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Distributive Justice and Donative Intent

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ABSTRACT

The inheritance system is beset by formalism. Probate courts reject wills on technicalities and refuse to correct obvious drafting mistakes by testators. These doctrines lead to donative errors, or outcomes that are not in line with the decedent's donative intent. While scholars and reformers have critiqued the intent-defeating effects of formalism in the past, none have examined the resulting distribution of donative errors and connected it to broader social and economic inequalities. Drawing on egalitarian theories of distributive justice, this Article develops a novel critique of formalism in the inheritance law context. The central normative claim is that formalistic wills doctrines should be reformed because they create unjustified inequalities in the distribution of donative errors. In other words, probate formalism harms those who attempt to engage in estate planning without specialized legal knowledge or the economic resources to hire an attorney. By highlighting these distributive concerns, this Article reorients inheritance law scholarship to the needs of the middle class and crystallizes distributive arguments for reformers of the probate system.

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INTRODUCTION

Bill Cornwell and Tom Doyle were romantic partners for over fifty years before Bill died at the age of eighty-eight in 2014.¹ The two artists lived together in a brownstone building that Bill had purchased in 1979, when the neighborhood was regarded as somewhat “slummy.”² Tom was financially dependent on Bill, who had the steadier job, and they both relied upon the building for housing and rental income to supplement their Social Security checks.³ Tom and Bill did not marry, primarily because legal marriage was not available to same-sex couples in New York for most of their relationship; however, after legalization, the couple’s health problems prevented them from traveling to the courthouse.⁴

Bill executed a will several years before his death, devising their home to Tom.⁵ Unfortunately, Bill had only one witness attest to the will, and New York law requires two.⁶ The probate court rejected the will on this technicality even though there was no serious doubt as to the document’s authenticity.⁷ Since Bill and Tom had no relationship that was recognized by law, Bill’s nephews and niece claimed the building as their inheritance, potentially displacing Tom, who was then eighty-five years old.⁸ As for Bill and Tom’s relationship,

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1. See Sarah Maslin Nir, *A Brownstone and the Bitter Fight to Inherit It*, N.Y. TIMES (Oct. 23, 2016), http://www.nytimes.com/2016/10/24/nyregion/a-brownstone-and-the-bitter-fight-to-inherit-it.html?_r=0.
 2. See Paul Schindler, *His Husband Gone, Gay Man Fights for Their Home*, GAY CITY NEWS (Oct. 27, 2016), <http://gaycitynews.nyc/husband-gone-gay-man-fights-home> [<https://perma.cc/Q3EG-CYTX>].
 3. See Affidavit of Petitioner Thomas Doyle in Support of Injunctive Relief ¶ 18, Estate of Cornwell, No. 2014-3465 (N.Y. Sur. Ct. filed Oct. 28, 2016) (“I had, for the most part, always been financially dependent on Bill. I worked as a freelancer, so my income was never steady. . . . Without the rental income from the property, and the rent-free living space, I will most certainly struggle to survive.”).
 4. See Nir, *supra* note 1. Tom’s final legal theory was that they entered into a common-law marriage in Pennsylvania when they traveled to that state. See Petition ¶ 5, *Estate of Cornwell*, No. 2014-3465. The court ultimately rejected this theory. See Memorandum of Law, *Estate of Cornwell*, No. 2014-3465.
 5. See Nir, *supra* note 1.
 6. See N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(4) (McKinney 2012).
 7. See Nir, *supra* note 1.
 8. See *id.* The nephews and niece offered Tom a five-year lease in his apartment at a nominal rent, plus nearly 3.5 percent of the sale price. See *id.* Tom found this unacceptable, as it meant he might need to leave the house in five years if he had not died. *Id.* The attorney for the family members questioned whether they would “feel so benevolent” if Tom legally contested the sale of the property that Bill’s relatives intended. *Id.* According to Arthur

the relatives claimed that the couple were merely “friends” or “great companions.”⁹

Despite Bill’s clear desire to bequeath the building to Tom, his donative intent was not fulfilled. This outcome is anathema to the guiding principle of inheritance law: the freedom of disposition.¹⁰ This principle dictates that one’s property after death should be allocated as the decedent would have wanted, with a few narrow exceptions. Freedom of disposition is so well-entrenched in our law that one is generally empowered to disinherit one’s children,¹¹ leave millions of dollars to a pet rather than to human relatives,¹² or condition inheritance on marrying a nice Jewish girl.¹³ This case thus represents an instance of *donative error*, or a situation in which the legal system’s outcome deviates from an individual’s donative intent, and not because some contrary principle requires that result.¹⁴ Unfortunately, these failures to honor donative intent are not unusual.¹⁵ Many courts reject wills on technicalities and refuse to correct obvious drafting mistakes by testators.¹⁶

Schwartz, Tom’s attorney, the case may now fortunately be coming to an acceptable settlement. See *Scoopy’s Notebook, Week of July 13, 2017*, VILLAGER (July 13, 2017), <http://thevillager.com/2017/07/13/scoopys-notebook-week-of-july-13-2017> [https://perma.cc/6PNG-FRJT].

