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Because a will's authenticity is never certain, courts sometimes make incorrect determinations regarding whether a purported will is a genuine expression of the decedent's intent. When the court incorrectly admits an inauthentic will to probate, a false-positive outcome occurs. Conversely, when the court incorrectly denies probate of an authentic will, a false-negative outcome occurs. Because false-positive outcomes grant probate of inauthentic wills and false-negative outcomes deny probate of authentic wills, both can be characterized as "probate errors."

Probate errors are inevitable, and consequently policymakers must decide how to balance the risk of false-positive outcomes and false-negative outcomes. With the aim of aiding policymakers in this decision, this Article uses decision theory to systematically analyze how the risk of probate errors should be balanced. Decision theory suggests that, to identify the proper goal of a decision-making process, one must compare the error costs of false-positive outcomes and false-negative outcomes. If error costs are symmetric, then the decision-making process should be designed to minimize the total risk of error. However, if error costs are asymmetric, then the decision-making process should be designed to minimize the more costly type of error.

This Article argues that probate-error costs were previously asymmetric, with false-positive outcomes being more costly than false-negative outcomes. It therefore explains why the law's conventional method of will authentication minimizes the risk of false-positive outcomes at the expense of an increased risk of false-negative outcomes. More importantly, it argues that probate-error costs have changed so that they are now more symmetric. The recognition of this shift suggests that the goal of will authentication should be increased accuracy and therefore that reform of the conventional law is needed.

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INTRODUCTION

The method by which probate courts authenticate wills necessarily strikes a balance between false-positive outcomes and false-negative outcomes. A false-positive outcome occurs when the probate court validates an inauthentic will.[1] Conversely, a false-negative outcome occurs when the court invalidates an authentic will.[2] Because false-positive outcomes grant probate of inauthentic wills and false-negative outcomes deny probate of authentic wills, both can be characterized as "probate errors."[3]

No method of differentiating authentic wills from inauthentic wills is perfect; indeed, probate errors are inevitable.[4] But once this inevitability is recognized, policymakers must decide how to balance the risk of false-positive outcomes with the risk of false-negative outcomes.[5] Perhaps they

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[1] *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 153 (9th ed. 2013) ("[A false-positive is] a spurious finding of authenticity . . . ."); Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 880 (2012) ("False positives . . . involve probating documents that are not animated by testamentary intent . . . ."); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014).

[2] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 (explaining that a false-negative occurs when a court denies probate despite "overwhelming evidence of authenticity"); Kelly, *supra* note 1, at 880 ("False negatives . . . involve not probating documents that are animated by testamentary intent . . . ."); Sitkoff, *supra* note 1, at 647.

[3] Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 338 (2016). False-positive outcomes are sometimes referred to as Type I errors, and false-negative outcomes are sometimes referred to as Type II errors. *E.g.*, Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504 (1999).

[4] *See* Glover, *supra* note 3, at 368 ("Because of the evidentiary difficulties of probate . . . [u]nder any system, probate errors will occur.").

[5] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 147–48 ("The challenge is to prescribe a set of formalities, and a rule for the exactness with which those formalities must be complied, that balances the risk of probating an inauthentic will with the risk of denying probate to an authentic will."); Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 309 (2011) ("Where perfection is unattainable, this 'hard place' 'between over- or under-inclusion errors' is familiar yet frighteningly irreversible."); *see also* Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV.

should craft the law so that most probate errors that occur are false-positive outcomes.[6] Alternatively, perhaps most probate errors that occur should be false-negative outcomes.[7] Or maybe the goal should be to strike an intermediate balance between false-positive outcomes and false-negative outcomes.[8]

The appropriate tradeoff between these two types of probate errors depends in part upon their relative costs.[9] On the one hand, if false-positive outcomes are worse than false-negative outcomes, then a method of will authentication that produces probate errors that are mostly false-negative outcomes might be appropriate. On the other hand, if false-negative outcomes are worse than false-positive outcomes, then a method of will authentication that produces probate errors that are mostly false-positive outcomes might be appropriate. If all probate errors are equally costly, then the law's goal might be to strike a tradeoff between false-positive outcomes and false-negative outcomes that minimizes the overall rate of error. Accordingly, to accurately assess what the goal of the law's method of will authentication should be, a clear picture of the costs of both false-positive outcomes and false-negative outcomes is required.

A careful examination of probate-error costs has been needed for some time. Over the last several decades a reform movement has sought to change the way in which the law authenticates wills.[10] Critics argue that the conventional law produces too many false-negative outcomes,[11] and they suggest that reform is needed so that probate errors are more evenly

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1495, 1521 (2001) ("Systems that operate under uncertainty always balance type I and type II errors—false positives . . . and false negatives . . . ."); *see generally* Glover, *supra* note 3 (analyzing potential methods of will-execution reform).

[6] Some have argued that this is the appropriate allocation of probate-error risk. *See, e.g.*, Guzman, *supra* note 5, at 309 ("[S]electing rules that risk over-inclusion by favoring the identification of testamentary intent—and therefore wills——is the better choice . . . .").

[7] The conventional law allocates probate-error risk in this way. *See* Glover, *supra* note 3, at 341–43 (discussing the "highly formalized will-execution process"); *see also infra* notes 69–77 and accompanying text.

[8] The reform movement argues that probate errors should be balanced so as to minimize the overall rate of error. *See* Glover, *supra* note 3, at 348–67 (arguing that "the method for determining a will's authenticity should be designed to make correct determinations as frequently as possible"); *see also infra* notes 78–84 and accompanying text.

[9] *See* Glover, *supra* note 3, at 348–49 (explaining that "[i]f one type of error is more costly than the other, minimization of the total number of errors is not necessarily the appropriate goal of the law").

[10] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 179–85 (discussing the emergence of the substantial compliance doctrine and the harmless-error rule); Sitkoff, *supra* note 1, at 646–48 (explaining that the "[m]odern law has shifted the balance . . . by reducing the number of required formalities and by relaxing the exactness with which they must be satisfied").

[11] *See* Glover, *supra* note 3, at 346–48 (discussing Professor John Langbein's critique of the "overly formalistic" conventional law); *see also, e.g.*, John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 498–503 (1975) ("[T]he rule of literal compliance with the Wills Act formalities is the doctrinal consequence of the inferior status of the probate courts.").

distributed between false-positive outcomes and false-negative outcomes.[12] Implicit in the reform movement's argument is the idea that all probate errors are equally costly,[13] but until recently, the role that probate-error costs play in shaping the law of wills has not been explicitly discussed.[14] Because no thorough analysis of probate-error costs has occurred, the reform movement has not fully explained the need for change.

This Article therefore seeks to more fully develop the case for altering the way that probate courts authenticate wills. By systematically evaluating the relative costs of false-positive outcomes and false-negative outcomes, this Article provides a better understanding of why the conventional law strikes a false-negative-heavy tradeoff of probate errors.[15] More importantly, this Article's analysis of probate-error costs bolsters the argument that the modern law of wills should pursue a more balanced tradeoff between false-positive outcomes and false-negative outcomes.[16]

This Article proceeds in three Sections. Section I describes the role that error costs play in shaping the law. Specifically, Section I uses the context of criminal adjudication to illustrate how error costs can affect the law's tradeoff between false-positive outcomes and false-negative outcomes. Section I also introduces the debate and reform movement surrounding probate errors. Sections II and III then turn the Article's focus specifically toward probate-error costs. Section II explains how asymmetric probate-error costs provide a rationale for the conventional law's preference for false-negative outcomes. Section III then argues that a shift toward symmetric probate-error costs has changed the way in which the law should authenticate wills.

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[12] *See* Kelly, *supra* note 1, at 881–82 ("[T]he harmless error rule and reformation doctrine appear to reduce the probability of Type II errors without substantially increasing the likelihood of Type I errors. . . . Thus, [they] may be superior to strict compliance . . . [and] to the no reformation rule . . . .").

[13] *See* Glover, *supra* note 3, at 348–49 (explaining that unlike in the criminal law context, where false-positive outcomes are considered very costly, "false-positive outcomes are generally just as costly as false-negative outcomes within the probate context").

[14] *See, e.g.*, DUKEMINIER & SITKOFF, *supra* note 1, at 148 (addressing compliance with formalities and how both errors dishonor "the decedent's freedom of disposition"); Glover, *supra* note 3, at 348–49 (advocating for a "broader system for differentiating authentic wills from inauthentic wills," as opposed to focusing on inequities in specific cases); Kelly, *supra* note 1, at 879–80 (highlighting the dependence on "the trade-off between error costs and decision costs" in selecting the desirable doctrine); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 463 (2002) (arguing for a standard of clear and convincing proof of testamentary intent where "an erroneous decision upholding an informal will is substantially more costly than an erroneous decision rejecting an informal will"); Sitkoff, *supra* note 1, at 647 (identifying the challenge in prescribing a set of formalities that balances both risks).

[15] *Infra* Section II.

[16] *Infra* Section III.

I. ERROR COSTS AND THE LAW

Error costs are a component of a larger analytical framework known as decision theory, which seeks to identify the optimal process for making decisions under conditions of uncertainty.[17] Courts are decision makers;[18] they make all sorts of determinations, such as whether a defendant is guilty or innocent, whether a custody arrangement is in the best interests of the child, and whether a decedent had the capacity to execute a will. Under conditions of perfect information, the court's decision-making process would be straightforward. It would simply apply the facts to the law and reach the appropriate legal conclusion.[19] For example, a defendant who killed another person with the intent to do so would be found guilty of murder. The court's decision would not be hampered by uncertain facts.

However, courts must make decisions under uncertain conditions.[20] Oftentimes objective facts, such as whether a defendant actually killed a victim, are unclear.[21] Moreover, certainty is unattainable when the court must determine someone's subjective intent,[22] such as whether a defendant

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[17] *See* C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 41–42 (1999) ("Decision theory sets out a *process* for making factual determinations and decisions when information is costly and therefore imperfect. It formulates a methodology for determining when to make decisions on the basis of current information and when to gather and consider further information before making a decision."); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 498 (2001) ("Decision theory provides a powerful framework for understanding situations in which choices among alternative actions must be based on imperfect information. It helps us understand the tradeoffs between, in effect, convicting the innocent and absolving the guilty."); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1065 (1968) ("[T]he typical decision-theory problem involves the proper course of action to be taken by a decisionmaker who may gain or lose by taking action upon uncertain data that inconclusively support or discredit differing hypotheses about the state of the real but nonetheless unknowable world.").

[18] Beckner & Salop, *supra* note 17, at 43.

[19] *See* Michael Owens, Comment, *A Cure for Collusive Settlements: The Case for a Per Se Prohibition on Pay-for-Delay Agreements in Pharmaceutical Patent Litigation*, 78 MO. L. REV. 1353, 1380 (2013) ("In a world of perfect information, whether a certain activity should be permitted or enjoined would depend on a straightforward application of appropriate law to the facts of a given case.").

[20] *See* Beckner & Salop, *supra* note 17, at 43 ("A court inevitably must make its decisions on the basis of limited and imperfect information. As a result, a court can never be absolutely certain that its factual findings are correct, the correct litigant prevails, or the remedy it mandates still would be the best outcome if all the facts were known."); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1243 (1985) ("Realistically, the courts cannot obtain perfect information about parties and their acts.").

[21] *See* Richard Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance*, 58 IND. L.J. 433, 484 (1983) ("Legal proof, even of objective facts, is inherently uncertain.").

[22] *See* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656 (1988) (explaining that intestacy statutes "suffer[] from the impossible search for subjective intent"); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 303 (2001) ("[A]s a philosophical truism, it may be well-nigh

who killed a victim intended to do so. Because courts must make decisions based upon imperfect information, decision-making processes guide them when making decisions.[23] These decision-making processes are composed of presumptions of fact, burdens of persuasion, standards of proof, and procedural and evidentiary rules.[24] For instance, the law places the burden to prove a defendant's guilt upon the prosecution, a burden that the prosecution must discharge beyond a reasonable doubt.[25] If the prosecution satisfies this burden, the court finds the defendant guilty; if it does not, the court finds the defendant not guilty.

Decision theory suggests that the optimal decision-making process for a given determination must weigh the benefits of making better decisions with the costs of obtaining and processing additional information.[26] A decision-making process reaches better decisions when it minimizes expected error costs.[27] Expected error costs are a product of the likelihood of an erroneous decision and the cost of that erroneous decision.[28] If false-positive outcomes and false-negative outcomes are equally costly, a decision-making process that minimizes the overall rate of error produces the lowest expected error costs.[29] Under this scenario, minimization of

impossible to identify someone else's subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man's head.").

[23] *See* Kelly Casey Mullally, *Legal (Un)certainty, Legal Process, and Patent Law*, 53 LOY. L.A. L. REV. 1109, 1151–52 (2010) (explaining that decision-making tools "are designed by the legal system to compensate for imperfect information, which causes uncertainty").

[24] *See* Beckner & Salop, *supra* note 17, at 43–44 ("Through experience, courts create presumptions to guide their factual investigations and decision making. In addition, courts can gather information. In our adversarial system . . . the fact gathering is literally carried out by the parties, not the court. A court, however, exerts significant control over information gathering by creating a process of discovery and issue formulation that affects the amount and accuracy of the information."); Mullally, *supra* note 23, at 1151 ("[A]djustment of burdens of proof, burdens of persuasion, and presumptions would be effective tools if reformers simply want to increase certainty as to which party will prevail on a given issue. Such process-oriented tools allow for systematically tipping the scales against the class of litigants deemed most appropriate to bear the costs of uncertainty."); Owens, *supra* note 19, at 1380 ("In light of this uncertainty, courts must form presumptions, impose burdens of proof, collect and process information, make relevant findings of fact, and apply the relevant legal standards to those findings.").

