Empirical Inheritance Law

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Empirical legal scholars tell it like it is.[1] The nature of the "it" that we might want to know about varies significantly by legal field, however, and it also differs based on one's scholarly position within that field. This Comment explores the major ways that empirical legal scholarship can be valuable to those of us working on normative or theoretical legal scholarship in inheritance law.[2]

In order to describe how empirics might be useful, it is important to distinguish between the first-order and second-order normative questions that they might inform. In the trusts and estates field, the first-order normative question is what the end goals of the inheritance system should be.[3] To the extent that the primary principle in inheritance law is the freedom of disposition, the inheritance system

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[1] And increasingly, they have a broader audience. *See* Shari Seidman Diamond, *Empirical Legal Scholarship: Observations on Moving Forward*, 113 NW. U. L. REV. 1229, 1229 (2019) ("Empirical legal scholarship was once a novel and contested participant in the legal academy. In the twenty-first century, it has emerged as an active and valued player."); Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?* , 66 J. LEGAL EDUC. 78, 78 (2016) ("The number of empirical legal studies that show up in the pages of journals has been on the rise as empirical methods improve and researchers gain easy access to a growing number of data sets. This addition to legal scholarship is welcome after decades of theory's dominance.").

[2] Normative and theoretical legal scholarship also has much to provide empirical legal scholars, though that is not the focus of this Comment. *See* Mark C. Suchman & Elizabeth Mertz, *Toward A New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 574 (2010) ("Although disciplinary social science relies on empirical methods to generate reliable answers, it relies on theoretical models to generate important questions and to organize isolated findings into coherent accounts.").

[3] *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007) (noting that first-order issues address the end goals of the relevant legal system).

should broadly strive to implement donative intent.[4] The primacy of the freedom of disposition, however, is contested by other policy goals, such as protecting the family from disinheritance, putting temporal limits on donative intent, and reclaiming wealth for use by the state.[5] First-order normative discussions center primarily on when we should favor the freedom of disposition or one of these other goals in the inheritance system. Empirical legal scholarship has comparatively less to contribute to these "pure" normative debates, as they occur largely at the level of theory.

On the other hand, such scholarship adds significant value to the second-order normative questions of inheritance law. These are matters of system design and concern how we implement the first-order normative goals in legal doctrines and institutions.[6] In addition, they implicate the normative goals of efficiency and just distribution. In other words, all other things being equal, we would prefer the least costly inheritance system that also accomplishes our favored first-order normative goals.[7] This is the efficiency goal. However, we would also prefer an inheritance system that implements first-order normative goals in a fair way across the population.[8] This is the just distribution goal.

Given these different types of normative questions and answers, what are the biggest targets for empirical legal inquiry in inheritance law? The normative importance of donative intent makes it the first "it" that empirical legal scholars might helpfully illuminate. In doing this, empiricists face a similar obstacle as courts do when they consider evidence of donative intent in the context of wills or trusts after the death of the testator or settlor respectively. The best dataset — the expressed preferences of the deceased — is not available, as decedents

[4] *See In re* Gustafson, 547 N.E.2d 1152, 1153 (N.Y. 1989) ("[The court's] primary function is to effectuate the testator's intent . . . ."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.").

[5] *See* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 331 (2018) (describing these policy exceptions).

[6] *See* Cox & Posner, *supra* note 3, at 811 ("Second-order design issues concern the legal institutions that are used to implement the first-order policy goals.").

[7] *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 862-65 (2012) (arguing for the economic analysis of wills law); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 648-49 (2004) (applying an agency costs analysis to the law of trusts).

[8] *See* Boni-Saenz, *supra* note 5, at 342-43 (arguing for the incorporation of distributive justice principles into evaluations of the inheritance law system).

do not make good interview subjects.[9] Empiricists can still make progress on questions of donative intent by gathering data that might inform the construction of the default rules of inheritance law. Through survey techniques, we can discover the majority's preferences on different topics and implement them in intestacy statutes or the subsidiary law of wills.[10] When that is not possible or practical, we can ascertain what people believe the legal rule is and use that to guide default rule construction, as Adam Hirsch has artfully argued in his empirical study of the doctrine of revival.[11]

An interesting and unresolved problem remains, however, for the use of empirical evidence in the construction of default rules. In at least some cases, there will be no clear majority preference on some issue. This may be because a preference only commands a slim majority and may be within the margin of error. Or perhaps there are multiple options, none of which garner majority support. Knowing this is itself useful, as it indicates that we may need to resort to some other normative consideration beyond donative intent to structure the law. This opens up the possibility of embracing other types of defaults under some circumstances.[12]

The second "it" that empirical legal scholars can describe is the law in action. This refers to how the inheritance regime actually works on the ground, taking into account relevant legal doctrines but also the various other components of the legal system, including people, institutions, and norms.[13] Knowing how the inheritance regime works

[9] *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941) ("[T]he testator will inevitably be dead and therefore unable to testify when the issue is tried."). Empirical legal scholars can still make some headway on this question of decedent intent by considering a wider range of evidence than was available to the court at the time of a particular case, either because it was excluded by the rules of evidence, came to light later, or required more sustained investigation to uncover.

