In Partial Defense of Probate: Evidence from Alameda County, California

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For five decades, probate—the court-supervised administration of decedents' estates—has been condemned as unnecessary, slow, expensive, and intrusive. This backlash has transformed succession in the United States, as probate avoidance has become a booming industry and contract-like devices such as life insurance, transfer-on-death accounts, and revocable trusts have become the primary engines of intergenerational wealth transmission. Despite this hunger to privatize the inheritance process, we know little about what happens in contemporary probate court. This Article improves our understanding of this issue by surveying every estate administration stemming from individuals who died in Alameda County, California in 2007. This original dataset of 668 cases challenges some of the most entrenched beliefs about probate. For one, although succession is widely seen as a tranquil process in which beneficiaries settle disputes amicably and pay a decedent's debts voluntarily, both litigation and creditors' claims are common. In addition, attorneys' and personal representatives' fees are far lower than assumed. The Article then uses these insights to critique the demand for probate avoidance, to contend that probate's cautious approach to creditors should also govern nonprobate transfers, and to suggest reforms to the probate process.

TABLE OF CONTENTS

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INTRODUCTION

Asuncion Ortez Hamilton was contemplating the end of her life.[1] Her husband had already passed away.[2] She was alienated from her son, Eugene, but close to her four grandchildren and her niece, Glenda.[3] Her most prized possession was her home in a blue-collar section of Oakland, California.[4] On November 26, 2004, she attended an estate planning presentation at a senior center.[5] The topic was probate: the process by which a court oversees the management and transfer of your property after you die.[6] Most likely, she heard that this regime—which applies to decedents who either make wills or die intestate—was unnecessary, slow, and expensive.[7] She received a booklet extolling the virtues of revocable trusts: contract-like arrangements that transfer assets after death without judicial supervision.[8] On page eleven of this pamphlet, she attempted to create a trust, writing in jagged letters:

1. *See* First and Final Account and Report of Executor, Petition for Statutory Compensation, Petition for Determination of Entitlement to Estate Distribution and Petition for Final Distribution at 1–2, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. Nov. 20, 2008) [hereinafter Hamilton, Petition for Final Distribution].

2. *See* Petition for Probate of Will and for Letters Testamentary at 5, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. Apr. 27, 2007) [hereinafter Hamilton, Petition for Probate of Will].

3. *See* Hamilton, Petition for Final Distribution, *supra* note 1, at 5.

4. *See* Inventory and Appraisal at 4, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. Oct. 23, 2007).

5. *See* Hamilton, Petition for Final Distribution, *supra* note 1, at 5.

6. *See id.*

7. Although I do not know exactly what Asuncion learned at the presentation, trust vendors usually cast probate as an "expensive legal nightmare." Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 595 (2000) (quoting MARYLAND ESTATE PLANNING, INC., THE LIVING TRUST: A WAY TO LIVE AND A WAY TO DIE 3) (internal quotation marks omitted).

8. *See* Hamilton, Petition for Final Distribution, *supra* note 1, at 5.

> I leave all my [e]state to my Grandchildren
> it will be divided among them[.]
> they: Teresa Lynn Hamilton
> Rachell Hamilton
> My trustee is Glenda Neri
> with my money and house[.][9]

She signed and dated this document.[10] On March 15, 2007, she died.[11]

Asuncion Ortez Hamilton's Purported Trust

IRREVOCABLE LIVING TRUSTS 11-26-07

An Irrevocable Living Trust, as its name indicates, is one that cannot be revoked or changed. It is final. There are some tax advantages in using an Irrevocable Trust, and it also has most of the advantages of a revocable trust. This trust can be used for gifts, typically to miners. The assets in an irrevocable trust will avoid the probate system, avoid estate taxes in some circumstances, avoid income taxes to the grantor, and the trustee can manage the property for the beneficiaries if needed.

I leave all my state to my Grandchildren
it will be divided among them
they: Teresa Lynn Hamilton
Rachell Hamilton
My Trustee is Glenda Neri
With my money and house

Asuncion Hamilton

Page 11

9. Hamilton, Petition for Probate of Will, *supra* note 2, at 5–6.
10. *Id*.
11. *See id.* at 2.

By trying to bypass probate, Asuncion was not unique. Every year, millions of people go out of their way to achieve the same goal.[12] Although judicial involvement in the inheritance process has a venerable history,[13] today it is "perhaps the most hated and feared of all American legal institutions."[14] Probate's downfall began in 1965, when Norman Dacey's *How to Avoid Probate* sold 1.5 million copies and became "one of the most successful books ever."[15] Dacey argued that probate serves no purpose, takes too long, and permits lawyers and personal representatives to enrich themselves at the expense of decedents and their loved ones.[16] Soon scores of articles in newspapers and law journals echoed Dacey's criticisms.[17] Estate planners began abandoning wills and embracing life insurance, pay-on-death accounts, and revocable trusts.[18] A lucrative industry rode Dacey's wake, as everyone from seasoned practitioners to vendors of do-it-yourself estate planning kits to sketchy "trust mills"[19] capitalized on our "near obsession with avoiding probate."[20] When Dacey published a new edition of his book in 1990, he made a subtle but telling revision: *How to Avoid Probate* became *How to Avoid Probate!*[21]

Today, Dacey's assertions are truisms. According to the conventional wisdom, there is no reason to involve the government in the mechanics of succession. To be sure, judicial oversight can prevent and resolve conflict. But then

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12. *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109–10 & n.4 (1984).

13. *See infra* section I.A.

14. NORMAN F. DACEY, HOW TO AVOID PROBATE! 20 (5th ed. 1993) (quoting Professor Richard V. Wellman).

15. Edwin McDowell, *Book Notes*, N.Y. TIMES, Mar. 7, 1990, http://www.nytimes.com/1990/03/07/arts/book-notes-459190.html.

16. *See* DACEY, *supra* note 14, at 23–36.

17. *See, e.g.*, Charles Dent Bostick, *The Revocable Trust: A Means of Avoiding Probate in the Small Estate?*, 21 U. FLA. L. REV. 44, 47 (1968) ("[P]robate . . . suffers from the ailments of old age—a sort of arteriosclerosis of method that renders it both philosophically and functionally unable to cope with the insistent demand of modern society."); Langbein, *supra* note 12, at 1116 ("The probate system has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse."); Richard V. Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 547 (1981) ("[S]uccession costs . . . are notoriously higher in the United States than in other countries."); Sal Nuccio, *Personal Finance: How to Avoid a Costly Probate*, N.Y. TIMES, Nov. 14, 1966, at 65 ("[T]here is evidence—and general agreement among many top legal experts—that the probate procedures in many areas are woefully inefficient.").

18. *See, e.g.*, Langbein, *supra* note 12, at 1110–14. Admittedly, this shift away from wills is not entirely due to probate avoidance. Instead, it also reflects dramatic changes in the nature of capital. Americans hold trillions of dollars in securities, mutual funds, and retirement accounts—assets that allow owners to bypass probate by filling out a beneficiary designation. *See, e.g.*, John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 12–16 (2012); Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 167–69 (2014).

19. "Trust mills" sell mass-produced, preprinted trusts, usually targeting senior citizens and other vulnerable populations. *See, e.g.*, David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1715–18 (2009).

20. JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS, CASES AND MATERIALS 503 (2d ed. 2003).

21. *Compare* NORMAN F. DACEY, HOW TO AVOID PROBATE (1965), *with* DACEY, *supra* note 14.

again, the state does not insist on monitoring the performance of individuals who enter into similar transactions, such as contracts or gifts.[22] Indeed, some scholars have argued that court-supervised inheritance is especially misguided because the close-knit relationship between family members minimizes disputes.[23] Likewise, probate's other functions are seen as anachronistic. For instance, the process once protected creditors by creating a forum for them to collect a decedent's debts.[24] Yet as John Langbein emphatically asserts in his canonical article about the nonprobate revolution, "in general, *creditors do not need or use probate*."[25] Similarly, because probate generates a court order, it helps clear title to real property.[26] But although that task was vital in an agrarian society where land was the primary source of wealth, it is less important now that paper assets—stocks, bonds, and mutual funds—dominate the financial landscape.[27] More importantly, probate is no longer the exclusive way to clear title. Owners who wish to transfer land after they die now enjoy a range of private options.[28] Thus, probate has reportedly not kept pace with the times.

In addition, probate's flaws are legendary. First, both personal representatives and their attorneys are entitled to be paid for their services.[29] Traditionally, these fee awards have been set at a minimum percentage of the value of the decedent's property.[30] Arguably, this departure from hourly billing practices allows personal representatives and lawyers to pad their incomes with routine matters that require little work.[31] Second, probate filings, like all court papers, are a matter of public record.[32] Thus, unlike trusts, which are private, wills and intestate administrations expose intimate family dynamics to "heirs, thieves, reporters, and 'inquiring minds' alike."[33] Third, probate moves slowly. Dacey peppered his book with nightmarish accounts of cases stuck for decades in the jaws of the system.[34] Even in less extreme situations, "the property is 'tied up' until all of the court-centered and statutorily required steps are taken and the

22. *See, e.g.*, Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 394 ("The transfer of wealth on death typically involves the formal intervention of the state to a degree not true of *inter vivos* transfers.").

23. *See* Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 191–92 (1969).

24. *See, e.g.*, R. H. Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEG. HIST. 68, 76–77 (1979).

25. Langbein, *supra* note 12, at 1120.

26. *See, e.g.*, PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS 57 (2003).

27. *See* Langbein, *supra* note 12, at 1119.

28. For example, states are experimenting with transfer-on-death deeds, "which allow[] the owner of real property to execute and record a revocable beneficiary designation effective to transfer the property on the owner's death." Langbein, *supra* note 18, at 16.

29. *See, e.g.*, JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 45–46 (8th ed. 2009).

30. *See infra* text accompanying notes 81–83.

31. *See* DACEY, *supra* note 14, at 24–25.

32. *See* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 557 (2008).

33. *Id.*

34. *See* DACEY, *supra* note 14, at 27–28.

estate is closed."[35] Juxtaposed against the lightning speed of nonprobate transfers, judicial oversight seems like "a mandatory waiting period": a purgatory "for the vast majority of estates that involve no disputed or unknown claims."[36] For these reasons, "probate is not just criticized. It is studiously avoided."[37]

Yet these critiques have remained static for half a century, even as great changes have swept through society. Some of these developments may have rekindled the state's interest in shepherding assets from the dead to the living. For instance, court involvement may be "cautious to the point of absurdity"[38] if a decedent's loved ones are, in fact, close. But according to the U.S. Census Bureau, nearly half of the couples who married in the late 1970s are no longer together.[39] There are anecdotal reports that this fraying of the family structure has caused a spike in estate litigation.[40] Similarly, creditor protection may be a more pressing concern than it was during the formative years of the nonprobate movement. Between 1991 and 2004, the outstanding balance on Americans' credit cards more than tripled,[41] raising new questions about the intersection of debt and death. Likewise, the public's distaste for the system may be based on outdated views. Many states have revamped their procedures to make them simpler, quicker, and cheaper.[42] Even probate's transparency may be less objectionable in an era where people often "broadcast[their] internal monologue across the Internet."[43]

In fact, we know almost nothing about what happens in modern probate court.[44] During the middle of the twentieth century, a handful of scholars recognized that probate records could be a fertile source of information about the efficacy of the process.[45] Although these studies shine a welcome light on the administration of decedents' property, they are decades out of date.

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35. John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 49 (2009).

36. *Id.*

37. *Id.* at 43; *see also* DUKEMINIER ET AL., *supra* note 29, at 46 (noting that probate can be avoided with adequate preparation).

38. Bostick, *supra* note 17, at 48.

39. *See, e.g.*, Betsey Stevenson & Justin Wolfers, *Divorced From Reality*, N.Y. TIMES, Sept. 29, 2007, http://www.nytimes.com/2007/09/29/opinion/29wolfers.html (noting that 47% of marriages that occurred from 1975 to 1979 have now ended).

40. *See, e.g.*, Philip Moeller, *8 Tips to Avoid Nasty Estate Surprises*, U.S. NEWS & WORLD REP. (Oct. 23, 2009, 10:10 AM EDT), http://money.usnews.com/money/blogs/the-best-life/2009/10/23/8-tips-to-avoid-nasty-estate-surprises.

41. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON PRACTICES OF THE CONSUMER CREDIT INDUSTRY IN SOLICITING AND EXTENDING CREDIT AND THEIR EFFECTS ON CONSUMER DEBT AND INSOLVENCY 7 (2006), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.pdf.

42. *See, e.g.*, Wellman, *supra* note 17, at 503–06 (surveying widespread legislative changes to state probate codes in the 1970s).

43. Hannah Seligson, *An Online Generation Redefines Mourning*, N.Y. TIMES, Mar. 21, 2014, http://www.nytimes.com/2014/03/23/fashion/an-online-generation-redefines-mourning.html.

44. As I discuss in more depth *infra* section II.B.2.b and section III.A, we know even less about nonprobate instruments, the terms of which only appear in public records if a dispute arises.

45. *See, e.g.*, MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 44–45 (1970) (collecting data from probate decedents and survivors in Cuyahoga County, Ohio in the

This Article updates our understanding of contemporary probate. Its centerpiece is an original dataset that traces the arc of every probate matter stemming from individuals who, like Asuncion Ortez Hamilton, died in Alameda County, California in 2007. This fine-grained account of 668 cases—the product of painstaking review of tens of thousands of pages of court filings—upends some of the best-settled assumptions about probate. First, contrary to the belief that disputes over estates are exceedingly rare, eighty-three cases degenerated into litigation. In addition, dozens more required court intervention to resolve uncontested but consequential issues: quasi-adversarial matters that did not feature formal oppositions but in which a litigant needed to persuade the judge to grant a particular form of relief. Second, creditors no longer ignore probate. In my sample, over 200 different individuals, entities, and governmental agencies sought to recover almost $20 million in debts from decedents. Third, probate costs less than is commonly presumed. Even combined, attorneys' and personal representatives' fees consumed a meager 2.5% of the gross value of all estates.

On the other hand, probate's length continues to be its Achilles' heel. It took an average of about a year and a half for the Alameda County estates to wind through the system. But this figure is somewhat misleading. Many cases grind to a halt for reasons that are unrelated to the fact that they are subject to court jurisdiction. Instead, the culprit is usually the unruliness of succession itself: the difficulty of handling incomprehensible wills,[46] executors who vanish after

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mid-1960s); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1304 (1969) (canvassing 187 testate estates from Washtenaw County, Michigan and 100 testate estates from London, England, in 1963); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 241 (1963) (surveying 97 estates from 1953 and 73 estates from 1957 from Cook County, Illinois); Richard R. Powell & Charles Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919, 923−25 (1930) (analyzing statistics about estate administration from two New York counties at the beginning of the twentieth century); Robert A. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 596 (1974) (looking at four Minnesota counties in 1969); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 55 (1985) [hereinafter Stein & Fierstein, *Demography*] (using the same data as the 1984 study but shifting the focus to decedents); Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1110, 1114 (1984) [hereinafter Stein & Fierstein, *The Role of the Attorney*] (reporting on probates during 1972 in California, Florida, Maryland, Massachusetts, and Texas, with an emphasis on the lawyers who were involved); Ward & Beuscher, *supra* note 22, at 393−94 (examining 415 probate cases from five different time periods between 1929 and 1944 in Dane County, Wisconsin).

There is also a rich historical literature that uses probate files from previous centuries to examine a range of social and economic issues. *See, e.g.*, 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, 803 (2011) (considering 110 wills from Greene County, Alabama, from the three decades before the Civil War); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1446−47 (2007) (surveying 513 estates from San Bernardino County, California in 1964); Jason C. Kirklin, Note, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479, 535 (2011) (examining 18 wills from Hamilton County, Indiana between 1838 and 1857).

46. *See* Petition for Probate of Will and for Letters of Administration With the Will Annexed at 6–7, Estate of Varela, No. RP07345102 (Cal. Super. Ct. Sept. 7, 2007) (involving a decedent who left an

transferring funds to offshore gambling websites,[47] and homes in ritzy neighborhoods that turn out to be cesspools of hoarded junk.[48]

Asuncion Ortez Hamilton's experience showcases how court supervision can actually be advantageous. Despite her efforts, Asuncion did not avoid probate. To place her house in trust, Asuncion needed not only to sign a writing naming her niece, Glenda, as trustee, but to deed her house to Glenda as trustee.[49] Because Asuncion did not execute a deed, she seemed to die intestate, meaning that her property would pass to her estranged son rather than her beloved grandchildren.[50] Yet California recognizes holographic wills: those that are largely in the testator's handwriting.[51] Because Asuncion's document met this criterion, the probate court admitted it as a holographic will and implemented her dispositive wishes.[52] Unfortunately, that was not the final complication. Asuncion's will contained a glaring ambiguity: although it stated that her assets should be "divided among" her "[g]randchildren," it identified just two of the four of them by name.[53] But based on a declaration from Glenda about Asuncion's intent, the court construed the will as making equal gifts to all members of that class.[54] Ironically, then, Asuncion's estate benefitted from the very judicial oversight that Asuncion sought to avoid.

Although Asuncion's case is just a single dispatch from the trenches, I argue that it symbolizes a broader point: there are ways in which decedents and society have been ill-served by our embrace of privatized succession. For one, the emergence of a massive trust creation and administration industry has funneled decedents into expensive estate-planning devices even when their needs would be adequately served by simple wills or intestacy. Similarly, I explore the idea that some individuals might rationally decide to subject their

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envelope that contained two inconsistent wills with the same date and, apparently, a page torn out of a book about the history of Palestine).

47. *See* Petition for Final Distribution; With First and Final Accounting of the Special Administrator; and for Allowance of Statutory Fees, Extraordinary Compensation and Reimbursement of Expenses Advanced at 3, *In re* Estate of Epifani, No. RP07327771 (Cal. Super. Ct. Mar. 25, 2011).

48. *See* First and Final Account and Report of Special Administrator and First and Final Account and Report of Status of Administration and Petition for Settlement Thereof; for Allowance of Statutory Attorneys' and Executors' Compensation; for Extraordinary Attorneys' Compensation; for Reimbursement of Costs Advanced; and for Final Distribution at 7, Estate of Ozeroff, No. RP07311595 (Cal. Super. Ct. May 4, 2009) (detailing the efforts required to sell the decedent's house, which required filling seven dumpsters and performing over a hundred pages of repairs).

49. Under the statute of frauds, a trust containing land requires either the trustee to sign a written instrument evidencing the trust, or the settlor to deed the property to the trustee. *See* CAL. PROB. CODE § 15206 (West, Westlaw through 2014 Reg. Sess.). Thus, Asuncion would have created a valid trust if she had named herself trustee. Yet because Asuncion named Glenda, she needed to execute a deed transferring the house to Glenda as trustee.

50. *See id.* § 240.

51. *See id.* § 6111(a).

52. *See* Order Appointing Executor at 1, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. June 13, 2007).

53. Hamilton, Petition for Final Distribution, *supra* note 1, at 5.

54. *See* Petition for Instructions to Remit Beneficial Interest to Alameda County Treasurer at 1–2, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. May 25, 2011).

property to court supervision. Specifically, people who are worried about conflict over their estates can benefit from ex ante judicial involvement and the constraints imposed by statutorily fixed attorneys' and personal representatives' fees. Finally, probate's cautious approach to creditors helps avoid spillover costs. I thus urge policymakers not only to preserve this regime within probate, but to import it into the realm of trusts, pensions, life insurance, and other private transfers.

Of course, I do not mean to suggest that probate always functions well. The process continues to need reform. I conclude the Article by using the Alameda County files to evaluate existing proposals and to make fresh suggestions. For example, the Uniform Probate Code (UPC) and some jurisdictions dispense with judicial monitoring under certain circumstances.[55] Likewise, several thoughtful commentators have proposed eliminating personal representatives or replacing probate with a bare-bones registration system.[56] I argue that these views proceed from the false premise that inheritance runs smoothly and rarely requires state intervention. I claim that a better solution for many estates would be to abolish expensive, time-consuming, and unnecessary administrative hurdles, such as filing an inventory and appraisal (I&A) and obtaining a surety bond.

The Article contains three Parts. Part I traces the history of probate from its birth in the ecclesiastical courts of Anglo-Saxon England to its bitter unpopularity in modern America. It reveals how court oversight came to be seen as an intrusion into an orderly process, sparking the nonprobate revolt. Yet Part I also cites a range of recent social and legal changes that may have shaved off probate's rough edges and restored some of its vitality. Part II analyzes every probate court record stemming from deaths that occurred in Alameda County, California, in 2007. The goal here is myth busting: using hard data to challenge the sometimes hyperbolic assertions of the nonprobate revolution. Part III first uses these findings as the springboard for a series of normative claims that cluster around the counterintuitive idea that probate should continue to play a role in the posthumous transmission of property. It then sketches some ways to improve the process.

I. PROBATE'S RISE AND FALL

Probate was once the norm. Today, it is seen as little more than a trap for the unwary. This Part describes probate's spectacular fall from grace.

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55. These curtailed administrative regimes come in several flavors, such as "common form" probate and "unsupervised" administration. I discuss them *infra* text accompanying notes 149–52.

56. *See* Martin, *supra* note 35, at 77−87 (proposing that states create an Office of Registration to handle administration); John H. Martin, *Non-Judicial Estate Settlement*, 45 U. MICH. J.L. REFORM 965, 967–84 (2012) (further defining a registration system by contrasting it with the UPC's informal procedures); *see also* Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449, 477–78 (2009) (advocating for a regime that dispenses with administration entirely).