[25] *See* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1188 (1979) ("[D]ue process requires that the prosecution in a criminal case prove each and every material element of a criminal offense beyond a reasonable doubt . . . .").

[26] *See* Beckner & Salop, *supra* note 17, at 46 ("In evaluating investment in information, the benefit of additional information is that it may reduce the likelihood of making a costly erroneous decision. In this sense, the decision to consider additional information can be seen as a tradeoff between two types of costs—error costs on the one hand and information costs on the other.").

[27] *See* Robert G. Bone, *A Normative Evaluation of Actuarial Litigation*, 18 CONN. INS. L.J. 227, 248 (2011) (explaining that lowered "expected error costs" result in more "accurate outcomes").

[28] *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 911 (2009) ("[T]he cost of an error discounted by the probability that it will occur.").

[29] *See* Frederick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 41 (2010) (explaining that "[m]inimizing errors is an attractive goal, but only because doing so will

expected error costs depends solely on accuracy. As long as the correct decision is made as frequently as possible, the decision-making process should be indifferent to whether the errors that occur are false-positive outcomes or false-negative outcomes.

However, when one type of error is more costly than the other, minimization of expected error costs does not depend solely on accuracy but instead also depends upon the tradeoff between false-positive outcomes and false-negative outcomes.[30] In mathematical terms, expected error costs can be expressed as the sum of: (1) the likelihood of a false-positive outcome multiplied by the cost of a false-positive outcome and (2) the likelihood of a false-negative outcome multiplied by the cost of a false-negative outcome.[31] Thus, when relative error costs are symmetric (i.e., the cost of a false-positive outcome is equal to the cost of a false-negative outcome), the most accurate decision-making process minimizes expected error costs.[32] By contrast, when relative error costs are asymmetric (i.e., one type of error is more costly than the other), the decision-making process that strikes the appropriate tradeoff between false-positive outcomes and false-negative outcomes minimizes expected error costs.[33]

While the minimization of expected error costs produces the benefit of making better decisions, it also generates costs. To make better decisions, courts must obtain and process additional information.[34] These costs are known as decision costs and include "any burden, such as resource expenditure or opportunity costs, associated with reaching a decision,"

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generally minimize the cost of errors" and suggesting that asymmetric error costs provide a justification for not pursuing the goal of minimizing the total number of errors).

[30] *See* Hylton & Salinger, *supra* note 17, at 502 ("Decision theory implies that the best legal rule minimizes the overall expected costs of error. The three important factors suggested by the analysis are the base rate probability of harm, the ratio of the false conviction to the false acquittal probability (relative error rates), and the ratio of the false conviction to the false acquittal cost (relative error costs)."); Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 864 (2007) ("Error costs are minimized by the joint minimization of the costs of Type I and Type II errors, as measured by their frequency and the severity of harm that results from their occurrence.").

[31] Bone, *supra* note 28, at 911–12 n.173.

[32] *See* Vars, *supra* note 29, at 41 ("Minimizing errors is an attractive goal, but only because doing so will generally minimize the cost of errors. It is the cost, not the error itself, that matters . . . . [But] [o]nce asymmetric costs are shown . . . [other] considerations . . . should be weighed.").

[33] *See* Bone, *supra* note 28, at 248 n.48 ("If false negatives are more costly than false positives, a rule might reduce the error risk overall and still increase expected error costs if it reduces the less costly type of error and increases the more costly one."); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 24–25 (1996) (discussing the affect that asymmetric error costs play in shaping the mechanics of criminal trials and contrasting the effect that symmetric error costs play in shaping the mechanics of civil trials).

[34] *See* Beckner & Salop, *supra* note 17, at 46 (explaining that "gather[ing] and consider[ing] additional information" can "reduce the risk of error" and increase the likelihood of "mak[ing] a better decision"); Owens, *supra* note 19, at 1380 ("The more intensive the process of gathering and using additional information, the more likely a court can reach a correct . . . determination.").

including "time, money, and emotional distress from uncertainty, conflict, worry, and the like."[35] Decision theory suggests that both the benefits and costs of making better decisions should be considered and that the optimal decision-making process generates the fewest overall costs,[36] or, put differently, minimizes the sum of error costs and decision costs.[37]

As a subcomponent of the economic analysis of law,[38] decision theory and more specifically error-cost analysis has seen widespread application. Scholars have applied error-cost analysis to the study of a broad array of legal fields, including antitrust,[39] arbitration,[40] class actions,[41] intellectual property,[42] federal preemption,[43] and statutory interpretation.[44] But while

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[35] Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006) (emphasis omitted) (explaining further that these costs "reach[] everyone who bears these costs, whether public or private actors"); *see* Beckner & Salop, *supra* note 17, at 44 ("In making these determinations, the court must be mindful of the financial, time, and management costs that it is inflicting on the parties (including third parties) and itself."); *see also* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) ("'Decision costs' is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including costs of supplying judges with information to decide the case at hand and formulate doctrines to govern future cases; the opportunity costs of litigation to litigants and judges (that is, the time spent on a case that could be spent on other cases); and the costs to lower courts of implementing and applying doctrines developed at higher levels.").

[36] *See* Beckner & Salop, *supra* note 17, at 46 ("The efficiency of gathering and using additional information depends on the cost of the information versus the benefits."); Owens, *supra* note 19, at 1380–81 ("The desirability of discovering additional information . . . depends on the costs of obtaining that information relative to the benefits of considering it.").

[37] *See* Beckner & Salop, *supra* note 17, at 46 ("A rational decision maker will try to minimize the sum of the two types of costs. This is the second key insight of the decision theoretic approach."); Bone, *supra* note 28, at 910 ("The optimal rule from among the set of feasible alternatives is the rule that maximizes the expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs."); *see also* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 879 (2011) ("[D]ecision theory's instruction [is] to craft legal rules so as to minimize the sum of decision and error costs.").

[38] *See* Beckner & Salop, *supra* note 17, at 43 (indicating that decision theory and error-cost analysis are subordinate aspects of the economic analysis of the law).

[39] *See* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 247–49 (2012) (discussing the Chicago School's application of decision theory and the error-cost approach to antitrust); *see also, e.g.*, Beckner & Salop, *supra* note 17, at 41–42 (discussing the role of decision theory in antitrust); Hylton & Salinger, *supra* note 17, at 469–70 (discussing the application of decision theory to post-Chicago tying doctrine); David McGowan, *Between Logic and Experience: Error Costs and* United States v. Microsoft Corp., 20 BERKELEY TECH. L.J. 1185, 1186 (2005) (exploring the debate over the application of error-cost analysis to antitrust through the lens of the several cases comprising the *United States v. Microsoft Corp.* dispute).

[40] *See, e.g.*, Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 50–51 (2004) (applying decision theory and error-cost analysis to arbitration).

[41] *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1286–87 (2002) (applying error-cost analysis to class actions).

[42] *See, e.g.*, Joseph Scott Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 178–79 (applying error-cost analysis to IP statutes).

[43] *See, e.g.*, Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 205–06 (2008) (applying decision theory and error-cost analysis to the doctrine of preemption of products liability claims).

decision theory in general and error-cost analysis in particular can be employed in a variety of legal contexts, criminal adjudication perhaps most clearly exemplifies the role that relative error costs play in shaping the law.

A. *The Criminal Adjudication Example*

Courts must make decisions regarding the guilt or innocence of defendants at criminal trials. In this context, courts can make correct determinations by either convicting truly guilty defendants or acquitting truly innocent defendants. However, because they must make decisions with imperfect information, courts can also make incorrect determinations of guilt or innocence by either convicting truly innocent defendants or by acquitting truly guilty defendants. An incorrect conviction can be labeled a false-positive outcome, and an incorrect acquittal can be labeled a false-negative outcome.[45]

How the law minimizes expected error costs in the context of criminal adjudication depends in part upon the relative costs of incorrect determinations of guilt and innocence.[46] As explained above, if incorrect convictions and incorrect acquittals are equally costly, then a decision-making process that makes the correct determination as frequently as possible minimizes expected error costs.[47] However, if one type of error is more costly than the other, then a decision-making process that strikes the appropriate balance between false-positive outcomes and false-negative outcomes minimizes expected error costs.[48] In short, relative error costs play an important role in identifying the optimal decision-making process for criminal adjudication.

In this regard, false-positive outcomes in the form of wrongful convictions are considered more costly than false-negative outcomes in the form of erroneous acquittals.[49] In the words of Justice John Marshall

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[44] *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 662 (1992) (applying error-cost analysis to judicial interpretation of statutes). Error-cost analysis has also occasionally been applied to the law of succession. *See, e.g.*, Adam Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 633–35 (2009); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043–45 (2011).

[45] *See* Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 487 (2000) ("The wrongful conviction of an innocent defendant (a 'false positive') is much costlier than the wrongful acquittal of a criminal (a 'false negative').").

[46] *See supra* notes 26–33 and accompanying text.

[47] *See supra* notes 28–29 and accompanying text.

[48] *See supra* notes 30–33 and accompanying text.

[49] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."); Seidmann & Stein, *supra* note 45, at 487 ("The wrongful conviction of an innocent defendant (a 'false positive') is much costlier than the wrongful acquittal of a criminal (a 'false negative').."); *see also* Alexander Volokh, *N Guilty Men*, 146 U. PA. L.

Harlan II,

> [i]n a criminal case[] . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . [Instead it is] a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.[50]

Although Justice Harlan does not explain the difference between the costs of false-positive outcomes and the costs of false-negative outcomes, Professor William Stuntz nicely summarizes the rationale. He explains, "[t]he terrible nature of prison means that the cost of incarcerating the wrong people is very high," but "the only injury from letting the defendant off is the loss of deterrence coupled with any intangible harm occasioned by the unjust result."[51] Stuntz concludes that these costs "cannot equal the injury inflicted on the wrongly punished innocent defendant."[52] Error costs in the context of criminal adjudication are therefore asymmetric—false-positive outcomes in the form of wrongful convictions are more costly than false-negative outcomes in the form of erroneous acquittals.

Because criminal adjudication error costs are asymmetric, the court's decision-making process strikes a tradeoff between false-positive outcomes and false-negative outcomes that is intended to minimize expected error costs.[53] Indeed, the decision-making process that courts use within the context of criminal adjudication is not designed to reach the correct determination of guilt or innocence as frequently as possible but is instead designed to minimize the likelihood of wrongful convictions.[54] This protection against false-positive outcomes is primarily achieved by requiring the prosecution to establish the defendant's guilt beyond a reasonable doubt.[55] The reasonable doubt standard of proof requires that

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REV. 173, 174–75 (1997) (suggesting that wrongful convictions have been considered more costly than wrongful acquittals throughout much of history and theology).

[50] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[51] Stuntz, *supra* note 33, at 24–25 (explaining further that "[w]hether or not the guilty defendant goes to jail, the victim's harm will still exist").

[52] *Id.* at 25; *see also* Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1665 (2001) (suggesting that the reasonable doubt standard in criminal cases reflects "a moral judgment about the wrongfulness of inflicting the pain of criminal conviction on people who are not guilty of crimes").

[53] *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U. L. REV. 1, 25–27 (explaining that "[c]riminal cases . . . are the paradigm for asymmetrical error costs").

[54] *See id.* at 27 ("The Court's imposition of the 'beyond a reasonable doubt' standard [in criminal cases] can . . . be seen as an attempt to minimize error costs . . . ."); *see also* Stuntz, *supra* note 33, at 24–25 ("The terrible nature of prison means that the costs of incarcerating the wrong people is very high. Obviously, procedures that aim to promote one-way accuracy——that avoid incarcerating innocent defendants——help to reduce those costs.").

[55] *See* Speiser v. Randall, 357 U.S. 513, 525–26 (1958) ("There is always in litigation a margin of

the court be nearly certain of a defendant's guilt before reaching a conviction.[56] Thus, because the reasonable doubt standard limits convictions to those defendants who have the highest likelihood of guilt and results in acquittals of defendants who, although they might have some likelihood of guilt, are not undoubtedly guilty, false-negative outcomes are more likely than false-positive outcomes in the context of criminal adjudication.[57]

In sum, criminal adjudication exemplifies how relative error costs can shape the law and the court's decision-making process. Because criminal adjudication error costs are asymmetric (i.e., false-positive outcomes are more costly than false-negative outcomes),[58] the court's decision-making process is designed to avoid false-positive outcomes at the expense of more false-negative outcomes.[59] Put simply, the scales of justice are tilted in favor of the defendant. The law tilts the scales of justice out of recognition that a false-positive outcome in the form of a wrongful conviction is worse that a false-negative outcome in the form of an erroneous acquittal. In this way, relative error costs influence how the court's decision-making process is designed.

B. *The Push to Minimize Probate Errors*

Just as courts must make determinations regarding the guilt of

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error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."); *see also* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 587 (1999) ("[W]e require the prosecution at trial to prove its case beyond a reasonable doubt precisely because, given imperfect information, we want to maximize the protection of innocent defendants, even at the expense of setting some guilty defendants free."). Other aspects of criminal trials also favor the defendant. *See* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 71–77 (2008) (explaining special trial rights afforded to criminal defendants).