[10] *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L.J. 643, 645 (2014) (describing intestacy statues as an "estate plan by default"); *id.* at 655 (describing the subsidiary law of wills as in part "the rules of construction, which evolved out of long experience with interpreting and administering testamentary dispositions in accordance with the donor's probable intent").

[11] *See generally* Adam J. Hirsch, *Waking the Dead: An Empirical Analysis of Revival of Wills*, 53 UC DAVIS L. REV. 2269 (2020).

[12] *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1042-61 (2004) (discussing social defaults as an alternative to majoritarian defaults).

[13] *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 388 (2005) (understanding the "'law in action' to include both the gaps between the law on the books and what happened in legal

can help us evaluate whether it is working as intended. For example, Emily Poppe's meticulous and comprehensive empirical study of testation demographics focuses on the people element of the inheritance system, highlighting exactly who is engaging in estate planning and in what ways.[14] This type of study is particularly important for understanding whether our inheritance system is working well to implement donative intent for all sectors of the population, rather than just for those who have access to expensive legal counsel.[15] The better we understand the law in action, the better we can design a system that implements first-order normative goals in an efficient and fair way.

The need to understand the law in action also persists over time, as we must make sure that legal doctrine is a good fit with the present socio-legal context. Consider the elective share. It has traditionally been understood as a way to protect less economically powerful spouses — often women — who might otherwise be disinherited after participating in a years-long marital partnership.[16] Naomi Cahn's study of the elective share case law suggests that it is not the first spouse who typically uses the elective share, but instead spouses of subsequent marriages, often in opposition to children of the decedent spouse's earlier marriage.[17] This is relevant because it may be the first spouse who entered into the economic partnership that generated the bulk of family wealth, though this is also an empirical question. Similarly, in Jeffrey Pennell's study of spousal disinheritance, he finds that in Georgia — the rare state without an elective share statute — it is more often wives who disinherit their husbands, and seemingly for "the 'right' reasons."[18] Studies like these can lead us to reevaluate the factual predicates for various normative theories or arguments that we might hold dear.

The third "it" of particular empirical interest is the set of normative trade-offs in inheritance system design. Such trade-offs are inevitable, and they stem from balancing different normative goals and the

institutions, and, the way problems were avoided, suppressed, and dealt with apart from official public norms, sanctions, and institutions").

[14] *See* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 UC DAVIS L. REV. 2511, 2540-55 (2020).

[15] *See* Boni-Saenz, *supra* note 5, at 348 ("The donor population is . . . diverse in that it includes those wealthy enough to employ attorneys as well as those who do not have significant assets.").

[16] *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 99-113 (1994) (discussing the evolving rationales for the elective share).

[17] *See* Naomi Cahn, *What's Wrong About the Elective Share "Right"?* , 53 UC DAVIS L. REV. 2087, 2101-06 (2020).

[18] Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 UC DAVIS L. REV. 2473, 2485 (2020).

difficulties in implementing those conflicting normative goals through institutions and legal actors.[19] These trade-offs cannot be fully considered in the abstract, as they take on different forms based on the legal doctrine in question and the socio-legal context in which that doctrine operates. Empiricists can help identify and explain these trade-offs.

David Horton's empirical study of do-it-yourself wills is a perfect example of empirical legal scholarship in this vein. He describes how do-it-yourself wills entail both increased access to testation for people in a variety of circumstances, including those in ill health, while also statistically increasing the odds of litigation.[20] This illustrates something of a trade-off between the goals of implementing donative intent, pursuing an efficient inheritance system, and ensuring that donative intent is implemented across the donor population in a fair way. Horton's study confirms the presence of the trade-off, but perhaps more importantly paints a fuller picture of its scope. This creates fertile ground for a more nuanced and sophisticated scholarly discussion going forward.

Normative legal scholars tell it like it should be. But we need to know what "it" is before we can do so. For this, we are reliant on empirical legal scholars, who enrich the scholarly discussion, help refine normative theories, and suggest new avenues for legal reform of the inheritance system.

[19] *See* J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 575-76 (2014) ("Understanding these tradeoffs and the constraints on system functionality they produce lies at the heart of the design challenge for robustness of legal systems.").

[20] *See* David Horton, *Do-It-Yourself Wills*, 53 UC DAVIS L. REV. 2357, 2386-95 (2020).