A. PROBATE'S ORIGINS

Inheritance began as a private transaction. Under the Roman tradition of universal succession, estates passed seamlessly to one's heirs and beneficiaries.[57] These survivors simply acquired a decedent's assets, rights, and obligations, as though they were "clothed with his legal personality."[58] Likewise, in medieval England, the inheritance process did not involve courts.[59] Real property, the wellspring of economic power, could not be devised by will.[60] Likewise, most debts did not survive the death of either the borrower or the lender.[61] Thus, there was little need for an officer of the state to ensure that a decedent's wishes were honored or that her books were balanced.[62]

Yet the Norman Conquest transformed the legal landscape, and by the thirteenth century, a primitive probate system had emerged in the ecclesiastical courts of the Church of England.[63] Personal property did not simply glide between generations; instead, it entered a kind of limbo upon its owner's death. To steer the estate during this transition, the ecclesiastical courts appointed a personal representative, who stepped into the decedent's shoes.[64] Often, one of the personal representative's first tasks was to persuade the bishop of the local diocese that the decedent's testamentary instrument was authentic—a process known as "probating" the will.[65] Then the personal representative would pay a bond, take possession of the decedent's assets, inventory them, and distribute them to survivors.[66] The ecclesiastical court did not oversee each step; rather, it merely required the personal representative to return at the end and account for her actions.[67]

Unfortunately, this regime straddled a fault line in the British judiciary. Ecclesiastical courts could supervise personal representatives and validate wills,

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57. *See, e.g.*, WILLIAM ALEXANDER HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 740 (4th ed. 1903).

58. *Id*. Many civil law countries continue to follow this blueprint. *See, e.g.*, George A. Pelletier, Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323, 326–29 (1966).

59. *See, e.g.*, Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 110 (1943).

60. *See, e.g.*, RANULF DE GLANVILLE, A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 118 (1900); A. W. B. Simpson, Book Review, 78 HARV. L. REV. 1303, 1304–05 (1965) (reviewing MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND (1963)). Land could be passed by trust, however. *See, e.g.*, John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1071 (2007).

61. *See, e.g.*, 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 258 (2d ed. 1898).

62. *See, e.g.*, Atkinson, *supra* note 59, at 108–09.

63. *See id.* at 112–13.

64. *See id.*

65. *Id.*

66. *See, e.g.*, 7 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 210 (John Houston Merrill ed., 1889).

67. *See, e.g.*, SAMUEL TOLLER & FRANCIS WHITMARSH, THE LAW OF EXECUTORS AND ADMINISTRATORS 248 (2d Am. ed. 1824).

but disputes over debts were the province of royal judges: the Court of King's Bench, the Court of Common Pleas, and the High Court of Chancery.[68] As the law became more hospitable to claims brought by or against estates, personal representatives found themselves torn between various tribunals.[69] This fissure deepened when the Statute of Wills made land devisable in 1540,[70] because only secular courts could entertain claims involving real property.[71] Estate administration "became highly intricate, costly, and fraught with hazard."[72]

This clumsy model cast a long shadow over early American probate. To be sure, the colonies did not have ecclesiastical courts and thus managed to avoid the chaos of the British system by giving a single branch power over decedents' property.[73] But with no template to follow, probate courts diverged wildly from state to state and county to county. In some areas, probate was akin to small claims court: the presiding officer was not a lawyer, hearings took place off the record, and rulings were appealed to trial judges for de novo review.[74] Other regions treated probate matters like all other civil cases.[75] Even the name of this division varied throughout the country from probate court to orphans' court to surrogates' court to prerogative court.[76]

By the nineteenth century, these tribunals had become increasingly embroiled in the minutiae of estate administration. This shift may have stemmed from the rising complexity of winding up a decedent's affairs in an industrialized society;[77] alternatively, it might have been a brazen effort by lawyers and judges to line their pockets with fees.[78] Either way, unlike their ecclesiastical forebearers, who only exerted dominion at the beginning and end of the process, U.S. probate judges began to monitor every stage of an ever-more byzantine ritual.[79] They required personal representatives to file an initial petition seeking appoint-

68. *See* POLLOCK & MAITLAND, *supra* note 61, at 348. However, if a testator's will instructed her executor to pay her creditors, the ecclesiastical courts conceptualized this provision as a bequest and continued to hear the matter. *See* R. H. Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEGAL HIST. 68, 75 (1979).

69. *See, e.g.*, Atkinson, *supra* note 59, at 118.

70. *See* 32 Hen. 8, c. 1 (1540) (Eng.).

71. *See, e.g.*, Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 968 (1944) ("[T]he jurisdiction of the ecclesiastical courts was limited to the disposition of personal property.").

72. 2 J.G. WOERNER & WILLIAM F. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION (INCLUDING WILLS) 1179 (3d ed. 1923). For a well-known expression of frustration with the British system, see generally CHARLES DICKENS, BLEAK HOUSE (1853) (describing a fictional case that is stuck for generations in probate).

73. *See* Simes & Basye, *supra* note 71, at 977.

74. *See id.* at 977–82.

75. *See id.* at 984–85.

76. *See id.* at 987.

77. *See, e.g.*, LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW 401 (1946); *cf.* Max Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431, 433 (1975) ("Modern economic life, based essentially upon credit, would be impossible if a person's debts abated with his death.").

78. *See* Rheinstein, *supra* note 77, at 438.

79. *See* SIMES & BASYE, *supra* note 77, at 387–401.

ment, publish notice of death in a newspaper, send a similar announcement to a decedent's family and creditors, hire an appraiser, seek approval before selling real property, file an accounting, and wait to distribute the estate until all affected parties had a chance to come forward.[80] These cautious procedures—the opposite of universal succession—were designed to flush out and resolve conflict *before* distributing the estate.

In addition, compensation worked differently in probate than in other practice areas. Rather than allowing personal representatives and attorneys to bill by the hour, many bar associations and state legislatures adopted schedules that linked minimum fee awards to the value of the decedent's property.[81] For example, in 1950s Chicago, a lawyer handling a $9,000 estate would recover a flat $260 on the first $3,000 in assets and then 7% of the remaining $6,000.[82] These fixed payments were a floor, not a ceiling: personal representatives and lawyers could recover more by proving that they had rendered "extraordinary services."[83]

B. PROBATE DATA

How well did the American probate system work? In the early and mid-twentieth century, several commentators wrestled with that question. This section summarizes their efforts.

In 1930, Richard Powell and Charles Looker distilled some basic information about estate administration from two counties in New York.[84] Rather than dusting off actual court documents, Powell and Looker relied on aggregate statistics compiled by the state and federal governments.[85] One of their most striking findings was that the number of deaths reported in each area greatly exceeded the number of probate cases filed.[86] For instance, from 1914 to 1929, between two-thirds and three-quarters of deaths did not result in a court proceeding.[87] Powell and Looker hypothesized that these absent decedents

80. *See, e.g.*, *In re* Estate of Trigg, 368 S.W.3d 483, 491–92 (Tenn. 2012) (describing early twentieth century reforms aimed at giving interested parties notice of the probate); *see also* Thomas E. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425, 425 (1943); Stein & Fierstein, *Demography*, *supra* note 45, at 68; Ward & Beuscher, *supra* note 22, at 406 n.19 (listing the steps required to close an estate). Not every state followed this mold. For instance, starting in 1843, Texas allowed testators to voluntarily subject their will to independent administration. *See* William I. Marschall, Jr., *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95, 97–98 (1954).

81. *See, e.g.*, Stein & Fierstein, *The Role of the Attorney*, *supra* note 45, at 1173; Comm. on Admin. & Distribution of Decedents' Estates, ABA, *Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, 13 REAL PROP. PROB. & TR. J. 238, 244–45 (1978).

82. *See* Dunham, *supra* note 45, at 277 n.49.

83. *Ex parte* Bickley, 16 Ohio Dec. 569, 572 (Ohio Ct. C.P. 1906); *In re* David's Estate, 288 N.W. 418, 419 (Iowa 1939).

84. *See* Powell & Looker, *supra* note 45.

85. *See id.* at 921−22.

86. *See id.* at 923–25.

87. *See id.*

either had not accumulated any assets, or that their loved ones had divided their property informally.[88]

Powell and Looker also provided some rough data about the estates that had passed through the judicial system. They determined that will contests were rare, occurring in just 4% of cases.[89] Also, they examined the payment of debts, taxes, encumbrances, and probate costs.[90] Unfortunately, Powell and Looker were not able to segment out each particular item; rather, they simply reported the overall amount by which estates "shrank" during probate.[91] They concluded that there was an inverse relationship between the size of an estate and the degree to which it was consumed by expenses during the process.[92] For instance, estates worth $2,500 or less lost between 40% and 70% of their total value, whereas decedents who left $100,000 to $1,000,000 only shed about 12% to 15% of their net worth.[93]

Two decades later, Edward Ward and J. H. Beuscher published a more ambitious project.[94] Rather than relying on data collected by others, Ward and Beuscher examined actual probate files from Dane County, Wisconsin.[95] They began by pulling all the death certificates within the jurisdiction for the years 1929, 1934, 1939, 1941, and 1944.[96] From this master list, they selected every fifth document, narrowing their list to 983 individuals.[97] Finally, they checked these names against local probate court records and found 415 matches.[98] Like Powell and Looker before them, Ward and Beuscher were surprised that a majority of decedents—here 58%—left no probate estate.[99]

Ward and Beuscher reached two main conclusions about probate. First, they noted that the regime was unfavorable to smaller estates.[100] For instance, most cases closed in about eleven months.[101] Paradoxically, however, those with the least amount of property took the longest to conclude.[102] Likewise, in these

88. *See id.* at 927–28 & n.10.
89. *Id.* at 932.
90. *See id.* at 945–48.
91. *See id.*
92. *See id.* at 948.
93. *Id.*
94. *See* Ward & Beuscher, *supra* note 22.
95. *See id.* at 393.
96. *See id.*
97. *See id.* at 394.
98. *See id.* Forty-seven percent of these decedents were testate. *See id.* at 411.
99. *See id.* at 396. In fact, this number would likely be higher today. In 1950s Wisconsin, joint tenancies passed through probate. *See id.* at 393, 397–98 (including thirty-three "joint tenancy survivorship proceedings" in the sample of 415 probate files); *see also* Stein & Fierstein, *Demography*, *supra* note 45, at 62–63 ("[T]he probate court usually is not involved in the transfer of [joint tenancy] ownership rights."). Excluding these cases, 601 of the 983 Dane County decedents (62%) left no probate estate.
100. *See* Ward & Beuscher, *supra* note 22, at 403–04.
101. *See id.* at 403.
102. *See id.* Ward and Beuscher did not count two exceedingly long cases: one that took eighteen and a half years to resolve, and one that was open for more than seven years. *See id.*

lower brackets, administrative expenses were disproportionately large.[103] Indeed, attorneys' and personal representatives' fees ate up 30% of estates worth $2,000 or less, but only about 6% of those that held $50,000 or more.[104] Second, Ward and Beuscher determined that probate was better described as transactional, rather than adversarial.[105] For starters, they found that most testators "transferred their property 'within the family.'"[106] Indeed, only three testators (1%) disinherited relatives in favor of friends or charities.[107] In light of this fact, Ward and Beuscher were not surprised to unearth just six contests out of 172 wills (3.5%):

> There are some reasons for the small number of will contests in these testate cases. One, probably the most important, is that most wills provide for the testator's closest heirs. If all of the closest heirs are not included, it is usually the children who lose out in favor of decedent's spouse, an arrangement which is usually acceptable to the children, and, even if not, is considered a natural provision.[108]

Accordingly, Ward and Beuscher came away with "a strong impression that in the great majority of cases the work is routine."[109]

In 1963, Allison Dunham employed similar techniques to canvass 170 probate cases from 1953 and 1957 in Cook County, Illinois.[110] Dunham began by observing that she uncovered substantially more "absent" decedents than Ward and Beuscher did: a whopping 85% of deaths in the area did not lead to a probate.[111] Otherwise, however, Dunham's findings largely mirrored Ward and Beuscher's. For instance, Dunham noted that smaller estates took especially long to close: although most probates lasted between thirteen and eighteen months, those with less property sometimes persisted for almost two years.[112] Likewise, Dunham found that dispositive patterns in wills were relatively conventional. Specifically, twenty-seven of the twenty-eight married testators (96%) left their entire estate to their surviving spouse.[113] At first blush, dece-

103. *See id.* at 404.
104. *Id.*
105. *See id.* at 415–16.
106. *Id.* at 413.
107. *See id*.
108. *Id.* at 416. Similarly, other kinds of disputes were few and far between. Seven beneficiaries initiated judicial proceedings to interpret unclear wills. *See id.* However, in several instances, "the parties acknowledged the ambiguity and were willing to abide by the court's clarifying construction so that there was no real contest." *Id.* In addition, just 12% of estates featured creditors' claims. *Id.* at 417.
109. *Id.* at 415.
110. *See* Dunham, *supra* note 45, at 241–42.
111. *See id.* at 244.
112. *See id.* at 269. Dunham's attempt to analyze personal representatives' and attorneys' fees was hamstrung by gaps in the probate files. *See id.* at 277. However, she did spotlight two interesting facts. First, many personal representatives—particularly those who were closely related to the decedent—did not charge at all for their services. *See id.* at 275–76. Second, 46% of attorneys actually billed less than the fee fixed by the Bar Association scale. *See id.* at 277.
113. *See id.* at 253.

dents seemed to exhibit more individuality when giving to children: roughly 70% of wills "avoided the equality of distribution prescribed by the intestate succession laws."[114] At the same time, though, Dunham discovered no wills that excluded entire bloodlines.[115] Even in the exceedingly rare instances where a testator omitted a child, it was in order "to include [that child's] descendants."[116] Perhaps because disinheritance was so rare, Dunham did not collect data about litigation.[117]

Upping the ante, sociologists Marvin Sussman, Judith Cates, and David Smith then published a monograph, *The Family and Inheritance*, based on their review of 659 files and interviews with survivors.[118] These cases constituted 5% of the probate docket between November 1964 and August 1965 in Cuyahoga County, Ohio.[119] Unlike previous researchers, Sussman, Cates, and Smith found that small and medium-sized estates wrapped up in roughly nine to twelve months, but larger estates took twice as long.[120] However, Sussman, Cates, and Smith also spotlighted an alarming fact: fifteen matters were protracted for five years or more.[121] In addition, the authors emphasized that attorneys' fees were "the most significant expense" in the process.[122] Although they did not calculate the amount of these payments, it appears that between 4% and 12% of low-value estates ended up in the hands of lawyers.[123] Turning to the contents of wills, Sussman, Cates, and Smith joined the chorus of commentators who had remarked that the overwhelming majority of testators—here 85%—bequeathed their entire estate to their surviving spouse.[124] Similarly, Sussman, Cates, and Smith noted that fewer than 10% of testators conveyed property to nonrelatives.[125] As in prior studies, this homogeneity made conflict extremely uncommon: only six of 453 wills were contested (1.3%).[126]

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114. *Id.* at 254.

115. *See id.* at 256.

116. *Id.*

117. *See generally id.* Similarly, Dunham did not mention creditor's claims.

118. SUSSMAN, CATES & SMITH, *supra* note 45.

119. *See id.* at 45. There were 453 testate estates (69%) and 206 intestacies (31%). *See id.* at 63.

120. *See id.* at 238–39. Sussman, Cates, and Smith hypothesized that this may have been because federal estate tax valuation rules create incentives for personal representatives to wait before seeking final distribution. *See id.* at 238.

121. *See id.* at 239. These estates either featured litigation, problems locating heirs, or "apparent[] gross incompetence on the part of the personal representative or his attorney." *Id.*

122. *Id.* at 244. However, like Dunham, the authors noticed that personal representatives who were "very close family member[s]" often waived fees. *Id.* at 243; *accord* Dunham, *supra* note 45, at 275–76.

123. SUSSMAN, CATES & SMITH, *supra* note 45, at 244–45. At the opposite pole, attorneys' fees constituted between 1.7% and 8.3% of the wealthiest estates. *See id.* at 245.

124. *See id.* at 89.

125. *See id.* at 108.

126. *Id.* at 184. Sussman, Cates, and Smith also found that although 61% of estates left debts, these obligations "usually constituted a small proportion of the gross estate" and were usually paid by survivors "without the necessity of court proceedings." *Id.* at 183–84.

Most recently, Robert Stein surveyed files in 1969 from Dodge and Hennepin Counties in Minnesota.[127] A familiar picture emerged. First, Stein discovered that only about 30% of decedents left probate estates.[128] Second, he cited average case spans of between sixteen and thirty-six months as support for the proposition that "many probate administrations take too long."[129] Third, he noted that attorneys' fees represented just 2% of richer estates but 14% of less affluent ones.[130] And finally, he confirmed that testators generally gave all their property to their spouse.[131]

Thus, by the second half of the twentieth century, several key points about probate had coalesced. For one, court supervision came at a price. Routine matters languished in the system, and smaller estates moved slowly and paid more than their fair share. Moreover, because testators usually bequeathed their estate to their spouse or children, conflict was virtually non-existent. Nevertheless, decedents had few options other than probate. But as I discuss next, that was about to change.

C. THE NONPROBATE REVOLUTION

Interest in trusts as an estate planning tool had slowly bloomed during the first part of the twentieth century.[132] At first, these devices faced a formidable legal hurdle. Trust instruments rarely comply with the stringent rules that govern will execution, such as being signed by two witnesses. As a result, several courts refused to enforce trusts that served as "will substitutes," reasoning that they did not satisfy the formalities for making a "testamentary" transfer.[133] Yet other judges went to elaborate lengths to distinguish trusts from wills and thus enforce them.[134] Moreover, banks and corporate fiduciaries

127. *See* Stein, *supra* note 45, at 596. Working with a co-author, Stein expanded on this pilot study in two later pieces that surveyed nearly 6,000 estates from California, Florida, Maryland, Massachusetts, Minnesota, and Texas in 1972. *See* Stein & Fierstein, *Demography*, *supra* note 45 (reporting on the characteristics of probate decedents and their property); Stein & Fierstein, *The Role of the Attorney*, *supra* note 45 (focusing on norms in the probate bar).

128. Stein, *supra* note 45, at 597. In a subsequent piece, Stein and Fierstein concluded that the rate of "absent" decedents varied between jurisdictions from about 66% to 80%. *See* Stein & Fierstein, *Demography*, *supra* note 45, at 61.

129. Stein, *supra* note 45, at 602.

130. *Id.* at 600. This imbalance carried over to other probate costs, as well. Overall, the costs of administration were 23% of the small estates and 3% of the large estates. *Id.*

131. *See id.* at 602–03 (limiting this observation to smaller estates). In a later piece, Stein and Fierstein also highlighted "[t]he relative infrequency of disputes," but did not elaborate. Stein & Fierstein, *Demography*, *supra* note 45, at 88 n.91.

132. *See, e.g.*, A. James Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108, 110 (1960).

133. *See, e.g.*, Betker v. Nalley, 140 F.2d 171, 173 (D.C. Cir. 1944); Smith v. Simmons, 61 P.2d 589, 590 (Colo. 1936); Coon v. Stanley, 94 S.W.2d 96, 99 (Mo. 1936).

134. *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600, 608 (Ill. 1955); Nat'l Shawmut Bank v. Joy, 53 N.E.2d 113, 122 (Mass. 1944). These cases engaged in an ingenious sleight-of-hand by explaining that trust beneficiaries acquire a "present interest" when the trust is created. *See Farkas*, 125 N.E.2d at 603. This stake blossoms into full-fledged ownership the moment the settlor dies, leaving no "testamen-

recognized that trusts held great potential. When these entities serve as the personal representative in probate, they are limited to charging a one-time fee for their services. But trusts allow them to manage assets—and thus bill the estate—for years and even decades. Thus, the amount of funds held by corporate trustees had swollen from $21 billion in 1940 to $144 billion in 1963.[135]

However, the gradual shift toward trusts accelerated to light speed in 1965, when *How to Avoid Probate* became a smash hit.[136] The book was unorthodox in many ways. For one, its author, Norman Dacey, was a mutual fund salesman, not a lawyer.[137] In addition, it was initially self-published: Dacey cajoled a handful of stores near his home in Connecticut to carry it.[138] The manuscript even looked unusual: it was available only in paperback and printed in columns on oversize pages, like a magazine.[139] It began with a screed against judicial oversight of inheritance—a tradition that Dacey called "[a]lmost universally corrupt."[140] Dacey argued that probate's statutory compensation scheme, which guaranteed lawyers and personal representatives a minimum percentage of the estate, resulted in fees that were "astronomical in relation to the time spent . . . on the matter."[141] In fact, he argued, some attorneys saw the act of drafting a will as a "loss leader": not profitable by itself, but merely a hook for being allowed to handle "the lucrative probate which follows the client's death."[142] Then, citing horror stories from around the country—including an estate that had been mired in the courts since 1898—he claimed that the U.S. system took far longer than other countries' regimes.[143] Finally, he concluded with two hundred pages of fill-in-the-blank templates that readers could use to create trusts.[144] Despite its quirks, *How to Avoid Probate* became the best-selling nonfiction book of 1966.[145] Second place went to *Human Sexual Response*, prompting one writer to quip that *How to Avoid Probate* was "more popular than sex."[146]

Dacey's success sparked a period of sustained interest in probate reform. In fact, even before *How to Avoid Probate* hit bookshelves, the American Bar Association (ABA) and Uniform Law Commission had begun drafting a pro-

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tary" transfer on the table that must comply with the formalities for making wills. *See id.* at 605–08. One of the problems with this logic is the fact that settlors often retain the power to revoke their trusts, making it exceedingly difficult to conceptualize the nature of the interest that automatically vests in beneficiaries. *See id.* at 603 (admitting that "[i]t is difficult to name this interest").