[56] *See* Stein, *supra* note 55, at 80 ("Criminal convictions . . . require a very high, although numerically unstated, probability of guilt."); *see also* Vars, *supra* note 29, at 7 (explaining that the reasonable doubt standard requires that the factfinder be at least 90% certain of the defendant's guilt and suggesting it perhaps requires an even higher degree of certainty).

[57] *See* Richard A. Bierschback & Alex Stein, *Deterrence, Retributivism, and the Law of Evidence*, 93 VA. L. REV. IN BRIEF 189, 191 (2007), http://www.virginialawreview.org/sites/virginialawreview.org/files/bierschbach.pdf [https://perma.cc/U8H4-AR24] ("[B]y decreasing the incidence of false positives (erroneous convictions of the factually innocent), a 'reasonable doubt' standard increases the incidence of false negatives (erroneous acquittals and non-prosecutions of the factually guilty)."); *see also* Stein, *supra* note 55, at 80 (explaining that the reasonable doubt standard "allows many guilty defendants to go free in the interest of not convicting the innocent").

[58] *See supra* notes 49–52 and accompanying text (substantiating the asymmetric value of error costs).

[59] *See supra* notes 53–57 and accompanying text.

defendants at criminal trials,[60] courts must also make determinations regarding the authenticity of wills during the probate process.[61] A will is authentic when the decedent intended it to be a legally effective expression of her intended testamentary gifts. If a will is authentic, the court should grant probate so that the decedent's intent is fulfilled; however, if the decedent did not intend a will to be legally effective, the court should deny probate so that the decedent's estate is not distributed to unintended beneficiaries.[62] Probate courts must distinguish authentic wills from inauthentic wills based upon imperfect information. Because the decedent is dead at the time of probate, the best evidence of the decedent's intent is unavailable when the court makes a determination regarding a will's authenticity.[63] The court cannot simply ask the decedent whether she intended a particular document to constitute a legally effective will.

Because of the evidentiary difficulties of probate, the decision-making process that courts typically use to distinguish an authentic will from an inauthentic will relies upon an easily identifiable proxy of the decedent's intent. The conventional law requires that a decedent comply with a variety of formalities to execute a legally effective will, such as the requirements that a will be written, signed by the decedent, and attested to by two witnesses.[64] If the decedent complies with these formalities, the court presumes that she intended the will to be legally effective and therefore that the will is authentic.[65] However, if the decedent does not comply with the formalities of will execution, the court presumes that she did not intend the will to be legally effective and therefore that the will is inauthentic.[66] Under the conventional rule of strict compliance, the presumption of

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[60] *See* discussion *supra* Section I.A (explaining how courts apply error-cost analysis to strike a balance between false-positive and false-negative determinations of guilt).

[61] *See* Glover, *supra* note 3, at 340 ("[B]efore accepting a will for probate administration and distributing the estate according to the will's terms, the court must decide whether the decedent intended the will to be legally effective.").

[62] *See* Sitkoff, *supra* note 1, at 643 ("The American law of succession embraces freedom of disposition[] . . . .").

[63] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 147 ("The witness who is best able to authenticate the will, to verify that it was voluntarily made, and to clarify the meaning of its terms is dead by the time the court considers such issues.")

[64] *See id.* at 148 (stating that the conventional law of will execution also includes various technicalities that are related to the primary formalities of writing, signature, and attestation); Glover, *supra* note 3, at 342 (explaining the various technical formalities required before a will is considered valid).

[65] *See* Langbein, *supra* note 11, at 514–15 (stating that if the formalities are not complied with, the court should look to extrinsic evidence, but does not always do so); *see also* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 139 (2012) (stating that in addition to aiding the court in identifying testamentary intent, will-execution formalities may also serve a therapeutic function).

[66] *See* Langbein, *supra* note 11, at 489 ("[O]nce a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.").

inauthenticity that is triggered by a decedent's noncompliance is conclusive.[67] Courts will not consider extrinsic evidence that suggests a decedent intended a noncompliant will to be legally effective.[68]

This conventional process for determining the authenticity of wills results in a significant risk of false-negative outcomes and little likelihood of false-positive outcomes.[69] Most people would not go through the process of producing a written document, signing it, locating two witnesses, and having the witnesses sign the document if they did not intend the will to be legally effective.[70] Thus, when courts rely on the proxy of formal compliance to determine the issue of a will's authenticity, there is little likelihood that they will incorrectly validate inauthentic wills.[71]

Although the court's decision-making process creates a minimal risk of false-positive outcomes, it produces a significant risk of false-negative outcomes.[72] The same formalities that provide robust evidence of authenticity also present opportunity for will-execution blunders. Either because of ignorance or mistake, decedents who intend to execute legally effective wills sometimes fail to comply with the prescribed formalities.[73] Because wills must be executed with a high level of formality, the conventional law has produced a host of cases in which the court

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[67] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 ("[B]y establishing a conclusive presumption of invalidity for an imperfectly executed instrument, the strict compliance rule denies probate even if the defect is innocuous and there is overwhelming evidence of authenticity . . . ."); Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 100–02 (2014) ("[A] decedent's failure to comply with the prescribed formalities invalidates the will, and the probate court will not entertain independent evidence that suggests the decedent intended the document to constitute a legally effective will.").

[68] *See* Langbein, *supra* note 11, at 489 ("The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.").

[69] *See* Glover, *supra* note 3, at 345 ("[T]he conventional law of will-execution heavily allocates probate-error risk in favor of false-negative outcomes.").

[70] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 ("A competent person not subject to undue influence, duress, or fraud is unlikely to execute an instrument in strict compliance with all of the Wills Act formalities unless the person intends the instrument to be his will."); Guzman, *supra* note 5, at 311 n.18 ("Few people would undergo [the will-execution] ceremony without holding testamentary intent.").

[71] *See* Glover, *supra* note 3, at 342–43 ("A decedent likely would not go through the highly formalized process of conventional will-execution without intending to leave behind a legally effective will.").

[72] *See id.* at 345 ("[B]y requiring the testator to leave behind strong evidence of testamentary intent in the form [of] a written, signed, and witnessed will, the conventional law minimizes the likelihood that the court will validate a will that the decedent did not intend to be legally effective.").

[73] *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 433–34 (2009) ("In addition to deterring people from attempting will execution, formalities also frustrate the testamentary intent of some of those who do try to create a valid will. Critics of strict compliance routinely argue that will formalities frustrate testamentary intent because of the burdens they place on prospective testators, and courts invalidate wills that they acknowledge clearly express the testator's intent.").

invalidates a will because of the decedent's noncompliance under circumstances that strongly suggest she intended the will to be legally effective.[74] When the court relies on the decedent's compliance as a proxy for her intent in such situations, the court likely invalidates an authentic will.[75] In some cases, the will's authenticity is so clear that the court expressly acknowledges that its decision-making process produces obvious false-negative outcomes.[76] Thus, by requiring the decedent to leave behind robust evidence of a will's authenticity in the form of a written, signed, and attested document, the conventional law guards against false-positive outcomes, but by denying courts the ability to validate noncompliant wills when extrinsic evidence strongly suggests that the will is authentic, the conventional law produces a high risk of false-negative outcomes.[77]

The conventional decision-making process for distinguishing authentic wills from inauthentic wills has drawn significant criticism in recent years.[78] Critics point to cases in which courts invalidate clearly authentic wills and suggest that the conventional law's high risk of false-negative

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[74] *See* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 PA. L. REV. 1033, 1036 (1994) ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases . . . .").

[75] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 ("[B]y establishing a conclusive presumption of invalidity for an imperfectly executed instrument, the strict compliance rule denies probate even if the defect is innocuous and there is overwhelming evidence of authenticity—a *false negative*."); 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' . . . has led to strict compliance with Wills Act formalities and denial of probate for documents that decedents intended to constitute their wills.").

[76] *See, e.g.*, *In re* Estate of Pavlinko, 148 A.2d 528, 528 (Pa. 1959) (describing the invalidation of a will in which the decedent's intent was clear as a "very unfortunate" result); Mann, *supra* note 74, at 1036 (explaining that courts invalidate wills "sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator.").

[77] *See* Kelly, *supra* note 1, at 880 ("Currently, the concern about [false-negative outcomes] may be greater than the concern about [false-positive outcomes]. Most disputes over execution formalities . . . seem to involve technical defects . . . with little or no risk of fraud. 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 . . . than probating a document the testator did not intend to be her will . . . .").

[78] *See* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 602–11 (2014) (detailing the criticism the court faced for holding a decedent's will invalid because she and her husband mistakenly signed each others' wills instead of their own); 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, 4 (1987) ("The Wills Act is meant to implement the decedent's intent; the paradox in a case [that applies the rule of strict compliance] is that the Wills Act defeats that intent."); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243 (1996) ("The argument for simplifying will formalities and forgiving 'harmless errors' in execution rests on the premise that effectuating testamentary intent, and thus protecting testamentary freedom, is the primary goal of wills law."); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 541–43 (1990) (criticizing the effectiveness of the attestation requirement in regards to the case of Smith v. Nelson, 299 S.W.2d 645 (Ark. 1957), in which there was no question of genuine testamentary intent, but the Arkansas Supreme Court denied probate solely because only one person had witnessed the will).

outcomes is unwarranted.[79] Although they do not typically frame the issue in terms of probate-error risk, critics of the conventional law essentially argue that the risk of false-negative outcomes can be reduced without significantly increasing the risk of false-positive outcomes.[80] In response to this criticism, a reform movement has emerged that has suggested two types of changes to the conventional law. First, the formalities of will execution could be simplified.[81] A streamlined will execution process would still provide strong evidence of a will's authenticity but would reduce the likelihood of will-execution blunders.[82] Second, courts could be given discretion to validate noncompliant wills.[83] By allowing courts to validate clearly authentic yet noncompliant wills, obvious false-negative outcomes could be avoided.[84] Through these changes to the conventional law, the reform movement seeks to decrease the risk of false-negative outcomes without significantly increasing the risk of false-positive outcomes, thereby making the court's decision-making process regarding the authenticity of wills more accurate.

Although the reform movement's goal of accuracy intuitively seems advantageous, decision theory suggests that accuracy is not always the optimal objective of a decision-making process.[85] As explained previously, whether increased accuracy minimizes the expected error costs of a particular decision-making process depends upon the relative costs of false-positive outcomes and false-negative outcomes.[86] If false-positive outcomes and false-negative outcomes are equally costly, then the reform movement's goal of increased accuracy would reduce expected probate-

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[79] *See* Langbein, *supra* note 78, at 4–5 (referencing the case of Groffman, in which "the testator signed out of the witnesses' joint presence," rendering the will invalid).

[80] *See* Glover, *supra* note 3, at 363–66 (using statistics to explain that, with factors such as level of formality, it is possible to reduce the risk of false-negative outcomes without significantly increasing the risk of false-positive outcomes and that even if the risk of false-positive outcomes rises by a small degree, it is more acceptable to have false-positive outcomes than false-negative outcomes).

[81] *See* Fellows, *supra* note 22, at 615 ("States have stripped their wills statutes of many of the formalities found in the English Statute of Frauds and the Wills Act of 1837.").

[82] *See id.* at 614 ("The reduction in legal formalities minimizes the number of cases in which property owners take actions indicating that they probably intend to make a donative transfer, but, nevertheless, fail to meet the formalities because they are unadvised or ill-advised by their attorneys.").

[83] *See* Lester, *supra* note 75, at 579–82 (suggesting that courts adopt a "harmless error rule" in which a judge may "examine both the noncomplying document as a whole and the circumstances surrounding the document's execution").

[84] *See id*. at 579–80 ("[S]ubstantial compliance permits judges to examine a noncomplying will and determine whether the writing, attestation, signature, or combination thereof within the noncomplying will sufficiently performs the purpose of Wills Act formalities despite a defect in one or more of these requirements.").

[85] *See supra* notes 26–37 and accompanying text.

[86] *See supra* notes 27–33 and accompanying text.

error costs.[87] By contrast, if false-positive outcomes are on average more costly than false-negative outcomes, then the conventional law's preference for false-negative outcomes would be consistent with the objective of minimizing expected probate-error costs.[88] Whether the reform movement's goal of increased accuracy results in a more optimal decision-making process therefore depends upon the relative costs of false-positive outcomes and false-negative outcomes.

Despite the importance of relative error costs in determining the optimal decision-making process for the authentication of wills, no systematic analysis of the relative costs of probate errors has occurred. As a result, critics of the conventional law and the reform movement have not fully explained both the problems with the traditional way that courts authenticate wills and the need for change. To fill this analytical void, the remainder of this Article focuses on the costs of probate errors. Specifically, it focuses on what is lost when the court's decision-making process produces false-positive outcomes by validating inauthentic wills and when it produces false-negative outcomes by invalidating authentic wills. Ultimately, a better understanding of the relative costs of probate errors explains the conventional law's preference for false-negative outcomes and illuminates the need for reform.

