

TOWARD ECONOMIC ANALYSIS OF THE UNIFORM PROBATE CODE[†]

Daniel B. Kelly*

Insights from economics and the economic analysis of law may be useful in analyzing succession law, including intestacy and wills as well as nonprobate transfers such as trusts. After surveying prior works that have examined succession from a functional perspective, I explore the possibility of utilizing tools like (i) transaction costs, (ii) the ex ante/ex post distinction, and (iii) rules versus standards, to illuminate the design of the Uniform Probate Code. Specifically, I investigate how these tools, which legal scholars have employed widely in other contexts, may be relevant in understanding events like the nonprobate revolution and issues like “dead hand” control; analyzing UPC provisions pertaining to the harmless error rule, reformation, and ademption by extinction; and evaluating law reforms such as proposals to abolish attestation or prevent the disinheritance of children.

INTRODUCTION

Law and economics, as an intellectual movement, and the Uniform Probate Code (UPC), as a model statute, have both been highly influential since the 1960s.¹ But, perhaps surprisingly, legal scholars have not applied many of the fundamental ideas and advances within the economic analysis of law to the UPC and

[†] © Copyright, 2012, Daniel B. Kelly. All rights reserved.

* Associate Professor of Law, Robert & Marion Short Scholar, and Co-Director, Law & Economics Program, Notre Dame Law School; J.D., Harvard Law School; B.A., University of Notre Dame (daniel.kelly@nd.edu). I am grateful to Ira Bloom, Margaret Brinig, Barry Cushman, Howard Erlanger, John Langbein, Shelly Kreiczer-Levy, Robert Sitkoff, Lawrence Waggoner, and participants at the 2011 American College of Trust and Estate Counsel Symposium, “The Uniform Probate Code: Remaking American Succession Law,” at the University of Michigan Law School for their comments and suggestions.

1. On the origins of law and economics and one of its seminal articles, R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), see, e.g., Thomas W. Hazlett, *Ronald H. Coase*, in PIONEERS OF LAW AND ECONOMICS 1–30 (Lloyd R. Cohen & Joshua D. Wright eds., 2009); Ejan Mackaay, *History of Law and Economics*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 65, 71–77 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). On the UPC’s promulgation in 1969, see J. Pennington Straus, *History and Origin of the Uniform Probate Code*, in ACLEA NATIONAL CONFERENCE ON THE UNIFORM PROBATE CODE: STUDY MATERIALS (1972); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969); on the UPC’s amendments in 1990, see John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871 (1992) (introducing symposium on 1990 UPC); on the UPC’s influence in adopting as well as non-adopting states, see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 900 (1992) (“The laws of nearly all if not all states have been affected by the Code.” (citing Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985))).

law of succession. This Article is an initial attempt to remedy that deficiency and to outline a preliminary research agenda for analyzing succession law, including the law of intestacy and wills as well as non-probate transfers such as trusts, from an economic perspective.

To this end, Part I provides a brief overview of prior efforts to apply economic and functional considerations to succession law. These efforts include seminal articles by John Langbein, Larry Waggoner, and others who have emphasized function over form;² general treatises on law and economics, including those by Richard Posner and Steven Shavell, which discuss the transmission of wealth at death or dead hand control;³ and more recent work by a new generation of trusts and estates scholars who have begun to apply economic insights, both theoretical and empirical, to various topics within trust law.⁴

Part II highlights three important tools in law and economics—transaction costs, the ex ante/ex post distinction, and rules versus standards—and discusses why each tool is potentially relevant for understanding succession law. In Part II.A, I examine the importance of transaction costs—the various impediments to the transmission of wealth at death—as well as the role of comparative institutional analysis and the trade-off between error costs and decision costs. In Part II.B, I contend that a proper analysis of the UPC and the laws of succession requires an ex ante (i.e., before the fact), rather than ex post (i.e., after the fact), perspective. In Part II.C, I investigate how the UPC relies on both rules, in which the law is given its content ex ante, and standards, in which the law is given its content ex post.

Part III then applies these economic tools to several issues in succession law. In Part III.A, I examine how these tools are useful for understanding previous developments, including the revolution in nonprobate transfers and the adoption of the harmless error rule

2. See, e.g., John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) [hereinafter Langbein, *Nonprobate Revolution*]; John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter Langbein, *Substantial Compliance*].

3. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* ch. 18 (8th ed. 2010); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 59–72 (2004).

4. See, e.g., Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007); see also M.W. LAU, *THE ECONOMIC STRUCTURE OF TRUSTS* (2011).

and reformation doctrine. In Part III.B, I utilize these tools to analyze the UPC's current design, including provisions relating to dead hand control and ademption by extinction. In Part III.C, I discuss why these tools also may be beneficial in evaluating the desirability of future law reforms, such as proposals to abolish the attestation requirement or prevent the intentional disinheritance of children.

The Conclusion summarizes the Article's main points and identifies a number of topics for future research and law reform. For example, more work is necessary to develop the significance of ex ante versus ex post analysis and rules versus standards in succession law. Other economic concepts, such as agency costs and information costs, also require further research. Recent work highlights the importance of these costs in trust law,⁵ but agency and information costs have received little attention in wills law. Although law reform involves several dimensions, the economic analysis of law can provide valuable insights into the optimal design of legal rules and institutions. There is thus a clear need for further theoretical and empirical scholarship.

Overall, this Article provides a framework for analyzing the UPC and succession law from an economic perspective. Incorporating well-established economic tools into the analysis may be beneficial in developing a better understanding of succession law as well as generating new ideas for law reform. Yet the analysis here is preliminary. Rather than providing a definitive or comprehensive analysis, the Article offers a roadmap for future research. In this way, the Article seeks to contribute to a nascent but growing literature applying economic insights to wills, trusts, and estates.⁶

I. PRIOR LITERATURE

Functional analysis of inheritance dates back to at least the late eighteenth and early nineteenth century, with works by William Godwin and Jeremy Bentham.⁷ Among the first examples of

5. On agency costs, *see, e.g.*, Sitkoff, *supra* note 4; Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749 (2008); *see also* LAU, *supra* note 4, at 37–58. On information costs, *see, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 843–49 (2001); *see also* LAU, *supra* note 4, at 142–44.

6. *See supra* note 4; *see also infra* notes 31–32 and accompanying text.

7. *E.g.*, JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 234–46 (Oxford U. Press 1914) (1802); JEREMY BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 122–24 (1825); WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 718–19 (Penguin Classics 1985) (1793). Thereafter, for much of the nineteenth and early twentieth century, formalism was predominant in England as well the United States, until the advent of legal realism in the 1920s and 1930s. *See generally* PATRICK S. ATIYAH, *THE RISE AND FALL OF*

functional analysis of American succession law were two articles in the mid-twentieth century, one by Ashbel Gulliver and Catherine Tilson and one by Philip Mechem.⁸ Gulliver and Tilson explored the ritual, evidentiary, and protective functions of the Wills Act formalities.⁹ Likewise, Mechem called for a modern wills act to replace the Model Probate Code, the precursor to the UPC, arguing that the “imposition of further formalities is likely to imperil meritorious wills.”¹⁰ In criticizing the excessive formalism of wills law, both articles emphasized functional concerns.

This functional movement then languished for several decades,¹¹ until John Langbein revived it with his path-breaking article, *Substantial Compliance with the Wills Act*.¹² Rejecting the formalism of strict compliance, Langbein advocated a “functional rule of substantial compliance” that would deem a defectively executed will to be in accord with the Wills Act formalities if a testator had satisfied the Act’s underlying purposes.¹³ Subsequently, Langbein urged states to adopt the “harmless error” rule to excuse execution errors¹⁴—a doctrine that also prioritizes function over form and

FREEDOM OF CONTRACT 345–58, 388–97, 660–71 (1979); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41–67 (1977). One example of the formalism of this age was John Chipman Gray’s classic treatise, *The Rule Against Perpetuities*, in which Gray attempted to formalize the law of perpetuities. See Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982). Similarly, in trust law, a desire to compile and categorize existing doctrine in new treatises, and the influence of such treatises, was evident in England from at least the 1830s. See D.W.M. Waters, *The Role of the Trust Treatise in the 1990s*, 59 MO. L. REV. 121, 121, 128 (1994) (describing successive editions of Thomas Lewin, *A Practical Treatise of the Law of Trusts and Trustees* (1837), and how “Lewin’s schemata entered the pages of the law reports as axiomatic, such was the eminence of the authors and the conviction of the century as to the scientific nature of law”). This trend continued in the United States in the 1920s and 1930s. See Robert Whitman, *Resolution Procedures to Resolve Trust Beneficiary Complaints*, 39 REAL PROP. PROB. & TR. J. 829, 862 & n.217 (2005) (“Professor Austin Scott . . . designed the Restatement (First) of Trusts in a manner that scientifically categorized the legal doctrines Launched in 1923, the restatement project may well have represented the final effort to realize Langdell’s ideal of a science of law.” (citing RESTATEMENT OF TRUSTS (1935))).

8. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Philip Mechem, *Why Not a Modern Wills Act? A Comment on the Wills Provisions of the Model Probate Code*, 33 IOWA L. REV. 501 (1948).

9. Gulliver & Tilson, *supra* note 8, at 5–13. Commentators sometimes refer to the ritual function as the “cautionary” function. See, e.g., Langbein, *Substantial Compliance*, *supra* note 2, at 494–96. Langbein also suggests another function, the “channeling” function, see *id.* at 493–94, in discussing the purposes of the formalities, see *id.* at 491–98.

10. Mechem, *supra* note 8, at 504.

11. See Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 n.10 (1994).

12. Langbein, *Substantial Compliance*, *supra* note 2.

13. *Id.* at 489.

14. See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

that the UPC adopted in 1990.¹⁵ Langbein's scholarship and his law reform work have had an enormous influence on both wills law and trust law.¹⁶

Other prominent trusts and estates scholars have emphasized functional considerations as well. An active participant in the Uniform Law Commission and American Law Institute, Larry Waggoner has paved the way for functional reforms through his casebook,¹⁷ one of the field's most highly regarded; his scholarship, spanning six decades,¹⁸ including several articles with Langbein;¹⁹ and his work as the Reporter (i.e., principal drafter) of the 1990 UPC and the *Restatement (Third) of Property: Wills and Other Donative Transfers*.²⁰ The late Jesse Dukeminier, "whose importance . . . to the field cannot be overstated,"²¹ not only analyzed the implications of the UPC and other uniform acts in

15. UNIF. PROBATE CODE § 2-503 (2011), 8 U.L.A. pt. I, at 146–48 (1998); see also *infra* Part III.A.2.

16. Langbein's contributions to wills law are cited throughout this Article, including footnotes 1, 2, 14, 19, 104, 219, and 223. For a sampling of his contributions to trust law, see John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) [hereinafter Langbein, *Mandatory Rules*]; Langbein, *Nonprobate Revolution*, *supra* note 2; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005) [hereinafter Langbein, *Best Interest*]; John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988). See also *infra* note 26 (citing articles by Langbein and Richard Posner on trust investment law).

17. LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* (4th ed. 2006).

18. *E.g.*, Lawrence W. Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L. F. 423; Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U. L. REV. 626 (1971); Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991); Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992); Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996) [hereinafter Waggoner, *Antilapse*]; Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1 (2003); Lawrence W. Waggoner, *US Perpetual Trusts*, 127 LAW Q. REV. 423 (2011).

19. Langbein & Waggoner, *supra* note 1; John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987); Langbein & Waggoner, *supra* note 2.

20. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (2003) [hereinafter RESTATEMENT (THIRD) OF PROP.].

21. Robert H. Sitkoff & James Lindgren, *Preface to the Eighth Edition* of JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS AND ESTATES*, at xxxi (8th ed. 2009).

his scholarship,²² but also was the lead author of six editions of one of the most widely-adopted and influential casebooks.²³ Other leading scholars, including Gregory Alexander, Adam Hirsch, James Lindgren, and Stewart Sterk, also have made significant contributions to the field's corpus of functionally oriented work.²⁴

In addition, two generalists with economic backgrounds—Richard Posner and Steven Shavell—have applied insights from economics to a variety of issues in inheritance and succession law. In *The Transmission of Wealth at Death*, one chapter of his influential treatise *The Economic Analysis of Law*, Posner discusses estate and gift taxation, dead hand control, *cy pres*, the elective share, and incentive and spendthrift trusts.²⁵ Posner also collaborated with Langbein on a series of seminal articles on trust investment law,²⁶ which led to law reform that altered trust investment in practice.²⁷ Similarly, in *Foundations of Economic Analysis of Law*, Shavell systematically investigates the transfer of property at death

22. See, e.g., Ira Mark Bloom & Jesse Dukeminier, *Perpetuities Reformers Beware: The USRAP Tax Trap*, 25 REAL PROP. PROB. & TR. J. 203 (1990); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995).

23. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES (6th ed. 1999).

24. Many of these scholars' contributions are cited throughout this Article. Moreover, Sterk, Alexander, and Lindgren have co-authored leading casebooks. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, ESTATES AND TRUSTS: CASES AND MATERIALS (4th ed. 2011); WAGGONER, ALEXANDER, FELLOWS & GALLANIS, *supra* note 17. A number of other scholars have investigated empirical issues related to intestacy and wills. See, e.g., Jeffrey Schoenblum, *Will Contests: An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607 (1987); see also UNIF. PROBATE CODE § 2-102 cmt. (2011), 8 U.L.A. pt. I, at 81–82 (1998) (collecting empirical studies regarding share of surviving spouse); 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 nn.3–4 (2007) (collecting various empirical studies from 1950 to 1996).