135. Douglas M. Cain, Arthur F. Shenkin & William P. Cantwell, *The Care and Feeding of Individual Trustees*, 39 U. COLO. L. REV. 205, 231 n.70 (1967).

136. *See* DACEY, *supra* note 14.

137. *See* Richard D. Lyons, *Norman Dacey*, N.Y. TIMES, Mar. 19, 1994, http://www.nytimes.com/1994/03/19/nyregion/norman-dacey-85-advised-his-readers-to-avoid-probate.html.

138. *See* McDowell, *supra* note 15.

139. *See* DACEY, *supra* note 14.

140. *Id.* at 23.

141. *Id.* at 24 (quoting Leo Kornfeld, former editor of *Trusts and Estates* magazine).

142. *Id.*

143. *Id.* at 26–27.

144. *See generally id.*

145. *See* McDowell, *supra* note 15.

146. Harold G. Wren, Book Review, 42 NOTRE DAME L. REV. 445, 447−48 n.17 (1967).

posed Uniform Probate Code (UPC).[147] Its reporter, esteemed professor Richard Wellman, believed that probate's fundamental deficiency was the fact that it treated the uneventful succession process as though it were adjudication:

> Inheritance is a family matter. Any economic advantage one set of survivors might gain over another by stirring up trouble would be countered in most cases by displeasure and resentment by relatives or close acquaintances, rather than strangers. . . . In sum, therefore, many of the usual components in succession tend to lead survivors to resolve any differences privately and amicably.[148]

To ameliorate this shortcoming, the UPC includes two streamlined options. First, it authorizes "informal" probate, in which a nonjudicial official approves a will or determines the identity of intestate heirs without a hearing.[149] Only then must the personal representative give notice to interested parties, who have a short window to request that a court reexamine these issues in "formal" probate.[150] Second, the UPC creates a default rule of unsupervised administration, thus allowing a personal representative to manage and distribute the decedent's property privately.[151] Thanks to these innovations—descendants of the Roman concept of universal succession—Wellman imagined a future in which lawyers told clients who inquired about setting up a trust: "Save your money. Probate works well."[152]

But there was no stopping the locomotive of probate avoidance. For one, when the UPC emerged from the ABA's House of Delegates in 1969, it received a mixed reception. To be sure, many jurisdictions enacted portions of Wellman's blueprint.[153] For instance, several legislatures replaced fixed fee schedules with the model statute's recommendation to allow courts to award "reasonable compensation" (whatever the judge thinks is appropriate) to attorneys and personal representatives.[154] Yet because only a dozen or so states adopted the

147. *See* Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 453 (1970) (describing the UPC's drafting process).

148. Wellman, *supra* note 23, at 191–92.

149. *See id.* at 198−99; *see also* UNIF. PROBATE CODE § 3-301 (amended 2010).

150. *See id.* § 3-401. Wellman borrowed this technique from a handful of states that drew a similar dichotomy between "common form" and "solemn form" probate. *See, e.g.*, Wells v. Odum, 170 S.E. 145, 146 (N.C. 1933); Abercrombie v. Hair, 196 S.E. 447, 450 (Ga. 1938); Wellman, *supra* note 23, at 198−99.

151. *See* UNIF. PROBATE CODE § 3-715 & comm.; *see also* Wellman, *supra* note 23, at 199. Parties can also request supervised administration, which requires the personal representative to obtain judicial approval before making distributions. *See id.* §§ 3-502, 3-504.

152. *Id.* at 201.

153. *See, e.g.*, CAL. PROB. CODE § 21135 (West, Westlaw through 2014 Reg. Sess.) (adopting the UPC's approach to ademption); MASS. GEN. LAWS ANN. ch. 190B, § 3-606 (West, Westlaw ch. 389 of 2014 2d Annual Sess.) (same for rules relating to bonds); PA. CONS. STAT. ANN. § 2202 (West, Westlaw through Acts 1 to 171, 173 to 198 and 200 to 204 of 2014 Reg. Sess.) (same for spousal elections).

154. UNIF. PROBATE CODE §§ 3-715(18)−(21), 3-719 (amended 2010); *see also* ARIZ. REV. STAT. ANN. § 14-3719 (West, Westlaw through 2014 2d Reg. & Special Sess.); D.C. CODE § 20-751 (West, Westlaw

UPC's informal probate and unsupervised administration regimes,[155] full-bore probate remained the only avenue for many decedents. Moreover, the public's view of this process could not be rehabilitated. The Watergate scandal in the mid-1970s created further cynicism about the legal profession.[156] Against this backdrop, probate's maze of rules seemed symptomatic of a larger pathology.

Then, in a seminal 1984 article, John Langbein identified two less obvious factors that were continuing to drive the uprising against probate.[157] First, Langbein argued that probate's ability to clear title and make real property marketable might have been indispensable in the farm-based economy of previous centuries but was increasingly extraneous now that wealth consisted largely of stocks, bonds, and retirement accounts.[158] Second, Langbein asserted that probate's second "great mission"—"discharging the decedent's debts"—had become an exercise in futility.[159] Langbein based this conclusion on interviews with employees at commercial lenders and department stores.[160] He explained that these entities found probate collection actions to be cost-prohibitive, and thus relied on survivors to pay debts voluntarily.[161] Although Langbein's piece appeared thirty years ago, it has become the last word on the matter. Judicially supervised succession continues to be condemned as not only slow, expensive, and public, but "obsolete"[162]: a rotting husk that no longer

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through Nov. 25, 2014); 755 ILL. COMP. STAT. ANN. 5/27-2 (West, Westlaw the 98-1125 of 2014 Reg. Sess.); IND. CODE ANN. § 29-1-10-13 (West, Westlaw through 2014 2d Reg. Sess.); MASS. GEN. LAWS ANN. ch. 190B, § 3-719 (West, Westlaw ch. 389 of 2014 2d Annual Sess.); MICH. COMP. LAWS ANN. § 700.3719 (West, Westlaw through P.A.2014, No. 355 of 2014 Reg. Sess.); MINN. STAT. ANN. § 525.515 (West, Westlaw through 2014 Reg. Sess.); N.D. CENT. CODE ANN. § 30.1-18-19 (West, Westlaw through 2013 Reg. Sess.); WIS. STAT. ANN. § 851.40 (West, Westlaw through Act 380 of 2013 Sess.); DEL. CH. CT. R. 192. This shift was also spurred, in part, by a U.S. Supreme Court decision that held that a county bar association's minimum fee schedule for performing title examinations violated the Sherman Act. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 783–91 (1975). However, because the Sherman Act exempts "state action," some courts have refused to extend it to legislatively mandated probate fee schedules. *See, e.g.*, *In re* Estate of Effron, 173 Cal. Rptr. 93, 96 (Cal. Ct. App. 1981).

155. *See, e.g.*, ALASKA STAT. ANN. § 13.16.080 (West, Westlaw through 2014 2d Reg. Sess.); ARIZ. REV. STAT. ANN. § 14-3301 (West, Westlaw through 2014 2d Reg. & Special Sess.); COLO. REV. STAT. ANN. § 15-12-301 (West, Westlaw through 2014 2d Reg. Sess.); HAW. REV. STAT. § 560:3-301 (West, Westlaw through 2014 Reg. Sess.); IDAHO CODE ANN. § 15-3-301 (West, Westlaw through 2014 2d Reg. Sess.); ME. REV. STAT. ANN. tit. 18A, § 3-301 (West, Westlaw through 2014 2d Reg. Sess.); MASS. GEN. LAWS ANN. ch. 190B, § 3-301 (West, Westlaw ch. 389 of 2014 2d Annual Sess.); MICH. COMP. LAWS ANN. § 700.3301 (West, Westlaw through P.A.2014, No. 355 of 2014 Reg. Sess.); MINN. STAT. ANN. § 524.3-301 (West, Westlaw through 2014 Reg. Sess.); MONT. CODE ANN. § 72-3-212 (West, Westlaw through 2013 Sess.); NEB. REV. STAT. ANN. § 30-2414 (West, Westlaw through 2014 Reg. Sess.); N.M. STAT. ANN. § 45-3-301 (West, Westlaw through 2014 2d Reg. Sess.); N.D. CENT. CODE ANN. § 30.1-14-01 (West, Westlaw through 2013 Reg. Sess.); S.D. CODIFIED LAWS § 29A-3-301 (West, Westlaw through 2014 Reg. Sess.); UTAH CODE ANN. § 75-3-301 (West, Westlaw through 2014 Gen. Sess.).

156. *See, e.g.*, Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1261 (1991).

157. *See* Langbein, *supra* note 12.

158. *See id.* at 1118–19.

159. *Id.* at 1120.

160. *See id.*

161. *See id.* at 1120–25.

162. Martin, *supra* note 35, at 77.

serves relevant objectives.

However, one might question whether the central tenets of the nonprobate revolution have weathered decades of relentless social, cultural, and technological development. For example, estate administration may not have been contentious in the 1960s. Today, though, the no-fault divorce movement, the multiple marriage society, and increasing numbers of blended and nontraditional families have complicated end-of-life issues.[163] Indeed, practitioners are reporting "a large increase in fiduciary, estate planning, and probate litigation."[164] Similarly, Langbein's survey of creditors undoubtedly captured the zeitgeist of the 1980s. Nevertheless, since then, consumer borrowing has become an entirely different animal. Fueled by the expansion of the credit card industry, aggregate household debt now exceeds $13 trillion.[165] Even the rise of the Internet may have changed how we think about probate's lack of privacy. Information about people and their property is now more accessible than ever. In addition, the popularity of social media and the phenomenon of over-sharing has redrawn the border between public and private. If "TMI ('Too Much Information') is SOP ('Standard Operating Procedure'),"[166] is probate transparency still jarring?

In the next Part, I examine whether these changes have affected probate by examining a year's worth of decedents in a large California county.

II. EMPIRICALLY ASSESSING PROBATE

This Part describes the empirical research that is the heart of this Article. It then explains how these findings cast fresh light on probate's functions and flaws.

A. METHODOLOGY

California's probate system is a hybrid. In some ways, it is quite conventional. It has bucked the UPC-inspired trend of allowing attorneys and personal representatives to recover "reasonable compensation," and instead bases fees on a percentage of the value of the estate.[167] Yet lawmakers have also refined the

163. *See, e.g.*, Kevin F. Kinghorn & Ronald G. Wilson, *How Estate Planning Has Failed the Baby Boomer Generation*, 45 ARIZ. ATT'Y 12, 13 (2009) ("The traditional focus of estate planning is ill equipped to deal with the complexities caused by non-traditional family relationships."). For example, in the generation born between 1940 and 1944, 18% of men and 16% of women have been married twice or more. *See* ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, at 9, *available at* http:// www.census.gov/prod/2011pubs/p70-125.pdf (last accessed Jan. 3, 2014).

164. David E. Kauffman, *Ethical Issues in Probate Litigation*, 20 OHIO PROB. L.J. 233, 233 (2010); *see also* Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 725 (2011) ("Litigation in the area of trusts and estates is continuing to increase.").

165. *See, e.g.*, LYN C. THOMAS, CONSUMER CREDIT MODELS: PRICING, PROFIT, AND PORTFOLIOS 2 (2009); *see also* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 123 (2000) (noting that between 1980 and 1995, "the amount of revolving credit outstanding jumped sevenfold").

166. Jerry Kang, *What's "Active Intermediaries" Got to Do with It?*, 161 U. PA. L. REV. ONLINE 303, 309 (2013).

167. *See* CAL. PROB. CODE § 10810 (West, Westlaw through 2014 Reg. Sess.). The court can increase the fee award when the lawyer or personal representative has performed "extraordinary services." *Id.*

process over the years. For instance, low-value estates—those worth $150,000 or less—may be administered without judicial oversight.[168] In addition, under the Independent Administration of Estates Act (IAEA), personal representatives need not obtain court approval before taking most actions.[169] Likewise, if certain criteria are met, personal representatives can make a preliminary distribution of up to half of a decedent's property without waiting for the case to close.[170]

The specific locus of this study, Alameda County, is a community near San Francisco with a population of 1.5 million.[171] It includes low-income cities such as Richmond, affluent areas like Piedmont, suburbs such as Freemont and Hayward, and the economically diverse towns of Berkeley and Oakland. Although the median household income is over $70,000, nearly 12% of residents live in poverty.[172] It is therefore slightly wealthier than the larger United States, which has a median income of about $53,000 and a poverty rate of close to 15%.[173]

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§ 10811. For states with similar compensation schemes, see ARK. CODE ANN. § 28-48-108 (West, Westlaw through 2014 2d Ex. Sess.); FLA. STAT. ANN. § 733.617 (West, Westlaw through 2014 2d Reg. Sess. & Sp. "A" Sess.); IOWA CODE ANN. § 633.197 (West, Westlaw through 2014 Reg. Sess.); M.D. CODE ANN., EST. & TRUSTS § 7-601 (West, Westlaw through 2014 Reg. Sess.); MO. ANN. STAT. § 473.153 (West, Westlaw through 2014 2d Reg. Sess.); NEV. REV. STAT. ANN. §§ 150.060−.067 (West, Westlaw through 2014 28th Special Sess.).

168. *See* CAL. PROB. CODE § 13100 (West, Westlaw through 2014 Reg. Sess.). Most other jurisdictions also have an exemption, although the maximum estate value varies widely. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-3971 (West, Westlaw through 2014 2d Reg. & Special Sess.) ($50,000 in personal property and $75,000 in real estate); FLA. STAT. ANN. § 735.201 (West, Westlaw through 2014 2d Reg. Sess. & Sp. "A" Sess.) ($75,000); 755 ILL. COMP. STAT. ANN. § 5/9-8 (West, Westlaw through P.A. 98-823 of the 2014 Reg. Sess.) ($100,000); IOWA CODE ANN. § 635.1 (West, Westlaw through 2014 Reg. Sess.) ($100,000); MASS. GEN. LAWS ANN. ch. 190B, §§ 3-1201−02 (West, Westlaw Ch. 389 of 2014 2d Annual Sess.) ($25,000); N.Y. SURR. CT. PROC. ACT LAW § 1301 (West, Westlaw through ch. 478 of 2014) ($30,000); WASH. REV. CODE ANN. § 11.62.010 (West, Westlaw through 2014 legislation) ($100,000).

169. *See* CAL. PROB. CODE §§ 13650−13660 (West, Westlaw through 2014 Reg. Sess.).

170. *See id.* §§ 11620−11624. In general, the personal representative must wait at least two months after being appointed to file the petition, and also must prove that "that the distribution may be made without loss to creditors or injury to the estate or any interested person." *Id.* § 11621. However, if the personal representative has full power under the IAEA, she can seek a distribution of up to 50% of the estate after providing notice to interested parties. *See id.* § 11623. Again, other states have similar rules. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-234(21) (West, Westlaw through 2014 Feb. Reg. Sess.); NEV. REV. STAT. ANN. § 143.450 (West, Westlaw through 2014 28th Special Sess.); WASH. REV. CODE ANN. § 11.72.006 (West, Westlaw through 2014 legislation).

171. *See State and County QuickFacts, Alameda County, California*, U.S. CENSUS BUREAU (July 8, 2014), http://quickfacts.census.gov/qfd/states/06/06001.html.

172. *See id.*

173. *See State and County QuickFacts, USA*, U.S. CENSUS BUREAU (July 8, 2014), http://quickfacts.census.gov/qfd/states/00000.html. The country as a whole is about 78% white, 5% Asian, 17% Hispanic, and 13% African American. *See id.* Alameda County is slightly more diverse, with 52% of residents identifying as white, 28% as Asian, 22% as Latino, and 13% as African American. *See id.*

Alameda County makes court records available through a website called DomainWeb.[174] The files are organized by location, date, and courtroom number. The county's two probate judges sit in Department 23 of the Rene C. Davidson Oakland Courthouse and Department 602 of the Freemont Hall of Justice. In the summer of 2009, a team of research assistants began to comb through cases from these divisions. They started with matters that came on calendar on January 1, 2008, and moved through each day of the docket until March 1, 2009. When they encountered the administration of a will or an intestacy, they recorded about two dozen variables on an Excel spreadsheet, including the decedent's name, the case number, the dates that probate opened and closed, the estate's gross worth, the value of real property, information about creditor's claims, and the amount of personal representatives' and attorneys' fees. This first pass resulted in a dataset of about 2,000 estates, with dates of death ranging from 1947 to 2008.

I returned to the project in the summer of 2013. Because including every case on the docket would lead to a biased sample in which long-running, problematic matters were overrepresented, I decided to focus exclusively on decedents who died in 2007. In addition, I double-checked the work of my research assistants and updated the thirty or so cases that were pending in 2009 but had concluded. Finally, I expanded the spreadsheet to capture other issues, including the decedent's marital status, the identity of creditors, whether real property was sold, how often attorneys appeared before the court, the relationship between the decedent and the heirs, beneficiaries, and personal representatives, and whether litigation had ensued.

Before I dive into the results, I want to flag two overarching issues. First, I acknowledge that my findings may not be generalizable. Of course, a snapshot from a single county may not reflect practices elsewhere in the state, let alone the nation. And more specifically, because California is a community property jurisdiction, its probate code differs from common law property states in some important ways. For instance, California has created a nonprobate shortcut for the estates of married decedents. By filing a "spousal property petition," a surviving husband or wife can lay claim to his or her interest in the community without having to march through the paces of traditional administration.[175] As I will discuss below, the availability of this technique greatly influences the demographics of the decedents in my study.

Second, when I refer to the value of an estate, I mean the gross value: what the property is worth without regard to debts and encumbrances. The probate system uses this crude measure exclusively, which can be misleading. For instance, if someone took out a $500,000 loan to purchase a $750,000 house, the court sees a $750,000 asset—even though the owner's interest in it is only

174. *DomainWeb*, SUPERIOR COURT CAL., ALAMEDA CNTY., http://www.alameda.courts.ca.gov/pages.aspx/domainweb (last visited Oct. 27, 2014).

175. *See* CAL. PROB. CODE § 13500 (West, Westlaw through 2014 Reg. Sess.).

$250,000. Because granular financial information is generally not available in the files, I was unable to calculate the net value of each estate. The degree to which this distorts my numbers depends on whether most decedents have built up equity in their homes. If many people die owing large balances on their mortgages, then probate treats them as being richer than they actually are. Unfortunately, there is little I can do other than to be forthright about this issue and call for further research.

B. RESULTS

My study yielded 668 estates: 399 wills (60%) and 269 intestacies (40%).[176] 56% of these decedents were women and 44% were men. The gross value of their property was $471,557,262—nearly half a billion dollars. Although the average size of an estate was $719,051, there was tremendous variation among individuals, ranging from several who were bankrupt to one whose net worth topped $80,000,000. Finally, the total value of property passing by will was $329,755,473 (an average of $849,000 per estate), compared to $140,105,954 for intestacies (an average of $530,704).[177]

At the outset, it appears that the desire for probate avoidance is more vociferous than ever. Recall that previous studies determined that between 15 and 40% of all deaths resulted in a probate.[178] My research—the first since the nonprobate movement kicked into high gear—indicates a dramatic decline in the decedent-to-probate ratio. Alameda County reported 9,319 deaths in 2007.[179] Given the 668 cases that this project unearthed, only 7% of decedents left probate estates.[180]

To be sure, not all of these "absent" decedents executed will substitutes such as trusts. Some families likely divided a decedent's personal property among themselves. In addition, as noted above, California exempts estates worth less than $150,000 from court supervision.[181] Given Alameda County's double-digit poverty rate, a non-negligible percentage of its residents almost certainly slipped

176. Five hundred and eighty-eight cases came from the Oakland courthouse and eighty cases originated in Freemont.

177. Previous studies found significantly larger economic disparities between testate and intestate decedents. For instance, Dunham's data broke down into 60% testators and 40% intestate decedents—precisely the same ratio as I found. *See* Dunham, *supra* note 45, at 248. Yet Dunham observed that the amount of property that testators bequeathed—over $4 million—was nine times higher than the $440,000 that flowed through intestacy. *See id.* at 250–51; *see also* Stein & Fierstein, *Demography*, *supra* note 45, at 82 (finding that the mean testate estate was three times larger than the mean intestate estate).

178. *See supra* text accompanying notes 87, 99, 111.

179. *See Table 5–16. Deaths by Year of Death, California Counties, 1998–2007 (By Place of Residence)*, CAL. DEP'T PUB. HEALTH, http://www.cdph.ca.gov/data/statistics/Documents/VSC-2007-0516.pdf (last accessed Nov. 5, 2014).

180. The actual number of relevant estates is 658, because ten cases were ancillary probates: those where a decedent was a resident of a different state, but owned property in Alameda County. This minor adjustment does not affect the 7% figure.

181. *See supra* text accompanying note 168.

through this crack. Finally, recall that surviving husbands or wives can sidestep probate by filing a spousal property petition.[182] As a result, married decedents who transmit their possessions largely to their spouse do not appear in the probate records.[183] One conspicuous fact suggests that this tool is popular: the 2007 Alameda County cohort was overwhelmingly single. Indeed, of the 662 people whose conjugal status was listed in court documents, a whopping 590 (88%) were unmarried.[184] Accordingly, the decline in the ratio of decedents to probate administrations does not stem entirely from the rise of trusts.