II. ASYMMETRIC PROBATE-ERROR COSTS

Although no full-scale analysis of relative probate-error costs has occurred, some scholars have briefly touched upon the subject.[89] For instance, Professor Robert Sitkoff explains that both false-positive outcomes and false-negative outcomes "dishonor the decedent's freedom of disposition."[90] More specifically, he suggests that a false-positive outcome "gives effect to a false expression of testamentary intent" and that a false-negative outcome "denies effect to a true expression of testamentary intent."[91] Because he views these probate-error costs as symmetric, Sitkoff concludes that the goal of will-execution reform should

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[87] *See supra* note 29 and accompanying text ("Minimizing errors is an attractive goal, but only because doing so will generally minimize the cost of errors. It is the cost, not the error itself, that matters.").

[88] *See* Bone, *supra* note 27, at 248 n.48 ("If false negatives are more costly than false positives, a rule might reduce the error risk overall and still increase expected error costs if it reduces the less costly type of error and increases the more costly one.").

[89] *See, e.g.*, Guzman, *supra* note 5, at 309 (suggesting that a change in the way courts determine a decedent's intent is appropriate because policymakers can make the process more accurate and "no one will die for courts having done so"). Guzman's take is obviously in jest.

[90] Sitkoff, *supra* note 1, at 647 ("Both kinds of error dishonor the decedent's freedom of disposition. The former gives effect to a false expression of testamentary intent; the latter denies effect to a true expression of testamentary intent.").

[91] *Id.*

be to make the process by which courts authenticate wills more accurate.[92]

Sitkoff's articulation of relative probate-error costs contains two assumptions. First, his analysis focuses exclusively on unintended distributions of the decedent's property and consequently assumes that the only costs associated with probate errors relate to the court's failure to carry out the decedent's intent.[93] This assumption is founded upon the central role that the decedent's freedom of disposition plays in the modern law of succession.[94] Indeed, the fundamental principle of this area of law is that the decedent has broad liberty to distribute her property upon death, and as such, the court's main objective is to honor the decedent's intent.[95] A probate-error cost analysis that focuses on the extent to which the decedent's intent is fulfilled would therefore seem to be appropriate.

The second assumption upon which Sitkoff's probate-error cost analysis is based is the idea that the court's failure to carry out the decedent's intent by ignoring an authentic will is equally costly as the court's failure to carry out the decedent's intent by validating an inauthentic will.[96] The validity of this assumption depends upon how the decedent's property is distributed when a false-positive outcome occurs and when a false-negative outcome occurs. When the court incorrectly validates an inauthentic will, the decedent's property is distributed according to the terms of a will that she did not intend to be legally

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[92] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 ("[T]he question [is] whether relaxing the number of formalities, relaxing the exactness with which those formalities must be complied, or both might reduce the rate of false negatives without increasing the rate of false positives.").

[93] *See* Sitkoff, *supra* note 1, at 647 (explaining the challenges of balancing the risk of probating inauthentic wills with the risk of denying probate to an authentic will); *see also* DUKEMINIER & SITKOFF, *supra* note 1, at 148 (explaining types of error that dishonor the decedent's freedom of disposition).

[94] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("Property owners have the nearly unrestricted right to dispose of their property as they please."); Sitkoff, *supra* note 1, at 643 ("The American law of succession embraces freedom of disposition."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882–85 (2012) (explaining that "[t]he most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death").

[95] *See* RESTATEMENT (THIRD) OF PROP. § 10.1 ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

[96] *See* Sitkoff, *supra* note 1, at 647 ("Both kinds of error dishonor the decedent's freedom of disposition. The former gives effect to a false expression of testamentary intent; the latter denies effect to a true expression of testamentary intent."); *see also* DUKEMINIER & SITKOFF, *supra* note 1, at 148 (reiterating that both errors dishonor freedom of disposition); Sherwin, *supra* note 14, at 463 ("[A] requirement of clear and convincing proof of testamentary intent might be appropriate if an erroneous decision upholding an informal will is substantially more costly than an erroneous decision rejecting an informal will. From the testator's point of view, this does not appear to be the case: an error either way results in a disposition the testator does not want.").

effective.[97] By contrast, when the court incorrectly invalidates an authentic will, the decedent's property is distributed in accordance with the default estate plan that is laid out in the relevant jurisdiction's intestacy statute.[98] Thus, when a false-positive outcome occurs, that decedent's property is distributed according to terms of a will that she did not intend to be a legally effective expression of her intent, and when a false-negative outcome occurs, her property is distributed according to a dispositive scheme that she had no role in crafting. A probate-error costs analysis that treats false-positive outcomes and false-negative outcomes as equally costly could therefore be reasonable.

This Section questions the extent to which these assumptions were true in the past. If the fulfillment of the decedent's intent at one time competed with other goals, then probate errors may previously have had other costs.[99] A deeper understanding of alternative probate-error costs may suggest that these costs were previously asymmetric and therefore might explain the conventional law's preference for false-negative outcomes. Furthermore, if false-positive outcomes and false-negative outcomes previously undermined the decedent's freedom of disposition to different degrees, then probate errors may have once been asymmetric, even if the only costs factored into the analysis are unintended dispositions of property. Under either scenario, the conventional law's preference for false-negative outcomes may have been justified.

A. *The Competing Policy of Family Protection*

As explained previously, freedom of disposition is the organizing principle of the modern law of succession.[100] Sitkoff's suggestion that will-execution reform should be evaluated by a probate-error-cost analysis that focuses on the extent to which the law honors the decedent's freedom of disposition therefore seems to be appropriate. However, to understand why the conventional law is not constructed to make the most accurate determination of a will's authenticity, one must consider not the error costs that are valued today, but those that were valued as the conventional law developed. In the past, freedom of disposition did not always enjoy the

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[97] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63 ("A person who dies with a will is said to die *testate*. The probate property of such a person is distributed in accordance with the terms of the person's will.").

[98] In this situation, the decedent's property is distributed according to the default estate plan of intestacy if she dies with no legally effective will. *Id.* If the court invalidates an authentic will, but the decedent left behind a legally effective will that was executed before the will that the court invalidated, the decedent's property is distributed according to the terms of the prior will. For a discussion on how this possibility affects the analysis of relative probate-error costs, see *infra* Section III.B.

[99] *See infra* Section II.A.

[100] *See supra* notes 94–95 and accompanying text.

same elevated status,[101] and consequently error costs other than unintended dispositions of property likely influenced the development of the law of will execution. When these alternative probate-error costs are recognized, one can better appreciate the conventional law's preference for false-negative outcomes.

Specifically, to understand potential probate-error costs other than unintended dispositions of property, one must consider that family protectionism has competed with freedom of disposition for influence over the development of the law of succession.[102] Although freedom of disposition long ago emerged as the primary policy objective of the law, the decedent does not have absolute freedom to distribute her property upon death,[103] and many of the limitations that the law places on the decedent's freedom of disposition are justified as family protection measures.[104] For example, one major limitation on the decedent's freedom of disposition is the forced spousal share, which requires a deceased spouse to give a portion of her estate to her surviving spouse.[105] Even if the decedent leaves behind an indisputably authentic will that unambiguously expresses her intended estate plan, the law will not allow her to disinherit her surviving spouse. This limitation on freedom of disposition is based in part upon the notion that the decedent has a duty to provide for her surviving spouse after death,[106] and the law forces the decedent to fulfill

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[101] *See infra* notes 119–127 and accompanying text.

[102] *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 209 (2001) ("Donative freedom is a principal value in the American system of inheritance. But . . . even it can become a 'myth' when a testator attempts to leave property to those closest by affective rather than by blood or marital ties."); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 276 (1999) ("[T]he doctrines of mental capacity, undue influence and testamentary fraud incorporate a rational bias in favor of the testator's legal spouse and close blood relations. This bias, sensible though it may be, imperils any estate plan that disfavors the testator's legal spouse or close blood relations in favor of non-family beneficiaries.").

[103] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM LAW INST. 2003); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1158–65 (2013) (elaborating on justifications for restricting testamentary freedom).

[104] *See* Kelly, *supra* note 103, at 1181 ("[S]everal limitations on testamentary freedom involve family members and relatives. The spousal elective share prevents a donor from disinheriting a surviving spouse. The law prohibits conditional bequests that create unreasonable restraints on marriage. And courts have invalidated terms that interfere with the mother-child relationship, sibling interaction, and other family relationships.").

[105] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 512–14 (explaining the elective share of a surviving spouse); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1246 (reporting that forty of forty-one separate property states have forced spousal share statutes).

[106] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 514–15 ("The primary justification for the elective share is that the surviving spouse contributed to the decedent's spouse's acquisition of wealth. This reflects a *partnership theory* of marriage. An older and narrower justification for the elective share is that marriage entails a *support obligation* that continues after death. Both theories justify the

this duty even if doing so contravenes her unequivocal intent.

While the role that family protectionism has played in the development of the forced spousal share is relatively clear, its influence in shaping the law's method of will authentication is less straightforward. Yet, with some effort, the conventional law of will execution can be viewed as a limitation on the decedent's freedom of disposition that is based upon the policy of family protection. By requiring the testator to strictly comply with a variety of formalities, the conventional law of will execution impedes the decedent's exercise of this freedom.[107] The decedent cannot simply distribute property upon death in any manner she chooses; instead if she wants to execute a will, which could potentially disinherit family members, she must do so in a specifically prescribed form that communicates her intent clearly and unambiguously.[108] Some decedents attempt to exercise their freedom of disposition in other ways, and as a result, some genuine wills—even some that are clear and unambiguous—are denied probate because of harmless formal defects.[109] This requirement of the conventional law increases the rate of false-negative outcomes and decreases the overall accuracy of the will authentication process because some genuine wills do not comply with the prescribed form.[110]

To understand how this preference for false-negative outcomes furthers a family protection policy, one must understand how the decedent's estate is distributed in the absence of a will. When the conventional law produces a false-negative outcome and the decedent dies without a legally effective will,[111] her estate is distributed under the default estate plan of intestacy.[112] The intestacy statutes of all states distribute the decedent's property within the family.[113] Surviving spouses and descendants are the primary takers under intestacy, and in their absence surviving parents and siblings take.[114] More remote relatives enjoy the benefit of the decedent's intestate estate when closer family members

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existence of *an* elective share."); Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 493 (2000) ("The policy underlying traditional elective-share statutes . . . is to protect the surviving spouse from disinheritance by the deceased spouse.").

[107] *See* Glover, *supra* note 73, at 423–25 (elaborating on the formal requirements to which testators must adhere).

[108] *See supra* notes 64–68 and accompanying text.

[109] *See supra* notes 74–76 and accompanying text.

[110] *See* Glover, *supra* note 3, at 345 ("[T]he rule of strict compliance prohibits courts from correcting the false-negative outcomes.").

[111] *See supra* note 98.

[112] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63 ("Distribution of the probate property of . . . people, who are said to die *intestate,* is governed by the *default rules* of the law of *intestacy.*").

[113] *See id.* at 70 (describing the basic structure of intestate succession).

[114] *See id.* at 65 ("American intestacy law generally favors the decedent's spouse, then descendants, then parents, and then collaterals and more remote kindred.").

predecease the decedent.[115] Within this context, the conventional law's overproduction of false-negative outcomes can be seen as expressing a preference for the intestate distribution of the decedent's property within the family and therefore as serving a policy of family protection.[116]

The idea that the law of will-execution favors intestate distribution to the decedent's family by impeding the decedent's exercise of freedom of disposition undercuts the prevailing understanding of the modern law of succession. As Professor Adam Hirsch suggests, "[t]he perversity of [this] analysis is readily apparent," as it "contradicts the longstanding ideology of inheritance law, whose central tenet is freedom of testation."[117] If the law's central tenet truly is freedom of disposition, then the law should be designed to facilitate, not hinder, the decedent's exercise of this freedom.[118] However, the conventional law's impediment function that Hirsch finds perverse when viewed through the lens of the modern law seems less troubling when viewed from a past perspective in which freedom of disposition held a lesser status.

This diminished status of freedom of disposition is evident in what Professor James Lindgren describes as the common law's "presumption against testacy."[119] This preference for intestate distribution of the decedent's estate manifested itself in the way that courts interpreted the meaning of wills.[120] Whereas today courts presume that a decedent would prefer to avoid intestacy,[121] in the past courts presumed that the decedent intended to benefit intestate heirs unless the decedent unequivocally expressed the intent to disinherit them.[122] For example, one seventeenth-

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[115] *Id.*

[116] *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1066 n.30 (1996) ("[A] formalities requirement could reflect another, tacit policy: namely, a preference for the distributive scheme mandated by the intestacy statute, absent clear and convincing evidence of intent to the contrary.").

[117] Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 805 (2014).

[118] *See id.* at 805–07 (critiquing Glover's suggestion that formalities discourage effective will making).

[119] Lindgren, *supra* note 78, at 552; *see also* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1029 (1992) (explaining that courts now typically attempt to avoid intestacy).

[120] *See* Lindgren, *supra* note 78, at 552–53 (elaborating how this view is a reversal of the common law presumption against testacy).

[121] *See* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1473 (2013) ("Courts have created a presumption against intestacy . . . ."); *see, e.g.*, *In re* Carmany's Estate, 53 A.2d 731, 732–33 (Pa. 1947) (citations omitted) ("One who writes a will is presumed to intend to dispose of all of his estate and not to die intestate as to any portion thereof. If possible to do so, a will must be construed to avoid an intestacy.").