25. See POSNER, *supra* note 3, at 687–703. One reason Posner may have initially addressed the topic is the dearth of economic analysis of inheritance that existed at the time of the first edition of his treatise. For an exception that proves the rule, see Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 465 (1971) (“I have not been able to turn up any serious effort to apply welfare economics to the problem.”).

26. See John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1; John H. Langbein & Richard A. Posner, *The Revolution in Trust Investment Law*, 62 A.B.A. J. 887 (1976); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law: II*, 1977 AM. B. FOUND. RES. J. 1; John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980).

27. See Schanzenbach & Sitkoff, *supra* note 4 (investigating effect of “prudent investor rule” on trust portfolio allocation). On the influence of modern portfolio theory on trust investment law, see generally BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986); Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721 (1976); Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

and dead hand control,²⁸ including the reason for bequests.²⁹ There is also a relatively large economic literature exploring the bequest motive and the division of estates among children.³⁰

Recently, several trusts and estates scholars of a new generation have begun incorporating economic insights more explicitly than many of their predecessors. The emerging scholarship is both theoretical and empirical. Robert Sitkoff has led the way, applying insights from agency theory and the economics of information to trust and fiduciary law.³¹ Sitkoff also has joined with co-authors Max Schanzenbach and Jonathan Klick to publish several empirical studies on agency costs, trust investment law, and the jurisdictional competition for trusts.³² In several of their articles, Sitkoff and Schanzenbach also provide insights on the political economy of

28. See SHAVELL, *supra* note 3, at 59–72 (discussing altruism, accidental bequests, life insurance, wills, and various arguments for allowing or not allowing dead hand control).

29. See *id.* at 60–63; see also Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401 (1991). For another seminal contribution to the law and economics literature, see Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998).

30. See, e.g., LAURENCE J. KOTLIKOFF, *ESSAYS ON SAVING, BEQUESTS, ALTRUISM, AND LIFE-CYCLE PLANNING* (2001); Joseph G. Altonji, Fumio Hayashi & Laurence J. Kotlikoff, *Parental Altruism and Inter Vivos Transfers: Theory and Evidence*, 105 J. POL. ECON. 1121 (1997); Gary S. Becker & Nigel Tomes, *An Equilibrium Theory of the Distribution of Income and Intergenerational Mobility*, 87 J. POL. ECON. 1153 (1979); B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 J. POL. ECON. 733 (2003); Douglas B. Bernheim, Andrei Shleifer & Lawrence H. Summers, *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045 (1985); Donald Cox, *Motives for Private Income Transfers*, 95 J. POL. ECON. 508 (1987); William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, 8 J. ECON. PERSP. 145 (1994); Michael D. Hurd, *Mortality Risk and Bequests*, 57 ECONOMETRICA 779 (1989); Laurence J. Kotlikoff, *Intergenerational Transfers and Savings*, 2 J. ECON. PERSP. 41 (1988); Kathleen McGarry, *Inter Vivos Transfers and Intended Bequests*, 73 J. PUB. ECON. 321 (1999); Paul L. Menchik, *Primogeniture, Equal Sharing, and the U.S. Distribution of Wealth*, 94 Q. J. ECON. 299 (1980); Nigel Tomes, *The Family, Inheritance, and the Intergenerational Transmission of Inequality*, 89 J. POL. ECON. 928 (1981); see also Luc Arrondel & André Masson, *Altruism, Exchange or Indirect Reciprocity: What Do the Data on Family Transfers Show?*, in 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006) (surveying the literature).

31. See, e.g., Sitkoff, *supra* note 4; Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565 (2003); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039 (2011) [hereinafter Sitkoff, *Fiduciary*]. Other scholars, including Melanie Leslie, Lee-ford Tritt, and M.A. Lau, have incorporated functional considerations in their scholarship as well, including responses to works by Langbein and Sitkoff. See LAU, *supra* note 4, at 25–30, 37–58 (responding to both Langbein and Sitkoff); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005); Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579 (2011) (responding to Sitkoff).

32. E.g., Klick & Sitkoff, *supra* note 5; Schanzenbach & Sitkoff, *supra* note 4; Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006) [hereinafter Schanzenbach & Sitkoff, *Perpetuities*]; Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314 (2010) [hereinafter Schanzenbach & Sitkoff, *Prudent Investor*]; Sitkoff & Schanzenbach, *supra* note 4.

trusts and trust reform.³³ Like their predecessors, many scholars of this new generation, including Sitkoff and Tom Gallanis, are active in law reform as well.³⁴

As this synopsis suggests, there is increasing interest in applying economic insights to topics within trusts and estates. But trusts and estates scholars who have applied concepts like agency costs and rules versus standards have done so primarily in the context of trusts.³⁵ By contrast, the economic analysis of intestacy and wills is generally under-theorized.³⁶ To be sure, in analyzing the UPC, schol-

33. See, e.g., Schanzenbach & Sitkoff, *Perpetuities*, *supra* note 32, at 2470 (investigating “what sparked the movement to abolish the Rule [Against Perpetuities]”); Schanzenbach & Sitkoff, *Prudent Investor*, *supra* note 32, at 414–15 (distinguishing “top-down” and “bottom-up” law reform); Sitkoff & Schanzenbach, *supra* note 4, at 416–18 (discussing “interest group theories of jurisdictional competition”); see also Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003). There is also a considerable literature on the political economy of enforcement of charitable trusts, see, e.g., Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946 (2004); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999), and a more limited literature on business trusts, see, e.g., Robert H. Sitkoff, *Trust as “Uncorporation”: A Research Agenda*, 2005 U. ILL. L. REV. 31, 33 n.9 (collecting citations); see also A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183 (2010).

34. Sitkoff and Gallanis are also the principal successor authors of two leading casebooks. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21; THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* (5th ed. 2011).

35. On agency costs in trusts, see Klick & Sitkoff, *supra* note 5; Sitkoff, *supra* note 4; Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006); Tritt, *supra* note 31; see also LAU, *supra* note 4, at 37–58; Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1 (1985). On rules versus standards in trusts, see Sitkoff, *Fiduciary*, *supra* note 31. For one of the few examples in wills law, see DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 263, 386–87 (using rules versus standards).

36. See Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2253 & n.287 (2011) (noting that “the field of wills remains underdeveloped theoretically” and that “[s]cholars have rarely tilled its soil with the implements of interdisciplinary analysis that have proven so fruitful in other regions of the legal landscape” including “the subfield of trusts, which—at least in part as a result—has enjoyed a renaissance of late”). Likewise, the empirical analysis of probate law is generally underdeveloped. Although there seems to have been an increase in empirical work on intestacy and wills in recent years, most of this work relies on surveys or on probate records from a single county or courthouse. See, e.g., Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27 (2008); 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 (2011); Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN’S L.J. 1 (2007); Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009); Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409 (2010); Kristine S. Knaplund, *The Evolution of Women’s Rights in Inheritance*, 19 HASTINGS WOMEN’S L.J. 3 (2008); Jason C. Kirklin, Note,

ars like Langbein and Waggoner have emphasized important functional considerations, and their insights are often consistent with economic intuition and logic. Much of this seminal work, however, neither relies upon economic tools explicitly nor applies economic analysis systematically.³⁷ At the same time, several economists have utilized economic insights in analyzing bequests. But these economists rarely focus on the institutional design of intestacy and wills law or particular provisions of the UPC (and sometimes overlook basic legal concepts).³⁸ Thus, to date, there has been no systematic effort to analyze the structure or elements of succession law from an economic perspective.³⁹

II. THREE ECONOMIC TOOLS

This section briefly describes three economic tools: transaction costs, the ex ante/ex post distinction, and rules versus standards. These tools, which legal scholars employ widely in addressing other issues,⁴⁰ may be useful in evaluating the UPC and succession law.

Measuring the Testator: An Empirical Study of Probate in Jacksonian America, 72 OHIO ST. L.J. 479 (2011); see also *supra* note 24 (citing earlier empirical studies).

37. Cf. Langbein, *Mandatory Rules*, *supra* note 16, at 1106 & n.3 (adopting “classificatory rubric of default and mandatory rules” but noting that, although “terminology has spread through American law from the law-and-economics literature,” “distinction between default and mandatory rules does not . . . turn on economic analysis”).

38. To illustrate, in a working paper, Schanzenbach and Sitkoff criticize the existing empirical literature within economics on how donors divide their estates. They point out that, while this literature normally does incorporate lifetime transfers as well as gifts at death, it usually neglects to consider the trust, a common mechanism for the intergenerational transfer of wealth. See Max M. Schanzenbach & Robert H. Sitkoff, *The Equal Bequest Puzzle: A Legal Perspective*, Harvard Law School, Working Paper, 2009, <http://isites.harvard.edu/fs/docs/icb.topic503720.files/Sitkoff%204%2014.pdf>.

39. Here, I focus on (second-order) questions of institutional design rather than (first-order) questions regarding the purpose of succession. Therefore, I assume that the “organizing principle” of succession law is the “freedom of disposition,” RESTATEMENT (THIRD) OF PROP. § 10-1 cmt. a (2003), and that among the UPC’s underlying purposes and policies are “to discover and make effective the intent of a decedent in distribution of his property” and “to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors,” UNIF. PROBATE CODE § 1-102(b)(2)–(3) (2011), 8 U.L.A. pt. I, at 26 (1998).

40. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1788 n.141 (2003) (“Analysis of transaction costs is widespread in legal scholarship.”); Yael Aridor Bar-Ilan, *Justice: When Do We Decide?*, 39 CONN. L. REV. 923, 926 (2007) (“[M]uch has already been written on the ex ante and ex post distinction in various areas of law.”); Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1256 & n.236 (2008) (discussing the “broader framework of legal scholarship on the choice between rules and standards” and noting “literature on this topic is extensive”).

A. Transaction Costs

The concept of transaction costs, which Ronald Coase first developed in his work on the nature of the firm and the problem of social costs,⁴¹ has been one of the most influential ideas in modern legal scholarship.⁴² Some scholars define transaction costs as the costs of bargaining or exchange, while other scholars define transaction costs more broadly as the costs of establishing and enforcing property rights.⁴³ Either way, transaction costs are fundamental in analyzing legal systems, including the laws governing intestacy, wills, and nonprobate transfers.⁴⁴

Why are transaction costs so important? Using a hypothetical involving a farmer and rancher, Coase demonstrates that, in the absence of transaction costs, parties will bargain to the same outcome, namely, the optimal outcome, irrespective of the applicable legal rule.⁴⁵ Coase's hypothetical assumes that transaction costs are zero, but Coase's point is essentially the opposite: in the real world, transaction costs are positive.⁴⁶ As a result, transaction costs can prevent parties from bargaining to mutually beneficial outcomes. Thus, in comparing institutional arrangements, including competing legal rules, policymakers must attempt to select the institutional arrangement that minimizes transaction costs (or, more precisely, minimizes the sum of transaction costs and misallocation costs). Policymakers can do so either by lowering the costs of bargaining or by allocating entitlements efficiently so that bargaining is unnecessary.

41. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Coase, *supra* note 1.

42. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357, 398 (2001) (describing the "influence of Ronald Coase's revolutionary identification of transaction costs as the key determinant of the structure of legal entitlements"); see also Ronald H. Coase, *The Relevance of Transaction Costs in the Economic Analysis of Law*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* (Francesco Parisi & Charles K. Rowley eds., 2005).

43. See generally Douglas W. Allen, *Transaction Costs*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 893 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (discussing history, use, and significance of transaction costs and distinguishing two definitions).

44. In succession law, the costs of bargaining or exchange would include any impediments to the transfer of wealth. The costs of establishing and enforcing property rights would include these bargaining and exchange costs, plus any other institutional costs such as the expense of establishing and operating probate courts.

45. See Coase, *supra* note 1, at 2–8; see also SHAVELL, *supra* note 3, at 102–03 (describing "invariance version of the Coase Theorem").

46. See Coase, *supra* note 42, at 207 ("I examined what would happen in a world in which transaction costs were assumed to be zero. My aim in doing this was not to describe what life would be like in such a world but . . . to make clear the fundamental role which transaction costs do, and should, play in the fashioning of institutions . . .").

Because transaction costs may prevent parties from bargaining to achieve the optimal outcome, Coase suggests that courts (or legislatures) should attempt to award an entitlement to the party that values it the most.⁴⁷ However, a court (or legislature) usually makes a legal decision (or policy choice) without perfect information. Consequently, the legal system may misallocate the entitlement. Of course, a court (or legislature) can incur additional costs to improve the accuracy of its determination (e.g., by conducting an especially sophisticated cost-benefit analysis or by collecting more data and conducting econometric studies), but these administrative or decision costs also constitute transaction costs.⁴⁸ Therefore, there is a fundamental trade-off between *error costs*—the costs of misallocating an entitlement—and *decision costs*—the costs of determining how to allocate the entitlement.⁴⁹

Consider intestate succession, i.e., the rules governing the distribution of property if a person dies without a valid will. There are many compelling reasons to execute a will, including the ability to direct the disposition of property, select guardians for minor children, and minimize tax liability.⁵⁰ Nevertheless, approximately half of all Americans die without a will.⁵¹ Why? One reason is transaction costs. The costs of creating, executing, and updating a will are often non-trivial. These costs include the time and effort necessary to locate and consult an attorney and execute a will,⁵² the fees paid for these legal services,⁵³ and the psychic costs of focusing on one's own death.⁵⁴ Thus, transaction costs may deter many people who otherwise would execute a will from doing so.

47. See Herbert Hovenkamp, *The Coase Theorem and Arthur Cecil Pigou*, 51 ARIZ. L. REV. 633, 638 (2009) (“What Coase added to [Pigou] was that in cases of high costs of movement (that is, high ‘transaction costs’) a legislature, government agency, or court could assign the initial allocation to the highest value user so that movement would not have to occur.”).