Nevertheless, I also found evidence that trusts remain the centerpiece of most testamentary schemes. Of the 399 wills I discovered, seventy (17%) were "pour over" wills. Pour over wills serve as a safety net for decedents whose primary estate planning instrument is a trust.[185] These documents bequeath property to the trustee, thus "pouring over" all probate assets into the trust.[186] This ensures that possessions that are mistakenly omitted from the trust estate will nevertheless be distributed under the terms of the trust instrument.[187] Pour over wills are designed *not* to be probated: because of the carve-out for low-value estates, only settlors who die owning significant nontrust assets must take that step.[188] However, one out of every six wills in my sample was a pour over will. And for every such will, there were likely dozens more that conveyed less than $150,000 into the trust and thus never appeared in the court files. In this way, the pour over wills in my spreadsheet were a shadow left by the nonprobate movement—a hint of the massive fleet of trusts lurking out there.

This flight from probate stems from the perception that the process is broken. The remainder of this Part tries to complicate that tidy narrative.

1. Probate's Purposes

Judicial oversight of succession resolves disputes, protects creditors, and facilitates the transfer of real property. These purposes are seen as outmoded. But this section offers evidence that they are more relevant than we think.

a. Conflict Resolution. One of the sturdiest pillars of the nonprobate movement is the idea that "the vast majority of estates . . . lack disputes and uncertain-

182. *See supra* text accompanying note 175.

183. California created the spousal property petition in 1972. *See* CAL. PROB. CODE § 13500 cmt. (West, Westlaw through 2014 Reg. Sess.). A survey of California court records from the same year found that 20% of deaths led to a probate—significantly more than my 7% figure. *See* Stein & Fierstein, *Demography*, *supra* note 45, at 61. Of course, the increase in "absent" decedents over the decades could stem from the growing popularity of spousal property petitions or trusts—or both.

184. Two hundred and ninety-eight were divorced or had never wedded, and two hundred and eighty-two had outlived their husband or wife.

185. *See, e.g.*, MICHAEL J. GAU, A PRACTICAL GUIDE TO ESTATE PLANNING AND ADMINISTRATION 61 (2005).

186. *See id.* The ultimate beneficiaries of the decedent's estate plan are those named in the trust. Because the trust instrument is not public, it is impossible to determine their identities.

187. *See id.*

188. *See id.*

ties."[189] Because previous studies found will contests in only about 1% to 3% of cases,[190] scholars fault probate for forcing a harmonious exchange into a clumsy, adversarial posture.[191] However, as I explain in this section, my data are different. Not only did prior research underestimate the incidence of probate conflict, but the process has become more fraught over time.

To frame this discussion, it is useful to step back and note that statistics about estate litigation are a Rorschach test. As noted, the apparent dearth of will contests can be used to bolster the claim that court supervision is unnecessary. Yet the literature in a different context spins the same facts differently. U.S. law gives heirs formidable weapons to challenge the validity of estate plans, including the doctrines of incapacity and undue influence.[192] Some commentators have argued that these highly pliable rules make it too easy for disgruntled family members to extort settlements from beneficiaries.[193] As these voices observe, because "there are millions of probates per year, one-in-a-hundred litigation patterns are very serious."[194]

But if a 1% conflict rate is alarming, then my results are eye-popping: of the 668 estates, eighty-three (12%) involved litigation. Several factors seem to be operating in tandem. The first pertains to an observation that Langbein made in his watershed article: the non-probate revolution is splitting succession in half.[195] One path is for easy matters. Some decedents transfer each asset to their trust, update their IRA to reflect their evolving family, and take pains to insulate their dispositive instruments from contest. Financial intermediaries—trustees, pension administrators, and life insurance companies—handle these routine cases without judicial intervention.[196] Yet as more and more of these straightforward administrations exit the system, probate has become the domain of the messy estate.

Second, the seemingly astronomical increase in litigation reflects the fact that the scope of prior research into probate lawsuits was extremely limited. Indeed, the surveys from the early and mid-twentieth century only tracked a single

189. Martin, *supra* note 56, at 993.

190. *See, e.g.*, SUSSMAN, CATES & SMITH, *supra* note 45, at 184 (finding will contests in 1.3% of all cases); Ward & Beuscher, *supra* note 22, at 415–16 (concluding that 3.4% of wills are contested).

191. *See, e.g.*, Langbein, *supra* note 12, at 1116 ("[A] judicial proceeding is inconsistent with the interests that ordinary people regard as paramount when they think about the transmission of their property at death."); Martin, *supra* note 35, at 52 ("[W]ealth transmission seems unlikely to be a proper subject of the judicial process."); Wellman, *supra* note 23, at 193 ("The assumption that administration of an estate requires a judicial proceeding is . . . doubtful . . . .").

192. *See, e.g.*, DUKEMINIER ET AL., *supra* note 29, at 159–97.

193. *See, e.g.*, John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 (1994) (book review).

194. *Id.* at 2042 n.5; *see also* Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (contending that wills generate more litigation "than any other legal instrument").

195. *Cf.* Langbein, *supra* note 12, at 1120 (describing how "[f]inancial intermediaries execute easy transfers and shunt the hard ones over to probate").

196. *See id.*

species of probate dispute: will contests.[197] Yet as my data reveal, challenges to the validity of a testamentary instrument are the tip of the litigation iceberg. For instance, of the 399 Alameda County wills, twenty-one were contested (5.3%). Nevertheless, I also found twenty-four disputes over the identity of a personal representative, nineteen objections to the exercise of fiduciary duties, fifteen claims seeking to recover estate property from a third party, ten heirship grievances, and three issues relating to the meaning of a testamentary instrument.[198] This array of claims elucidates that early empirical work on probate court is not a reliable guide to the frequency of litigation.

Third, probate is no longer "a family matter" in which social norms prompt "survivors to resolve any differences privately and amicably."[199] Indeed, at least in California, court-based inheritance sweeps within its ambit a diverse group of people with often antagonistic interests. For one, I found a surge in "nontraditional" dispositive choices. Ward and Beuscher discovered only three wills (1.7%) that completely disinherited relatives and concluded that "a substantial number of people" treated similarly situated relatives exactly the same.[200] Likewise, no will in Dunham's study omitted a line of descent: even when a testator excluded a child, she invariably included that child's children.[201] Conversely, as drafted, 176 of the Alameda County wills (44%) deviated from the norm of "equally near, equally dear." These testators gave nothing to close family members, or favored some children over others, or rewarded friends, far-flung relatives, in-laws, stepchildren, or charities. This idiosyncrasy increased friction: nine will contests featured relatives who had been completely cut out of a decedent's estate plan, and three more featured lopsided property divisions among children or grandchildren. Figure 1 illustrates the variation in testamentary schemes by showing the identity of non-contingent beneficiaries.[202]

Of course, because testators sometimes outlive their first-choice beneficiaries, a different group of people actually received bequests. Here the identity of parties with claims on the estate further splintered. Studies from the 1950s and 1960s determined that about 50% of probate decedents were married,[204] and

197. *See, e.g.*, SUSSMAN, CATES & SMITH, *supra* note 45, at 184; Ward & Beuscher, *supra* note 22, at 415–16.

198. Because some cases involved multiple forms of litigation, the number of claims filed (ninety-two) exceeds the number of estates that featured lawsuits (eighty-three).

199. Wellman, *supra* note 23, at 191–92.

200. Ward & Beuscher, *supra* note 22, at 413.

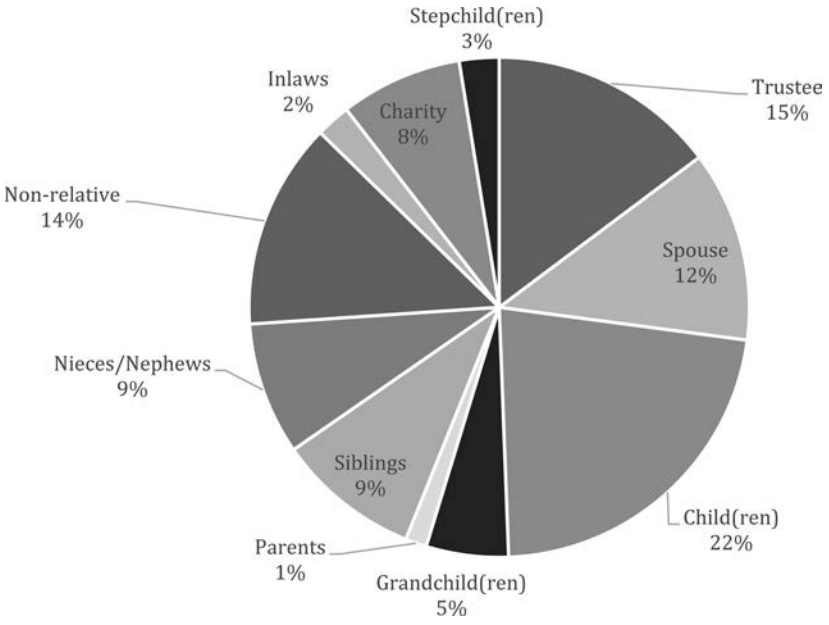
201. *See* Dunham, *supra* note 45, at 256.

202. By "non-contingent," I mean beneficiaries who stood to receive property immediately under a will, rather than only upon the occurrence of some future event. In addition, I was only able to measure the frequency with which particular individuals were named or served as beneficiaries or heirs. Thus, Figures 1 through 3 do not reflect the exceedingly more difficult calculation of the amount of property passing to each class.

203. As noted above, the overwhelming majority of bequests to trustees appeared in pour over wills. *See supra* text accompanying notes 185–88.

204. *See, e.g.*, SUSSMAN, CATES & SMITH, *supra* note 45, at 70 (383 of 686 (56%) were married); Dunham, *supra* note 45, at 247 (239 of 481 decedents (49%) were married).

Figure 1: Identity of Non-Contingent Testate Beneficiaries[203]



that between 85% and 96% of these individuals left their entire estate to their husbands or wives.[205] As a result, about half of all wills left everything to a surviving spouse—a dispositive scheme that is unlikely to be controversial.[206] Yet recall that the Alameda County testators were nearly 90% single.[207] Thus, as Figure 2 highlights, spouses received a mere 4% of all bequests. Likewise, although forty-three testators tried to bequeath everything to their husbands or wives, most of these bequests lapsed, leaving just seven (1.7%) all-to-spouse outcomes. In turn, when no single individual serves as a repository for all of a testator's property, estate administration becomes riskier and requires balancing the demands of competing stakeholders.

Similar forces were at the root of many disputes over intestacies. California gives the decedent's spouse all of the community property and a portion of the separate property that hinges on how many other relatives survive.[208] Any remainder drops down the family tree to be shared among descendants, or, if there are none, the decedent's parents, siblings, or nieces and nephews.[209]

205. *See* SUSSMAN, CATES & SMITH, *supra* note 45, at 89; Dunham, *supra* note 45, at 252–53.

206. *See, e.g.*, Ward & Beuscher, *supra* note 22, at 416.

207. *See supra* text accompanying note 184.

208. *See* CAL. PROB. CODE § 6401 (West, Westlaw through 2014 Reg. Sess.). The spouse takes half of the remainder if the decedent left only one child, grandchild, parent, or descendant of parent. If the decedent left two such individuals, the spouse takes the minimum share of one-third of what is left over. *See id.*

209. *See id.*

Figure 2: Identity of Actual Testate Beneficiaries

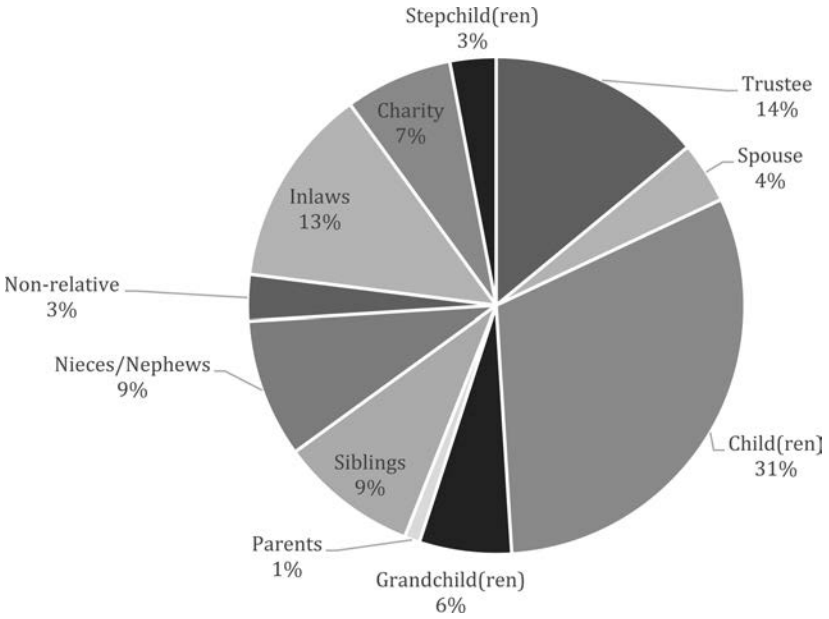


Figure 3 reveals that a mere thirty-seven (14%) intestate decedents were married, and only 160 (59%) left children or grandchildren.

The fragmentation of intestate beneficiaries explains the emergence of a surprising bone of contention: battles between heirs over who should serve as personal administrator. Objections to proposed administrators or petitions to remove an administrator appeared seventeen times in my records (in over 6% of all intestacies). California's method for selecting administrators tracks its regime for allocating an intestate decedent's property and thus gives priority to spouses, followed by children, grandchildren, parents, and siblings.[210] Yet the statute does not address how to resolve competing petitions among equally situated relatives, such as two children. With so few married decedents, 194 (72%) left multi-individual beneficiary classes, laying the groundwork for squabbles over who would run the estate. These clashes were often surprisingly fierce and featured siblings accusing each other of committing felonies,[211] embezzlement,[212] or even stealing the vase that contained the decedent's ashes.[213]

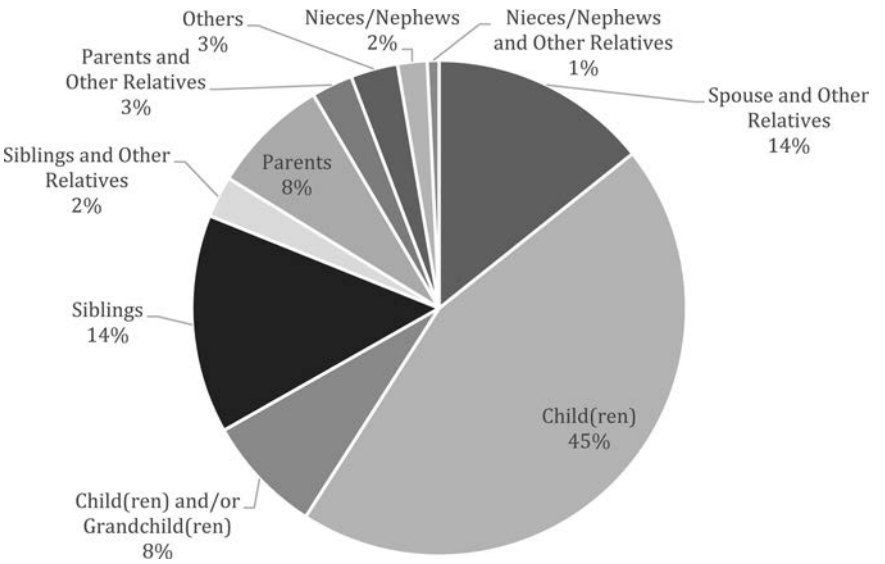
210. *See* CAL. PROB. CODE § 8461 (West, Westlaw through 2014 Reg. Sess.). In addition, heirs can petition to remove an administrator for serious malfeasance, such as fraud. *See id.* § 8502.

211. *See* Objection at 1, *In re* Estate of Mouzon, No. RP07322619 (Cal. Super. Ct. July 19, 2007).

212. *See* Petition to Remove Personal Representative of the Estate at 3, *In re* Estate of Maah, No. RP07342443 (Cal. Super. Ct. Jan. 12, 2010).

213. *See* Objections by Kevin A. Williams, Sr., Hilleri M. Reynolds and Kianna J. Reynolds to Orlando J. Williams' Petition for Letters of Administration and Authorization to Administer Under the

Figure 3: Identity of Intestate Heirs



Of course, this heterogeneity of beneficiaries and heirs might be California-specific. As noted, perhaps because of spousal property petitions, most married decedents do not show up in the files.[214] Accordingly, I cannot help but oversample individuals who have outlived their husband or wife. The second spouse to die is more likely to have varied dispositive wishes than the first spouse to die (who probably leaves most of their property to the survivor). As a result, other jurisdictions may have fewer eclectic testamentary schemes and thus a lower percentage of disputed estates.

At the same time, though, I have also understated the degree to which probate judges serve as an arbiter of conflict. I based the 12% litigation figure on the number of *contested* matters, where one party's pleading sparked an objection from another party. However, I also unearthed numerous quasi-adversarial proceedings. In an additional thirty-two estates, parties engaged in motion practice and oral argument to try to convince the court to grant a particular form of relief.[215] These issues ran the gamut from complex heirship determina-

Independent Administration of Estates Act at 4, Estate of Reynolds, No. RP07321115 (Cal. Super. Ct. June 11, 2007).

214. *See supra* text accompanying note 184.

215. I excluded routine probate matters such as petitions to probate wills, appoint administrators, approve accountings, or award fees.

tions,[216] to attempts to clarify language in a will,[217] to efforts to transfer real property from the estate to the decedent's trust.[218] Even though these petitions were not opposed, judges often pushed back and denied them, reinforcing the similarity to full-fledged litigation.[219] Including these cases in the "conflict" column means that the court actively resolved disputes in 115 matters: more than 17%.

In sum, my research suggests that probate litigation is significantly more common than assumed. I will return to this issue and discuss its implications for probate avoidance in Part III. But first, I discuss another phenomenon that has flown under the scholarly radar: creditor's claims.

b. Creditor Protection. Supposedly, probate "plays an inconsequential role in the collection of decedents' debts."[220] This view rests almost entirely on a single reed: John Langbein's influential 1984 article, *The Nonprobate Revolution and the Future of the Law of Succession*.[221] As noted above, Langbein declared that creditors had abandoned probate after he spoke with specialists at banks, trust companies, and department stores.[222] His pronouncement was likely true when it was made. Nevertheless, as I show in this section, times have changed.

Probate debt collection is flourishing. Indeed, I found over 200 different creditors presenting demands for payment in 266 estates (40% of all cases). These individuals and entities sought to recover a total of $19,757,157 (4% of the gross value of all decedents' assets). To put this number in perspective—and as I will discuss in greater depth below—the final tally of attorneys' fees for the Alameda County decedents was $7,551,540, or about 1.5% of the gross worth of their property. Thus, although creditors' claims supposedly do not exist, and

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216. *See, e.g.*, Petition to Determine Heirship at 1, Estate of Repetto, No. RP07329971 (Cal. Super. Ct. Mar. 26, 2008) (asking the court to decree that the decedent's second cousins are her intestate heirs).

217. *See, e.g.*, Petition for Declaratory Relief Re: No Contest Clause; Memorandum of Points and Authorities at 2–3, Estate of Rainin, No. RP07339583 (Cal. Super. Ct. Oct. 29, 2007) (seeking an order that several proposed petitions would not violate the will's no-contest clause).

218. *See, e.g.*, Memorandum of Points and Authorities in Support of Petition for an Order Directing Transfer of Property to Living Trust at 2, *In re* Cheng, No. RP07357380 (Cal. Super. Ct. Nov. 20, 2007).

219. *See, e.g.*, Minutes at 1, *In re Cheng*, No. RP07357380 (Cal. Super. Ct. Jan. 8, 2008) (revealing that the court heard oral argument and ultimately denied an unopposed petition to transfer title to real property into the decedent's trust).

220. Langbein, *supra* note 12, at 1120. Likewise, the most recent amendments to the UPC confidently declare that "the vast majority" of estates are "distributed without any creditor controversy." UNIF. PROBATE CODE § 3-803 cmt. (amended 2010); *see also* Martin, *supra* note 35, at 98 (claiming that only "in few instances do [creditors] rely on the probate procedures"); Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 760 (2008) ("Apparently, even creditors rarely find it necessary to use the probate safeguards designed for their benefit . . . ."); Stein & Fierstein, *Demography*, *supra* note 45, at 106 ("In recent years, creditors have not tended to rely upon the probate process . . . ."); Wellman, *supra* note 23, at 191 ("Creditors . . . are not a notable source of controversy.").