[122] *See* Lindgren, *supra* note 78, at 552–53 (explaining that the rule protecting heirs has been displaced by the modern rule of favoring constructions that avoid intestacy); *see also* 4 JEFFREY A. SCHOENBLUM, PAGE ON WILLS § 30.16 (2016) ("Every reasonable construction in the will must be made in favor of the heir at law; and he can be disinherited only by words which produce that effect clearly and necessarily, either by express terms or by necessary implication.").

century English court suggested that "the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend where the intention of the testator is not apparently, and not ambiguously to the contrary."[123] Thus, by presuming that the decedent intended to benefit intestate heirs, the way that courts interpreted wills once favored distribution of the decedent's property within the family.

Similarly, just as a preference for intestate takers once existed within the context of will interpretation,[124] the same preference can also be found within the context of will authentication. In the past, some courts openly questioned the appropriateness of granting decedents the ability to pass property through wills and instead favored distribution of the decedent's estate through intestacy.[125] For example, the Supreme Court of Georgia pondered: "Why a desire to favor . . . wills . . . should exist in this State, we do not very well understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property."[126] Likewise, the Supreme Court of California once suggested that "[i]n the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all is often gravely questioned."[127] These examples suggest that, at some point in the past, freedom of disposition was not universally heralded as the cornerstone of the law of succession, and that instead family protection was viewed as a competing policy objective.

A preference for distribution of property within the family could be founded upon a number of rationales. For instance, such a preference could be based on a sense that the decedent has a duty to support dependent family members after death,[128] or relatedly, a preference of intestate distribution could be seen as promoting the general economic stability of

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[123] Gardner v. Sheldon (1671) 124 Eng. Rep. 1064, 1066; Vaughan 259, 268 (Eng.); *see* Thomas v. Thomas (1796) 101 Eng. Rep. 764, 767; 6 T.R. 671, 677 (Eng.) ("The heirs at law must recover the possession of this estate, unless some other person be clearly and unequivocally entitled to take under the will.").

[124] *See supra* notes 119–23 and accompanying text.

[125] *See, e.g.*, Banks v. Sherrod, 52 Ala. 267, 270 (1875) ("The law, and courts of justice, pursuing its spirit and maxims, have always favored heirs."); Mann, *supra* note 74, at 1049 ("[O]ne occasionally glimpses a belief that intestacy should have a privileged status . . . .").

[126] Reed v. Roberts, 26 Ga. 294, 300–01 (1858).

[127] *In re* Walker's Estate, 42 P. 815, 818 (Cal. 1895). Similarly, some early nineteenth-century policymakers expressed their skepticism of broad freedom of disposition by suggesting: "We may safely lean in favor of intestacy; since it rarely happens that the disposition of a disputed will are as just and equitable as those which, in the event of it being set aside, the law provides." Report of Revisers of N.Y. Statutes of 1827–28, *quoted in* W.W. Ferrier, Jr., *Revival of a Revoked Will*, 28 CAL. L. REV. 265, 267 (1940).

[128] This is one of the rationales upon which the forced spousal share, which requires the decedent to leave some portion of her estate to her surviving spouse, is based. *See* DUKEMINIER & SITKOFF, *supra* note 1, at 514.

the familial unit.[129] However, regardless of the underlying rationale of a preference for intestacy, when potential benefits of intrafamilial distribution of the decedent's estate are considered alongside freedom of disposition, probate-error costs become asymmetric.

Specifically, false-negative outcomes become on average less costly than false-positive outcomes. To be sure, a false-negative outcome undermines the decedent's freedom of disposition,[130] but the decedent's family is protected through intestate distribution of the decedent's estate. By contrast, a false-positive outcome also undermines the decedent's freedom of disposition;[131] however, the inauthentic will could possibly disinherit the decedent's family. The conventional law's preference for false-negative outcomes and the consequent intestate distribution of the decedent's estate could therefore be explained as recognition that family protectionism is a policy concern within the law of succession that sometimes competes with the decedent's freedom of disposition.[132]

In sum, when the possibility that freedom of disposition once competed with other policies is recognized, the prospect that probate-error costs were once asymmetric emerges. Although freedom of disposition is the cornerstone of the modern law of succession,[133] its primacy did not always go unquestioned, and consequently, policymakers may have previously viewed false-positive probate errors and false-negative probate errors as having different costs. In particular, these additional error costs may have included the extent to which false-positive outcomes present a risk of familial disinheritance that false-negative outcomes do not.[134] Because the law of will-execution developed under conditions in which protection against familial disinheritance perhaps tempered the decedent's freedom of disposition to a greater extent than it does today, the recognition of alternative probate-error costs places the conventional law within the appropriate context to better understand its preference for false-negative outcomes.

B. *The Fulfillment of Probable Intent*

Sitkoff's conclusion that the law's method of authenticating wills should focus on minimizing the rate of error is founded not only on the

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[129] *See id.* at 65 (suggesting that intestate distribution "serves the secondary function of protecting the economic health of the decedent's family"); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & INEQ. 1, 27 (2000) (explaining that "society has decided that intestacy statutes should benefit and strengthen families").

[130] Sitkoff, *supra* note 1, at 647.

[131] *Id*.

[132] *See* Glover, *supra* note 78, at 632–35; *see also* Glover, *supra* note 73, at 431–34.

[133] *See infra* Section III.A.

[134] *See supra* notes 111–27 and accompanying text.

assumption that an error-cost analysis should focus exclusively on the degree to which the decedent's freedom of disposition is honored but also on the assumption that both false-positive outcomes and false-negative outcomes undermine the decedent's freedom of disposition to the same extent.[135] As discussed above, inclusion of additional probate-error costs, such as familial disinheritance, within the error cost analysis could suggest that a preference for false-negative outcomes is justified.[136] However, the exclusion of family protection from probate-error cost analysis does not inevitably render error costs symmetric, and therefore it does not necessarily suggest that the law's method of will-authentication should focus exclusively on accuracy. Even if the analysis focuses solely on the extent to which the law honors the decedent's freedom of disposition, asymmetric probate-error costs could still explain the conventional law's preference for false-negative outcomes.

To evaluate the soundness of Sitkoff's second assumption, one must therefore understand how the decedent's property is distributed both when a false-positive outcome occurs and when a false-negative outcome occurs. When the law produces a false-positive outcome, the decedent's property is distributed according to the terms of a will that the decedent did not intend to constitute a legally effective expression of her desired estate plan.[137] As such, the costs of a false-positive outcome depend upon the likelihood that the terms of an inauthentic will significantly depart from the decedent's intended estate plan. By contrast, when the law produces a false-negative outcome and the decedent dies without a legally effective will, the decedent's estate is distributed according to the default estate plan of intestacy.[138] The costs associated with a false-negative outcome consequently depend upon the extent to which the default estate plan of intestacy carries out the decedent's intent.

The important takeaway from both of these scenarios is that neither type of probate error necessarily results in an entirely unintended disposition of property. Instead, the extent to which a probate error undermines the decedent's freedom of disposition is a matter of degree. A probate-error cost analysis that focuses on freedom of disposition must therefore compare the likely extent to which an inauthentic will reflects the decedent's intended estate plan and the likely extent to which the default estate plan of intestacy matches the decedent's intent. If inauthentic wills generally do a better job of carrying out the decedent's intended estate plan than the default estate plan of intestacy, then false-positive outcomes are

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[135] Sitkoff, *supra* note 1, at 647.

[136] *See supra* Section II.A.

[137] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63 (explaining the default rules of the law of intestacy).

[138] *Id.*; *see also supra* note 98.

on average less costly than false-negative outcomes. Conversely, if the default estate plan of intestacy typically honors the decedent's intent to a greater extent than inauthentic wills, then false-negative outcomes are generally less costly than false-positive outcomes. If, as Sitkoff suggests,[139] false-positive outcomes and false-negative outcomes on average fulfill the decedent's intent to the same degree, then both types of error are equally costly.

A false-positive outcome could occur if the decedent left behind a rough draft of a document that purports to dispose of the decedent's estate but that the decedent did not intend to be a legally effective will or when a wrongdoer attempts to benefit from the decedent's estate through fraud or duress.[140] As suggested previously, when a false-positive outcome occurs, the decedent's estate is not inevitably distributed only to unintended beneficiaries. Indeed, even an inauthentic will could accurately express the decedent's intended estate plan to some degree. For instance, when the decedent leaves behind a rough draft of a will to which she has not given her final assent, she could be certain of some dispositions of property but not all aspects of her estate plan.[141] Because the inauthentic will accurately reflects some of her intended gifts, a false-positive outcome in this situation would not completely undermine her freedom of disposition. A rough draft of a will that the decedent did not intend to be a final expression of her estate plan will not always partially reflect her intended testamentary gifts, and certainly, an inauthentic will might not accurately reflect her final intent at all. However, for purposes of error-cost analysis, it is important to note that a rough draft could, to a certain extent, accurately describe the decedent's intended estate plan. Therefore, a false-

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[139] Sitkoff, *supra* note 1, at 647; *see also supra* notes 96–98 and accompanying text.

[140] Under the conventional law of will execution, false-positive outcomes resulting from the court's validation of rough drafts are rare. *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 ("A competent person not subject to undue influence, duress, or fraud is unlikely to execute an instrument in strict compliance with all the Wills Act formalities unless the person intends the instrument to be his will."); Guzman, *supra* note 5, at 311 n.18 ("Few people would undergo [the will-execution] ceremony without holding testamentary intent."). However, situations do occur in which the decedent leaves behind a formally compliant will that she does not intend to be legally effective. *See* Glover, *supra* note 3, at 363–66 (explaining that a contestant of the will can show evidence to argue that the decedent did not intend the will to be legally effective). Fraud in this context involves a wrongdoer attempting to probate a will that the decedent did not intend to be legally effective. *See* Glover, *supra* note 78, at 618 (discussing the protection against fraud during the execution of the will and at the time of probate). Similarly, duress in the context of will authentication involves a wrongdoer coercing the decedent to execute a will that she does not intend to be legally effective. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (AM. LAW INST. 2003) ("A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.").

[141] *See* Sherwin, *supra* note 14, at 463–64 n.49 ("[A]n informal document offered as a will often reflects a disposition that the testator at least considered, even if the disposition was ultimately rejected.").

positive outcome will not always undermine the decedent's freedom of disposition.

By contrast, when false-positive outcomes occur because of fraud or duress,[142] the possibility that an inauthentic will accurately reflects the decedent's intended estate plan becomes substantially less likely. In such situations, the will is inauthentic not because it is a work-in-progress to which the decedent has not given her final assent, but instead because a wrongdoer has attempted to benefit from the decedent's estate. In a situation involving fraud, the terms of the will likely do not substantially conform with the decedent's intent and may not reflect her intended testamentary gifts at all because the wrongdoers would not have attempted fraud or duress if they would benefit from the decedent's intended estate plan. Thus, when a false-positive outcome occurs because of the lack of the decedent's final approval, error costs could be insignificant, but when a false-positive outcome occurs because of fraud or duress, error costs are likely substantial.

In contrast to a false-positive outcome, a false-negative outcome could occur when the decedent intends the will to be legally effective but fails to leave behind strong evidence that she intended the will to be legally effective.[143] To be sure, in such situations, the best evidence of the decedent's intended testamentary dispositions is ignored.[144] However, just because the decedent tried to leave behind a legally effective expression of her intent does not mean that her intended estate plan significantly departs from the default estate plan of intestacy. A large portion of her intended testamentary gifts could be fulfilled regardless of whether her estate is distributed according to the terms of her will or in the manner laid out in the intestacy statute. To analyze the error costs associated with a false-negative outcome, one must therefore understand how the default estate plan of intestacy disposes of the decedent's estate and what goals policymakers attempt to achieve when crafting intestacy statutes.

The primary goal of an intestacy statute is to distribute the decedent's

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[142] *See supra* note 140 and accompanying text.

[143] Under conventional law, the decedent must leave behind a formally compliant will, a requirement that creates a substantial risk of false-negative outcomes. *See supra* notes 72–77 and accompanying text.

[144] *See* Matter of Estate of Lohr, 497 N.W.2d 730, 735 (Wis. Ct. App. 1993) ("[T]he language of the will is the best evidence of the testator's intent . . . ."). The language of an authentic will is typically considered such reliable evidence of the decedent's substantive donative intent that courts generally will not look to other evidence of the decedent's intended estate plan. *See* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 595–96 (2016) (explaining the obstacles that may be present when a court tries to ascertain the actual intent of a decedent). Of course, testimony from the testator herself would be better evidence of her intent, but such evidence in unavailable at the time of probate. *See* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 137 (1990) (explaining that the current system cannot guarantee that a testator's intentions and instructions will be followed, despite his caution and efforts).

property in the way that she likely would have intended had she left behind a legally effective will.[145] As Sitkoff explains, "[i]n accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death."[146] The task of designing this majoritarian default rule of course involves "substantial guesswork,"[147] but such guesswork may not have been so difficult in the past when the conventional law of will execution developed.