48. See SHAVELL, *supra* note 3, at 98 (describing administrative costs).

49. Sitkoff discusses this trade-off in the context of fiduciary obligations. See Sitkoff, *Fiduciary*, *supra* note 31, at 1044 (standards pertaining to duties of loyalty and care “minimize *error costs*” but “reduction in error costs comes at the price of increased *uncertainty* and increased *decision costs*”).

50. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 71–72 (discussing advantages of avoiding intestacy by executing a will).

51. *Id.* at 71 (noting that “roughly half the population dies intestate”).

52. See *id.* at 72 (noting that, for most people, going to a lawyer “seems like a ‘big deal’”).

53. See Garry A. Pearson & Chad E. Pearson, *Introduction to Probate and Estate Planning*, 74 N.D. L. REV. 177, 181 (1998) (noting that “a relatively simple will . . . might cost around \$300”).

54. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 72 (noting that “unpleasantness of confronting mortality invites procrastination”); cf. Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008) (listing “fear of death” as one reason why “so few people choose to control the disposition of their own estates” but contending that another reason “for the disappointing number of individuals who execute wills is a

In several respects, intestate provisions are themselves an effort to minimize transaction costs. Intestacy establishes a series of majoritarian default rules to approximate the intent of the “average” or “hypothetical” decedent.⁵⁵ Any person can “opt out” of these default rules by executing a valid will. If a person dies without a valid will, however, the legal system distributes the decedent’s assets according to the rules of intestacy. Assuming these default rules are successful in approximating the average decedent’s wishes, fewer people may have an incentive to execute a will, given the costs of doing so, to achieve a particular distribution of property.⁵⁶

However, it is unclear whether the transaction cost savings of having fewer individuals execute wills is socially desirable. On one hand, if the intestate distribution is identical (or almost identical) to the distribution a decedent would have made via a will, and there are no other social benefits from having the decedent execute a will, then saving the transaction costs of executing the will may be socially desirable.⁵⁷ On the other hand, if there are other social benefits from having the decedent execute a will (e.g., if a will provides an opportunity for the testator to designate a guardian for minor children, or an opportunity for the testator to deliberate more fully on the nature of his or her estate plan), then reducing transaction costs by having fewer people execute wills may be socially undesirable.⁵⁸

Transaction costs also help to explain why, if a decedent dies intestate, probate courts do not attempt to make an individualized

wholesale failure of the legal industry to effectively market them”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012) (acknowledging traditional explanation that high rates of intestacy are a “product of psychological fears regarding mortality and the unwillingness to contemplate matters relating to death” but offering alternative explanation for procrastination based on “the relative inaccessibility of the will-making process because of its obscurity, complexity, and cost”).

55. See, e.g., *King v. Riffe*, 309 S.E.2d 85, 88 (W. Va. 1983).

56. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1042 (2004) (“[B]y patterning the default rules of intestacy after the ‘average’ decedent’s intent ‘the number of cases in which a will is thought desirable will be reduced.’” (quoting Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 187–88 (1935))).

57. See *id.* at 1060 (contending that “the default rule more closely consonant with probable intent provides greater efficiency, because it also lessens transaction costs”).

58. See Shelly Kreiczler-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105, 110 (2008) (“If indeed a will carries important social benefits, why try to encourage people not to write one by stipulating intent-furthering intestate rules? Why not make escheat the rule, and thus create a strong incentive to write a will?”); see also Atkinson, *supra* note 56, at 197; Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1312 (1969). But see Hirsch, *supra* note 56, at 1061 (concluding that penalty defaults, as well as social defaults and expressive defaults, “have no place in our inheritance law” and that majoritarian defaults should be the “exclusive means of achieving public policy within the arena of gratuitous transfers”).

determination of the decedent's donative intent. Neither the UPC nor any of the states authorizes this type of individualized determination, even if there is some evidence—perhaps even clear and convincing evidence—that the decedent's wishes differed from the intestate distribution. The UPC's reliance on the general rules of intestacy reflects a judgment that, in the absence of a will, the decision costs of attempting to determine the intent of each decedent would outweigh the error costs of an intestate distribution that may deviate from the wishes of a certain percentage of decedents.⁵⁹

B. Ex Ante Versus Ex Post Analysis

The ex ante/ex post distinction is also fundamental in analyzing legal rules and institutions. An ex post perspective looks at an event *after the fact*. For example, after an accident has occurred, how should a court allocate the losses between a driver and pedestrian? Once a party has breached a contract, is it fair to enforce a liquidated damages clause in which the penalty far exceeds the damages? Or, after a testator has died, is it beneficial to enforce a conditional gift in a will if the condition is inconsistent with the wishes of the devisees? In each of these situations, the ex post perspective “takes the situation as it is presented, and looks for the solution that makes the most sense . . . given what has transpired and the circumstances in which the parties find themselves.”⁶⁰ Ex post analysis is thus backward-looking in that it attempts to arrive at an outcome or disposition which seeks to promote fairness, vindicate rights, or maximize social welfare based on prior events, without regard to the impact the decision might have had on the behavior of these parties at the outset or will have on similarly situated parties in the future.

59. Instead of focusing on the minimization of transaction costs, some commentators and courts emphasize the “expressive function” of intestacy, *see, e.g.*, E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1077–80 (1999), including the importance of fairness and equality, *see, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995 (2012). It is worth noting that economic analysis of law does not necessarily exclude considerations of fairness and equality and, indeed, explicitly incorporates such considerations in analyzing the social desirability of legal rules. *See* SHAVELL, *supra* note 3, at 608–12; *see also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1363 (2001) (noting that “much of what is thought to be important with regard to equality is already included in the welfare economic approach”).

60. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 66–67 (2007).

By contrast, an *ex ante* perspective looks at an event *before the fact*. For example, if a court establishes a particular rule of liability or damages governing accidents, how will the rule affect the behavior of drivers and pedestrians? If a court refuses to enforce a liquidated damages clause, will similarly situated parties structure their contracts differently, or perhaps forego such contracts altogether? And, if a court refuses to enforce a conditional gift in a testator's will, what effect, if any, will that have on the testator's happiness, as well as the testator's incentive to give, during life? *Ex ante* analysis is thus forward-looking in that it recognizes that the selection of a legal rule can often have an effect on a party's incentives.

The conventional wisdom among economically-oriented legal scholars is that the *ex ante* perspective is superior to the *ex post* perspective as a mode of legal and policy analysis.⁶¹ The *ex ante* perspective has at least two distinct advantages. First, *ex ante* analysis incorporates "the fact that the choice of legal rules may affect how individuals behave at the outset, which often has an important influence on individuals' well-being."⁶² Second, the *ex ante* perspective avoids the possibility of "hindsight bias" by considering "all possible outcomes an individual might experience" rather than just a salient, perhaps atypical, outcome that happens to occur.⁶³

To illustrate these advantages, consider two examples from probate law and trust investment law. In probate, some commentators have argued that the law should curtail an individual's ability to waive the spousal elective share.⁶⁴ Other scholars, however, have

61. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 439 (2002) (concluding that "relying on an *ex post* view, when it differs from the *ex ante* perspective, always entails favoring a legal policy under which everyone is worse off *ex ante*"). For an argument to the contrary, see Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279, 280 (2006) (reaching "counterintuitive conclusion" that "welfarism requires an *ex post* approach").

62. Kaplow & Shavell, *supra* note 59, at 1356; see also ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 183 (2011) (discussing the *ex ante*/*ex post* distinction and pointing out that "[o]ne of the most important contributions of law and economics methodology has been to call attention to the way a legal decision in a discrete conflict today influences and shapes private activities in the future" (citing Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984))).

63. Kaplow & Shavell, *supra* note 59, at 1356. On hindsight bias, see Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237, 253 (2008) ("With hindsight, people overestimate the predictability of past events—both overstating their ability to have predicted past events and believing others should have been able to predict these events.").

64. See, e.g., Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994). The elective share is a right of the surviving spouse, when a marriage ends in death, to a share of the decedent's property. Waiver of the elective share, which the UPC authorizes in section 2-213, involves waiving a right to an election of property upon the death, rather than divorce, of a spouse. Historically, courts treated premarital agreements in

emphasized the importance of considering “the ex ante consequences of an unwaivable elective share.”⁶⁵ For example, Adam Hirsch points out that if spouses were unable to waive the elective share “some would-be spouses might prefer not to marry, even though some of their would-be partners would rather sign away rights [to the elective share] than remain unmarried.”⁶⁶ Ex ante analysis does not dictate whether it is better for the elective share to be waivable or unwaivable or under what circumstances, if any, a court should enforce a waiver. But determining the appropriate legal rule requires considering how alternative rules might influence the parties’ actions at the outset, a consideration that only an ex ante perspective can illuminate.

The second advantage of the ex ante perspective is that it avoids the possibility of hindsight bias. In trust investment law, the predominant approach in analyzing the reasonableness of a trustee’s investment decisions has shifted from the “prudent man rule” to a “prudent investor rule.”⁶⁷ One problem with the prudent man rule was that courts allowed hindsight bias to influence their evaluation of a trustee’s investment performance.⁶⁸ For example, a court

anticipation of death differently than premarital agreements in anticipation of divorce. See Brod, *supra*, at 263 & n.189 (pointing out that, although, traditionally, “premarital agreements contemplating divorce were not enforceable, premarital agreements addressing the property rights of a surviving spouse at widow(er)hood had long been favored and were enforceable in many states” because “such agreements were thought to promote marriage and domestic harmony and were considered in furtherance of public policy”). Attempting to waive property interests through a premarital agreement contemplating divorce raises a host of other legal, economic, and moral questions, including the signal that such an agreement may send to a future spouse about the level of trust and the expected likelihood of success of the marriage. See, e.g., Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 11–12, 16, 21–22 (Harvard Law Sch. John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper No. 436, 2003), available at http://lsr.nellco.org/harvard_olin/436/.

65. Hirsch, *supra* note 36, at 2231.

66. *Id.* at 2231–32 (citing Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 169–70, 204, 207 (1998); Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 315–17; Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005)). A common situation in which parties contemplating marriage may want to waive the elective share is a marriage that occurs later in life—for example, between a widow and a widower—in which one (or both) of the spouses wants “to insure that property derived from the prior spouse passes at death to the joint children (or descendants) of the prior marriage instead of to the later spouse.” UNIF. PROBATE CODE § 2-213 cmt. (2011), 8 U.L.A. pt. I, at 94 (Supp. 2011); *cf. id.* Part 2, gen. cmt., ex. 2, 8 U.L.A. pt. I, at 68 (Supp. 2011) (describing how death of one spouse in short-term, later-in-life marriage, “particularly the post-widowhood remarriage occurring later in life,” may result in perverse outcomes under conventional elective-share law).

67. See RESTATEMENT (THIRD) OF TRUSTS ch. 17 intro. note (2007); see also Halbach, Jr., *supra* note 27; Langbein, *supra* note 27.

68. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 804 (2001) (illustrating how judges exhibited hindsight bias in

might focus on the actual performance of a trustee's investment decisions without considering all of the possible outcomes and the probabilities of those outcomes. Ultimately, the Uniform Prudent Investor Act, which embraces the prudent investor rule, and a number of courts recognized that the determination of whether a trustee had breached the duty of prudent investment should depend on whether the trustee acted consistently with the trustee's fiduciary obligation *ex ante*, not whether the trustee's investments turned out poorly *ex post*.⁶⁹

Unfortunately, in wills, trusts, and estates, as in other fields, the *ex post* perspective is surprisingly common. There are several reasons why courts, as well as commentators, often adopt an *ex post* perspective and neglect *ex ante* considerations. First, insights from modern psychology and the behavioral analysis of law suggest that hindsight bias sometimes exerts inordinate influence on the decision-making processes of human beings, including judges.⁷⁰ Second, courts may have a natural tendency to favor the *ex post* perspective because they encounter disputes only after the fact and are charged with deciding particular cases rather than constructing universal rules.⁷¹ Third, the *ex post* perspective may be particularly problematic in the context of probate and trust law because courts

their *ex post* assessments of the *ex ante* desirability of trustees' investment decisions (citing *First Nat'l Bank v. Martin*, 425 So. 2d 415, 428 (Ala. 1982); *Chase v. Peaver*, 419 N.E.2d 1358, 1368 (Mass. 1981); *In re Chamberlain*, 156 A. 42, 42-43 (N.J. Prerog. Ct. 1931)); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 79-81 (2000) (discussing how courts have exhibited hindsight bias in judging the liability of trustees); Schanzenbach & Sitkoff, *supra* note 4, at 684; *see also* Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 70-72 (1987).

69. *See* UNIF. PRUDENT INVESTOR ACT § 8 (1994), 7B U.L.A. 38 (2006) ("Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."); *see also* Dennis v. R.I. Hosp. Trust Nat'l Bank, 571 F. Supp. 623, 631 (D.R.I. 1983); *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 190 (Ind. App. 1943); *In re Estate of Janes*, 681 N.E.2d 332, 336 (N.Y. 1997). *But cf.* Guthrie, Rachlinski & Wistrich, *supra* note 68, at 821 (concluding that "judges applying the prudent-investor rule to cases of trustee liability seem also to have fallen prey to the hindsight bias").

70. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998) (citing Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXP. PSYCH.: HUM. PERCEPTION & PERFORMANCE 288 (1975)); *see also* Kaplow & Shavell, *supra* note 59, at 1096 (arguing that the "tendency to adopt an *ex post* perspective can be explained by familiar cognitive biases").