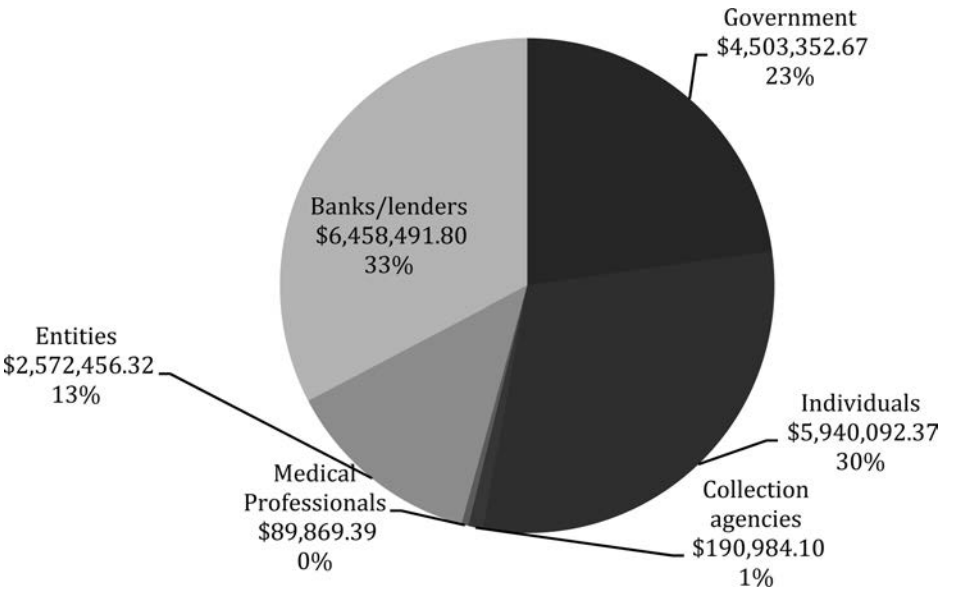
221. Langbein, *supra* note 12.

222. *See id.* at 1120 & n.53.

legal fees are said to be "extortionate,"[223] the value of the former is actually more than twice the latter.

As one might expect given the explosion in consumer debt, lenders led the way with 129 claims requesting a combined $6,458,491. In addition, individuals brought seventy-seven claims—usually alleging that the decedent had committed a tort or breached a contract—for $5,940,092. Finally, the State of California filed 115 times, seeking $4,503,352. 95% of this sum stemmed from a single source: the Department of Health Care Services (DHCS). Federal law requires jurisdictions that receive Medicaid grants to seek reimbursement for certain expenses from a decedent's probate estate.[224] California tasks the DHCS with carrying out this mandate. Thus, the agency was the most active creditor in my database, asserting forty-eight demands for a total of $4,296,378. Figure 4 describes the division of claims by identity of creditor.

Figure 4: Claims Asserted by Identity of Creditor[225]



223. DACEY, *supra* note 14, at 23–24.

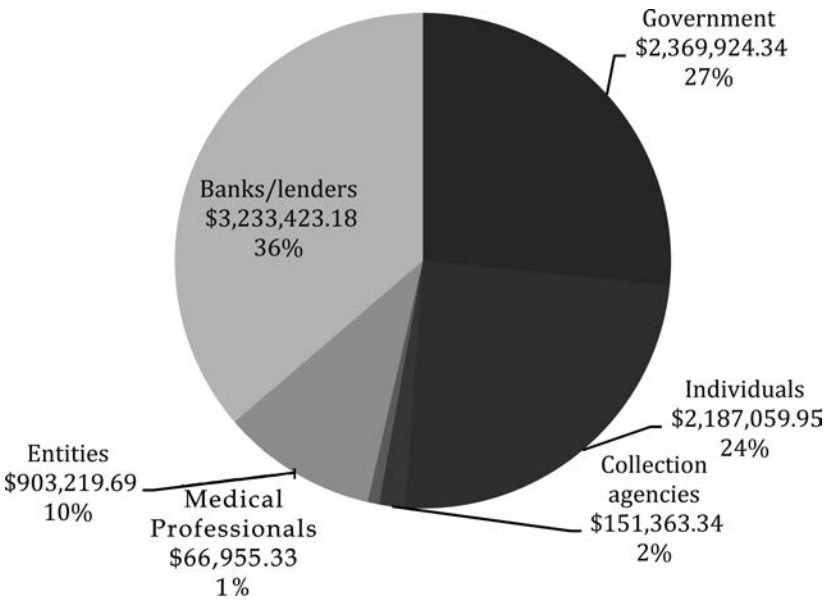
224. *See* 42 U.S.C. § 1396a (2012); CAL. WELF. & INST. CODE § 14009.5 (West, Westlaw through 2014 Reg. Sess.). Specifically, states must seek reimbursement "for nursing facility services, home and community-based services, and related hospital and prescription drug services." *Estate Recovery and Liens*, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Estate-Recovery.html (last visited Oct. 27, 2014).

225. I realize that "entities" is a loose term. I intended it to capture companies that were neither lenders nor medical providers. It included life insurance companies, law firms, homeowner's associations, and a variety of mom and pop businesses.

Admittedly, not all of these claims were paid in probate. In California, creditors must assert their rights within four months after the appointment of a personal representative or sixty days of receiving notice of the death (whichever is later).[226] Due to this short fuse, some claims were untimely. In addition, personal representatives sometimes refused to pay, arguing that the decedent did not owe the underlying debt.[227] Once a personal representative rejects a demand, the creditor must initiate a separate civil proceeding within ninety days.[228] Unfortunately, I was not able to gather information about these independent lawsuits. Nevertheless, as Figure 5 reveals, the amount of claims satisfied within probate was nearly $9 million.

In addition, there were a surprising number of small claims. Recall that Langbein attributed the decline of probate debt collection to the fact that the cost to creditors of exercising their rights often exceeded the amount owed.[229] This may no longer be the case. Indeed, I found claims for as little as $15[230] and

Figure 5: Claims Paid by Identity of Creditor



226. *See* CAL. PROB. CODE § 9100 (West, Westlaw through 2014 Reg. Sess.).

227. *But see* Langbein, *supra* note 12, at 1121 ("In the vast majority of cases, survivors pay off decedents' debts voluntarily and rapidly."); Martin, *supra* note 56, at 991 (asserting that beneficiaries "agree that the liabilities exist" and "want the debts paid promptly").

228. *See* CAL. PROB. CODE § 9353 (West, Westlaw through 2014 Reg. Sess.).

229. Langbein, *supra* note 12, at 1120–25.

230. *See* Creditor's Claim at 1, Estate of Augustine, No. HP07346605 (Cal. Super. Ct. Nov. 21, 2007) (seeking $14.94 on behalf of the East Bay Municipal Utility District).

$19.[231] Similarly, eighty-four creditors pursued amounts that were less than $500. This flurry of activity is likely the product of law revision efforts in California that have made it easier to file creditor's claims. Claim forms are available online, and creditors need only mail one copy to the personal representative and another to the court.[232] Accordingly, the cost of collecting an obligation from an estate can be as little as two postage stamps.

Thus, in sharp contrast to the conventional wisdom, creditors actively participate in probate. And as I explain next, the process's ability to clear title to real property is also more vital than we think.

c. Clearing Title. Probate's title-clearing function is seen as archaic for two reasons. First, scholars have argued that title clearing's primary virtue—making real property marketable again—is less useful now that land is no longer the centerpiece of the economy.[233] Second, to the extent that title clearing is beneficial, probate has lost its monopoly on that process. Five decades ago, a court order was the only reliable way for decedents to transmit land.[234] These days, probate must share the spotlight with a host of private options, from trusts to transfer-on-death deeds.[235] Yet I believe that the demise of probate's title-clearing function has been slightly exaggerated. Not only have real estate values climbed sharply in recent years, but mechanisms like survivorship deeds are not appropriate for all decedents.

To be sure, transmitting land is no longer the lynchpin of the inheritance process. Indeed, as Charles Dent Bostick asserted in 1968, the "lethal shortcoming of probate is its increasing irrelevance to modern modes of wealth."[236] Langbein's classic 1984 article stressed this point, contending that probate's preoccupation with transferring "single-tenancy real estate" reflects the ethos of "the small-farm, small-enterprise economy of the nineteenth century."[237] And as land has receded, intangible assets have filled the lacuna. Stocks, bonds, mutual funds, and life insurance have skyrocketed in value. These "financially intermediated" accounts obviate the need for a will—and even a trust—by passing automatically upon death to named beneficiaries.[238]

However, the fact that real property is less significant does not mean that it is insignificant. In fact, even when adjusted for inflation, median home values in the United States doubled between 1970 and 2000,[239] and then doubled again

231. *See* Creditor's Claim at 1, Estate of Eisenkramer, No. RP07337959 (Cal. Super. Ct. Oct. 18, 2007) (seeking $18.82 on behalf of Associated Internal Medicine Medical Group, Inc.).

232. Cal. Superior Court, Creditor's Claim Form, *available at* http://www.courts.ca.gov/documents/de172.pdf (last visited Oct. 27, 2014).

233. *See, e.g.*, Langbein, *supra* note 12, at 1119.

234. *See* Langbein, *supra* note 18, at 16.

235. *See id*.

236. Bostick, *supra* note 17, at 46.

237. Langbein, *supra* note 12, at 1119.

238. *See* Langbein, *supra* note 18, at 16.

239. *See Census of Housing*, U.S. CENSUS BUREAU (June 6, 2012), http://www.census.gov/hhes/www/housing/census/historic/values.html.

by 2006.[240] To be sure, over the next three years, the housing bubble burst, and prices fell by about a third from peak prices.[241] But the underlying point remains: real estate has relentlessly appreciated since the heyday of the nonprobate revolution. Indeed, of the $471,557,262 to pass through probate in my study, $256,302,472 (54%) was real property. Notably, these valuations are from 2007 and onward—the heart of the housing crisis. Thus, the family home remains the flagship asset for many Americans. And as a result, title clearing is still a crucial step in administering estates.

The more serious challenge to probate is the rise of alternative ways to clear title. Now that trusts are ubiquitous, trustees can transmit real property by filing an affidavit with the county recorder.[242] Likewise, several jurisdictions recognize community property with the right of survivorship, which allows one spouse to absorb the other's interest upon death.[243] And in an even more comprehensive change, twenty states are experimenting with transfer-on-death deeds.[244] These documents borrow the contractual model of financially intermediated accounts by allowing decedents to convey land by simply naming beneficiaries on a form.[245] These devices are somewhat embryonic, but because they clear title to real property without court intervention, they are likely to be extremely popular.

Yet these novel mechanisms are not suitable for all landowners. Indeed, probate (and, admittedly, trusts) can still do one thing that community property

240. *See* Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1179 & n.1 (2012).

241. *See id.* at 1179.

242. *See, e.g.*, Office of Assessor, Alameda Cnty., Change in Ownership Statement, *available at* http://www.acgov.org/forms/assessor/statement_of_death_of_real_property_owner.pdf (last visited Oct. 27, 2014).

243. *See* ALASKA STAT. ANN. § 34.77.110(e) (West, Westlaw through 2014 2d Reg. Sess.); ARIZ. REV. STAT. ANN. § 33-431 (West, Westlaw through 2014 2d Reg. & Special Sess.); CAL. CIV. CODE § 682.1 (West, Westlaw through 2014 Reg. Sess.); IDAHO CODE ANN. § 15-6-401 (West, Westlaw through 2014 2d Reg. Sess.); NEV. REV. STAT. § 111.064 (West, Westlaw through 2014 28th Special Sess.); WIS. STAT. ANN. §§ 766.58−.60 (West, Westlaw through Act 380 of 2013 Sess.).

244. *See* ARIZ. REV. STAT. ANN. § 33-405 (West, Westlaw through 2014 2d Reg. & Special Sess.); ARK. CODE ANN. § 18-12-608 (West, Westlaw through 2014 2d Ex. Sess.); COLO. REV. STAT. ANN. § 15-15-402 (West, Westlaw through 2014 Reg. Sess.); D.C. CODE § 19-604.05 (West, Westlaw through Nov. 25, 2014); HAW. REV. STAT. § 527-5 (West, Westlaw through 2014 Reg. Sess.); 755 ILL. COMP. STAT. ANN. 27/20 (West, Westlaw through P.A. 98-1125 of the 2014 Reg. Sess.); IND. CODE. ANN. § 32-17-14-14 (West, Westlaw through 2014 2d Reg. Sess.); KAN. STAT. ANN. § 59-3501 (West, Westlaw through 2014 Reg. Sess.); MINN. STAT. ANN. § 507.071 (West, Westlaw through 2014 Reg. Sess.); MO. ANN. STAT. § 461.025 (West, Westlaw through 2014 2d Reg. Sess.); MONT. CODE ANN. § 72-6-121 (West, Westlaw through 2013 Sess.); NEB. REV. STAT. ANN. § 76-3405 (West, Westlaw through 2014 Reg. Sess.); N.M. STAT. ANN. § 45-6-405 (West, Westlaw through 2014 2d Reg. Sess.); N.D. CENT. CODE ANN. § 30.1-32.1-02 (West, Westlaw through 2013 Reg. Sess.); OHIO REV. CODE ANN. § 5302.22 (West, Westlaw through 2014 Sess.); OKLA. STAT. ANN. tit. 58, § 1253 (West, Westlaw through 2014 2d Sess.); OR. REV. STAT. ANN. § 93.953 (West, Westlaw through 2014 Reg. Sess.); VA. CODE ANN. § 64.2-624 (West, Westlaw through 2014 Reg. Sess.); WIS. STAT. ANN. § 705.15 (West, Westlaw through Act 380 of 2013 Sess.); WYO. STAT. ANN. § 2-18-103 (West, Westlaw through 2014 Sess.).

245. *See* Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532 (2006).

with survivorship rights and transfer-on-death deeds cannot: facilitate the sale of real estate. For some individuals, the bare power to transfer land after death is not enough. For instance, an estate that consists primarily of real property still must pay debts and taxes. Often, the only way to raise these funds is for the personal representative to put the decedent's residence on the market. Similarly, it can be awkward for multiple beneficiaries to own a single parcel. Such an arrangement raises delicate questions about occupation rights (who gets to live in the family home) and management strategy (whether to sell or rent, among other things).[246] Probate allows personal representatives to put land up for bid while it is under court supervision, pay a decedent's obligations and administrative costs, and then distribute cash to the beneficiaries.[247]

A large number of personal representatives in my study took advantage of this option. Of the 453 estates with land, 217 (48%) invoked probate's sales process. As expected, the common threads in these cases were that decedents either had few other possessions or multiple beneficiaries (or both). For example, 145 sales (67%) occurred where real property was 90% or more of the estate's value.[248] In these instances, community property with the right of survivorship or a transfer-on-death deed would not have sufficed—the personal representative needed cash to manage the estate. Similarly, 167 (82%) of these decedents were survived by multiple beneficiaries.[249] By permitting their personal representative to sell the property, these decedents were able to transmit cash to their loved ones, rather than an unwieldy fractional interest.

Accordingly, despite the rise of financially intermediated assets, the power to clear title to real estate remains an indispensable part of succession. Undoubtedly, more and more landowners will accomplish this goal through nonprobate techniques. At the same time, though, these procedures may not work well for decedents who leave few liquid assets or multiple beneficiaries.

2. Probate's Downsides

Probate's cost, lack of privacy, and sluggishness, are its unholy trifecta, cited repeatedly as fatal flaws.[250] This section uses my data to critique these critiques.

a. Expense. Complaints about probate expenses take two basic forms. The first is the broad-stroke idea that judicial oversight "costs too much."[251] For

246. *See, e.g.*, Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 897–98 (2013) ("When real property descends to multiple heirs as tenants in common, the fractionation of interests makes an already modest inheritance even less valuable because problems of coordination and collective action render maintenance and alienation of the property difficult, slow, and expensive.").

247. As noted, trustees can also sell real property. The primary difference is that probate generates a court order, thus putting to rest any festering issues about the transaction.

248. In fact, in fifty-three sales—nearly a quarter—real property was 100% of the value of the estate.

249. Information about beneficiaries was only available for 202 estates. I excluded ten pour-over wills from this calculation because the record did not reveal the ultimate beneficiaries of the underlying trust.

250. *See supra* notes 29–37 and accompanying text.

251. Stein, *supra* note 45, at 600; *see also* DACEY, *supra* note 14, at 24; DUKEMINIER, *supra* note 29, at 45 ("Much is heard about the excessive cost of probate . . . .").

instance, some legislators believe that probate operates like contingency fee litigation, with lawyers charging between a quarter and a third of an estate's value.[252] Second, fixed fee schedules are unpopular. In California, as in other jurisdictions, personal representatives and attorneys are each entitled to at least 4% of the first $100,000 in the estate, 3% of the next $100,000, 2% of the next $800,000, and 1% of any remaining amount.[253] Because these shares decline as the value of the decedent's property rises, they seem to unfairly burden smaller estates.[254] Arguably, they also confer a windfall on attorneys and personal representatives: even when a case only requires a few boilerplate filings, these parties earn more than they would have under hourly billing practices.[255] And on top of this, personal representatives and attorneys can always earn compensation for "extraordinary services."[256]

Nevertheless, I found that fees were much more modest than expected. Indeed, attorneys charged just 1.5% of the gross value of all estates. Personal representatives earned even less: 1.0% of that sum.[257] Similarly, the median amount of total legal and fiduciary fees, $13,410, was only 3% of the median estate value of $451,000.

Fees were so low, in part, because a surprising number of personal representatives did not hire a lawyer. A longstanding knock on probate is that it is too complex for personal representatives to navigate on their own. Indeed, scholars have declared that "[a]n attorney is retained by the personal representative in virtually every estate administration"[259] and that lawyers will "remain necessary . . . whatever the course of future probate 'reforms.'"[260] In stark contrast, I found that seventy-nine personal representatives (12%) served on a *pro se* basis. Twenty-two of these individuals charged no fee at all; the remainder requested only a small fraction of what they were due. Collectively, they handled more than $110,000,000 in assets for a mere $600,000.

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252. *See, e.g.*, Stein, *supra* note 45, at 600; Stein & Fierstein, *The Role of the Attorney*, *supra* note 45, at 1187 & n.125 (recounting a conversation with a Minnesota legislator who apparently "confuse[d] probate fee charging with the practice of contingent fee charging in personal injury matters"). Some commercial trust vendors make less dramatic—but nevertheless bold—claims about probate costs. *See, e.g.*, Candice Lapin, *The Top Three Ways to Avoid Probate*, LEGALZOOM (Aug. 2009), https://www.legalzoom.com/articles/the-top-three-ways-to-avoid-probate (advertising that probate fees usually eat up "ten percent of the total estate").

253. *See, e.g.*, CAL. PROB. CODE §§ 10810−14 (West, Westlaw through 2014 Reg. Sess.); NEV. REV. STAT. ANN. §§ 150.060−.067 (West, Westlaw through 2014 28th Special Sess.).

254. *See* DACEY, *supra* note 14, at 25; Ward & Beuscher, *supra* note 22, at 403–04.

255. *See, e.g.*, DACEY, *supra* note 14, at 25.

256. CAL. PROB. CODE § 10811 (West, Westlaw through 2014 Reg. Sess.).

257. Intestate decedents paid slightly more to attorneys and personal representatives (2.7% of the gross value of the estate) than their testate counterparts (2.2%).

258. To avoid distorting the data, I made all fee-related calculations after eliminating the twenty-six cases that were abandoned before the court awarded fees. This shrank the total pool of assets from $471,557,262 to $456,693,921.

259. Stein & Fierstein, *The Role of the Attorney*, *supra* note 45, at 1225.

260. *Id.* at 1147.

Table 1: Fees Per Estate Value[258]

Estate Value	Number	Attorneys' Fees	Personal Representatives' Fees	Total Fees as a % of Estate Value	Median Total Fees
Intestate					
Under $250,000	59	$287,912	$112,663	5.3%	$6,476
$250,000 to $499,000	81	$743,829	$345,114	3.8%	$10,200
$500,000 to $749,000	61	$689,242	$315,410	2.7%	$15,740
Above $749,000	49	$894,327	$525,473	2.3%	$21,179
Total	250	$2,615,310	$1,298,660	2.9%	$12,665
Testate					
Under $250,000	92	$411,291	$197,776	4.6%	$6,925
$250,000 to $499,000	125	$1,163,007	$478,223	3.3%	$11,319
$500,000 to $749,000	90	$1,172,698	$540,308	3.2%	$15,342
Above $749,000	85	$2,189,234	$1,264,061	1.6%	$26,776
Total	392	$4,936,230	$2,480,368	2.3%	$13,649
Grand Total	642	$7,551,540	$3,779,028	2.5%	$13,410

In addition, the gap between the wealthiest and poorest decedents has narrowed significantly. Recall that Powell and Looker found that affluent estates "shrank" by 6% to 15% during probate, while those in the lowest brackets lost between 40% and 70% of their value.[261] More specifically, Ward and Beuscher found that attorneys' and personal representatives' fees swallowed 6% of the assets of decedents on the top rung of the financial ladder but 30% of those on the bottom.[262] In my study, this disparity was much less pronounced: the richest cohorts paid about 2% of their value, compared to about 5% for the least well-off. Moreover, median fees for estates worth $750,000 or more was $24,000, whereas median fees for estates worth $250,000 or less was much lower: roughly $6,700. Thus, at least by these benchmarks, fees seem to correspond to the value of the decedent's property.

Finally, my data suggest that probate's traditional fixed fee schedule is a double-edged sword. On the one hand, this scheme does overcompensate lawyers and personal representatives in some cases. Two hundred and thirty estates (34%) did not require a single court appearance and wrapped up in an average of less than a year. Yet attorneys and personal representatives charged an average of $16,296 (1.8% of the value of the estates) in these easy matters. Given the routine nature of this work, fixed fees likely exceed the amount that

261. *See* Powell & Looker, *supra* note 45, at 948.
262. *See* Ward & Beuscher, *supra* note 22, at 403–04.