Without exception, policymakers have crafted intestacy statutes so that the decedent's property is distributed within the family,[148] with close family members, such as spouses and children, taking first and more remote relatives taking in their absence.[149] Intuitively, distribution within the family would seem to be what most decedents would prefer,[150] and indeed, despite the broad freedom of disposition that decedents enjoy, several studies of probate records suggest that, in the past, most people who executed wills distributed the bulk of their estates to close family members in consistent and predictable ways.[151]

Of course, just because most decedents intend to benefit family members and intestacy accomplishes this goal does not mean that the costs

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[145] *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 789 (2012) ("The primary goal of intestacy statutes, as stated by the drafters of the UPC and by scholars, is to transfer property according to the probable intent of a decedent who dies without a will. The statutes try to reach the result that most intestate decedents likely would want . . . ."); Reid Kress Weisbord, *Anatomical Intent*, YALE L.J. FORUM 117, 125 (2014) ("For the most part, intestacy law operates by ascertaining and employing commonly held preferences as a proxy for the probable intent of intestate decedents.").

[146] DUKEMINIER & SITKOFF, *supra* note 1, at 63.

[147] *See id.* (explaining further that the disparate preferences of persons without a will must be aggregated into a model intestate decedent).

[148] *See id.* at 70 (explaining the basic structure of intestate succession).

[149] *See id.* at 65 ("American intestacy law generally favors the decedent's spouse, then descendants, then parents, and then collaterals and more remote kindred.").

[150] *See* CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 207 (1987) ("Despite almost complete testamentary freedom, Americans have whenever possible limited their substantial bequests to spouse, sons, and daughters."); STEWART E. STERK ET AL., ESTATES AND TRUSTS CASES AND MATERIALS 167 (4th ed. 2011) ("Most people who write wills leave the bulk of their property to close family members, and particularly to spouses. [T]hey generally need no legal compulsion to provide for family members.").

[151] *See, e.g.*, Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 254 (1962) (reporting that a study of the probate records of Cook County, Illinois, for the years 1953 and 1957, shows that most testators left their estates to a surviving spouse or, if no surviving spouse, to surviving descendants); Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3, 21–30 (2008) (reporting in a study of probate records of Los Angeles County from 1893 that most testators left the bulk of their estates to family); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 413 (reporting that in a study of Wisconsin probate proceedings from the 1930s and 1940s that "practically all testators transferred their property 'within the family'").

of a false-negative outcome are necessarily insignificant. If the decedent intends to benefit family members in a way that does not conform to the dispositive scheme that the intestacy statute prescribes, error costs of false-negative outcomes could be substantial. This could especially be true under modern conditions in which familial structures vary significantly due to the increase of unmarried cohabitation, nonmarital children, and blended families.[152] However, in the past, the default estate plan of intestacy may have largely conformed with most decedents' intended estate plans because most families had similar structures, with the traditional nuclear family comprised of a husband, a wife, and their children.[153] Therefore, when the conventional law of will execution developed, false-negative outcomes likely had relatively low average error costs because the default estate plan of intestacy substantially aligned with the intended estate plans of most decedents.

Like false-positive outcomes, false-negative outcomes can occur with or without fraud. A false-positive outcome that occurs as the result of fraud involves a wrongdoer attempting to pass a will that the decedent did not intend to be legally effective through the probate process.[154] By contrast, a false-negative outcome that is produced by fraud involves the fraudulent suppression of an authentic will.[155] More specifically, in this scenario the wrongdoer argues during the probate process that a purported will is inauthentic when, in fact, the wrongdoer knows that it is authentic. Despite the similarities between false-positive outcomes and false-negative outcomes that are the product of fraud, the two scenarios on average produce different error costs. Whereas a false-positive outcome that occurs as a result of wrongdoing likely has substantial error costs,[156] a false-negative outcome might not. When a false-positive outcome occurs, the wrongdoer specifies the gifts that are made through the terms of the fraudulent will, and therefore the wrongdoer has wide latitude to describe an estate plan that significantly departs from the decedent's intended estate

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[152] *See infra* Section III.B.

[153] *See* Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 685–87 (1992) ("The transformation of the American family constitutes one of the great phenomenons of the past two decades. The traditional *Leave It to Beaver* family no longer prevails in American society. To be sure, families consisting of the wage-earning husband, the homemaking and child-rearing wife, and their two joint children still exist. But divorce rates are astonishingly high and remarriage abounds. . . . In addition, single parent families and families with two working adults are commonplace. Lesbian, gay, and unmarried heterosexual couples, sometimes with children, constitute unmistakable parts of the American family scene. Inevitably, this transformation of the family will increasingly exert new tensions on traditional wealth-succession laws . . . .").

[154] *See supra* note 140.

[155] *See* Glover, *supra* note 78, at 618 (noting that fraud during a will execution can include instances of suppression of a valid will).

[156] *See supra* note 140 and accompanying text.

plan. However, when a false-negative outcome occurs through fraud, the wrongdoer has substantially less leeway to manipulate the decedent's estate plan because the gifts that replace those intended by the decedent are limited to the default plan of estate plan of intestacy, a limitation that minimizes likely error costs.[157]

Thus, a comparison of the likelihood of unintended disposition of property under both false-positive outcomes and false-negative outcomes suggests that false-positive outcomes typically have greater error costs than false-negative outcomes. At least under previous conditions in which families were more uniformly structured,[158] false-negative outcomes that did not involve fraud likely undermined the decedent's freedom of disposition to a lesser extent than false-positive outcomes that did not involve fraud.[159] Indeed, because most decedents intended to leave property to close family members and this result was achieved through the default plan of intestacy,[160] false-negative outcomes might have had lower error costs than false-positive outcomes. Furthermore, the difference in error costs between false-positive outcomes and false-negative outcomes is likely greater in situations involving fraud. Because the wrongdoer who attempts to pass a fraudulent will through the probate process dictates the terms of the inauthentic will but the wrongdoer who suppresses an authentic will cannot, false-positive outcomes involving fraud likely have higher error costs than false-negative outcomes resulting from fraud. Of course, the evaluation of the typical costs of probate errors is not precise; however, it is plausible that under previous conditions error costs focusing solely on the decedent's freedom of disposition were asymmetric, and therefore the conventional law's preference for false-negative outcomes may have been justified.

All in all, Sitkoff's conclusion that probate-error costs are symmetric is based upon two assumptions. First, he assumes that the only error cost that should be considered is the extent to which the decedent's freedom of disposition is undermined,[161] and second, he assumes that the decedent's intent is undermined to the same extent if her estate is distributed according to the terms of an inauthentic will or if an authentic will is ignored and her estate is distributed according to the default estate plan of

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[157] *See supra* notes 145–53 and accompanying text.

[158] *See supra* notes 152–53 and accompanying text.

[159] *See* Sherwin, *supra* note 14, at 463 n.49 ("Because [intestacy] statutes are designed to mimic the intentions of typical testators, an error resulting in intestacy might, on average, be less at odds with the testator's wishes than an error resulting in probate of an informal disposition the testator did not intend to take effect.").

[160] *See supra* notes 145–53 and accompanying text.

[161] *See* Sitkoff, *supra* note 1, at 647 (stating that error in will execution "dishonor[s] the decedent's freedom of disposition."); *see also supra* notes 93–95 and accompanying text.

intestacy.[162] However, these assumptions may not be appropriate when the process of will-authentication is considered from the perspective of policymakers during the time that the conventional law developed.

If other policy considerations previously competed with the decedent's freedom of disposition, then probate-error costs may once have been asymmetric.[163] Likewise, if, in the past, the default estate plan of intestacy substantially conformed to most decedents' intended estate plans, then the average cost of a false-negative outcome may have been significantly less than the cost of a false-positive outcome, thereby also resulting in asymmetric probate-error costs.[164] Therefore, if at one time there were other costs associated with probate errors other than unintended dispositions of property or if the default estate plan of intestacy substantially mirrored the intended estate plans of most decedents, the conventional law's preference for false-negative outcomes may have previously represented an optimal tradeoff between the two types of probate errors.

III. SYMMETRIC PROBATE-ERROR COSTS

Although probate-error costs may once have been asymmetric,[165] the reform movement's supposition that probate-error costs are now symmetric may be correct if conditions have changed since the time that the conventional method for authenticating wills developed. If, as Sitkoff suggests, the only error cost that should be considered is the extent to which the decedent's freedom of disposition is undermined and if both false-positive outcomes and false-negative outcomes undermine the decedent's freedom of disposition to the same degree, then probate-error costs are now symmetric.[166]

This Section argues that, under current conditions, probate-error costs are now more symmetric than they once were. Specifically, this Section explains that freedom of disposition is now unquestionably the cornerstone of the law of succession and therefore validates Sitkoff's assumption that other error costs should not be considered when analyzing the law's method for authenticating wills.[167] Furthermore, it argues that, although the default estate plan of intestacy may once have largely fulfilled most

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[162] *See* Sitkoff, *supra* note 1, at 647 (holding that that the admission of inauthentic wills and the denial of authentic wills are equally erroneous and must be "balanced"); *see also supra* notes 96–98 and accompanying text.

[163] *See supra* Section II.A.

[164] *See supra* notes 140–57 and accompanying text.

[165] *See supra* Section II.

[166] *See* Sitkoff, *supra* note 1, at 647 (stating that admission of inauthentic wills and the denial of authentic wills need to be "balanced" against each other); *see also supra* notes 93–98 and accompanying text.

[167] *See infra* Section III.A.

decedents' intent,[168] intestacy statutes are no longer as reliable as they once were, and therefore false-negative outcomes likely no longer have smaller average error costs than false-positive outcomes.[169] Because this Section argues that probate-error costs now exhibit greater symmetry, it bolsters the reform movement's argument that the conventional law should be altered so that the process for authenticating wills becomes more accurate.[170]

A. *The Primacy of Freedom of Disposition*

Sitkoff's suggestion that unintended dispositions of property are the only probate-error costs that should be considered is correct. This focus on the extent to which the decedent's freedom of disposition is undermined stems from the central role that freedom of disposition plays in the modern law of wills, which is evident in numerous descriptions of the law by jurists, scholars, and policymakers. As Hirsch explains: "[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy."[171] The Supreme Court of Washington exemplifies Hirsch's understanding when it places freedom of disposition at the forefront of the law of wills thusly: "A basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires."[172] Likewise, echoing their jurist counterparts, legal scholars have repeatedly described the decedent's freedom of disposition as having an elevated status within the modern law of wills.[173] Sitkoff, for example, explains that the "American law of succession embraces freedom of disposition, authorizing dead hand control, to an extent that is unique among modern legal systems."[174]

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[168] *See supra* Section II.B.

[169] *See infra* Section III.B.

[170] *See supra* Section I.B.

[171] Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989); *see, e.g.*, *In re* Estate of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009) ("The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom . . . ."); Cantrell v. Cantrell, No. M2002-02883-COA-R3-CV, 2004 WL 3044907, at *5 (Tenn. Ct. App. Dec. 30, 2004) ("A fundamental principle of the law of wills is that a testator is entitled to dispose of the testator's property as he or she sees fit, regardless of any perceived injustice that may result from such a choice.").

[172] *In re* Estate of Malloy, 949 P.2d 804, 806 (Wash. 1998).

[173] *See, e.g.*, THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 349 (5th ed. 2011) ("Freedom of disposition is the hallmark of the American law of succession."); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444–45 (2012) ("Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession."); Langbein, *supra* note 11, at 491 ("The first principle of the law of wills is freedom of testation."); Spitko, *supra* note 102, at 278 ("The ideal of testamentary freedom grounds the law of testation.").

[174] DUKEMINIER & SITKOFF, *supra* note 1, at 1.

Perhaps the clearest explanation of the primary role that freedom of disposition plays within the law of wills is found in the Restatement (Third) of Property. The Restatement explains: "The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."[175] Although the Restatement recognizes that the decedent's freedom of disposition is not absolute,[176] it suggests that the law's primary focus should be freedom of disposition.[177] It explains further, "[t]he main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."[178] Therefore, as the Restatement makes clear, the modern law of wills is founded upon freedom of disposition, and subject to limited exceptions, the purpose of the entirety of the law in this area is to facilitate the decedent's exercise of this freedom.

The recognition of the primacy of freedom of disposition within the modern law of succession changes the error-cost analysis related to the authentication of wills. In the past, familial disinheritance may have increased the error costs of false-positive outcomes, thereby making probate-error costs asymmetric.[179] Both false-positive outcomes and false-negative outcomes produce unintended dispositions of property.[180] However, unlike false-negative outcomes, which result in the decedent's estate passing to family members through intestacy,[181] false-positive outcomes raise the possibility that the decedent's family will be

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[175] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003).

[176] *See id.* § 10.1 cmt. c ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. . . . Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations."); *see also* DUKEMINIER & SITKOFF, *supra* note 1, at 1 (discussing the ways in which freedom of disposition is curtailed by statutory limitations).

[177] *See* RESTATEMENT (THIRD) OF PROP. § 10.1 cmt. a ("This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor's intention; and (2) that the donor's intention is given effect to the maximum extent allowed by law.").

[178] *Id.* § 10.1 cmt. c; *see also* DUKEMINIER & SITKOFF, *supra* note 1, at 1 ("Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

[179] *See supra* Section II.A.

[180] *See* Sitkoff, *supra* note 1, at 647 (stating that "[probating an inauthentic will] gives effect to a false expression of testamentary intent" and "[denying probate to an authentic will] denies effect to a true expression of testamentary intent").