71. *See* MERRILL & SMITH, *supra* note 60, at 66 ("Courts are naturally drawn to *ex post* analysis because this is how controversies are presented to them."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 603 (1988) ("[J]udges, who see everything *ex post*, really cannot help but be influenced by their *ex post* perspectives."); *see also* Carroll v. Otis Elevator Co., 896 F.2d 210, 215 (7th Cir. 1990) (Easterbrook, J., concurring) ("The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment."); *cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

may have a natural proclivity to favor the needs of devisees and beneficiaries who are living rather than carrying out the wishes of a testator or settlor who is dead.⁷²

C. Rules Versus Standards

Legal commands take two primary forms: rules and standards.⁷³ Rules are legal commands that are given their content *ex ante* or before a person acts (e.g., a rule that a driver not exceed 55 m.p.h.). Standards are legal commands that are given their content *ex post* or after a person acts (e.g., a standard that a person drive “reasonably”).⁷⁴ For many types of laws, like the prohibition against speeding, the legal system relies on rules. But standards, such as the “reasonable person” or “good faith,” are ubiquitous in legal analysis as well.⁷⁵

Whether a rule or standard is optimal depends on the context, and each form has certain advantages and disadvantages.⁷⁶ Generally, rules entail higher drafting costs, lower decision costs, greater predictability and consistency (for both the parties and courts), lower agency costs, and somewhat less flexibility to do justice in specific cases. Conversely, standards typically involve lower drafting costs, higher decision costs, less predictability and consistency, higher agency costs, and more flexibility to do justice in specific cases.

To amplify, rules usually entail higher drafting costs than standards because enacting rules normally requires more

72. Cf. SHAVELL, *supra* note 3, at 72 (“The generation that is alive always enjoys the power to use property that the dead would have wanted to control and certainly has an interest in doing so.”).

73. On rules versus standards, see generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 U.C.L.A. L. REV. 379 (1985).

74. If a court, in interpreting a standard, issues a judicial decision that establishes a precedent, then the standard can provide *ex ante* guidance for other parties. See Kaplow, *supra* note 73, at 578 (“When the first adjudication does create a precedent, only the first enforcement proceeding and individuals’ actions that precede the completion of that first proceeding need be considered, as subsequent events are identical under both rules and standards.”).

75. See John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 273 (2001) (“Who is the ‘reasonable person,’ that ‘excellent but odious character’ who seems to inhabit every nook and cranny of the common law?” (citation omitted)).

76. See *MindGames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (Posner, C.J.) (“No sensible person supposes that rules are always superior to standards, or vice versa [T]he important point is that some activities are better governed by rules, others by standards.”).

investigation, analysis, and debate.⁷⁷ Determining that the optimal speed limit is 55, rather than, say, 65, is likely to be more difficult, as a matter of both policy and politics, than promulgating a traffic law requiring motorists to drive “reasonably.”

By contrast, standards typically involve higher decision costs. Unlike rules, in which the legislature has given the law its content *ex ante*, standards may require courts to weigh multiple factors and use judicial discretion to infuse the law with its content *ex post*.⁷⁸ Under a standard that requires “reasonable” driving, a court might have to decide whether or not a motorist has violated the law if the motorist, who is late for an important meeting, is driving 30 m.p.h. during a rainstorm near a school when children are present.⁷⁹

Furthermore, rules entail more predictability and consistency than standards. Unlike standards, which depend on decisions that may vary from court to court, rules are promulgated in advance and applied universally. Rules also entail lower agency costs than standards. A court, as an agent of the legislature, may have less discretion under a rule to deviate from the legislature’s objectives. But standards may involve greater flexibility to do justice in specific cases. A court, in exercising its discretion, can weigh various factors that are pertinent to a controversy, including factors the legislature was not able to consider or delineate in advance.⁸⁰

The UPC relies on a combination of rules and standards. For example, intestate provisions like UPC section 2-102 use a series of rules to specify the fractional share of a surviving spouse.⁸¹ By contrast, whether a “parent-child relationship” exists for purposes of UPC sections 2-115 to 2-122 depends on whether a person “[f]unctioned as a parent of the child,”⁸² a standard that requires a court to consider myriad factors relating to custodial responsibility, decisionmaking responsibility, and caretaking and parenting functions.⁸³

77. See Kaplow, *supra* note 73, at 568–69.

78. See Ehrlich & Posner, *supra* note 73, at 261; see also Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 222 (1996) (“Standards . . . allow[] *ex post* decisionmakers substantial discretion to define a violation.”).

79. Kaplow concludes that the “central factor influencing the desirability of rules and standards” is the “frequency with which a law will govern conduct” and that rules are likely to be preferable if conduct will be frequent whereas standards are generally preferable if conduct will be infrequent. See Kaplow, *supra* note 73, at 621.

80. For these reasons, Rose suggests that rules may encourage greater productivity, carefulness, and planning, while standards may prevent disproportionate hardship and deter certain forms of opportunism. See Rose, *supra* note 71, at 592, 601–02.

81. See, e.g., UNIF. PROBATE CODE § 2-102 (2011), 8 U.L.A. pt. I, at 36–37 (Supp. 2011).

82. § 2-115, 8 U.L.A. pt. I, at 50 (Supp. 2011).

83. See § 2-115 cmt., 8 U.L.A. pt. I, at 51–52 (Supp. 2011).

Rules and standards also vary in their degree of complexity.⁸⁴ For example, simple rules might entail lower drafting and decision costs than complex rules or complex standards, but simple rules tend to be overinclusive, underinclusive, or both.⁸⁵ As a result, the UPC at times may adopt rules that are more complex in order to minimize the problems of over- and underinclusiveness, even though such rules may entail higher drafting and decision costs.⁸⁶ The UPC also utilizes various mitigation structures, including rules subject to exceptions, which may themselves be rules or standards, and standards with presumptions or safe harbors.⁸⁷ Presumptions, which allocate the burden of proof, often can be determinative in probate litigation.⁸⁸ In addition, amendments to the UPC in 1990 and in 2008 altered the mixture of rules and standards in ways that an economic analysis of succession law may help to explain.⁸⁹

III. APPLICATION OF ECONOMIC ANALYSIS TO THE UPC AND SUCCESSION LAW

In this section, I utilize the economic tools discussed above—transaction costs, the ex ante/ex post distinction, and rules versus standards—to explore a number of applications that illustrate the power and promise of analyzing the UPC and succession law from an economic perspective. First, I suggest that these tools are useful

84. See Kaplow, *supra* note 73, at 586–96 (discussing simple and complex rules and issue and complex standards and distinguishing the issue of rules versus standards from the issue of complexity, the latter of which involves the problem of over- and underinclusiveness); see also Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

85. See Kaplow, *supra* note 73, at 591–93 (discussing example in which a “simple rule is both over- and underinclusive compared to [a] more complex standard”).

86. I thank Larry Waggoner, who served as the Reporter of the 1990 UPC, see *supra* text accompanying note 20, for emphasizing this point to me in an e-mail.

87. See, e.g., DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 386–87 (discussing “rule tempered by exceptions” and “standard tempered by presumptions and burdens”).

88. Compare *Wilson v. Lane*, 614 S.E.2d 88 (Ga. 2005) (contestant has burden of persuasion to establish lack of testamentary capacity and loses), with *In re Estate of Washburn*, 690 A.2d 1024 (N.H. 1997) (proponent has burden of persuasion to establish testamentary capacity and loses); see also UNIF. PROBATE CODE § 3-407 (2011), 8 U.L.A. pt. II, at 87 (1998) (“Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.”). The UPC relies upon presumptions in many other circumstances, including the determination of whether a specific devise has adeemed, in which the burden of proof has shifted (twice) as a result of amendments in both 1990 and 1997, see *infra* notes 176 & 182 and accompanying text.

89. See, e.g., *infra* Part III.A.2 (harmless error); Part III.B.2 (ademption by extinction); see also Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1087 (1992) (“The revised version of article II apparently muddies the waters of wills law in some ways, while crystallizing it in others. What explains this mixture of formality and informality, rules and standards, crystals and mud in the new UPC?” (citation omitted)).

in understanding events like the nonprobate revolution and the UPC's adoption of the harmless error rule and reformation doctrine. Second, I employ these tools in analyzing the current design of succession law, including the law's treatment of dead hand control and the UPC provision relating to ademption by extinction. Third, I discuss how these tools may be relevant for evaluating future reforms, such as whether to abolish attestation or prevent filial disinheritance.

A. Prior Developments

1. Coase and the Nonprobate Revolution

The revolution in nonprobate transfers illustrates the importance of transaction costs. Recall that transaction costs, broadly understood, include not only bargaining or exchange costs but all costs of establishing and enforcing property rights.⁹⁰ Thus, in the probate context, transaction costs include the costs of drafting and executing a will, as well as the costs of operating a system of public succession like the probate courts.

The probate system is notoriously expensive and time-consuming.⁹¹ Probate costs typically include court fees, the personal representative's commission, the attorney's fee, and the appraiser's fee,⁹² in addition to the time value of delays in administering the decedent's estate.⁹³ Moreover, because wills are public documents, there is often a lack of privacy for the testator with respect to the nature and distribution of the testator's assets, a situation that may entail significant costs for devisees.⁹⁴ (Suppose, for example, that a potential thief is able to learn from a will that the testator has

90. See *supra* notes 43–44 and accompanying text.

91. See Langbein, *Nonprobate Revolution*, *supra* note 2, at 1116 (“The probate system has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse.”); see also PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* (2003). For an article highlighting a particularly egregious example of corruption, incompetence, and waste, see John H. Langbein, *Don't Die in Connecticut*, *HARTFORD COURANT*, Oct. 23, 2005, at C1.

92. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 45–46 (discussing costs of probate).

93. See John H. Martin, *Reconfiguring Estate Settlement*, 94 *MINN. L. REV.* 42, 48 (2009) (“The delay of which beneficiaries complain is the deferred access to the decedent's assets.”).

94. See Frances H. Foster, *Trust Privacy*, 93 *CORNELL L. REV.* 555, 559–63 (2008) (“Publicity is the price a decedent pays for using ‘court-regulated devices’ such as wills or testamentary trusts.”); Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 *REAL PROP. PROB. & TR. J.* 529, 541 (2006) (“The cost and the public nature of the process are the primary disadvantages of transferring property through probate.”).

devised a priceless work of art to her daughter.) All the private costs that an estate must bear directly (and that the testator and devisees bear indirectly), as well as the public costs of operating a probate system (e.g., the salaries of probate judges and other court personnel), are transaction costs.

Given the relatively high costs of probate, one might expect that individuals would attempt to circumvent probate by “bargaining around” this system of public succession. In fact, once probate costs became excessive, many donors attempted to avoid probate entirely.⁹⁵ These donors increasingly used a variety of will substitutes, such as revocable trusts, joint tenancies, life insurance policies, and payable-on-death contracts or transfer-on-death designations in pension plans, retirement funds, bank accounts, and brokerage accounts. Such nonprobate transfers enable individuals to achieve essentially the same result as they could through a will—namely, the ability to designate the disposition of their property at death while retaining the ability to use their property and alter beneficiaries during life—without the additional costs and delays of probate.⁹⁶

Of course, nonprobate transfers involve transaction costs as well. Compared to a simple will, a pour-over will and a revocable trust involve creating, executing, and updating two documents rather than just one.⁹⁷ Moreover, a settlor who creates a trust may have to perform additional tasks like transferring assets into the trust or changing beneficiary designations.⁹⁸ Other types of nonprobate transfers also involve transaction costs, and, frequently, a person must manage multiple will substitutes.⁹⁹ In addition, unlike the

95. See Martin, *supra* note 93, at 43 (noting that probate is “studiously avoided” because of “deficiencies of probate, chief among them being delay, expense, and lack of privacy”); Gary, *supra* note 94, at 531 (“Many people choose to avoid the probate process, either because of concerns about delays and cost or because of a desire for privacy.”).

96. See Langbein, *Nonprobate Revolution*, *supra* note 2, at 1109 (“When properly created, each [will substitute] is functionally indistinguishable from a will—each reserves to the owner complete lifetime dominion, including the power to name and to change beneficiaries until death.”). The joint tenancy is an “imperfect” will substitute because a “covenant acquires an interest that is no longer revocable.” *Id.* at 1114.

97. See Ann Bradford Stevens, *Uniform Probate Code Procedures: Time for Wyoming to Reconsider*, 2 WYO. L. REV. 293, 304 (2002) (“The legal costs of preparing a revocable trust and will are somewhat higher than those for preparing a will only”); see also Howard B. Solomon, *Revocable Trusts—A Contrarian’s Viewpoint*, 68 N.Y. ST. B.J. 34, 35 (1996).

98. See Gary, *supra* note 94, at 540; Stevens, *supra* note 97, at 304; see also Solomon, *supra* note 97, at 35 (“[D]epending on the attorney’s involvement in transferring the assets to the trust (for example, real estate deeds and accompanying transfer tax filing), the net cost can be many times that of a conventional Will.”).

99. See Langbein, *Nonprobate Revolution*, *supra* note 2, at 1109 (“It would not be unusual for someone in mid-life to have a dozen or more will substitutes in force, whether or not he had a will.”).

transaction costs associated with the probate system, most of which are incurred after the testator has died, a settlor incurs much of the cost of creating a trust or utilizing other nonprobate transfers while still alive.¹⁰⁰ Consequently, a testator may discount some of the costs of probate unless, perhaps, the testator is altruistic and would suffer a loss from knowing that family and friends must bear these costs in the future.

Before nonprobate transfers emerged as a viable option for most donors, wills were the dominant mechanism for transferring wealth at death, notwithstanding the associated transaction costs.¹⁰¹ However, as donors began to seek alternatives, a competition developed between the system of public succession, in which testators rely on formal wills and probate courts, and this alternative system of private succession, in which donors utilize various will substitutes.¹⁰² In such a competition, if the quality of products is substantially similar, the lowest-cost vendor typically wins. In this case, the revocable trust and other nonprobate transfers allow a donor to designate the disposition of property upon death, and to retain the ability to use the property and alter beneficiaries during life, without the additional costs of probate.