Table 2: Total Fees and Case Complexity

Lawyer Appearances	Number	Real Property Sales	Litigation	Trials	Mean Days in Probate	Median Days in Probate	Total Fees as % of Estate Value
0	230	55	4	0	347	307	1.8%
1	145	42	9	0	462	398	3.0%
2	96	39	8	0	536	488	3.0%
3	43	21	8	1	600	529	2.6%
4	36	18	10	2	695	611	4.2%
5+	75	36	45	18	896	802	3.0%

would be earned under free-market billing practices. But on the other hand, lawyers and personal representatives can get burned in complex administrations. About seventy-five cases (11%) were extremely troublesome, lasting for an average of 896 days and necessitating five or more court appearances. Eighteen involved full-blown trials. Despite these serious headaches, the amount of fees awarded—including for "extraordinary services"[263]—averaged $20,806 (3% of the value of the estates). Table 2 brings this point home. It shows that even as case difficulty increases, fee awards remain relatively consistent.

Thus, fixed fees are not entirely the boondoggle some commentators make them out to be. Although they artificially inflate compensation in easy matters, they have the opposite effect in hard cases.

One last point merits discussion: unfortunately, legal and fiduciary fees are not the only probate expenses. The process also involves an array of administrative costs. These charges often do not appear in the record, and so I was unable to gather systemic information about them. In general, though, opening an estate costs roughly $350, and publishing notice of death in a newspaper runs about $200.[264] In addition, a personal representative must prepare an I&A—a

263. *See supra* note 256 and accompanying text. Lawyers earned extraordinary fees in 115 cases, for a total of $556,379. Thirty-five of these awards were due to a local rule that entitles attorneys to an extra $750 for assisting in the sale of real property. *See* CAL. SUPERIOR COURT, ALAMEDA CNTY., LOCAL R. 7.420 (2014), *available at* http://www.alameda.courts.ca.gov/Resources/Documents/Title_7_01-01-11(1).pdf#Chapter10. Personal representatives took home extraordinary fees in 29 estates, for a sum of $107,625.

264. Alameda County once imposed a graduated filing fee that rose with the estimated value of the estate. However, in March 2008—during the period of my study—a California appellate court held that such a regime violated the state constitution. *See In re* Estate of Claeyssens, 74 Cal. Rptr. 3d 304, 310 (Cal. Ct. App. 2008). Thus, most of the estates under my microscope paid a flat fee of $350. In fact, in several matters that opened before March 2008, the petition for final distribution sought reimbursement from the court for filing fees that exceeded that ceiling. *See, e.g.*, Petition for Final Distribution, for Ordinary Compensation to Personal Representative, for Ordinary Compensation to Attorney, and for Partial Refund of Filing Fees at 25, Estate of Adams, No. RP07319025 (Cal. Super. Ct. Jun. 24, 2008).

list of the decedent's probate assets—with the help of an appraiser (a probate referee), who charges 0.1% of the value of the decedents' probate property.[265] Finally, a personal representative needs to post a surety bond.[266] Because California allows the testator or all the beneficiaries to waive bond,[267] 489 estates (73%) ended up being exempt from this mandate. In the other matters, bond premiums varied, although they tended to be about $500 for every $100,000 of property value. As I explain in more depth in section III.B, I have little sympathy for these steps. I mention them here merely to acknowledge that they exist and lay the groundwork for revisiting them.

In sum, I found that probate fees are significantly lower and less problematic than believed. But expense is hardly the only objection to probate. As I discuss next, the system supposedly suffers from a severe lack of privacy.

b. Publicity. Like all court files, probate records are open to the public.[268] As a result, the contents of wills and the particulars of estate administration are freely discoverable. Conversely, probate's most formidable competitor, the trust, is a private arrangement. Not only do trustees operate off the grid, but, in many states, even beneficiaries are not entitled to view the entire trust instrument.[269] Thus, commentators and trust-template companies often cite "[l]ack of privacy" as a "significant objection to traditional probate."[270] Nevertheless, in this section, I challenge this view on several fronts. I argue that it is unclear how probate's openness actually hurts decedents, that problematic trusts are as public as probate administrations, that society has an interest in a transparent inheritance process, and that some decedents actually seek to make their wishes widely known.

Admittedly, unlike other critiques of probate, which are showing their age, privacy concerns are more pressing now than they were decades ago. Credit card security breaches and government surveillance dominate the headlines.[271] A rich academic literature has shown how even trivial and anonymous information such as Netflix rental history and Google search queries can be combined

265. *See* CAL. PROB. CODE § 8961(a) (West, Westlaw through 2014 Reg. Sess.); *see also* CAL. PROBATE REFEREES' ASS'N, THE PROBATE REFEREE GUIDE 3 (Michael Kasolas et al. eds., 2013), *available at* http://www.sco.ca.gov/files-eo/probate_guide.pdf.

266. *See* CAL. PROB. CODE § 8480 (West, Westlaw through 2014 Reg. Sess.).

267. *See* CAL. PROB. CODE § 8481 (West, Westlaw through 2014 Reg. Sess.).

268. *See supra* text accompanying notes 32–33.

269. Trustees must only honor a beneficiary's "reasonable request" to view the trust provisions that pertain to her share. *See* UNIF. PROBATE CODE § 7-303(b) (amended 2010).

270. Martin, *supra* note 35, at 51; John H. Martin, *Improving Michigan Estate Settlement*, 29 T.M. COOLEY L. REV. 1, 26 (2012) (calling privacy "the trump card presently held by will substitutes"); *see also* Frank S. Ganz, Note, *Privacy in Probate Court: Why Connecticut Should Seal the Record*, 22 QUINNIPIAC PROB. L.J. 136, 137 (2009).

271. *See, e.g.*, Elizabeth A. Harris & Nicole Perlroth, *For Target, the Breach Numbers Grow*, N.Y. TIMES, Jan. 10, 2014, http://www.nytimes.com/2014/01/11/business/target-breach-affected-70-million-customers.html; James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES, Sept. 28, 2013, http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html.

with other clues to "blackmail, harass, defame, frame, or discriminate against us."[272] Compared to these bare tiles in the mosaic, probate files radiate with personal detail. Moreover, as this study illustrates, searching probate records no longer means rummaging through dusty boxes in a courthouse basement. Alameda County is one of several jurisdictions that make records available to anyone with an Internet connection.[273] Given privacy's new salience and the increased accessibility of probate files, perhaps it only makes sense that cautious property owners gravitate toward trusts.

However, I believe that the privacy objection to probate is overblown. For one, it elides the glowing question in debates over issues like wiretapping and data mining: how is the absence of privacy *harmful*? Half a century ago, Dacey sought to explain these dangers:

> There will be a list of your bank accounts, showing the amount in each. Your home will be appraised and its value set down. . . . Perhaps you made provision in your will for a bequest to an old friend. Confidential? Forget it, it'll be there in black and white. You will not be forgotten, ignored. There will be those who care. Your friendly local newspaper for one. . . . There are others who are interested in you, too. They are the people who go from probate court to probate court, compiling lists of names of widows and other heirs. . . . What husband would knowingly permit his wife to become the target of the unscrupulous characters who purchase these lists of 'hot prospects'? What wife could feel anything but foreboding that she might become the victim of these sharpsters?[274]

Today, this assertion seems both quaint and preposterous. It might have been chilling in the 1960s to reveal one's property values or "old friend[s]" to the outside world.[275] Yet in the era of Google, Zillow, Facebook, and online deeds and death certificates, many of these facts already lurk a few keystrokes away. Indeed, as Lior Jacob Strahilevitz has observed, "[o]ne of the most significant developments in the industrialized world during the last decade has been the

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272. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1705 (2010); *see also* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1843–45 (2011).

273. *See, e.g.*, *Case Summary*, L.A. SUPERIOR COURT, http://www.lacourt.org/casesummary/ui/ (last visited Oct. 27, 2014); *Public Case Access System*, SACRAMENTO SUPERIOR COURT, https://services.saccourt.ca.gov/publicdms/Search.aspx (last visited Oct. 27, 2014); *Circuit Court Access*, WIS. COURT SYS., http://wcca.wicourts.gov/index.xsl (last visited Oct. 27, 2014); *County Clerk Public Access*, TRAVIS COUNTY, http://tccweb.co.travis.tx.us/index.php?_module_=esd&_action_=probatekeysearch#results (last visited Oct. 27, 2014). As this Article entered the editing stage, Alameda County amended its policy and began charging users $1 per page for downloads on DomainWeb. *See FAQs*, ALAMEDA CNTY. SUPERIOR COURT, https://publicrecords.alameda.courts.ca.gov/PRS/Home/FAQ (last visited Oct. 27, 2014).

274. DACEY, *supra* note 14, at 28.

275. *Id.*

increased availability of information about individuals."[276] Similarly, scholars illustrate the perils of probate by citing instances in which the media has aired the terms of a celebrity's will.[277] But for the tremendous majority of decedents, this is not an issue. Thus, despite all the handwringing about probate's transparency, there is scant evidence that it causes reputational or financial injury.

Here one might accuse me of hypocrisy. After all, I have populated this Article with the names of decedents, descriptions of their property, and unflattering flourishes such as rocky family relationships or botched attempts to make testamentary instruments. Yet this rejoinder actually highlights a way in which probate and nonprobate transfers are more similar than they first seem. Trust disputes are subject to the same sunshine rules that govern all court filings.[278] Because most of the decedents I have identified were embroiled in litigation, they might have left a footprint even if they had opted out of probate. For these individuals, there is no neat dichotomy between private trusts and public probate.

John Martin has recently articulated a more nuanced argument against probate's openness. He concedes that "members of the public seldom wander down to the courthouse to rifle through probate files."[279] Yet no matter how wispy the possibility that a decedent will suffer unwanted exposure, Martin argues that this danger still outweighs the interests on the other side of the scale because there is no defensible rationale for probate publicity. Indeed, he claims, the reason for making court files freely available—to maintain confidence in the administration of justice—does not apply to the rank bureaucracy of probate:

> Those who defend public access to probate records generally argue that these are court records. It is said that the public must have complete access in order to retain confidence in the integrity of the judicial system. While it is true that present-day probate records are court records, the real question is why the details of an individual's assets and transfers to friends and family should be the subject of a judicial proceeding and therefore be in the files of a court. The public interest in a transparent judicial system seems fundamentally different from—and not pertinent to—public curiosity about the transmission of private wealth.[280]

276. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1670 (2008).

277. *See* Foster, *supra* note 32, at 559–66 (citing the examples of Marlon Brando, Doris Duke, Katharine Hepburn, and Jacqueline Kennedy Onassis); *cf.* Lauren Z. Curry, Note, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925, 946–47 (2011) (discussing the efforts of William Randolph Hearst's trustee to restrict the public's access to Hearst's probate file).

278. *See, e.g.*, Foster, *supra* note 32, at 564.

279. Martin, *supra* note 270, at 26–27.

280. Martin, *supra* note 35, at 51–52 (footnotes omitted).

He therefore concludes that even if the risks of spilling a decedent's secrets are slim, the justifications for probate publicity are even slimmer.[281]

However, probate transparency is not simply an exercise in voyeurism. Instead, because confidentiality has serious downsides, probate's openness helps maintain the integrity of the inheritance process. Indeed, as Frances Foster has noted, the cloak over nonprobate transfers can prevent heirs from learning that they have been cut out of an estate plan until the statute of limitations has expired.[282] Similarly, rules designed to shield the trust instrument from prying eyes can thwart beneficiaries' efforts to monitor the trustee.[283] Also, as I will discuss below, the obscurity of nonprobate transfers can deter legitimate creditors.[284] For these reasons, probate offers benefits that must be balanced against the appetite for posthumous privacy.

Admittedly, even the *specter* of betraying sensitive facts can be damaging. For instance, Daniel Solove has argued that an individual's privacy interests can be infringed simply by the bare act of being observed.[285] As Solove explains, a person who is being monitored by others will often change her behavior and engage in "self-censorship and inhibition."[286] This is a legitimate concern for estate planning, where a testator's knowledge that she is creating a public document could cause her to shy away from making controversial choices. In addition, I do not deny that decedents with skeletons in the closet have good reason to prefer the secrecy of trusts.

At the same time, my review of the files reveals a faction at the opposite side of the spectrum: individuals who see their estate plan as a means of self-expression.[287] These "speaking wills" fit snugly within a culture that increasingly encourages us to broadcast our opinions and share our daily experiences.[288] Thus, it is not surprising that some testators voiced sentiments that seem as much a part of their legacy as any property they left behind. For instance, an Alameda County testator named Joseph Vales punctuated his will with a deeply moving passage about his family and his wife:

> In closing, I would like to leave this little note, it was a very enjoyable time all through [our] life[ ] together as a family when Mamma was alive

281. *See id.* at 52; *see also* Martin *supra* note 56, at 986 ("The public's interest in a decedent's assets and her dispositive provisions is voyeuristic. Satisfaction of that curiosity is not essential or even helpful to the functioning of a democratic society.").

282. *See* Foster, *supra* note 32, at 595–98.

283. *See id.* at 606–09.

284. *See infra* section III.B. To be fair to Martin, his proposal to expand the role of nonjudicial estate settlement attempts to balance decedents' desire for privacy with the need to protect disinherited family members and creditors. *See* Martin, *supra* note 56, at 990.

285. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 493–94 (2006).

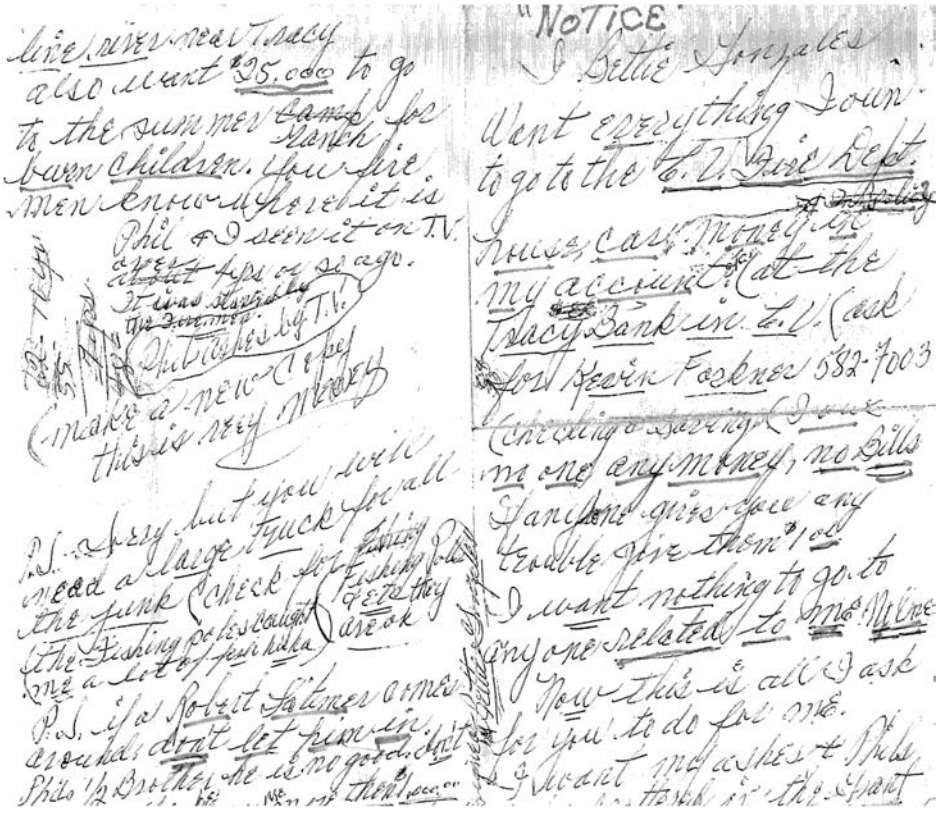
286. *Id.* at 493.

287. *See* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 81–89 (2012).

288. *See, e.g.*, Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 910–11 (2006) (providing examples of the ways in which the Internet facilitates self-expression).

> [and] . . . we all got together for our[] [picnics], fishing, . . . and Dorothy[']s swimming parties. I was very happy with [ ] Denny, she was everything to me, we thought [alike] in everything we did together. God made sure I would never have any children, for when I was born, he made sure that I had a[n] extra [c]hromosome[] which made me sterile. If this didn't happen, Denny and me would have had about 10 children, but God said I am putting these two together for they don't need children to make them happy. I will always love Denny into eternity and beyond. I will probably meet her when I go swimming with her in the future.[289]

Bettie Gonzales's Will[290]



289. Petition for Probate of Will and for Letters of Administration With Will Annexed at 7, Estate of Vales, No. RP07322292 (Cal. Super. Ct. Apr. 24, 2007).

290. Petition for Probate of Will and for Letters of Administration with Will Annexed at 9, Estate of Gonzales, No. RP07347314 (Cal Super. Ct. Sept. 20, 2007).

Likewise, Bettie Gonzales laced her stream-of-consciousness holographic will with apologies, jokes, and blunt assessments of relatives.

In the same vein, many testators explained their distributional choices. One left his estate to his girlfriend because she is "the only *totally* honest person I have ever met during my lifetime."[292] Another favored one of her three brothers because he "has been like a son to me."[293] And a mother was extremely specific about why she gave her daughter just one dollar: "This decision came about as a result of [her] coming to my home on August 26, 1991, and . . . enter[ing] into an argument with me."[294] Each of these testators is writing for an audience. Yet the publicity objection to probate assumes that all decedents want to shelter their estate plans from others.

Accordingly, the hazards of probate transparency are exaggerated, and the costs of trust privacy are ignored. Moreover, decedents do not single-mindedly value secrecy. Rather, some testators seize the opportunity to address the world at large.

c. Time. The final gripe about probate is that it takes too long.[295] Recall that previous studies found that the process generally takes between nine and eighteen months.[296] Conversely, pay-on-death accounts kick in as soon as the paperwork can be filed,[297] and trustees often can distribute a settlor's estate shortly after she dies.[298] To be sure, there is no evidence that these nonprobate devices regularly transmit property in these minimum timeframes. Nevertheless, the perception that they move much faster than probate has been a major driver of the nonprobate revolution. After all, most people want to give their loved ones quick access to their assets after death.[299]

Initially, my data seems to confirm that probate operates slowly. The median case length for the Alameda County decedents was 436 days, with an average of 507 days. The only good news is that, unlike other researchers, I did not find that smaller estates took longer to close than larger estates.[300] Instead, the widest systematic gulf is between the closing times of testate estates (with a

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291. *Id.* at 11.

292. Holographic Last Will and Testement [sic] of Alex Ozeroff at 1, Estate of Ozeroff, No. RP07311595 (Cal. Super. Ct. Apr. 19, 2007).

293. Petition for Probate of Will and for Letters Testamentary at 5, Estate of Mills, No. RP08365476 (Cal. Super. Ct. Jan. 11, 2008).

294. Petition for Probate of Will and for Letters Testamentary at 5, Estate of Holdener, No. HP08372654 (Cal. Super. Ct. Feb. 22, 2008).

295. *See, e.g.*, DACEY, *supra* note 14, at 26–28; Martin, *supra* note 35, at 48.

296. *See* SUSSMAN, CATES & SMITH, *supra* note 45, at 239; Dunham, *supra* note 45, at 269; Ward & Beuscher, *supra* note 22, at 403.

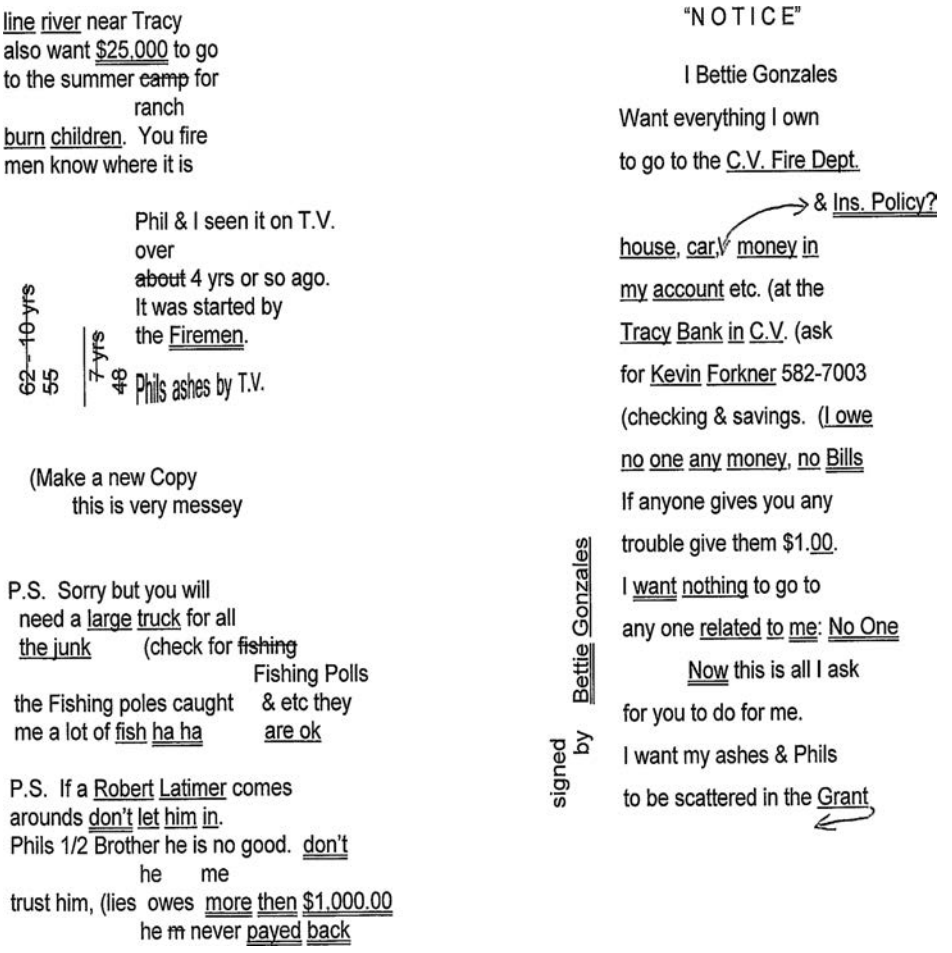
297. *See supra* text accompanying notes 243–44.