[181] *See supra* notes 111–16 and accompanying text.

disinherited.[182] If policymakers in the past viewed familial disinheritance as an error cost that should be considered when authenticating wills, they may have favored false-negative outcomes because the default estate plan of intestacy ensured that the decedent's estate would be distributed amongst her family.[183]

The inclusion of familial disinheritance within the error-cost analysis, however, conflicts with the modern law's focus on freedom of disposition.[184] As the Restatement explains, the law should facilitate the exercise of freedom of disposition by attempting to carry out the decedent's intended estate plan.[185] Because a family protection policy is not concerned with the intent of the decedent, the inclusion of familial disinheritance within the probate-error cost analysis undermines the facilitative goal of the law and also decreases the accuracy of will authentication. Thus, given freedom of disposition's elevated status today,[186] family protection should not factor significantly into the modern law's relative error-cost analysis.[187] In turn, the removal of error costs that are not related to freedom of disposition or the decedent's intent increases the likelihood that, on average, the error costs that are included in the analysis are symmetric because the error costs of false-positive outcomes are no longer increased by the potential of family disinheritance.

This shift toward symmetric error costs that results from the focus on freedom of disposition is evident in modern trends regarding how the law authenticates wills. As Hirsch explains, a probate-error cost analysis that considers family protectionism is inconsistent with "the modern statutory trend in favor of rolling back testamentary formalities that appear superfluous" because, if false-positive outcomes were considered more costly than false-negative outcomes, "superfluity should comprise a virtue, and the formalities of execution should remain thick and robust."[188] Put differently, if false-positive outcomes were worse than false-negative outcomes, then high levels of formality should remain in place so that the

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[182] *See supra* notes 130–32 and accompanying text.

[183] *Supra* Section II.A.

[184] *See* Hirsch, *supra* note 117, at 805 (noting the "longstanding ideology of inheritance law, whose central tenant is freedom of testation").

[185] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003).

[186] *See supra* notes 171–78 and accompanying text.

[187] *See supra* notes 117–18 and accompanying text. That is not to say that a family protection goal should be absent from the law of succession, but instead that if the law pursues such a goal, it should be made explicit and not imbedded in the way that the law authenticates wills.

[188] Hirsch, *supra* 117, at 806; *see* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243 (1996) ("The argument for simplifying will formalities and forgiving 'harmless errors' in execution rests on the premise that effectuating testamentary intent, and thus protecting testamentary freedom, is the primary goal of wills law.").

risk of false-positive outcomes is minimized.[189] However, because the goal of reform is not to protect against false-positive outcomes but is instead to increase the accuracy of will authentication, the trend of reduced formality that Hirsch describes is consistent with the view that probate-error costs are symmetric.[190]

In sum, as both Sitkoff and Hirsch suggest,[191] the extent to which the decedent's freedom of disposition is undermined is the only error cost that should be considered when analyzing the method by which courts authenticate wills. Although, other policies, such as family protection, may have once influenced how the law developed,[192] freedom of disposition is now unquestionably the organizing principle of the law of wills.[193] As such, the only error costs that should be considered when authenticating wills are unintended dispositions of property; other error costs, such as familial disinheritance, should be ignored. When error costs other than unintended dispositions of property are discarded from the error-cost analysis, probate errors become more symmetric, which consequently bolsters the reform movement's argument that the law's goal should be increased accuracy in differentiating authentic wills from inauthentic wills.[194]

B. *The Shortcomings of Intestacy*

Sitkoff's conclusion that probate-error costs are symmetric and therefore that the goal of the law's method for authenticating wills should be accuracy is based not only on the assumption that unintended dispositions of property are the only error costs that should be considered but also on the assumption that false-positive outcomes and false-negative outcomes undermine the decedent's freedom of disposition to the same extent.[195] Like his first assumption,[196] Sitkoff's second assumption may have been incorrect in the past, but it is now more likely accurate under modern conditions. As a result, probate-error costs are now more likely symmetric than they once were.

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[189] *See supra* notes 69–71 and accompanying text.

[190] *See supra* notes 81–82 and accompanying text.

[191] *See* Hirsch, *supra* note 117, at 805–06 (focusing on the "central tenet . . . [of] freedom of testation"); Sitkoff, *supra* note 1, at 647 (suggesting a "decedent's freedom of disposition" should be considered).

[192] *Supra* Section II.A.

[193] *Supra* notes 94–95 and accompanying text. Several potential rationales may underlie the primacy of freedom of dispositions. *See* DUKEMINIER & SITKOFF, *supra* note 1, at 16–19 (outlining rationales such as support of a market for social services and efficient distribution of wealth).

[194] *Supra* Section I.B.

[195] *See* Sitkoff, *supra* note 1, at 647 (describing that one error gives effect to a false expression of testamentary intent and that the latter error denies effect to a true expression of testamentary intent); *see also supra* notes 93–98 and accompanying text.

[196] *Supra* Section III.A.

As explained previously, the extent to which probate errors undermine the decedent's freedom of disposition by producing unintended dispositions of property depends upon how the decedent's estate is distributed both when a false-positive outcome occurs and when a false-negative outcome occurs.[197] When a false-positive outcome occurs, the decedent's estate is distributed according to the terms of a will that she did not intend to be legally effective.[198] In such a situation, the potential error costs are high because wills can distribute property to any and all potential beneficiaries.[199] By contrast, when a false-negative outcome occurs and the decedent dies without a legally effective will, her estate is distributed according to the default estate plan of intestacy.[200] As such, the average error costs associated with a false-negative outcome depend upon the extent to which the default estate plan aligns with the decedent's intended estate plan. If intestacy substantially conforms to most decedents' intent, error costs are low, but if intestacy does a poor job of approximating most decedents' intended estate plan, error costs are high.

In the past, error costs stemming from false-negative outcomes were likely to be relatively low because most decedents intended to benefit close family members after death in a fairly predictable manner,[201] and the default estate plan of intestacy achieved this result.[202] In contrast, the error costs of false-positive outcomes were correspondingly high because most decedents intended to benefit their family but inauthentic wills could dispose of property outside the decedent's family.[203] Consequently, probate-error costs were likely asymmetric during the time that the conventional law of will authentication developed.[204] Under today's conditions, however, the default estate plan of intestacy no longer approximates the intended estate plan of most decedents to the same extent

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[197] *See supra* notes 137–38 and accompanying text.

[198] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63 (positing that distributing the decedent's estate "often involves substantial guesswork" because of "the disparate preferences of persons without a will").

[199] *See supra* notes 140–42 and accompanying text.

[200] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63; *see also supra* note 98 (explaining that when the will is invalidated, the decedent's estate is distributed in accordance with the default estate plan of intestacy).

[201] *See* STERK ET AL., *supra* note 150, at 65 ("Studies indicate that most people—both those who write wills and those who do not—prefer to have their property pass to close family members . . . ."); *see also supra* notes 150–151 and accompanying text.

[202] *See* King v. Riffee, 309 S.E.2d 85, 87–88 (W. Va. 1983) ("The purpose of [intestacy] statutes . . . is to provide a distribution of real and personal property that approximates what decedents would have done if they had made a will. Spouses and children enjoy a favored position under the laws of intestate succession because, on statistical average, they are the natural objects of most peoples' bounty."); DUKEMINIER & SITKOFF, *supra* note 1, at 65, 70; *see also supra* notes 148–49 and accompanying text.

[203] *See supra* notes 140–42 and accompanying text.

[204] *See supra* Section II.B.

as it once did, and therefore, the error costs associated with false-negative outcomes are now greater than they once were.

The task of crafting intestacy statutes that match the typical decedent's intent has always involved considerable guesswork,[205] but given the increasing variation in familial structure,[206] this task is more difficult than ever. As Sitkoff explains, "[e]volving social norms have made [crafting intestacy statutes] increasingly difficult, as family and family-like relationships have become more varied and complex. Multiple marriages, same-sex marriages, blended families, adoption, and unmarried cohabitation have become increasingly common. Medical science now offers the making of a baby without coitus."[207] This increased variation in familial structures has, as Justice Sandra Day O'Connor explains, "[made] it difficult to speak of an average American family."[208] As it has become more difficult to identify an average family, it has become correspondingly more difficult to determine how a typical decedent would want her property distributed upon death.[209]

This difficulty in identifying the probable intent of the typical decedent is evident in an empirical study of recent probate records. Although studies of historical probate records confirm that the vast majority of decedents once preferred to distribute property to close family members,[210] the findings of Professor David Horton contradict this conventional

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[205] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 63.

[206] GALLANIS, *supra* note 173, at 59; *see* Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789 (2003) ("[T]he fluidity of family forms contrasts with static legal definitions that presume stability. Although our dominant legal norm is that family is a heterosexual, marital, biological unit, our social and cultural patterns expose a culture that is largely at odds with that nuclear, marital family norm.") (internal citations omitted).

[207] Sitkoff, *supra* note 1, at 645; *see* STERK ET AL., *supra* note 150, at 107 ("For many people in today's America, the family is not a simple entity composed of parents married for life and children born within the marital relationship. Instead, family may be a complex web of relationships affected by divorce, remarriage, adoption, and non-marital relationships.").

[208] Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The composition of families varies greatly from household to household."); *see* Katherine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 322–26 (describing the changes in society that have led to the destandardization of family).

[209] *See* Sitkoff, *supra* note 1, at 646 ("In light of evolving family and family-like relationships, to track the probable intent of the typical intestate decedent, the law of intestacy must likewise evolve. But on some issues, there is no clear majoritarian preference or preferences may be in flux."); *see also* STERK ET AL., *supra* note 150, at 107 ("The changing face of the American family has had a significant impact on intestate succession law . . . ."); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 57 (2000) ("The difficulty of creating a scheme of intestate distribution in the face of the multitude of family combinations cannot be underestimated . . . .").

[210] *See supra* note 151 and accompanying text (citing studies that showed the majority of wills distributed the estates to close family members).

understanding.[211] Horton reviewed the Alameda County, California probate records of decedents who died in 2007, a data set consisting of 668 estates.[212] The study revealed "a surge in 'nontraditional' dispositive choices" that "sweeps within its ambit a diverse group of people with often antagonistic interests."[213] More specifically, Horton points out that whereas the previous studies of historical probate records seldom produced examples of nontraditional estate plans, his study revealed that a large portion of decedents prefer idiosyncratic dispositive schemes. Horton explains, "as drafted, 176 of the Alameda County wills (44%) deviated from the norm of 'equally near, equally dear.' These testators gave nothing to close family members, or favored some children over others, or rewarded friends, far-flung relatives, in-laws, stepchildren, or charities."[214] Thus, Horton's study suggests that modern decedents are less likely than previous generations to prefer a traditional estate plan that benefits close family members in a consistent and predictable way.

The increased variation in nontraditional family structures and the corresponding decrease in predictable preferences for intrafamily distribution of wealth have increased the error costs associated with false-negative outcomes. No longer are false-negative outcomes backstopped by a default estate plan that substantially conforms with the intended estate plans of the vast majority of decedents. As such, when the court invalidates an authentic will and the decedent dies intestate, the costs produced are on average greater than they were when the preferences of most decedents largely aligned with the default estate plan of intestacy. These increased costs associated with false-negative outcomes have evened out the relative error costs of all probate errors. Under current conditions, a false-positive outcome can result in distributions of property that completely deviate from the decedent's intended estate plan.[215] Likewise, because the overwhelming majority of decedents no longer have easily predictable preferences that can be incorporated into the default estate plan of intestacy,[216] a false-negative outcome more likely results in distributions of property that completely deviate from the decedent's intent. Consequently, the error costs associated with both false-positive outcomes and false-negative outcomes are more symmetric than they once were.

In sum, whereas false-negative outcomes may once have been less costly than false-positive outcomes because the default estate plan of

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[211] *See* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 630–33 (2015) ("[P]robate is no longer a family matter.") (internal quotations omitted).

[212] *See id.* at 626–27 (describing the parameters of his study).

[213] *Id*. at 630.

[214] *Id*.

[215] *See supra* notes 140–41 and accompanying text.

[216] S*ee supra* notes 206–14 and accompanying text.

intestacy substantially conformed with the probable intent of most decedents,[217] probate-error costs are now likely more symmetric. The increase in non-traditional family structures has made the task of predicting the probable intent of most decedents significantly more difficult.[218] Thus, false-negative outcomes are no longer backstopped by a default estate plan that substantially mitigates the error costs produced by such probate errors. As the error costs associated with false-negative outcomes increase, they more closely resemble the error costs associated with false-positive outcomes. The diversification of decedents' intended estate plans has increased the symmetry between the error costs associated with false-positive outcomes and false-negative outcomes and consequently supports the reform movement's argument that the law's method of will authentication should be made more accurate.

C. *The Backstop of Testation*

Throughout this Article, it has been assumed that when a false-negative outcome occurs because an authentic will is incorrectly denied probate, the decedent's property will be distributed according to the default estate plan of intestacy.[219] This assumption facilitates the analysis of relative probate-error costs by demarking a clear distinction between the consequences of false-positive outcomes and false-negative outcomes.[220] Nevertheless, this assumption does not accurately reflect the consequences of false-negative outcomes under all circumstances. Sometimes a decedent attempts to execute only one will in her lifetime, and in such situations a false-negative outcome results in intestacy because the decedent's sole will is denied probate. Other times, however, a decedent leaves behind a sequence of wills that reflects changes in her intended estate plan over the course of her life.[221] In such situations, the decedent's last legally effective will governs the distribution of her property.[222] Thus, when a decedent leaves behind multiple wills, a false-negative outcome results in the distribution of the decedent's estate not through intestacy but instead according to the terms of her last legally effective will.