Consequently, the probate process has been steadily losing market share.¹⁰³ As Langbein points out, “[f]ar more wealth now flows through the main will substitutes . . . than passes through probate.”¹⁰⁴ The dramatic rise of nonprobate transfers illustrates that, if donors are capable of opting out of probate, private alternatives will emerge to compete with the system of public succession. The competition that ensued is a classic case of private ordering in the shadow of the law to minimize transaction costs.

100. See Solomon, *supra* note 97, at 35 (“In effect, the client is prepaying during life what would otherwise be payable after death.”).

101. See Mann, *supra* note 11, at 1059–60 (noting that “when there were no alternatives” wills law could “persist in its formalistic splendor as the sole unchallenged alternative to intestacy”).

102. See Langbein, *Nonprobate Revolution*, *supra* note 2, at 1108 (describing process by which “[i]nstitutions that administer noncourt modes of transfer are displacing the probate system” by “functioning as free-market competitors of the probate system”); see also DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 393 (noting that “modes of nonprobate transfer, taken together, function as a private system of succession that runs in parallel—indeed, competes—with the probate system”).

103. See Langbein, *Nonprobate Revolution*, *supra* note 2, at 1108 (“The law of wills and the rules of descent no longer govern succession to most of the property of most decedents.”); see also Thomas P. Gallanis, *Frontiers of Succession*, 43 REAL PROP. TR. & EST. L.J. 419, 430 (2008) (“Which of the two competing procedures—probate or nonprobate—will ultimately prevail? Society has reached a tipping point in favor of nonprobate . . .”).

104. John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, 30 (2004).

The nonprobate revolution has had an enormous impact on the UPC. Among other things, the rise of nonprobate transfers has exerted pressure on probate law and probate courts to reduce transaction costs.¹⁰⁵ One manifestation of this pressure is the reduction of formalities and the introduction of alternative formalities such as notarization.¹⁰⁶ Other consequences include the development and widespread adoption of informal probate,¹⁰⁷ which entails less court involvement and supervision than formal probate,¹⁰⁸ and the increasingly common practice of affidavit-based administration,¹⁰⁹ a practice that allows smaller estates to elect unsupervised administration.¹¹⁰ The UPC also now addresses will substitutes in much greater detail and attempts to reconcile many of the constructional rules regarding probate and nonprobate transfers.¹¹¹ Overall, these developments have reduced the transaction costs of probate, but nonprobate transfers are still predominant.

2. Harmless Error and Reformation

A second significant development is the UPC's adoption of the harmless error rule and reformation doctrine to correct mistakes. The 1990 UPC rejected strict compliance, which required a testator to comply precisely with the execution formalities—writing, signature, and attestation—and instead adopted a harmless error

105. See Langbein & Waggoner, *supra* note 1, at 875; Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1123–24 (1993).

106. See UNIF. PROBATE CODE § 2-502(a)(3)(B) (2011), 8 U.L.A. pt. I, at 103 (Supp. 2011); see also Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83 (2008).

107. See UNIF. PROBATE CODE §§ 3-301 to -322 (2011), 8 U.L.A. pt. II, at 13–16 (Supp. 2011).

108. See Richard V. Wellman, *Recent Developments in the Struggle For Probate Reform*, 79 MICH. L. REV. 501, 507–10 (1981) (describing informal probate under UPC).

109. See, e.g., UNIF. PROBATE CODE §§ 3-1201 to -1204 (2011), 8 U.L.A. pt. II, at 307–10 (1998); CAL. PROB. CODE §§ 13100–13506 (West 1991 & Supp. 2004); 755 ILL. COMP. STAT. 5/25-1 (2010).

110. See Langbein, *Best Interest*, *supra* note 16, at 941 n.50 (noting “tendency is widespread to allow smaller estates to elect unsupervised administration, usually by means of a simplified affidavit procedure”); see also DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 47 (describing “the ready availability of summary or affidavit administration for small estates, and special provisions for transfer of automobiles and other items with formal title registration”).

111. See, e.g., UNIF. PROBATE CODE §§ 2-701 to -711 (2011), 8 U.L.A. pt. I, at 140–69 (Supp. 2011) (rules of construction); §§ 2-801 to -806, 8 U.L.A. pt. I, at 170–82 (Supp. 2011) (probate and nonprobate transfers); §§ 6-101 to -417, 8 U.L.A. pt. II, at 240–53 (Supp. 2011) (nonprobate transfers); see also Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757 (2008).

rule,¹¹² as Langbein had proposed.¹¹³ Under the harmless error rule, a court may excuse noncompliance with the execution formalities if there is “clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent’s will.”¹¹⁴ Similarly, in 2008, the UPC rejected the “no reformation” rule, a rule that prevented courts from correcting a mistake in the terms of a will,¹¹⁵ and instead embraced reformation,¹¹⁶ as Langbein and Waggoner had advocated.¹¹⁷ Reformation is an equitable remedy whereby a court may reform the terms of a will if there is “clear and convincing evidence that the transferor’s intent and the terms of the governing instrument were affected by a mistake.”¹¹⁸ One consequence of adopting the harmless error rule and authorizing reformation is that an attorney is less likely to face malpractice liability for a mistake in drafting or executing a will.¹¹⁹

From an *ex post* perspective, it makes little sense to deny probate for a writing if there is clear and convincing evidence that the testator intended the writing to be her will. Under these circumstances, denying probate means defeating the testator’s intent. Similarly, *ex post*, permitting extrinsic evidence and allowing reformation to correct a mistake seems to make eminent sense. If a mistake exists in an administrative or dispositive provision, failing to correct the mistake will frustrate the testator’s intent.

But are there other considerations that, from an *ex ante* perspective, might affect the desirability of the harmless error rule or reformation? In theory, adopting harmless error or reformation could affect the incentives of a testator or the testator’s attorney. For example, if a testator knows a court can apply the harmless error rule to correct a mistake, the testator might exercise a lower level of care in executing the will. By this logic, strict compliance

112. UNIF. PROBATE CODE § 2-503 (1990) (amended 1997).

113. See *supra* notes 14–15 and accompanying text.

114. UNIF. PROBATE CODE § 2-503 (1990) (amended 1997); see also RESTATEMENT (THIRD) OF PROP. § 3.3 (“A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.”). Under the UPC, the harmless error rule also applies to a document or writing in the context of a revocation of a will, an addition to or alteration of a will, and the revival of a will. See UNIF. PROBATE CODE § 2-503 (1990) (amended 1997).

115. See, e.g., *Sanderson v. Norcross*, 136 N.E. 170, 172 (Mass. 1922).

116. UNIF. PROBATE CODE § 2-805 (2011), 8 U.L.A. pt. I, at 181 (Supp. 2011).

117. See Langbein & Waggoner, *supra* note 2; Langbein, *supra* note 104.

118. UNIF. PROBATE CODE § 2-805 (2011), 8 U.L.A. pt. I, at 181 (Supp. 2011).

119. Cf. Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151, 152, 154 (1979) (predicting malpractice liability “may provide an economic incentive . . . to eliminate or reform those rules that impose needless costs on the profession” including “formalities for executing a valid will”).

may provide a greater incentive to ensure the formalities are satisfied. Likewise, if courts can rely on reformation to correct a mistake, there may be less reason for the testator's lawyer to stay late at the office proofreading a will or reviewing client notes to ensure the will is error-free, unambiguous, and precisely carries out the testator's intent. Under this rationale, it is possible, as Pamela Champine has argued, that the "premium that a strict approach to reformation places on accuracy should tend to motivate care on the part of the lawyer and the client in the planning process and thus reduce the likelihood that error will occur."¹²⁰

However, there are dueling opinions on whether the harmless error rule or reformation doctrine would in fact alter the incentives of testators or their attorneys in drafting or executing a will.¹²¹ Ultimately, whether harmless error or reformation has any effect on these incentives is an empirical question. It seems likely that attorneys have other incentives, including maintaining their professional reputations,¹²² that may result in their exercising reasonable care even in the absence of malpractice liability.¹²³

Assuming that neither the harmless error rule nor reformation doctrine changes these incentives, the desirability of each doctrinal innovation depends on the trade-off between error costs and decision costs. Both costs are relevant because, in addressing the issue of mistake, the UPC now relies on a standard (specifically, whether there is "clear and convincing evidence" of the testator's intention),¹²⁴ rather than a rule (strict compliance or the no reformation rule).

120. Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 439 (2001); *see also id.* ("To the extent a liberalized approach reduces that care, it will tend to increase the incidence of mistake and thus exacerbate the problem it seeks to alleviate.").

121. *Compare* Langbein & Waggoner, *supra* note 2, at 587 ("[N]o draftsman would plan to rely on [reformation] when proper drafting can spare the expense and hazard of litigation."), *with* Champine, *supra* note 120, at 439 ("While it is illogical to assume that one would knowingly draft a problematic instrument in reliance on the availability of an opportunity to correct it later, that is quite different from believing that the level of care exercised by lawyers will be unaffected by the possibility of malpractice liability.").

122. *See* Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1241-42 (2006) ("[A]ttorneys who are repeat players . . . may be most concerned with establishing reputations that maintain or increase their effectiveness in the relevant bar or courts.").

123. *Cf.* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1440 (2010) (arguing firms may have "incentive to make safe products even in the absence of product liability" because of market forces such as reputation).

124. UNIF. PROBATE CODE § 2-503 (2011), 8 U.L.A. pt. I, at 108 (Supp. 2011) (harmless error); UNIF. PROBATE CODE § 2-805 (2011), 8 U.L.A. pt. I, at 181 (Supp. 2011) (reformation to correct mistakes).

Regarding error costs, there are two types of errors. False positives (or Type I errors) involve probating documents that are not animated by testamentary intent or altering terms that courts should not alter. False negatives (or Type II errors) involve not probating documents that are animated by testamentary intent or not correcting mistakes that courts should correct.

Currently, the concern about Type II errors may be greater than the concern about Type I errors. Most disputes over execution formalities or will terms, at least based on reported decisions, seem to involve technical defects or obvious mistakes, with little or no risk of fraud.¹²⁵ If these cases are representative of all cases, perhaps there is a much greater chance of denying probate to a document the testator did intend to be her will (under the strict compliance rule) than probating a document the testator did not intend to be her will (under the harmless error rule).¹²⁶ Similarly, perhaps there is a much greater risk of failing to correct a mistake (under the no reformation rule) than altering a term unnecessarily (under the reformation doctrine).

For harmless error, the comment to UPC section 2-503 also embraces the economically-oriented intuition that “[t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator’s intent.”¹²⁷ Therefore, a court is unlikely to excuse egregious errors, such as a will that is not in writing or not signed (except perhaps in “switched wills” cases).¹²⁸

Also, for harmless error, any testator may still comply with section 2-502 precisely, thereby minimizing the risk that a court will not probate a valid will. Thus, relatively sophisticated testators and their attorneys can enjoy the “safe harbor” of the rule in section 2-

125. For classic cases involving technical defects in execution formalities, see *Stevens v. Casdorff*, 508 S.E.2d 610 (W. Va. 1998); *In re Groffman*, [1969] 1 W.L.R. 733; *In re Estate of Pavlinko*, 148 A.2d 528 (Pa. 1959). For examples of cases involving obvious mistakes in will terms, see *Erickson v. Erickson*, 716 A.2d 92 (Conn. 1998); *Arnheiter v. Arnheiter*, 125 A.2d 914 (N.J. Super. Ct. Ch. Div. 1956).

126. See Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 578 (2007) (“In the past, a fear of probating ‘false positives’ (documents that were never intended to be wills) has led to strict compliance with Wills Act formalities and denial of probate for documents that decedents intended to constitute their wills.”).

127. UNIF. PROBATE CODE § 2-503 cmt. (2011), 8 U.L.A. pt. I, at 109 (Supp. 2011); see also Langbein, *supra* note 14, at 52 (discussing “purposive interpretation” of South Australian courts in which “[t]he larger the departure from the purposes of Wills Act formality, the harder it is to excuse a defective instrument”).

128. See Langbein, *supra* note 104, at 30–31.

502.¹²⁹ At the same time, unsophisticated testators or testators who lack adequate legal representation still have the opportunity to avoid intestacy under the “clear and convincing evidence” standard of section 2-503.¹³⁰

Regarding decision costs, one concern with harmless error or reformation is that these doctrines might increase litigation costs, as well as the opportunity for fraud and undue influence.¹³¹ But sections 2-503 and 2-805 mitigate this potential concern by requiring “clear and convincing evidence.”¹³² This relatively high evidentiary standard functions as “the real safeguard against fraud and other abuse.”¹³³

Of course, excusing harmless errors in will execution or liberally reforming mistaken terms could increase litigation costs. The Supreme Judicial Court of Massachusetts, only three years after allowing reformation for tax purposes,¹³⁴ rejected reformation for other purposes on both statutory and policy grounds.¹³⁵ The Court emphasized its view that reformation could result in “groundless will contests” and “open the floodgates of litigation.”¹³⁶

129. Cf. Ronald R. Volkmer, *The Complicated World of the Electing Spouse: In re Estate of Myers and Recent Statutory Developments*, 33 CREIGHTON L. REV. 121, 174 (1999) (“Estate planners are generally desirous of ‘crystal rules’ and ‘safe harbors’ . . .”).

130. See UNIF. PROBATE CODE § 2-503 cmt. (2011), 8 U.L.A. pt. I, at 109 (Supp. 2011). Hypothetically, by enacting an intestate provision that is a penalty default rule, rather than a majoritarian default rule, a testator may have a greater incentive ex ante to comply with the execution formalities. However, compliance with the formalities might still be imperfect, thus triggering the penalty, if the testator does not have complete information or has a mistaken belief about the law. See *id.* (pointing out that some “lay persons” believe erroneously that modifying an existing will does not require fresh execution).