298. California has created an optional, abbreviated statute of limitations for trusts. If a trustee gives notice of the settlor's death, any aggrieved heir or beneficiary must file a claim within 120 days. *See* CAL. PROB. CODE § 16061.8 (West, Westlaw through 2014 Reg. Sess.).

299. *See, e.g.*, Martin, *supra* note 35, at 48–49.

300. *See* Dunham, *supra* note 45, at 269; Ward & Beuscher, *supra* note 22, at 403.

The Official Transcription of Bettie Gonzales's Will[291]



line river near Tracy
also want $25,000 to go
to the summer ~~camp~~ for
ranch
burn children. You fire
men know where it is

Phil & I seen it on T.V.
over
~~about~~ 4 yrs or so ago.
It was started by
the Firemen.

~~62–10 yrs~~
55
~~7 yrs~~
48
Phils ashes by T.V.

(Make a new Copy
this is very messey

P.S. Sorry but you will
need a large truck for all
the junk (check for ~~fishing~~
Fishing Polls
the Fishing poles caught & etc they
me a lot of fish ha ha are ok

P.S. If a Robert Latimer comes
arounds don't let him in.
Phils 1/2 Brother he is no good. don't
he me
trust him, (lies owes more then $1,000.00
he ~~m~~ never payed back

"N O T I C E"

I Bettie Gonzales
Want everything I own
to go to the C.V. Fire Dept.
& Ins. Policy?
house, car, money in
my account etc. (at the
Tracy Bank in C.V. (ask
for Kevin Forkner 582-7003
(checking & savings. (I owe
no one any money, no Bills
If anyone gives you any
trouble give them $1.00.
I want nothing to go to
any one related to me: No One
Now this is all I ask
for you to do for me.
I want my ashes & Phils
to be scattered in the Grant

signed by Bettie Gonzales

median of thirteen months and an average of sixteen months) and intestate estates (with a median of sixteen months and an average of eighteen months). Table 3 presents these results.

But these numbers do not tell the full story. For one, some beneficiaries did not have to wait until probate closed to receive a share of their inheritance. Recall that one way California has modernized its probate regime is to permit

301. In fact, these numbers may actually understate the degree of delay. First, about fifteen estates were still pending as of February 2014. When these matters eventually close, they will further inflate the mean and median length of probate. Second, the 120-day waiting period for trusts usually begins shortly after the settlor passes away. Conversely, there is often a lag between the decedent's death and the opening of the probate estate. Indeed, in my sample, the average length of time between the decedent's passing and the close of her probate was 597 days, with a median of 524 days.

Table 3: Closing Time Per Estate Value[301]

Estate Value	Number	Median Days in Probate	Mean Days in Probate
Intestate			
Under $250,000	51	401	516
$250,000 to $499,000	78	453	510
$500,000 to $749,000	61	501	563
Above $750,000	53	532	635
Total Intestate	243	488	556
Testate			
Under $250,000	87	408	479
$250,000 to $499,000	121	350	425
$500,000 to $749,000	90	436	530
Above $750,000	90	391	485
Total Testate	388	398	476
Grand Total	631	436	507

personal representatives to make preliminary distributions.[302] I found forty such payments, totaling $19,218,516. They were made an average of 332 days before the estate closed and therefore gave beneficiaries much quicker access to the decedent's property.[303]

Moreover, bare statistics shed little light on the vital issue of *why* cases take so long. Critics usually blame judicial supervision itself, arguing that it is impossible for matters to zip through the labyrinth of court-mandated filings and appearances.[304] But my data belie this view. For instance, the shortest case length in my spreadsheet was 159 days—a turnaround that likely competes with even the speediest trust administration. Similarly, eighty-four estates (13%) spanned less than 250 days, and 163 (26%) ended with 299 days. So why were the overall figures about probate length so high? As Table 4 elucidates, the blame lies with the 241 cases (38%) that persisted for 500 days or more.

302. *See supra* note 170 and accompanying text.

303. A second, more controversial path that allowed beneficiaries to receive property before the estate closed is the use of inheritance purchasing companies. *See* CAL. PROB. CODE § 11604.5 (West, Westlaw through 2014 Reg. Sess.) (regulating these agreements). These deals typically involve a beneficiary accepting an immediate lump sum payment of about 75% of her inheritance in return for assigning her rights in the estate to a firm. I found fifty-one such contracts in thirty-one cases, for a total of $1,151,342.

304. *See, e.g.*, Martin, *supra* note 35, at 49 ("To initiate the probate process, a petition must be prepared and filed, a hearing date secured, notices given, and court appearances made.").

Table 4: Closing Time, Real Property Sales, and Litigation

Average Case Length (Days)	Median Case Length (Days)	Number	Real Property Sales	Litigation	Trials
299 or Less	181	163	28	2	0
300 to 499	396	222	69	18	2
500 or More	682	241	115	65	24

Critically, most of these slow-moving cases faced obstacles that would have bogged down *any* form of posthumous transfer. For instance, of the 241 estates that lasted more than 500 days, 115 (48%) involved real property sales. These matters bore the brunt of the collapse of the housing market. Many personal representatives struggled to find buyers. In fact, in nineteen of these cases, personal representatives needed to complete a foreclosure or short sale; in four more, land would not move at any price. Even if these decedents had used a trust or a transfer-on-death deed, the beneficiaries would not have received a penny until these wrinkles were ironed out. Similarly, of the 241 long-running administrations, sixty-five (27%) involved litigation, and twenty-four (10%) featured a trial.

In addition, there were numerous nonquantifiable hurdles: estates that did not involve full-fledged lawsuits but came to a standstill due to the sheer messiness of succession; beneficiaries disappeared;[305] an heir murdered a decedent;[306] land required major environmental remediation;[307] one will was lost;[308] and another was written entirely in Chinese.[309] A testator divided her estate into five shares and mistakenly gave away only four of them.[310] These matters were not delayed due to some arcane procedural requirement. Instead, they lingered in the system because succession can be as disorderly as life itself. There is no reason to believe that opting out of probate alters this brute fact.

Thus, probate continues to be time-consuming. Although there is no data about the speed of nonprobate devices, they almost certainly give beneficiaries

305. *See* Petition for Instructions to Remit Beneficial Interest to Alameda County Treasurer at 1–2, Estate of Hamilton, No. RP07322999 (Cal. Super. Ct. May 25, 2011).

306. *See* Petition for Letters of Administration at 6, Estate of Banh, No. HP07328248 (Cal. Super. Ct. May 30, 2007).

307. *See* Declaration Re Status of Estate at 1–2, *In re* Estate of Esposito, No. HP07356059 (Cal. Super. Ct. Feb. 11, 2010).

308. *See* Declaration of Alan J. Silver, Esq. in Support of Petition for Probate Re: Lost Will at 1–2, *In re* Estate of Hecht, No. RP08370890 (Cal. Super. Ct. Mar. 19, 2008).

309. *See* Petition for Probate of Will and for Letters Testamentary at 7, Estate of Chen, No. RP07330453 (Cal. Super. Ct. June 12, 2007).

310. *See* Petition for Final Distribution, for Ordinary Compensation to Personal Representative, for Ordinary Compensation to Attorney, and for Partial Refund of Filing Fees at 20, Estate of Adams, No. RP07319025 (Cal. Super. Ct. Jun. 24, 2008).

faster access to a decedent's property in easy cases. At the same time, though, hard cases are hard cases. Complaints about probate's length conveniently ignore the complexity of handling someone else's affairs after they die. When unforeseen events occur—and they often do—inheritance will test the patience of beneficiaries both inside and outside of the court system.

To summarize, conflict over succession is relatively common, creditors regularly assert claims, and roughly half the estates with real property use probate's sales process. In addition, probate is much cheaper and less public than assumed. Finally, probate's deliberativeness is not necessarily a byproduct of court supervision. Instead, it stems from the fact that the inheritance process can be chaotic. The next Part uses these descriptive findings to make several normative claims.

III. POLICY IMPLICATIONS

This Part uses my review of the Alameda County files to accomplish two goals. First, it argues that probate can actually be beneficial for certain individuals and for society. Second, it suggests changes that might allow the system to transcend its tarnished reputation.

A. PARTIALLY DEFENDING PROBATE

Thirty years ago, John Langbein observed that "[f]ree-market competitors have relegated probate to the periphery of the succession process."[311] Since then, court-supervised inheritance has become even more marginalized. With soaring demand for trusts and innovations like transfer-on-death deeds, inheritance is on the brink of becoming a purely private transaction. This Part cuts against the grain by arguing that some decedents should consider avoiding probate avoidance. It then claims that lawmakers should not only preserve probate's traditional approach to creditors, but extend it into nonprobate realms.

1. Rethinking Trust Hegemony

A kind of trust–industrial complex has emerged in the last two decades. The few facts we know about this brisk business are staggering. Corporate trustees who are members of the Federal Reserve hold about $870 billion in trust funds.[312] In 2011, irrevocable trusts—generally those established by settlors who are now deceased—reported $86 billion in income, $3.5 billion in trustee's fees, and $1.9 billion in lawyer, accountant, and other service fees.[313] Jurisdictions have fallen over each other to abolish the Rule Against Perpetuities in an attempt to seem settlor-friendly.[314] And increasingly, trusts are eclipsing wills in

311. Langbein, *supra* note 12, at 1140.

312. *See* Langbein, *supra* note 18, at 12.

313. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 393 (9th ed. 2013).

314. *See generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

the lower and middle income brackets.[315] But in this section, I question this one-size-fits-all preference for trusts.

One of probate's unsung advantages is its ability to facilitate low-cost, do-it-yourself wealth transmission. Suppose someone has simple estate planning needs, such as the desire to leave her property to her spouse or to her descendants equally. Rather than shelling out thousands of dollars for a trust, she can draft a holographic will or even decide to die intestate. Likewise, instead of saddling her estate with another round of trustees' and attorneys' fees, she can delegate administration to a *pro se* personal representative. In fact, ten Alameda County decedents did both of these things and thus accomplished something remarkable: they marched through the entire succession process without incurring a penny in legal or fiduciary fees.[316]

To be sure, these options are not for everyone. People who have complex families should see a professional estate planner. In addition, many owners prefer trusts for reasons that have nothing to do with probate avoidance. Unlike the blunt, one-time property transfer triggered by wills or intestacy, trusts allow settlors to craft flexible, multi-generational dispositive regimes, to harness the investment expertise of trustees, and to leave assets to minors or others who cannot bear the burdens of ownership. For many middle- and upper-class individuals, these virtues make trusts superior to any rough-and-tumble probate mechanism.

One might also object that there is a dark side to the self-directedness I have championed above. Estate planning and administration are complex endeavors. For instance, holographic wills have a reputation for clogging the docket with "chronic problems of validity and interpretation."[317] In addition, it would be easy to imagine that *pro se* personal representatives are a similar burden on the court. However, my data render a mixed verdict on these propositions. I confirmed that holographs were more problematic than formal attested wills. Of the 399 wills under my microscope, forty-two were handwritten (10%). But among the forty disputed testate matters, twelve involved holographs (30%).[318] On the other hand, though, *pro se* personal representatives performed as ably as their lawyered-up counterparts. The average estate length in *pro se* cases was

315. Companies like Rocket Lawyer, LegalZoom, and Nolo Press are increasingly marketing trust-making kits to these demographics. *See Create Your Free Living Trust*, ROCKET LAWYER, http://www.rocketlawyer.com/form/living-trust.rl (last visited Oct. 27, 2014); *Living Trust*, LEGALZOOM, http://www.legalzoom.com/living-trusts/living-trusts-overview.html (last visited Oct. 27, 2014); *Online Living Trust*, NOLO, http://www.nolo.com/products/online-living-trust-nntrus.html (last visited Oct. 27, 2014).

316. Similarly, married couples whose assets consist of community property do not need elaborate estate planning schemes. As noted above, they can file a spousal property petition and sidestep the costs and hassle of trust creation and even the full-bore probate process itself. *See supra* text accompanying note 175.

317. Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 123 (2006).

318. *Cf.* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 30–31, 59 (2008) (analyzing 145 holographic wills from Allegheny County, Pennsylvania and determining that only six (4%) led to litigation).

481 days, which is slightly shorter than the overall average of 507 days. Similarly, only five *pro se* estates involved litigation, and no claims were related to the personal representative's skill or diligence. Thus, at least with respect to estate administration, there seems to be little downside to not hiring a lawyer.

A second class of individuals who might prefer probate are those who anticipate a challenging succession process. One of probate's strengths is its ability to smooth out the rough patches that are endemic in inheritance. Recall Asuncion Ortez Hamilton from the Introduction of this Article, who wanted to leave her house to her grandchildren but failed to express her wishes clearly.[319] Because her property landed in probate, the court was able to issue a series of rulings that effectuated her intent.[320] These kinds of nudges are common: as noted above, there were dozens of nonadversarial hearings in which the probate court protected omitted or disabled heirs,[321] clarified vague or confusing wills,[322] and otherwise dealt with unexpected contingencies.[323]

There are also reasons to believe that probate is better at preventing and resolving conflict than trust administration. Of course, any comparison between these spheres must be tentative and exploratory. As noted, trust 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. Despite this caveat, it is worth pointing out that a common theme in the Alameda County files was cases that seemed bound for protracted litigation but did not arrive at that destination. One explanation for these "dogs that didn't bark" is that probate brings matters to a head. Objections to the validity of a will or the sale of real property must be made within weeks after the petition is filed.[324] The relentless march of judicial process requires survivors to critically examine the facts while they are fresh and then make sense of them in sworn statements. In turn, this minimizes opportunism and misunderstandings. In contrast, trust administration contains more room for uncertainty to fester. The statute of limitations to challenge the validity of a trust or the exercise of a trustee's duties is usually about three

319. *See supra* text accompanying notes 1–11.

320. *See supra* text accompanying notes 49–54.

321. *See, e.g.*, First and Final Report of Administration and Petition for Final Settlement, for Allowance of Statutory Fee and Expenses to Attorney, for Expenses to Executor and for Final Distribution at 5, *In re* Estate of Farber, No. RP07351295 (Cal. Super. Ct. May 12, 2008).

322. *See, e.g.*, Order Granting Petitioner's Petition for Declaratory Relief Re: No Contest Clause, Estate of Rainin, No. RP07339583 (Cal. Super. Ct. Dec. 11, 2007).

323. *See supra* text accompanying notes 305–10.

324. In California, an initial hearing must occur within about a month of the filing of the petition for probate of a will. *See* CAL. PROB. CODE § 8003(a) (West, Westlaw through 2014 Reg. Sess.). Then, if a will is admitted, contestants have four months to come forward. *See id.* § 8270. Objections to the sale of real property usually must be filed within a few weeks after the sale or proposed sale. *See id.* §§ 10587−10590. A knowledgeable reader might protest that, in California, trustees can also trigger a 120-day statute of limitations to contest the trust by serving notice of the settlor's death on beneficiaries. *See id.* § 16061.8. Yet unlike probate's mandatory deadlines, this technique is optional. In addition, few other states give trustees this tool.

years.[325] Thus, after an event that might give rise to a claim, families can fall out, financial circumstances can change, and beneficiaries can die and transmit their interests to others.

An Alameda County case called *Estate of Moreno* offers a good example of how probate identifies cases in which there is smoke but no fire. The testator handwrote a paragraph leaving her entire estate to her son Daniel and expressly disinheriting her sons Marvin and Vincent.[326] Yet when the paper arrived in court, it had been shredded and then taped back together.[327] At first, this seemed to invalidate the document: testators can revoke a will by ripping it with the intent to revoke it.[328] Yet because the probate court immediately demanded proof about why the instrument had been torn, the truth soon emerged. Daniel and Vincent submitted declarations establishing that it was Daniel—and not the testator—who had accidentally torn the document.[329] Thus, what could have been a multiyear dispute became a routine ten-month probate.

Also, unlike trusts, which only enter the judicial system when something goes wrong, the process of implementing a will begins in court. Thus, by the time a dispute erupts, the judge is often familiar with the context and the parties. Because battles over estates are "highly fact-sensitive,"[330] this proficiency can save time and lead to more accurate outcomes.

Finally, when litigation is unavoidable, probate's fixed fee schedule puts a damper on costs. For instance, Table 5 reveals that the attorneys and personal representatives in my study recovered a mere 3.8% of the gross estate value in contested cases—just 1.3% more than the fee awards in cases that did *not* involve disputes. This surprising parity stems from the fact that probate judges seem to conceptualize litigation as part of the administrative process: another step, such as selling land or paying creditors, necessary to cleanse property from the stain of death. Indeed, of the $2,373,612 in fees in litigated matters, $2,041,306 (86%) were for ordinary services. Extraordinary fees were limited to $271,757 for attorneys and $62,580 for personal representatives. Thus, even in contested matters, statutory fees are the norm.

Trusts work differently. Unlike probate's statutory model, compensation for trustees and their attorneys is primarily contractual.[331] Indeed, courts usually

325. *See id.* § 16460 (limitations period for breach of trust); *id.* § 1000 (providing that the rules of civil procedure govern if there is no probate code provision on point); CAL. CIV. PROC. CODE § 343 (West, Westlaw through 2014 Sess.) (stating a general statute of limitations of four years that would apply to claims that a trust is invalid).

326. Will, *In re* Estate of Moreno, No. FP08373451 (Cal. Super. Ct. Feb. 27, 2008).

327. *See* Declaration of Daniel Peixoto at 1, *In re* Estate of Moreno, No. FP08373451 (Cal. Super. Ct. Feb. 27, 2008).

328. *See* CAL. PROB. CODE § 6120(b) (West, Westlaw through 2014 Reg. Sess.); UNIF. PROBATE CODE § 2-507(a)(2) (amended 2010).

329. *See* Declaration of Daniel Peixoto at 1, *In re* Estate of Moreno, No. FP08373451 (Cal. Super. Ct. Feb. 27, 2008); Declaration of Thomas Vincent Peixoto at 1, *In re* Estate of Moreno, No. FP08373451 (Cal. Super. Ct. Feb. 27, 2008).

330. *In re* Estate of Harrison, 745 A.2d 676, 683 (Pa. Super. Ct. 2000).

331. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 38(1) (2003).

Table 5: Resolution of Litigation

Kind of Litigation	Number	Mean Days to Close Estate	Mean # of Attorney Appearances	Personal Rep. Fees as % of Estate Value	Attorney Fees as % of Estate Value	Total Fees as % of Estate Value
Validity of Instrument	15	822	7.4	1.4%	2.3%	3.7%
Appointment of Fiduciary	19	834	8.0	1.1%	1.7%	2.8%
Exercise of Fiduciary Duties	18	1071	10.0	2.0%	2.4%	4.4%
Petition to Recover Property	4	819	6.0	1.9%	2.4%	4.3%
Heirship Petition	9	727	7.2	1.7%	3.3%	5.0%
Other	9	771	4.4	1.4%	3.0%	4.4%
Totals	64	842	7.2	1.4%	2.5%	3.8%

defer to fee provisions in the trust instrument or freestanding agreements between the settlor or trustee and an attorney.[332] To get a very rough sense of the difference this might make, consider data published by corporate trustees. The litigated cases in Alameda County lasted for an average of twenty-seven months and had a mean estate value of about $800,000. Table 6 calculates that the corporate trustees would have charged about $21,000—2.7% of the value of the decedents' assets—to handle these matters.

332. *See, e.g.*, Estate of Ingram v. Ashcroft, 709 S.W.2d 956, 958 (Mo. Ct. App. 1986) ("The fixing of a [trustee's] fee by the courts is not applicable. . . where the compensation has been fixed by contract.").

333. *See Fees*, AUSTIN TRUST CO., http://www.austintrust.com/index.php?page=fees#C1 (last visited Oct. 27, 2014).

334. *See* COVENANT TRUST CO., REVOCABLE LIVING TRUSTS 7 (2012), *available at* http://www.covenanttrust.com/UserFiles/file/RLT%20brochure_2012.pdf.

335. *See* EDWARD JONES TRUST CO., DISCLOSURES AND FEE SCHEDULE 7 (2013), *available at* https://www.edwardjones.com/groups/ejw_content/@ejw/documents/web_content/web100511.pdf.

336. *See* FIDELITY PERSONAL TRUST CO., PERSONAL TRUST SERVICES 13 (2012), *available at* https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/PDF_Fidelity_Personal_Trust_Services_Brochure.pdf.

337. *See Fee Schedule*, INVESTORS' SEC. TRUST, http://www.allabouttrust.com/files/schedule_of_fees_2012_%201.pdf (last visited Feb. 14, 2014).

338. *See Asset Management and Trust Services*, N.H. TRUST CO., http://www.nhtrustco.com/fees.htm (last visited Oct. 27, 2014).

339. *See* THE PRIVATE TRUST CO., FEE SCHEDULE FOR TRUST SERVICES, *available at* http://www.joinlpl.com/Documents/Join%20LPL%20Redesign/Fee%20Schedule%20for%20Trust%20Services.pdf.

