] Parry and Kerridge, *supra* note 9, § 2-48.

[40] Hargis, *supra* note 38 at 458.

[41] Inheritance (Family and Dependants Maintenance) Act 1975, c. 63, s. 3 (Eng.). The court considers such factors as (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future; (b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future; (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future; (d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased; (e) the size and nature of the net estate of the deceased; (f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased; (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant. *Id*.

[42] Family Protection Act 1955, s 11 (N.Z.). "Without restricting the evidence which is admissible or the matters which may be taken into account on any application under this Act, it is hereby declared that on any such application, the court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for any person."). *Id*.

[43] *Id*.

[44] Succession Law Reform Act, R.S.O. 1990, c. S.26 (Can.).

[45] The Dependants Relief Act, C.C.S.M., 1990, c D-37 (Can. Man.).

[46] *Id*.

[47] Inheritance (Family and Dependants Provision) Act 1972 reg 57 (Austl.).

[48] Parry and Kerridge, *supra* note 9, § 2-48.

[49] Family Protection Act 1955, s 3 (N.Z.).

[50] *Id*.

[51] Succession Law Reform Act, R.S.O. 1990, c. S.26 (Can.).

[52] *Id*.

[53] The Dependants Relief Act, C.C.S.M., 1990, c D-37 (Can. Man.).

[54] Inheritance (Family and Dependants Provision) Act 1972 reg 57 (Austl.).

[55] 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, 349 (2017).

[56] Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, U. Ill. L.F. 717, 723 (1976).

[57] *Id*.

[58] Mary Louise Fellows et al., *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, Am. B. Found. Res. J. 319, 324 (1978).

[59] *Id*.

[60] Wright & Sterner, *supra* note 55, at 346.

[61] Mary Louise Fellows et al., *supra* note 58, at 325-326.

[62] *Id*. at 325.

[63] Qualtrics is an online enterprise research platform. Qualtrics Omnibus is a corporate and academic program designed to help researchers run short surveys with a statistically significant sample size. Questions are sent to a nationally representative sample of 1,000 respondents, compiled using overall demographic quotas based on census percentages for representation: age, gender, ethnicity, household income, and census region. A demographic block is provided at the end of each researcher's survey with additional fields such as education level, employment status, children in the household, etc. www.qualtrics.com/online-sample/omnibus.

[64] *United States Census Bureau American FactFinder*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_DP03&src=pt (last visited May 14, 2018).

[65] *United States Census Bureau QuickFacts*, https://www.census.gov/quickfacts/fact/table/US/PST045217#qf-headnote-b (last visited May 14, 2018).

[66] Adam. J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 Fordham L. Rev. 1031, 1059 (2004).

[67] Marsha Goetting & Peter Martin, *Characteristics of Older Adults with Written Wills,* 22 Journal of Family and Economic Issues, 243, 250-258 (2001).

[68] Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will* (May 18, 2016), http://news.gallup.com/poll/191651/majority-not.aspx%20.

[69] *Id*.

[70] See notes 1-4 *supra* and accompanying text.

[71] Jones, *supra* note 68.

[72] See note 30 *supra* and accompanying text.

[73] Restatement (Third) of Property: Wills and Other Donative Transfers § 2.4 cmt. i (Am. Law Inst. 1999).

[74] *Id*.

[75] *Id*.

[76] See *supra* note 7 and accompanying text.