131. See Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance From the Past*, 70 TUL. L. REV. 1893, 1920 (1996) (contending that legislatures and courts “ought to recognize the potential for an increasing quantity of probate litigation raising the issue of undue influence that may follow in the wake of the adoption of the dispensing power”); cf. John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TRUST & EST. L.J. 73, 80 (2008) (criticizing harmless error rule and noting “ineluctable problem remains of determining the intention of a person now dead, particularly in light of often conflicting evidence offered by persons with an interest in the outcome”).

132. UNIF. PROBATE CODE §§ 2-503, 2-805 (2011), 8 U.L.A. pt. I, at 108, 181 (Supp. 2011); see also Langbein, *supra* note 14, at 53–54 (recommending evidentiary standard of “clear and convincing evidence”).

133. Langbein & Waggoner, *supra* note 2, at 568; see also RESTATEMENT (THIRD) OF PROP. § 12.1 cmt. e (“The higher standard of proof under this section imposes a greater risk of an erroneous factual determination on the party seeking reformation than on the party opposing reformation This tilt [in risk] also deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence.”).

134. See *Pond v. Pond*, 678 N.E.2d 1321 (Mass. 1997).

135. See *Flannery v. McNamara*, 738 N.E.2d 739, 747 (Mass. 2000) (distinguishing *Pond* on the basis that tax issues are within a “very narrow exception” to the rule prohibiting the reformation of wills).

136. *Id.* at 746.

But it is also possible that the harmless error rule or reformation doctrine could decrease litigation costs. For example, under harmless error, plaintiffs may be less inclined to challenge documents in which the testator's intent is clear but there is a technical defect with the formalities.¹³⁷ And, in the jurisdictions that have adopted harmless error thus far,¹³⁸ it does not appear that courts have experienced a flood of will contests.¹³⁹ Ultimately, whether the harmless error rule or reformation doctrine would increase or decrease litigation costs is an empirical question.

Overall, the harmless error rule and reformation doctrine appear to reduce the probability of Type II errors without substantially increasing the likelihood of Type I errors. At the same time, there is little evidence that harmless error or reformation have increased decision costs; indeed, it is theoretically possible that litigation costs may decrease under either of these standards. Thus, the harmless error rule may be superior to strict compliance and reformation may be superior to the no reformation rule, even if strict compliance or no reformation might provide testators or attorneys a slightly greater incentive to avoid mistakes *ex ante*.

B. Current Design

1. Dead Hand Control

A central issue in wills, trusts, and estates is the extent to which the law should prevent “dead hand” control by restricting a donor's freedom to control property after death.¹⁴⁰ A donor may

137. See UNIF. PROBATE CODE § 2-503 cmt. (2011), 8 U.L.A. pt. I, at 147 (1998) (“[A]n Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power ‘actually prevents a great deal of unnecessary litigation,’ because it eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator’s intent.” (quoting LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON THE MAKING AND REVOCATION OF WILLS 46 (1981))); RESTATEMENT (THIRD) OF PROP. § 3.3, Reporter’s Notes (1998) (same); see also Langbein, *Substantial Compliance*, *supra* note 2, at 525–26; Langbein, *supra* note 104, at 30.

138. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 263 & n.19 (listing nine states as of 2009); see also RESTATEMENT (THIRD) OF PROP. § 3.3, Reporter’s Notes (1998) (discussing adoption in Israel and in various jurisdictions in Australia and Canada).

139. See UNIF. PROBATE CODE § 2-503 cmt. (2011), 8 U.L.A. pt. I, at 109 (Supp. 2011) (“Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation.”).

140. See generally RONALD CHESTER, *FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND* (2007); LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009); RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (2010); SHAVELL, *supra* note 3, at 67–72 (citing LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* (1955)); Gregory S. Alexander, *The Dead Hand*

attempt to control the future use of property in various ways, from conditional devises and bequests for specific purposes,¹⁴¹ to incentive trusts,¹⁴² statutory purpose trusts,¹⁴³ and perpetual or “dynasty” trusts.¹⁴⁴ But perhaps the most extraordinary assertion of control arises in situations involving the “right to destroy” property at death.

In a few idiosyncratic cases, a testator has instructed the executor to destroy the testator’s own home or other buildings on the testator’s land or even the testator’s own cash.¹⁴⁵ More common are situations in which the testator has an interest in destroying tangible personal property other than money, such as private papers or diaries, unpublished manuscripts, or unfinished symphonies.¹⁴⁶ For example, the view of U.S. Supreme Court Justice Hugo Black was that “private notes of the justices relating to Court conferences should not be published posthumously.”¹⁴⁷ Yet suppose Justice Black had not destroyed his conference notes before death and that his will directed his executor to destroy his notes. The question is: “Should a court order destruction of the notes, which

and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189 (1985); John H. Langbein, *Burn the Rembrandt? Trust Law’s Limits on the Settlor’s Power to Direct Investments*, 90 B.U. L. REV. 375, 378–80 (2010) (citing Gareth H. Jones, *The Dead Hand and the Law of Trusts, in DEATH, TAXES AND FAMILY PROPERTY* 119 (Edward C. Halbach, Jr. ed., 1977)); see also Langbein, *Mandatory Rules*, *supra* note 16, at 1107–19 (discussing how intent-defeating rules in the Uniform Trust Code and Restatement (Third) of Trusts serve an anti-dead-hand policy).

141. See Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999).

142. See Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445 (2006); Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses, and Alternatives*, 29 ACTEC J. 5 (2003).

143. See UNIF. PROBATE CODE § 2-907 (1990) (amended 1993); UNIF. TRUST CODE §§ 408–409 (2005); see also PAUL BAXENDALE-WALKER, *PURPOSE TRUSTS* (2d ed. 2009); Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (1999).

144. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003); see also Sitkoff & Schanzenbach, *supra* note 4 (discussing connection between generation-skipping transfer tax and validation of perpetual trusts); RESTATEMENT (THIRD) OF TRUSTS ch. 27 intro. note (2011) (discussing reasons for limiting dead hand control in the context of perpetual trusts and the Rule Against Perpetuities, and collecting citations to recent work on this subject by Lawrence Waggoner).

145. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 211 (Mo. Ct. Appeals 1975) (testator directs executor “to cause our home . . . to be razed and to sell the land upon which it is located”); *In re Will of Pace*, 400 N.Y.S.2d 488, 490 (N.Y. Surr. 1977) (settlor orders trustee to raze all buildings on two properties other than garage and tool shed); *In re Scott’s Will*, 93 N.W. 109, 109 (Minn. 1903) (testator orders executor to destroy “money or cash or other evidence of credit”).

146. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 37–38; see also Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 812 (2005) (“The destruction of diaries and other papers is commonplace, even when those written works have enormous economic value.”).

147. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 37.

might have enormous value to a Court historian?”¹⁴⁸ Or would facilitating freedom of disposition to this extent represent the triumph of the dead hand over the lives of the living?

Ex post, there is a plausible justification for distinguishing between the destruction of property during life, which the law generally permits, and destruction of property at death, which courts increasingly do not permit.¹⁴⁹ During life, an owner directly internalizes the burdens and benefits of her actions. As a result, it is usually safe to assume that an owner will destroy property only if the owner believes the benefits of doing so outweigh the costs.¹⁵⁰ By contrast, it would appear that, after death, the owner no longer internalizes the burdens and benefits of her actions. Thus, an owner might destroy property after death even if others might benefit from the property. In other words, the destruction entails waste.¹⁵¹

Ex ante, however, there are other important considerations. First, if a court is unwilling to allow the destruction of property at death, the owner may experience a loss during life.¹⁵² Justice Black, for example, may have experienced anxiety about the possibility of his notes being published posthumously. Second, knowing a court may not enforce such a provision, the owner may choose to destroy the property during life, i.e., sooner than the owner otherwise would have destroyed the property.¹⁵³ Justice Black died shortly after destroying his notes,¹⁵⁴ but suppose that, after destroying his notes, he had fully recovered, remained on the Supreme Court, and wished to consult the notes he had previously destroyed. Third, an owner's inability to destroy property at death may reduce the owner's incentive to create property during life.¹⁵⁵ Justice Black may just decide not to take notes during the Court's conferences. Fourth, and perhaps most importantly here, prohibiting

148. *Id.*

149. See Strahilevitz, *supra* note 146, at 796 (noting recent trend in case law).

150. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 37; see also MERRILL & SMITH, *supra* note 60, at 518.

151. See Strahilevitz, *supra* note 146, at 796 (“Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner’s ability to destroy her property.”).

152. See SHAVELL, *supra* note 3, at 68; cf. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 37.

153. See POSNER, *supra* note 3, at 700 (“In the case of the direction to destroy the art work, a testator can destroy the work himself if he doesn’t think the direction will be enforced.”).

154. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 37.

155. Cf. SHAVELL, *supra* note 3, at 65 (interfering with bequests “lowers [] incentives to work” because “a person will not work as hard to accumulate property if he cannot then bequeath it as he pleases”).

destruction could alter how the testator or other parties act and speak today. Justice Black's chief concern was that posthumous publication of the justices' notes might adversely affect the Court's deliberative process.¹⁵⁶ In any event, economic analysis of law also suggests that a testator may internalize the costs of destruction, even destruction after death, because the testator bears the "opportunity costs"¹⁵⁷ of not selling a remainder interest in the property during the testator's life.¹⁵⁸

Of course, there may be countervailing reasons for restricting a testator's freedom to destroy property at death. Society, including future generations, may value the property's existence more than the testator values its destruction, and there may be no market mechanism to facilitate a mutually-beneficial exchange.¹⁵⁹ Or maybe destroying the property will impose harmful effects or "externalities" on neighbors.¹⁶⁰ Or perhaps a testator did not foresee or failed to specify all potential contingencies, and, due to a change in circumstances, destruction would now be inconsistent with the testator's probable intention.¹⁶¹ Yet, it is impossible to evaluate a testator's right to destroy property at death in particular, or dead hand control in general, without incorporating *ex ante* considerations into the analysis.¹⁶²

2. Ademption by Extinction

The UPC revisions regarding ademption by extinction illustrate the importance of rules versus standards for the law of succession. Ademption by extinction involves situations in which the nature or ownership of property that is the subject of a specific devise changes after the testator has executed a will. For example, suppose a

156. See JOHN P. FRANK, *INSIDE JUSTICE HUGO L. BLACK: THE LETTERS* 61–62 (2000).

157. On the importance of opportunity costs, one of the "fundamental principles of economics," see POSNER, *supra* note 3, at 7–12.

158. Cf. SHAVELL, *supra* note 3, at 68; Strahilevitz, *supra* note 146, at 840.

159. Note, however, that this rationale generally does not limit a testator's right to destroy property during life, except in certain limited circumstances such as historical preservation, endangered species, and artists' moral rights.

160. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) (noting that "[d]estruction of the house harms the neighbors"). On externalities, see generally J.J. Laffont, *Externalities*, in 3 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 192, 192 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); SHAVELL, *supra* note 3, at 77–109.

161. See POSNER, *supra* note 3, at 699–700; SHAVELL, *supra* note 3, at 70.

162. See Strahilevitz, *supra* note 146, at 808 (suggesting the "ex ante perspective can be determinative when society must decide whether to permit or prohibit the destruction of certain kinds of property").

testator executes a will that includes a gift of a Corvette to an adult child but then the testator chooses to sell the car before dying. Traditionally, this specific devise to the child would fail (or “adeem”) because at the testator’s death the testator no longer owns an interest in the car. In addressing ademption, the UPC has shifted from a rule subject to several exceptions to a standard with presumptions and burdens.¹⁶³

The UPC originally embraced the “identity theory” of ademption.¹⁶⁴ Correspondingly, the UPC relied upon a rule with a number of exceptions.¹⁶⁵ The rule was that a specific devise failed if the decedent did not own the property at death, irrespective of the testator’s intent.¹⁶⁶ To avoid certain harsh outcomes arising in circumstances in which “the property is not in the estate because of an accident or the action of someone other than the testator, or where the facts indicate a high likelihood that the testator did not intend for ademption,”¹⁶⁷ the 1969 UPC, like legislatures and courts in many states, developed four exceptions to prevent ademption.¹⁶⁸

The 1990 UPC rejected this identity theory and instead adopted the “intent theory” of ademption.¹⁶⁹ In embracing the intent theory, the 1990 UPC included the previous exceptions, plus an additional exception for replacement property,¹⁷⁰ as “carefully tailored safe harbors.”¹⁷¹ However, the 1990 UPC converted the general framework from a rule to a standard.¹⁷² The standard was in a catch-all provision, UPC section 2-606(a)(6), which provided that a devisee has a right to the value of specifically devised property “unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator’s manifested plan of distribution.”¹⁷³ The objective of section 2-606(a)(6) was to

163. See *DUKEMINIER, SITKOFF & LINDGREN*, *supra* note 21, at 386–87; Alexander, *supra* note 89, at 1087.

164. See UNIF. PROBATE CODE § 2-606 cmt. (2011), 8 U.L.A. pt. I, at 139 (Supp. 2011) (discussing prior rule).

165. See § 2-608(a)(1)–(4) (2011), 8 U.L.A. pt. I, at 430 (Supp. 2011).

166. See § 2-606 cmt. (2011), 8 U.L.A. pt. I, at 139 (Supp. 2011).

167. *DUKEMINIER, SITKOFF & LINDGREN*, *supra* note 21, at 386.