Table 6: Trustee Fee Schedules

Trustee	Flat Fee	Annual Fee on First $500,000 of Estate Value	Annual Fee on Second $300,000 of Estate Value	Total Annual Fees on $800,000 Estate for 27 Months
Austin Trust Company	N/A	1.1%	1.1%	$20,240[333]
Covenant Trust Company	N/A	1.0%	1.0%	$18,400[334]
Edward Jones Trust Company	$1,200	1.5%	1.15%	$27,435[335]
Fidelity	N/A	1.2%	1.2%	$22,080[336]
Investors Security Trust Company	N/A	1.25%	1.25%	$23,000[337]
New Hampshire Trust Company	N/A	0.9%	0.9%	$16,560[338]
Private Trust Company	1% for first year	0.65%	0.65%	$19,960[339]
Summit Trust Company	$500	1.5%	1.5%	$28,100[340]
The Vanguard Group	$2,500	0.89%	0.89%	$18,876[341]
Average				$21,627

Notably, this sum is nearly twice the corresponding amount of personal representatives' fees in the litigated probate cases. In fact, it is just 1.1% less than the *total* amount of fees in the contested matters in my sample. Because prevailing trial lawyers in trust disputes often get paid from the corpus,[342] most of these estates would have also borne hefty attorneys' fees as well. Thus, it seems all but certain that litigation would have drained significantly more from trust estates than probate estates.

I want to reiterate that this is the very beginning of a conversation, and not the last word. A wide range of variables might complicate things in the real world. Also, in my quest for hard data about trustee's fees, I have stacked the deck by using corporate trustees, who probably charge more than individual trustees. Similarly, banks and other financial institutions bring investment exper-

340. *See* SUMMIT TRUST CO., FEE SCHEDULE—TRUSTS (2012), *available at* http://www.summittrust.com/images/fees/Commonly%20Used%20Trusts.pdf.

341. *See* VANGUARD ASSET MGMT. SERVS., TRUST SERVICES YOU AND YOUR FAMILY CAN COUNT ON 6 (2011), *available at* https://personal.vanguard.com/pdf/eptsb.pdf.

342. *See, e.g.*, Terry v. Conlan, 33 Cal. Rptr. 3d 603, 614 (Ct. App. 2005) (explaining that trust funds can be used when the litigation benefits the trust).

tise to the table, which raises the possibility that the trust would earn income to offset the higher trustee's fees. Finally, trust administration and litigation might conclude faster than probate cases, thus lowering costs. All of these issues must be ventilated by further research before we can draw firm conclusions.

2. Creditors

Recall that creditor protection is one of probate's animating purposes.[343] Traditionally, a personal representative needed to inform all parties who might have claims against the decedent about the proceeding. Recently, however, the UPC and many jurisdictions have eliminated this requirement. In this section, I argue that this trend is misguided. Not only should policymakers retain mandatory creditor notifications in probate, but, counterintuitively, they should import this norm into the streamlined realm of nonprobate transfers.

The point of departure for understanding creditors' rights in probate is the U.S. Supreme Court's Fourteenth Amendment due process jurisprudence. In a line of cases starting with Justice Jackson's renowned opinion in *Mullane v. Central Hanover Bank & Trust Co.*,[344] the Court held that parties whose interests may be affected by a judicial ruling are entitled to "notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action."[345] *Mullane* involved a New York statute that permitted trustees to inform beneficiaries of their rights by publication notice (placing a short block of text in a newspaper).[346] The Court reasoned that this technique was acceptable for beneficiaries about whom the trustee did not know.[347] However, the Court held that the trustee needed to provide actual notice (presumably by mail) to beneficiaries of whom the trustee was or should have been aware.[348]

In the decades after *Mullane*, courts and commentators struggled to apply its teachings to probate creditors.[349] Most states had two separate statutes of limitation for collection actions against a decedent's estate. First, they had "nonclaim" statutes. These probate-specific limitation periods were very short—usually two or three months—and began to run after a personal representative notified creditors of the proceeding.[350] Because many nonclaim statutes only required the personal representative to publish notice in a newspaper, some

343. I deal only with unsecured creditors in this section. Secured creditors can enforce their rights without asserting claims in probate. *See* UNIF. PROBATE CODE § 3-104 (amended 2010).

344. 339 U.S. 306 (1950).

345. *Id.* at 314.

346. *See id.* at 309.

347. *See id.* at 317–18.

348. *See id.* at 318.

349. *Compare* Cont'l Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984) (holding that *Mullane* required that a personal representative give actual notice to known creditors), *with In re* Estate of Fessler, 302 N.W.2d 414, 448 (Wis. 1981) (holding that *Mullane* does not apply to probate statute of limitations).

350. *See, e.g.*, MO. ANN. STAT. § 473.360 (West, Westlaw through 2014 2d Reg. Sess.); Estate of Busch v. Ferrell-Duncan Clinic, Inc., 700 S.W.2d 86, 87 (Mo. 1985) (en banc) (describing this as a "nonclaim statute").

scholars suggested that they were unconstitutional under *Mullane* as to known or reasonably ascertainable creditors.[351] But complicating matters, states usually had a second, longer statute that set an outer boundary on all claims against decedents.[352] These "self-executing" limitation periods expired between nine months and several years after the decedent passed away, without regard to whether creditors had been given adequate notice.[353]

In *Tulsa Professional Collection Services v. Pope*, the Court attempted to clarify the due process rights of probate creditors. [354] Oklahoma had adopted a two-month nonclaim statute that was triggered by publication notice.[355] Echoing *Mullane*, the Court held that this statute was unconstitutional when applied to creditors who were known or reasonably discoverable.[356] Yet the Court also had to walk a tightrope. It faced a powerful argument that had not arisen in *Mullane*: that the probate court's invocation of the nonclaim statute was not state action within the meaning of the Fourteenth Amendment.[357] The Court needed to reject this theory without also implying that state action occurred when a court barred a claim as untimely under a self-executing statute. The Court resolved this tension by focusing on the probate court's active role in applying nonclaim statutes:

> The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. . . . It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.[358]

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351. *See, e.g.*, Sheldon S. Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420, 438–39 (noting the widespread disagreement about the issue); Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1270 (1957) ("[I]t would seem necessary, in light of *Mullane*, to require notice by mail when the names and addresses of the interested parties are known or can be discovered by due diligence in the ordinary course of estate administration.").

352. *See, e.g.*, IND. CODE ANN. § 29-1-14-1(d) (West, Westlaw through 2014 2d Reg. Sess.) (nine months); IOWA CODE ANN. § 633.413 (West, Westlaw through 2014 Reg. Sess.) (five years); NEB. REV. STAT. ANN. § 30-2485(a)(2) (West, Westlaw through 2014 Reg. Sess.) (three years).

353. *See, e.g.*, Estate of Busch, 700 S.W.2d at 89 (Mo. 1985) (coining the phrase "self-executing statute of limitations" to describe a time-based bar on claims that "operates independently of any adjudicatory process"); Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C. L. REV. 659, 676–78 (1985) (arguing that these statutes are constitutional because they begin to run without state intervention).

354. 485 U.S. 478 (1988).

355. *See id.* at 480−81.

356. *See id*. at 489–90.

357. *See id.* at 485–86.

358. *Id.* at 487.

Accordingly, the Court extended *Mullane* to nonclaim statutes without making self-executing limitation periods vulnerable to due process challenges.

Ironically, rather than ensuring that creditors obtained notice, *Pope*'s legacy was the polar opposite. The drafters of the 1990 amendments to the UPC, convinced that creditors' claims are exceedingly rare, saw the Court's opinion as a blueprint for eliminating what they perceived to be a pointless duty.[359] Because the Court had linked state action to the judicial processes necessary to trigger nonclaim statutes, it had implied that self-executing statutes—which apply without court intervention—did *not* involve state action. Thus, in a creative gambit, the UPC encouraged jurisdictions to abolish nonclaim statutes and slash their self-executing limitations period from three years to one.[360] These changes liberated personal representatives from providing *any* notice to creditors about their rights. With only a self-executing statute on the books, personal representatives could simply sit on their hands and wait for twelve months. At that end of that timeframe, the self-executing statute would bar claims by all creditors—even those who were unaware of the death—without the due process clause ever entering the picture.[361] Similarly, this reading of *Pope* immunized nonprobate transfers from the rigors of constitutional notice. Because trusts and similar devices operate privately, they never trigger the Fourteenth Amendment. Thus, no state has adopted mandatory creditor notifications for trusts, community property with the right of survivorship, or pay-on-death devices such as pensions or life insurance.[362]

My evidence suggests that this movement is misguided. Because California continues to require notice, it showcases how creditors behave when they are

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359. *See* Sarajane Love, *Estate Creditors, the Constitution, and the Uniform Probate Code*, 30 U. RICH. L. REV. 411, 424–25 (1996) (describing the reaction of the UPC's Joint Editorial Board to *Pope*); *see also* Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice be Good Notice if Some Notice Is Not?*, 24 REAL PROP. PROB. & TR. J. 433, 439–40 (1990) (noting that the drafters of the UPC amendments "see *Pope* as an unexpected opportunity to avoid all notice burdens").

360. *See* UNIF. PROBATE CODE § 3-801(a) (amended 2010). The UPC does this by giving states the option to make notice permissive, thus authorizing the personal representative not to furnish any notice and instead count down the year until creditor's claims are barred by the self-executing statute. *See id.* However, if the personal representative chooses to publish notice, the statute requires creditors to file claims within four months. *See id.* § 3-801(b). In addition, if the personal representative mails notice, creditors must assert their rights within sixty days. *See id.* For a partial list of jurisdictions that have followed the UPC's lead, see IDAHO CODE ANN. § 15-3-801 (West, Westlaw through 2014 2d Reg. Sess.); N.D. CENT. CODE ANN. § 30.1-19-01 (West, Westlaw through 2013 Reg. Sess.); S.D. CODIFIED LAWS § 29A-3-801 (West, Westlaw through 2014 Reg. Sess.); UTAH CODE ANN. § 75-3-801 (West, Westlaw through 2014 Gen. Sess.).

361. *See* UNIF. PROBATE CODE § 3-803 cmt. (amended 2010) (acknowledging that the amendments were designed to prevent *Pope* "from unduly prolonging estate settlements and closings").

362. As part of the 1990 overhaul, the UPC extended the one-year self-executing statute to nonprobate transfers. *See id.* § 6-102; *see also* ARIZ. REV. STAT. ANN. § 14-6102 (West, Westlaw through 2014 2d Reg. & Special Sess.); IDAHO CODE ANN. § 15-6-107 (West, Westlaw through 2014 2d Reg. Sess.); IND. CODE ANN. § 32-17-13-3 (West, Westlaw through 2014 2d Reg. Sess.), N.M. STAT. ANN. § 45-6-102 (West, Westlaw through 2014 2d Reg. Sess.), VT. STAT. ANN. tit. 9, § 4359 (West, Westlaw through 2014 Sess.).

informed of their rights. As noted, the volume of claims filed—$19,757,157—is starkly at odds with the UPC's belief that creditors have "demonstrated [a] lack of interest in probate."[363] Moreover, the UPC attempts to justify the erosion of notice by contending that "the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small."[364] However, in my dataset, 47% of creditor's claims were filed by companies that operate at arm's length from their customers—not just banks and credit card issuers, but utilities, doctor's offices, and mom and pop businesses. These entities have no easy means to learn about a pending probate and thus are at the mercy of receiving notifications.[365] Allowing decedents and survivors to use creditors' ignorance as a buffer against claims imposes costs on others and serves no discernable purpose.

Yet my data also raise concerns about the current treatment of nonprobate creditors. As noted above, trustees, pension plan administrators, and other financial institutions generally need not provide notice when a settlor or pay-on-death account holder has passed away. If my survey of just 7% of all decedents in a single California county reveals nearly $20 million in creditor's claims, then the proliferation of nonprobate instruments means that massive amounts of debts are almost certainly going uncollected. Two pieces of evidence bolster this conclusion. First, recall that the State of California's Department of Health Care Services (DHCS) asserted more creditors' claims than any other entity.[366] This is no coincidence: state law treats the DHCS differently than other creditors and requires *trustees* to give the agency notice of the settlor's death.[367] This suggests that notice can be much more valuable than the UPC posits, and that there may be many nonprobate creditors waiting in the wings. Second, and similarly, I found that sometimes a decedent's creditors—not her loved ones—petitioned to open an estate and be appointed personal representative.[368] In

363. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, AMENDMENTS TO UNIFORM PROBATE CODE BY ADDING SECTION 6-102 AND DELETING SECTIONS 6-215 AND 6-309(B) AND TO MAKE CONFORMING CHANGES IN FREE STANDING ACTS DERIVED FROM UNIFORM PROBATE CODE ARTICLE VI, at 1, *available at* http://www.uniformlaws.org/shared/docs/probate%20code/upc6102.pdf (last accessed Feb. 13, 2014).

364. UNIF. PROBATE CODE § 3-803 cmt. (amended 2010).

365. To be sure, creditors who are individuals stand on different footing. Most of the claimants in this constituency knew the decedent well. Indeed, the most common demand was for payment for caretaking services. Because these creditors usually had ongoing relationships with the decedent, they do not necessarily need to be apprised of the death. At the same time, though, they are probably not aware of the short timeframe in which they must present their claims. Thus, no matter the contours of the Due Process Clause, dispensing with notice is bad policy.

366. *See supra* text accompanying note 224.

367. *See* CAL. PROB. CODE §§ 215, 19202 (West, Westlaw through 2014 Reg. Sess.).

368. *See, e.g.*, Petition for Letters of Administration at 5, Estate of Jackson, No. RP08411516 (Cal. Super. Ct. Sept. 24, 2008) (petition for probate filed by two tort plaintiffs who were suing the estate and were not even aware of the identity of the decedent's heirs); Objection to Appointment of Administrator and Nomination of Proposed Administrator by Person Entitled To Letters at 1, Estate of Cheng, No. RP08377376, (Cal. Super. Ct. June 16, 2008) (petition for probate filed by an individual creditor); Petition for Letters of Administration at 1, Estate of James, No. RP08382548 (Cal. Super. Ct. Apr. 19, 2008) (petition for probate filed by Wells Fargo Bank).

these cases, the decedent almost certainly left substantial debts and no probate estate. These creditors somehow managed to learn of the death and to protect their rights. Undoubtedly, many more were not so lucky.

Lawmakers could address this problem by taking two steps. First, they could require trustees and pay-on-death account administrators to work with a decedent's personal administrator (if there is one) or survivors (if there is not) to send notifications to creditors. Second, they could establish a cooling-off period for nonprobate transfers, which would give creditors the chance to assert claims.[369] Of course, this is only the most cartoonish outline of what would need to be a finely-drawn regime. Among the many questions that I do not purport to answer are whether creditors could seek redress directly from the nonprobate assets or whether they would need to trudge through probate. I also acknowledge that creditor notifications would be more difficult to implement for certain kinds of nonprobate transfers. Unlike wills, trusts, pensions, and life insurance, which have a fiduciary at the helm, joint tenancy, community property with right of survivorship, and transfer-on-death deeds have no middleman. Thus, with these devices, it is unclear who would bear the responsibility for ironing out creditors' issues. Nevertheless, these problems are both solvable and worth solving. Harmonizing the treatment of probate and nonprobate creditors would eradicate a distinction that is both razor-sharp and completely arbitrary.

B. REFORMING PROBATE

It is perverse to maintain a component of the legal system that exists largely to be avoided. In this section, I briefly consider ways to make probate more palatable.

One possibility is to scale judicial involvement back even further. More jurisdictions could adopt the UPC's menu of informal probate and unsupervised administration, which makes court involvement the exception rather than the rule.[370] Similarly, in a series of excellent articles, John Martin has proposed an even sleeker model: a registration system in which wills are lodged with an administrative agency and presumed valid.[371] Not every estate would have a personal representative; instead, like universal succession, heirs and beneficiaries would simply absorb a decedent's assets and liabilities.[372] As Martin explains, this shift would greatly abbreviate the "overwhelming majority of probate proceedings," which "do not require

369. For similar proposals, see Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460045 (manuscript at 39) (extending this suggestion to other nonprobate mechanisms); Sterk & Leslie, *supra* note 18, at 225–26 (suggesting that retirement account custodians be required to inform a decedent's family about the existence of nonprobate accounts and not distribute the property for one or two months after death).

370. *See supra* note 55 and accompanying text.

371. *See* Martin, *supra* note 35, at 77–78; Martin, *supra* note 56, at 976–78.

372. *See* Martin, *supra* note 35, at 82.

judicial oversight."[373]

My research sounds a note of caution about these curtailed administrative regimes. Contrary to their foundational premise, it appears that a majority of estates would need court involvement at some point. Assume that any one of the following contingencies would require the parties to obtain judicial assistance: litigation, creditors' claims, real property sales, a personal representative's death or declination to serve and the application of change-of-circumstance doctrines such as lapse (when a beneficiary predeceases the testator),[374] abatement (when the testator does not own enough property to honor all her bequests),[375] or ademption by extinction (when the will specifically conveys an item that the testator does not own at death).[376] Of the 668 cases in my spreadsheet, only 209 (31%) did not feature at least one of these events. Ironically, flipping the default to unsupervised administration could make the process take longer. Cases would hum along privately but then come to a screeching halt as the parties jumped through the hoops of invoking the court's oversight power.[377]

A less drastic way to make probate quicker and cheaper would be to preserve the exoskeleton of court supervision but slash its bloated midsection. For instance, recall that personal representatives must hire probate referees.[378] This seems unnecessary given the possibility that attorneys, personal representatives, and survivors would be able to agree on the valuation of most assets. Even worse, the compulsory use of probate referees causes delay. Indeed, the estate must stand idle until the referee finishes her task and enables the personal representative to lodge the I&A with the court. I found that an average of 189 days—over six months—passed between the opening of the estate and the filing of the I&A. Privatizing appraisals thus might have the double-barreled benefit of reducing costs and accelerating the process.

The bond requirement is also dysfunctional and could easily be eliminated. Bonds are supposed to prevent the personal representative from embezzling estate funds. However, California paradoxically permits this mandate to be waived (either by the testator or all the beneficiaries)[379] and yet requires any personal representative who does not reside within the state to post a $20,000 bond.[380] As a result, although only 179 estates (27%) needed to file a bond, far

373. *Id.* at 81.

374. *See* UNIF. PROBATE CODE § 2-603 (amended 2010).

375. *See id.* § 3-902.

376. *See id.* § 2-606.

377. Of course, the parties might be able to resolve some of these issues without judicial assistance. Changes in the office of the personal representative, uncontested creditors' claims, and real property sales stand out as likely candidates. It is also possible that Martin's proposal would eradicate so many time-consuming steps (like filing an accounting) that administration would still be much faster and cheaper even if the parties sometimes needed to go to court.

378. *See supra* text accompanying note 265.

379. *See* CAL. PROB. CODE § 8481 (West, Westlaw through 2014 Reg. Sess.).

380. I could not find this norm memorialized in any state or local rule, although it was widely applied and acknowledged. *See, e.g.*, *FAQ's—Probate a Decedent's Estate*, CAL. SUPERIOR COURT,

more testators and survivors would have preferred to dispense with bonding entirely. In addition, bonds have little deterrent effect. In one estate worth over $500,000, a $250,000 bond did not prevent the executor from gambling away the decedent's property.[381] Abolishing these compulsory extractions would go a long way toward defusing the charge that probate is "a form of private taxation" levied by the bar and other special interests.[382]

CONCLUSION

It has been exactly fifty years since Dacey's book sparked the most significant change in the history of American inheritance practices. Since then, the government's role in succession has diminished nearly to the vanishing point. This development has been applauded as the triumph of private ordering over the dysfunctions of the state. And to be sure, the rise of trusts and other nonprobate transfers has opened up new avenues of choice for owners and reduced time and expense for survivors. Nevertheless, when individuals opt out of probate, and when lawmakers further privatize posthumous wealth transmission, they have been acting on the basis of rumor and anecdote.

This Article has tried to remedy this deficiency. By doing so, it has discovered that much of what we think we know about probate is wrong. For one, court oversight adds more value and costs far less than assumed. In addition, the race to eliminate traditional probate functions causes serious harm to creditors. Finally, probate operates slowly. Yet because the root of this evil is the difficulty of imposing order on the anarchic succession process, it is possible that nonprobate mechanisms often suffer from similar flaws.

Recall that when Richard Wellman drafted the UPC, he envisioned a state-run inheritance scheme that truly competed with private devices like trusts—a system that allowed lawyers to respond to clients' knee-jerk requests to purchase a trust: "Save your money. Probate works well."[383] We should not abandon his dream, and we may be closer to realizing it than we imagine.

ALAMEDA CNTY., http://www.alameda.courts.ca.gov/pages.aspx/Probate-a-Decedents-Estate (last visited Oct. 27, 2014) ("If the personal representative lives outside of California, the court will require that s/he get a surety bond . . . .").

381. *See* Petition for Final Distribution; with First and Final Accounting of the Special Administrator; and for Allowance of Statutory Fees, Extraordinary Compensation and Reimbursement of Expenses Advanced at 3, *In re* Estate of Epifani, No. RP07327771 (Cal. Super. Ct. Mar. 25, 2011).

382. DACEY, *supra* note 14, at 23; *see also* Langbein, *supra* note 12, at 1117 (noting the widespread view that probate is "little more than a tax imposed for the benefit of court functionaries and lawyers").

383. Wellman, *supra* note 23, at 201; *see also supra* text accompanying note 152.