The recognition that not all false-negative outcomes lead to intestate

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[217] *Supra* Section II.B.

[218] S*upra* notes 206–14 and accompanying text.

[219] *See supra* note 98 and accompanying text (explaining the consequences of having no valid will).

[220] *See* text accompanying notes 197–200.

[221] *See, e.g.*, *In re* Hamm's Estate, 227 N.W.2d 34, 44 (Wis. 1975) (involving a testator who executes two wills in 1965, one in 1966, and an additional will in 1970); *see* Krausz v. Garver, No. 9-78-31, 1979 WL 207991, at *2 (Ohio Ct. App. May 1, 1979) (explaining that most people create many wills during their lifetime and proposing a hypothetical situation in which a testatrix executes her first will in 1930 and her twenty-fifth will in 1978).

[222] *See* Green v. Higdon, 870 S.W.2d 513, 520 (Tenn. Ct. App. 1993) ("[T]he last valid will of deceased controls the disposition of . . . property . . . .").

distribution of the decedent's estate raises issues regarding the relationship between the error costs of false-negative outcomes and false-positive outcomes. The potentially high error costs associated with false-positive outcomes remain the same;[223] however, the error costs associated with false-negative outcomes could change, but not necessarily. The primary consideration in analyzing the error costs of false-negative outcomes that result in the distribution of the decedent's estate according to the terms of a previously executed will is that the decedent did not intend the prior will to be legally effective. Indeed, because the decedent attempted to execute a new will, she consequently did not intend her old will to govern the distribution of her estate. The issue then becomes how accurately the decedent's outdated will describes her intended estate plan.

On the one hand, the error costs of false-negative outcomes could remain high because the mere fact that the decedent intended to replace her preexisting will could suggest that the prior will no longer reflects her intended estate plan at all. If the decedent completely changes the dispositive provisions of her will, then the incorrect invalidation of her new will and the consequent distribution of her estate according to an outdated will could entirely undermine her freedom of disposition and therefore could produce significant error costs. Under this scenario, both false-positive outcomes and false-negative outcomes produce potentially high error costs because both result in the distribution of the decedent's property according to a will that the decedent did not intend to be legally effective and that does not reflect her intended estate plan. Consequently, the symmetry between false-positive error costs and false-negative error costs that exists when false-negative outcomes result in intestate distribution would also hold when false-negative outcomes result in the distribution of the decedent's property according to the terms of an outdated will.

On the other hand, the potential error costs of false-negative outcomes would decrease if the will that the decedent intended to amend at least partially reflects the decedent's intended estate plan. Although the decedent's attempt to replace her preexisting will could suggest that she intended to make wholesale changes to her estate plan, the execution of a new will does not necessarily result in drastic alterations to the manner in which property is distributed. In fact, instead of replacing an old will to make significant dispositive changes, the decedent could execute a new will that makes no changes to her estate plan but that simply corrects typographical errors within the document.[224] In this situation, a false-

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[223] *See supra* notes 140–41 and accompanying text.

[224] *See, e.g.*, La Croix v. Senecal, 99 A.2d 115, 116 (Conn. 1953) (involving a testator who executed a codicil to her will that did not change the dispositive scheme but instead added additional information regarding the identity of a beneficiary); *In re* Estate of Wells, 983 P.2d 279, 281 (Kan. Ct.

negative outcome resulting in the invalidation of the decedent's new will would not undermine the decedent's freedom of disposition because the decedent's prior will directs the disposition of her property in the same manner as her new will. As such, a false-negative outcome would not produce significant error costs, and consequently, error costs would become asymmetric under this scenario with false-positive error costs remaining high and false-negative error costs becoming minimal.

The important takeaway from this analysis of the potential error costs produced by false-negative outcomes that result in property being distributed according to the terms of outdated wills is that a clear and simple understanding of such error costs is difficult to formulate. In some instances, false-negative outcomes could produce no error costs because the decedent's old will accurately reflects her intended estate plan. By contrast, in instances in which the decedent's outdated will disposes of her estate in an entirely unintended manner, the error costs produced by false-negative outcomes are incredibly high. Thus, the extent to which freedom of disposition is undermined is difficult to generalize and therefore it is unclear whether false-negative outcomes that result in the distribution of property according to the terms of an outdated will affect the symmetry of probate-error costs.

In sum, when it is assumed that false-negative outcomes result in intestate distribution of the decedent's estate, a fairly clear picture of probate-error costs emerges. Under this assumption, probate-error costs were previously asymmetric.[225] In the past, false-negative outcomes had relatively low average error costs because intestacy largely fulfilled most decedents' intent.[226] Conversely, false-positive outcomes had relatively high average error costs because inauthentic wills could distribute property to anyone and consequently could substantially deviate from the decedent's intended estate plan.[227] Furthermore, under the assumption that false-negative outcomes result in intestate distribution of the decedent's estate, probate errors are now more likely symmetric because intestacy statutes no longer mimic most decedents' intent to the same extent as they once did.[228]

The recognition that some false-negative outcomes result not in intestacy but in distribution of the decedent's estate according to an outdated will complicates the error-costs analysis. Instead of simply evaluating how well intestacy statutes, on average, match decedents'

App. 1999) (involving a codicil that was executed to correct typographical errors but was essentially identical to the testator's will in all material respects).

[225] *See supra* Section II.

[226] *See supra* Section II.B.

[227] *See supra* notes 140–41 and accompanying text.

[228] *See supra* Section III.B.

intended estate plans,[229] this new wrinkle adds greater variability to the analysis because the consequences of false-negative outcomes are no longer tied to the default estate plan of intestacy. However, just because it is difficult to formulate a clear picture of error costs when false-negative outcomes result in the distribution of property pursuant to an outdated will does not mean the law of will-authentication should favor false-negative outcomes over false-positive outcomes.[230] Indeed, because the majority of this Article's error cost analysis suggests that error costs have generally shifted to a more symmetric balance, the analysis ultimately bolsters the reform movement's argument that the law should no longer favor false-negative outcomes and should instead focus on making correct determinations of a will's authenticity as frequently as possible.[231]

CONCLUSION

Probate courts must authenticate wills with imperfect information, and consequently, they sometimes make incorrect determinations regarding a will's authenticity.[232] When an inauthentic will is incorrectly admitted to probate, a false-positive outcome occurs.[233] Conversely, when an authentic will is incorrectly denied probate, a false-negative outcome occurs.[234] Because probate errors, whether false-positive outcomes or false-negative outcomes, are unavoidable, much of the discourse surrounding the authentication of wills has focused on the relationship between false-positive outcomes and false-negative outcomes. Specifically, over the last several decades, a vocal reform movement has argued that the conventional law is designed to minimize false-positive outcomes and

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[229] *See supra* Sections II.B, III.B.

[230] The difficulties of evaluating the error costs associated with false-negative outcomes that result in the distribution of the decedent's estate according to an outdated will could greatly complicate the analysis of this Article if most false-negative outcomes were of this type. However, the answer to this empirical question is not clear. *Compare* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 13 (1992) ("Wills frequently mature years after they are executed, and the cost (both economic and psychological) of adding codicils may deter testators from updating estate plans to take into account changed circumstances. Estate plans become increasingly stale as time passes, and due to human inertia they tend to remain so.") (internal citations omitted), *with* Vars, *supra* note 29, at 1717 n.63 ("[M]any individuals execute multiple wills during their lifetimes . . . .").

[231] *See supra* Section I.B.

[232] *See id.*

[233] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 (defining false positives as spurious findings of authenticity); Kelly, *supra* note 1, at 880 (describing false positives to include probated documents that lack testamentary intent or that have improperly altered terms); Sitkoff, *supra* note 1, at 647 (defining false positives as spurious findings of authenticity).

[234] *See* DUKEMINIER & SITKOFF, *supra* note 1, at 153 (describing false negatives to involve the denial of probate in spite of overwhelming evidence of authenticity); Kelly, *supra* note 1, at 880 (describing false negatives to involve failure to correct mistakes or to probate documents with testamentary intent); Sitkoff, *supra* note 1, at 647 (describing false negatives to involve the denial of probate in spite of overwhelming evidence of authenticity).

therefore produces too many false-negative outcomes.[235] Moreover, this movement argues that law should not focus on minimizing only one type of error but should instead focus on minimizing the overall rate of error.[236] Put simply, the reform movement argues that the goal of will authentication should be accuracy.

This Article applies decision theory to will authentication to more fully explain why the law's goal should be accuracy in distinguishing authentic wills from inauthentic wills. Recognizing that decision-making errors are inevitable, decision theory suggests that a decision-making process should be designed to minimize expected error costs, which are the product of the likelihood of a particular type of error and the cost of that error.[237] If error costs are symmetric, such that false-positive outcomes and false-negative outcomes are equally costly, then a decision-making process should be designed to minimize the overall rate of error.[238] However, if error costs are asymmetric, such that one type of error is on average more costly than the other, then overall accuracy should not necessarily be the goal of a decision-making process. Instead, the goal should be to strike the appropriate tradeoff between false-positive outcomes and false-negative outcomes.[239] If false-positive outcomes are generally more costly than false-negative outcomes, as the conventional law of will authentication assumes,[240] then a decision-making process that produces more false-negative outcomes might be appropriate. By contrast, if false-negative outcomes are typically more costly than false-positive outcomes, then a decision-making process that produces more false-positive outcomes might be appropriate.

Using decision theory as its analytical framework, this Article argues that probate-error costs were once asymmetric with false-positive outcomes on average being more costly than false-negative outcomes[241] but that error costs are likely now more symmetric.[242] This shift from asymmetric error costs to symmetric error costs was driven by two factors. The first factor driving this shift toward symmetry is that freedom of disposition is now unquestionably the organizing principle of the law of

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[235] *See* Glover, *supra* note 3, at 348 (discussing how the perceived higher cost of false-positive outcomes has shaped efforts to minimize probate error).

[236] *See id.* at 349 (discussing how false-positive outcomes are equally as costly as false-negative outcomes).

[237] Bone, *supra* note 28, at 911.

[238] Vars, *supra* note 29, at 41.

[239] *See* Hylton & Salinger, *supra* note 17, at 502 (illustrating the minimization of the expected costs of an error such as a false acquittal); Zywicki, *supra* note 30, at 864 (describing how error costs are minimized by measuring frequency and severity of harm resulting from their occurrence).

[240] *See supra* Section I.B.

[241] *See supra* Section II.

[242] *See supra* Section III.

succession.[243] In the past, familial disinheritance was an error cost that was likely considered in the error costs analysis, and consequently, false-negative outcomes produced lower average error costs than false-positive outcomes because false-negative outcomes resulted in the decedent's property being distributed to family members through intestacy and false-positive outcomes resulted in distribution of the decedent's estate through the terms of an inauthentic will that could potentially disinherit the decedent's family.[244] However, with freedom of disposition now firmly at the center of the modern law of succession, familial disinheritance is not part of the error costs analysis; indeed, the only probate-error costs that should be evaluated are unintended disposition of property.[245] Therefore, because both false-positive outcomes and false-negative outcomes can produce entirely unintended dispositions of property, probate-error costs are more likely symmetric than they once were.

The second factor affecting relative probate-error costs is that the default estate plan of intestacy no longer fulfills the probable intent of decedents to the same extent as it once did.[246] In the past, most decedents' intended estate plans were more uniform and predictable, and as such, intestacy statutes could be crafted to align with most decedents' preferences.[247] The average error costs of false-negative outcomes were minimized because most decedents' intended estate plans were substantially carried out. By contrast, under modern conditions in which familial structures are more varied, the probable intent of most decedents is more difficult to identify.[248] Intestacy statutes no longer minimize the error costs of false-negative outcomes, and therefore both false-positive outcomes and false-negative outcomes likely undermine the decedent's freedom of disposition largely to the same extent.[249] Thus, both the removal of familial disinheritance from the error-cost analysis and the increased difficulty in crafting intestacy statutes that match most decedents' preferences have resulted in probate-error costs becoming more symmetric.

The recognition of the shift from asymmetric probate-error costs to symmetric probate-error costs has two important implications. First, it explains the conventional law's preference for false-negative outcomes. Under conditions of asymmetric probate-error costs, the rationale underlying the conventional law's false-negative-heavy tradeoff between

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[243] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003); DUKEMINIER & SITKOFF, *supra* note 1, at 1.

[244] *See supra* notes 130–32 and accompanying text.

[245] *See supra* Section III.A.

[246] *See supra* Section III.B.

[247] *See supra* notes 148–53 and accompanying text.

[248] *See supra* notes 207–14 and accompanying text.

[249] *See supra* notes 215–16 and accompanying text.

probate-error costs becomes clear. If false-positive outcomes are more costly than false-negative outcomes, the law should minimize false-positive outcomes at the expense of an increased risk of false-negative outcomes. Second and more importantly, the shift bolsters the argument that the law's method of will-authentication should not favor false-negative outcomes but instead should focus on accuracy. Indeed, when probate-error costs are symmetric, the law's method of will-authentication should not favor one type of error over the other, but instead should attempt to reach the correct determination of authenticity as frequently as possible. Thus, with a better understanding of the rationale underlying the conventional method of will authentication and a clearer picture of probate-error costs under modern conditions, policymakers may be more willing to change the way that courts authenticate wills.