168. See UNIF. PROBATE CODE § 2-608(a)(1)–(4) (1969) (amended 1997).

169. See § 2-606 cmt. (2011), 8 U.L.A. pt. I, at 138 (Supp. 2011) (discussing current rule).

170. See § 2-606 (a)(5) (2011), 8 U.L.A. pt. I, at 137 (Supp. 2011).

171. § 2-606 cmt. (2011), 8 U.L.A. pt. I, at 139 (Supp. 2011).

172. Compare § 2-608(a)(1)–(4) (1969) (amended 1997), with § 2-606(a)(1)–(6) (1990) (amended 1997).

173. § 2-606(a)(6) (1990) (amended 1997).

vindicate the testator's intent,¹⁷⁴ although the empirical case for the default rule in either the 1969 or 1990 UPC is unclear.¹⁷⁵ In analyzing intent, the standard in the 1990 UPC established a presumption against ademption, shifting the burden from the devisee, who previously had to argue for nonademption, to the party advocating ademption, who now had to prove that the testator favored ademption.¹⁷⁶

The different approaches to ademption in the 1969 UPC and 1990 UPC illustrate some of the classic trade-offs between rules and standards. At first glance, the drafting costs of the 1969 rule appear to be similar to the 1990 provision because the 1990 UPC retains (and, indeed, expands) the number of categorical exceptions.¹⁷⁷ However, one of the reasons for adopting the standard in section 2-606(a)(6) of the 1990 UPC was that the exceptions to the general rule of ademption were becoming increasingly difficult to articulate and define.¹⁷⁸ Thus, relying upon a standard may have eliminated some of the drafting costs associated with promulgating additional exceptions to the existing rule. In addition, the standard in section 2-606(a)(6) seemingly gives courts more flexibility to do justice, i.e., to effectuate the testator's intent in particular cases.¹⁷⁹

But one concern with section 2-606(a)(6), as with all standards, is that it may result in higher decision costs.¹⁸⁰ The catch-all nature of section 2-606(a)(6) could encourage specific devisees whose gifts otherwise might adeem to bring a claim, in addition to those devisees who do have a claim under one of the exceptions. Moreover, because the intent theory requires a judicial inquiry into

174. See Langbein & Waggoner, *supra* note 1, at 874 (citing "intent-serving nonademption rule of section 2-606(a)(6)" as example of how the "1990 UPC strives in a variety of places to vindicate transferor's intent in circumstances in which the former law might have defeated it").

175. See Mann, *supra* note 11, at 1057 (criticizing 1969 and 1990 UPC because both "rest on the presumed intent of the testator, but it is a suppositious intent with no empirical foundation" as "[t]here is no particular reason to believe that one position comports with the intent of most testators any better than the other").

176. UNIF. PROBATE CODE § 2-606 cmt. (1990) (amended 1997) (noting provision "creates a mild presumption against ademption by extinction" and imposes burden on "party claiming that an ademption has occurred").

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

178. Cf. Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 GONZ. L. REV. 105, 119 (1993) (noting that, although "legislatures have attempted to limit the operation of the ademption doctrine . . . most of these statutes deal with only a few ademption issues and do not resolve the underlying problem").

179. See *id.* at 125 ("The real reason for judicial evasion and legislative action in the area of ademption by extinction is that the present [identity] rule—more often than not—frustrates the testator's intent.").

180. See Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 647 (1993) (arguing section 2-606(a)(6) will "sow[] the seeds of litigation").

the testator's intent and the testator's plan of distribution, as section 2-606(a)(6) indicates, each claim might entail expensive and time-consuming litigation.

In part because of a concern about litigation costs and in part because of the (perhaps not unrelated) fact that five of the first seven jurisdictions to enact UPC section 2-606 omitted subsection (a)(6),¹⁸¹ the UPC's drafters amended this provision in 1997. The amendment shifted the burden back to a devisee to establish that the testator had favored nonademption.¹⁸² Still, the determination of whether the testator intended ademption or whether ademption is consistent with the testator's plan of distribution is often subject to conflicting evidence.

Consequently, despite the amendment placing the burden back on the devisee, the standard in section 2-606(a)(6) may result in higher decision costs. An increase in decision costs is especially likely under the intent theory if the same court would have been unwilling to carve out ad hoc exceptions under the identity theory. However, the identity theory also can entail significant litigation costs. For example, the parties may incur substantial costs in litigating the threshold question of whether a gift is a specific, rather than general, devise.¹⁸³ Thus, although the intent theory may entail somewhat lower drafting costs and a greater ability to do justice, it is ambiguous, at least as a theoretical matter, whether the identity or intent theory involves higher decision costs.

C. Potential Reforms

1. Abolishing Attestation

Another issue in which the distinction between rules and standards is relevant is whether to abolish the attestation (or witnessing) requirement. James Lindgren has argued that it is unclear whether attestation continues to serve any function because "fraudulent wills are seldom a problem."¹⁸⁴ Substantial wealth does seem to pass smoothly from one generation to the next without the use of witnesses. For example, nonprobate

181. UNIF. PROBATE CODE § 2-606 cmt. (2011), 8 U.L.A. pt. I, at 139 (Supp. 2011).

182. *See id.*

183. *See* Alexander, *supra* note 89, at 1086; Lundwall, *supra* note 178, at 157.

184. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 551 (1990) (arguing for eliminating attestation so that the UPC's only formalities for will execution would be a writing and the testator's signature).

transfers typically do not involve attestation,¹⁸⁵ and Pennsylvania has not required the use of witnesses for hundreds of years.¹⁸⁶ Moreover, as discussed above, in addition to allowing notarization as an alternative to attestation,¹⁸⁷ the UPC now employs the harmless error rule, or “dispensing power,” to correct execution mistakes including errors in attestation.¹⁸⁸ The question thus arises: “If in almost every case attestation defects are going to be excused, why not use a *rule* (no attestation requirement) rather than a litigation-breeding *standard* (the dispensing power)?”¹⁸⁹

Assuming, once again, that the harmless error rule does not alter the testator’s ex ante incentives, the desirability of the harmless error rule usually depends on whether the additional *decision costs* of correcting mistakes in the execution of wills outweigh the *error costs* of not correcting such mistakes.¹⁹⁰ The harmless error rule could increase decision costs, either because the rule might result in more litigation or because any litigation that does occur might involve factual or legal questions that are more difficult to determine. The harmless error rule may decrease one type of error costs—specifically, false negatives or “Type II” errors—as a court is authorized to excuse an execution defect if there is clear and convincing evidence the testator intended the document or writing to be a will. However, the harmless error rule still entails the possibility of error costs; courts, operating with imperfect information, may not apply harmless error correctly or uniformly in every case.¹⁹¹

The argument in favor of abolishing attestation is that these decision costs and error costs are both unnecessary. Abolishing attestation may eliminate decision costs on this issue entirely. Moreover, if abolished, there would no longer be any Type II errors as a result of defects in attestation because a lack of attestation would not prevent probate of a document that otherwise is a valid will. Finally, whereas attestation requires the additional transaction costs of having two witnesses at each execution ceremony, the

185. See *id.* at 557 (contending that “experience with will substitutes” suggests “witnessing isn’t necessary to prevent the[] harms” of fraud, duress, and undue influence).

186. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 264 (“Since the 1700s, Pennsylvania has not required attestation for formal wills, yet there is no evidence that fraud has run wild in Pennsylvania.”).

187. See *supra* note 106 and accompanying text.

188. See *supra* Part III.A.2 (discussing UPC section 2-503); see also Lester, *supra* note 126, at 587–90 (discussing how courts in South Australia and New South Wales almost always invoke the dispensing power to excuse errors in attestation).

189. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 263.

190. See *supra* Part III.A.2 (discussing potential trade-off).

191. See James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1025–26 (1992) (eliminating attestation may “give us greater uniformity between jurisdictions and judges”).

presence of these witnesses would no longer be necessary if attestation were abolished, thus reducing transaction costs.

One argument in favor of retaining the attestation requirement is that attestation may create better incentives for testators *ex ante*. In advocating the use of penalty default rules, Ian Ayres has suggested that “[b]y pretending to have a penalty default rule of denying probate to unattested wills, we encourage people to use witnesses.”¹⁹² Citing the work of Ayres and Robert Gertner on penalty defaults, Lindgren contends that “the main argument for retaining the attestation requirement is that we want to encourage attestation.”¹⁹³ But the underlying question is why, particularly in light of the nonprobate revolution, should we encourage people to use witnesses? If witnesses no longer serve any purpose, then attestation seems worthy of abolition.

To determine whether witnesses still serve a purpose, it is necessary to reexamine the functions of the formalities.¹⁹⁴ As Langbein points out, attestation no longer serves much of a protective function because “[t]oday, ‘wills are probably executed by most testators in the prime of life and in the presence of attorneys.’”¹⁹⁵ Attestation may perform an evidentiary function by assuring that “the actual signing is witnessed and sworn to by disinterested bystanders.”¹⁹⁶ However, with the broad acceptance of the validity of nonprobate transfers, it is doubtful whether the witnessing of a signature continues to play a significant evidentiary role. Likewise, although certain types of wills, such as holographic wills, may “serve the channeling function less well” than attested wills, it seems unlikely that most formal wills, at least as currently drafted, would be seen as anything other than a “virtually unmistakable testamentary act,” even without attestation.¹⁹⁷ Attestation does serve a cautionary function in ensuring that the “execution of the will is made into a ceremony impressing the participants with its solemnity and legal significance.”¹⁹⁸ But whether this aspect of the ritual is

192. Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 610 (2006).

193. Lindgren, *supra* note 191, at 1026 (citing Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989)); *see also* Shelly Kreiczler-Levy, *Deliberative Accountability Rules in Inheritance Law: Promoting Accountable Estate Planning*, 45 U. MICH. J.L. REFORM 937 (2012) (advocating use of intent-defeating rules to foster deliberation and accountability in estate planning).

194. *See supra* note 9 and accompanying text (discussing ritual [or cautionary], evidentiary, protective, and channeling functions).

195. Langbein, *Substantial Compliance*, *supra* note 2, at 497 (quoting Gulliver & Tilson, *supra* note 8, at 10).

196. *Id.* at 493.

197. *Id.* at 494.

198. *Id.* at 495.

still necessary is unclear: individuals regularly transfer substantial amounts of wealth through nonprobate transfers without a ceremony involving witnesses.¹⁹⁹

The preceding analysis of the function of attestation assumes a static picture of the world in which everything is the same except for the attestation requirement. However, the real world is dynamic.²⁰⁰ Knowing there is no attestation requirement, parties may have different incentives *ex ante*. For example, if attestation were abolished, more wrongdoers might attempt to engage in fraud, thereby reviving the relevance of the protective function. Or there might be an increase in homemade wills or wills with different formats or structures, thus reviving attestation's channeling function. The continuing relevance of attestation thus depends to a certain extent on predictions about how testators, potential wrongdoers, and others are likely to act if attestation were abolished.²⁰¹

2. Preventing Intentional Disinheritance of Children

American succession law, including the UPC, employs a rule-based approach in allowing testators to disinherit their children, even minor children.²⁰² Currently, 49 of the 50 states embrace a rule permitting filial disinheritance.²⁰³ The one exception is Louisiana,²⁰⁴ which has long provided a forced share for children by means of a

199. However, perhaps some people, in designating beneficiaries on life insurance policies, retirement accounts, and other nonprobate transfers, do not give enough thought to the seriousness of what they are doing.

200. On the distinction between static and dynamic efficiency, see Russell Hardin, *The Morality of Law and Economics*, 11 L. & PHIL. 331, 336–42 (1992).

201. Another potential problem with shifting from a legal regime in which attestation is encouraged but not required (due to the harmless error rule) to a legal regime without attestation involves transition costs. Specifically, because testators believe there is an attestation requirement, and may continue to hold this belief even if attestation were abolished, courts may end up probating signed documents that testators considered to be drafts. *See, e.g., Johnson v. Johnson*, 279 P.2d 928 (Okla. 1954). That is, until each testator knows that attestation is not required, abolishing attestation may increase false positives or Type I errors in which documents are admitted to probate despite the fact that the testator lacked testamentary intent. On transition costs in general, see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003).

202. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 166 (1994) (“Even under the least arbitrary and most progressive of the current elective share schemes—that of the 1990 UPC—a testator is free to disinherit his children.”); *see also* UNIF. PROBATE CODE § 2-302(b)(1) (2011), 8 U.L.A. pt. I, at 136 (share for omitted child does not apply if “it appears from the will that the omission was intentional”).

203. *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 519.

204. *See* Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996).

rule (subject to a number of exceptions),²⁰⁵ although forced heirship is waning even in Louisiana.²⁰⁶

By contrast, “[i]n most countries, bequests to children are compulsory.”²⁰⁷ While compulsory bequests to children could be subject to a rule-based approach (as in Louisiana), many countries instead rely on relatively flexible standards and judicial discretion. For example, in the United Kingdom, Australia, and other jurisdictions that utilize “family maintenance statutes,”²⁰⁸ a court determines what is “reasonable in all the circumstances”²⁰⁹ or what it “thinks fit”²¹⁰ for the child’s maintenance. Likewise, in China, courts enjoy “broad discretion to determine the optimal share on a case-by-case basis to fit the individual circumstances of each estate and claimant.”²¹¹ Given the stark contrast between the U.S. and these other jurisdictions, many commentators have proposed amendments to the UPC aimed at preventing the intentional disinheritance of children.²¹²

Here, one advantage of standards is that the drafting costs of relying on family maintenance statutes (as in the U.K. or Australia) or just relying on courts (as in China) are relatively low. Another advantage is that standards may provide courts an opportunity to “do justice” by examining the specific circumstances of each case.

However, relying on family maintenance statutes or granting courts discretion to evaluate a child’s circumstances may entail

205. See LA CIV. CODE ANN. art. 1493–95 (2012); see also art. 1621 (2012) (listing current exceptions).

206. See Vincent D. Rougeau, *No Bonds But Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 CIV. L. COMMENT, no. 3, winter 2008, at 2 (documenting history of forced heirship in Louisiana including trends that “led eventually to significant limitations on forced heirship in Louisiana law”). On other limited exceptions, see Hirsch, *supra* note 36, at 2237 n.218.

207. Hirsch, *supra* note 36, at 2233 (citing Brashier, *supra* note 204, at 1 & n.3 (“[P]rovisions protecting children from disinheritance are in place in most modern nations throughout the world.”)); see also Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 138 (2008) (discussing how U.S. approach “contrasts sharply with those of civil law and Commonwealth jurisdictions”).

208. See generally DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 521–27 (discussing family maintenance statutes).

209. Inheritance (Provisions for Family and Dependants) Act 1975 c. 63 § 1(2)(b) (U.K.) (rev. 2004).

210. *Inheritance (Family Provision) Act 1972* (SA) s 7 (Austl.).

211. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1224.

212. See, e.g., Deborah A. Batts, *I Didn’t Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); Ronald Chester, *Disinheritance and the American Child: An Alternative From British Columbia*, 1998 UTAH L. REV. 1; Jacqueline Asadorian, Note, *Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code*, 31 B.C. THIRD WORLD L.J. 101 (2011).

relatively high decision costs.²¹³ In addition, it is unclear whether courts are capable of overcoming the information problems of being unfamiliar with the individual circumstances of each child and family and the ideal disposition of the decedent's estate.²¹⁴

Unlike most types of rules, the American rule allowing the disinheritance of children also entails low promulgation costs. The rule is general and categorical rather than particularized and nuanced. As a result, there is no need for legislators or judges to delineate a complicated formula, based on myriad circumstances, to determine what is necessary for a child's maintenance, education, or support.²¹⁵ Moreover, testamentary freedom may provide parents with greater control over their children's behavior during life.²¹⁶

Of course, there is a concern about externalities if minor children are left without financial support.²¹⁷ There is also a concern that, as potential devisees, children will engage in "rent seeking" behavior, inefficiently investing resources to induce gifts to themselves in order to obtain a larger share of the estate.²¹⁸ Furthermore, the American rule potentially entails high decision costs, not in applying the rule itself, but because intentionally disinheriting children invites will contests (as well as defensive measures to prevent such contests).²¹⁹

213. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1186-91 (1986) (arguing family maintenance entails discretion that "promotes intrafamily litigation, depletes estates, and brings disarray into a relatively smooth-functioning area of the law").

214. Cf. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 (1992) (noting argument that testamentary freedom "'permits more intelligent estate planning,' by allowing the testator to 'take account of the differing needs' of members of her family" (quoting WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 3.1, at 88-89 (1988))).

215. Louisiana's forced heirship statute also has the advantage of being a rule with relatively low drafting costs, although the statute does include several exceptions, see Rougeau, *supra* note 206, at 5 n.5 (citing LA. CIV. CODE ANN. art. 1621 (1996 & 2003)), and now distinguishes children based on age, *id.* at 17.

216. See generally Bernheim, Shleifer & Summers, *supra* note 30; Tate, *supra* note 207, at 170-81; see also SHAVELL, *supra* note 3, at 63 (discussing control of children through conditional inheritance); Hirsch, *supra* note 36, at 2234 n.209 (citing historical examples from Texas and Virginia).

217. See SHAVELL, *supra* note 3, at 65; Hirsch, *supra* note 36, at 2236; Brashier, *supra* note 204, at 2. *But cf.* Brashier, *supra* note 204, at 12 ("It seems probable that most testators do still provide directly or indirectly for their minor children.").

218. See James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71 (1983).

219. See John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 (1994) (book review) (pointing out that "the American rule, by allowing liberal disinheritance of children, creates the type of plaintiff who is most prone to bring these actions").

These will contests often entail a number of determinations based on relatively open-ended standards. For example, in analyzing testamentary capacity, a court must determine whether the testator was “of sound mind” at the time of executing the will.²²⁰ A court also may have to determine whether a potential wrongdoer has exerted “undue influence” on the testator, based on the existence of a “confidential relationship” and “suspicious circumstances,”²²¹ or whether a wrongdoer engaged in fraud by deceiving a testator through a deliberate misrepresentation. Because they often involve open-ended standards, will contests based on undue influence or fraud can be especially difficult for courts to adjudicate,²²² which may result in higher litigation and decision costs. Consequently, there is also a concern that a disinherited child or other contestant may impose, or threaten to impose, such costs by filing a negative expected value suit to extract a settlement from the estate.²²³

To prevent a will contest, testators can include a “no-contest clause” in their wills. Enforcing no-contest clauses may reduce litigation costs. However, enforcing these clauses also has the potential to preclude certain meritorious claims.²²⁴ Here is another example of the trade-off between error costs and decision costs. UPC section 2-517, by providing that a no-contest clause is unenforceable if a contestant has “probable cause” to institute a proceeding,²²⁵ appears to offer a middle course.²²⁶ There is a concern, however, that in evaluating probable cause, courts may adopt

220. See UNIF. PROBATE CODE § 2-501 (2011), 8 U.L.A., pt. I, at 144 (Supp. 2011); see also RESTATEMENT (THIRD) OF PROP. § 8.1 (2001) (discussing requirements of mental capacity).

221. See RESTATEMENT (THIRD) OF PROP. § 8.3 cmt. h (2001).

222. See Bonfield, *supra* note 131, at 1908–09 (“[T]he ease with which ‘black letter law’ may be recited [regarding the elements of undue influence] says nothing about the difficulty that courts have in applying those same rules It has been and remains particularly difficult for courts to draw a precise line between conduct that should be regarded as acceptable encouragement of a testator . . . and what constitutes impermissible coercion”); DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 207 (“It is fairly easy to state the test for *fraud* but often difficult to apply it to particular facts.”).

223. See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685–86 & n.200 (2011) (citing John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978)); see also Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 286–90 (2010) (arguing that undue influence doctrine “creates wasteful litigation costs because heirs discontented with a will can use the threat of a will contest to force a settlement, which often distorts the decedent’s intent and depletes the value of the estate”).

224. As a result, Florida and Indiana refuse to enforce such clauses. See FLA. STAT. ANN. § 732.517 (West 2010); IND. CODE ANN. § 29-1-6-2 (West 2011).

225. See UNIF. PROBATE CODE § 2-517 (2011), 8 U.L.A. pt. I, at 161 (Supp. 2011).

226. See Hirsch, *supra* note 36, at 2209 (“A probable cause rule for no-contest clauses ostensibly reconciles these policies by fending off unmeritorious litigation, while at the same time blocking efforts to avert bona fide challenges.”).

an ex post, rather than ex ante, perspective.²²⁷ Moreover, even UPC section 2-517, which establishes a standard (rather than a rule), seems to invite litigation over whether probable cause exists and, if so, over the contested issue itself.²²⁸ Here, once again, the distinction between rules and standards is relevant.

CONCLUSION

In this Article, I have suggested that insights from economics and the economic analysis of law are relevant for analyzing the UPC and succession law. Certain trusts and estates scholars like Langbein and Waggoner have emphasized functional considerations in examining the UPC. Leading figures in law and economics such as Posner and Shavell have discussed some of the general economic factors underlying bequests and wills. In addition, a new generation of trusts and estates scholars led by Sitkoff is beginning to rely more explicitly on economic theory, as well as empirical analysis, in examining topics pertaining to trust law. Yet, to date, there is no systematic analysis of the institutional design of the UPC or succession law from an economic perspective. I have discussed how an economic analysis of succession law, including the law of intestacy and wills as well as non-probate transfers such as trusts, would be desirable and have outlined a preliminary agenda for undertaking this analysis.

In analyzing the UPC and succession law from an economic perspective, the Article has identified three tools that may be useful for conducting a more systematic analysis. Transaction costs play an important role in succession law, including the revolution in nonprobate transfers and the adoption of the harmless error rule and reformation doctrine. The distinction between ex ante and ex post analysis is also critical, and the ex ante perspective is the proper mode of analysis for evaluating the laws of succession, whether in the context of correcting mistakes, restricting (or sometimes justifying) dead hand control, or analyzing the intentional disinheritance of children. The distinction between

227. *Cf. id.* at 2209–10 (arguing there is “reason to doubt whether courts will resolve the issue of probable cause correctly” because of “hindsight bias”). In addition, no-contest clauses are sometimes ineffective because they “have little potency unless the client is willing to make a significant bequest to the potential contestant,” DUKEMINIER, SITKOFF & LINDGREN, *supra* note 21, at 206, and because “undue influencers or perpetrators of fraud might themselves be responsible for including no-contest clauses in wills executed as a result of their wrongdoing,” Hirsch, *supra* note 36, at 2208–09.

228. *See* Hirsch, *supra* note 36, at 2209 (explaining that probable cause “can give rise to an extra layer of litigation, and thus to additional costs”).

rules and standards is also an important but relatively unexplored topic in succession law, and this distinction seems directly applicable to debates regarding, among other things, ademption by extinction, the execution formalities, and the disinheritance of children.

Going forward, additional research is necessary to develop these and other economic insights and to apply them to concrete reforms in probate and trust law. To this end, I am currently working on an article that examines the relevance of *ex ante* analysis in wills, trusts, and estates.²²⁹ While trusts and estates scholars have occasionally mentioned situations in which the *ex ante*/*ex post* distinction might be pertinent, I attempt to provide a more systematic account of why these competing modes of analysis are significant for succession law. I also discuss a number of applications, from conditional bequests to the modification and termination of trusts.²³⁰

Additional work is also necessary to understand the role of rules versus standards in the law of wills. Despite the significance of rules versus standards in other legal areas, including trust and fiduciary law,²³¹ there has been relatively little analysis—and no systematic examination—of rules and standards in wills law. Notably, analyzing rules versus standards in probate and nonprobate transfers may differ in important respects from analyzing rules versus standards in other fields because the primary objective of succession law is to facilitate rather than regulate.²³² Moreover, the probate bar—whose support is necessary for enacting the UPC in most states—may prefer rules over standards (all other things being equal).²³³ Therefore, evaluating the relevant trade-offs between rules and standards is also crucial for understanding the political economy of probate reform.

Investigating and incorporating other economic tools is also necessary. For example, in trust law, recent scholarship has highlighted the importance of agency costs.²³⁴ But agency costs have received little or no attention in probate law, notwithstanding

229. See Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Considerations* (Working Paper 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990802.

230. See *id.*; see also Sitkoff, *supra* note 4, at 657–58 (describing trust modification and termination as a “useful example” of “how the law balances the *ex post* preferences of the beneficiaries with the *ex ante* wishes of the settlor”).

231. See Sitkoff, *Fiduciary*, *supra* note 31.

232. Cf. Kaplow, *supra* note 73, at 618 (noting “different analysis may be required for laws regarding form (for example, a requirement that there be two witnesses to the execution of a will for it to have legal effect) and background laws” than for “legal commands regulating harm-producing behavior”).

233. See *supra* note 129.

234. See, e.g., Sitkoff, *supra* note 4; Klick & Sitkoff, *supra* note 5.

the important roles of various types of agents, including personal representatives, guardians, and powers of attorney. Likewise, while information costs have received some attention in trust law,²³⁵ most scholars have failed to consider the importance of information costs in probate law.²³⁶

Finally, rigorous empirical analysis of succession law is a crucial complement to this theoretical work. As noted above, legal scholars have undertaken a number of empirical studies regarding intestacy and wills,²³⁷ but these studies are sometimes limited because they rely on stated, rather than revealed, preferences or entail the aggregation of probate files from a single county or courthouse. In addition, although there is a literature on bequests within economics,²³⁸ empirical analyses within this literature sometimes overlook pertinent legal issues such as the transmission of wealth through trusts.²³⁹ By contrast, several recent articles on trust law serve as a useful reminder of the value of empirical analysis that is theoretically motivated, methodologically sound, and sensitive to the underlying legal issues.²⁴⁰

Moving toward an economic analysis of succession law that combines theoretical as well as empirical research has the potential to pay dividends for future law reform. The law reform process, including an endeavor like the UPC, is complex and multifaceted, and often involves numerous prudential and political considerations. Yet economic analysis can provide valuable insights into the optimal design of legal rules and institutions. Previous developments within economics have transformed succession law in certain respects. Perhaps most notable is the effect of modern portfolio theory on trust investment law.²⁴¹ A more systematic application of economic principles to succession law is likely to bear even more fruit. This Article has touched upon a handful of economic tools and a few of their applications, but the analysis here is preliminary. There is

235. See, e.g., LAU, *supra* note 4, at 132–56; Sitkoff, *Fiduciary*, *supra* note 31, at 1047–48; Merrill & Smith, *supra* note 5, at 843–49.

236. For an exception, see Hirsch, *supra* note 56, at 1067–68.

237. See *supra* notes 24, 36.

238. See *supra* note 30.

239. See *supra* note 38.

240. See *supra* note 32. One obstacle to the empirical investigation of many issues in succession law is the potential cost of this type of research, a point that Lawrence Waggoner has emphasized. See Waggoner, *Antilapse*, *supra* note 18, at 2337 (“[R]equiring a systematic empirical study before any reform can be put into place would paralyze the law-reform process. Neither the Uniform Law Commission nor the American Law Institute, the two premier national organizations devoted to law reform, has funding for such studies.”).

241. See *supra* notes 26–27 and accompanying text; see also *supra* notes 67–69 and accompanying text (discussing shift from “prudent man rule” to “prudent investor rule”).

substantial work to complete in applying insights from economics and the economic analysis of law to the UPC and the law of succession.