9. See Nir, *supra* note 1.
10. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) (“The organizing principle of the American law of donative transfers is freedom of disposition.”).
11. See ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 564 (10th ed. 2017) (“In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent.”).
12. See Cara Buckley, *Cosseted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES (June 9, 2011), <http://www.nytimes.com/2011/06/10/nyregion/leona-helmsleys-millionaire-dog-trouble-is-dead.html> (discussing the story of Leona Helmsley, who left \$12 million to her dog, Trouble, while disinheriting two of her grandsons).
13. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 905–06 (Ill. 2009) (holding that a trust provision that conditioned distributions on marrying within the Jewish faith was valid); *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 828, 832 (Ohio Ct. Com. Pl. 1974) (holding that a similar requirement in a testator’s will was valid).
14. See *infra* Part I.A.
15. See, e.g., *In re Estate of Patrick*, 728 N.Y.S.2d 354, 354 (Sur. Ct. 2001) (refusing to reform a will even though it was based on a mistake of fact); *Stevens v. Casdorph*, 508 S.E.2d 610, 613 (W. Va. 1998) (rejecting a will because the witnesses did not sign the will in each other’s presence).
16. See Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 407–26 (2001) (surveying the seven classes of cases in which courts refuse to correct drafting mistakes); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 712 (1991) (“Insistence on strict compliance with the wills formalities has demonstrably produced cases that seem not only harsh and unfair, but absurd.”).

The probate system's embrace of formalism, or rigid adherence to rule-like directives, is a primary culprit for this situation.¹⁷ In Bill and Tom's case, having one witness instead of two made the difference between having a legally valid will and a legally irrelevant document. The distinction between a marriage ceremony and a five-decades-long relationship made the difference between Tom's inheriting the entire estate, as dictated by New York intestacy law, and Tom's having no inheritance rights.¹⁸ Moreover, these formalistic doctrines interact in significant ways with an individual's social and economic context. For example, Bill's lack of knowledge of inheritance law doctrines meant that he could not express his donative intent in a way that was intelligible to the legal system. If his lack of an attorney were due to insufficient resources to hire one, then his economic position also contributed to the outcome.

The central claim of this Article is that formalistic wills doctrines should be reformed because they create unjustified inequalities in the distribution of donative errors.¹⁹ Formalism is harmful in this context because it produces donative errors that often fall on those who do not deserve them and who are already experiencing other forms of social or economic disadvantage.²⁰ In other words, those who make a good faith effort to engage in will execution, albeit imperfectly, should not be punished because they lack specialized legal knowledge or the economic resources to hire a skilled attorney to navigate the legal system.²¹

This Article therefore presents a novel rationale for wills reform. While many scholars have critiqued the intent-defeating effects of formalism,²² none have examined the resulting distribution of donative errors or connected it to broader social and economic inequalities.²³ Similarly, while distributive issues have been on the mind of law reformers, these concerns have not been

17. See *infra* Part I.B.

18. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2012) (noting that in the absence of a spouse, the estate will go to blood relatives).

19. See *infra* Part II.C.1.

20. See *infra* Part II.C.2.

21. See *infra* Part II.C.3.

22. See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 159 (1989) ("Yet it is widely recognized that in reality, formalities often defeat donative intent."); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1010 (1992) ("I will then point out that, when formalism falls, intent rises.").

23. See Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 340 (2014) ("Surprisingly, however, there is a paucity of work exploring the class-based aspects of the law of wills, trusts, and estates.").

articulated in a consistent way in the legal literature.²⁴ This Article fills the gap in the inheritance law scholarship by developing the distributive critique of probate formalism.²⁵ While this project draws on egalitarian theories of distributive justice, the distributive analysis is not in tension with the traditional efficiency-based analyses in the literature.²⁶ Because satisfaction of donative intent is a non-scarce good and a significant portion of donative errors likely fall on the less well-off members of the donor population, wills reform holds the promise of decreasing overall donative errors—increasing the efficiency of the probate system—while also reducing unjustified inequalities in the distribution of those errors.

A focus on distributive concerns highlights a new dimension in inheritance law scholarship and practice, which has typically focused on those who have the most wealth in society.²⁷ This focus makes sense insofar as the wealthy have significant property to transmit and so can retain attorneys for that task. But the donor population is heterogeneous, and many middle-class individuals make arrangements for property after their deaths, even if that property is more modest—for example, a small family home or a collection of heirlooms.²⁸ With this population in mind, the Article suggests a host of legal reforms supported by this distributive analysis, reforms which revolve around simplifying will execution and enabling judicial discretion to facilitate donative intent.²⁹

This Article proceeds in three parts. Part I provides the theoretical background for the argument. It discusses the principles of freedom of disposition and formalism, explores the sources of donative error, and explains the need for a distributive analysis in inheritance law scholarship. Part II lays out the specifics of the distributive analysis. It identifies the good at issue, the relevant population, and the distributive principles of equality, desert, and priority

24. See Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 951–53 (putting wills law in the context of broader reform efforts to provide access to justice); John H. Langbein, *Richard Wellman and the Reform of American Probate Law*, 40 GA. L. REV. 1093, 1093–94 (2006) (describing how Wellman, a great law reformer in inheritance law, sought to make probate easier for American families).

25. See *infra* Part III.A.

26. See *infra* Part II.A, III.B.

27. See Naomi Cahn & Amy Zietlow, “Making Things Fair”: An Empirical Study of How People Approach the Wealth Transmission System, 22 ELDER L.J. 325, 328 (2015) (“Trusts and estates practice is oriented to serve the archetypal individual who needs financial planning: a person who is upper middle class—or wealthy—and is seeking to dispose of assets upon death (and can pay legal bills).”).

28. See Goodwin, *supra* note 24, at 954–56 (discussing the many ways in which estate planning is important for low- and middle-income families).

29. See *infra* Part III.B.

that are employed in the analysis. Part III applies this framework to donative intent in the inheritance system. It examines and critiques the current distribution of donative errors, and it concludes by suggesting several avenues for legal reform.

I. PRINCIPLES AND THE PROBATE SYSTEM

This Part provides the legal and social background for understanding the inheritance system and the need for a distributive analysis. Subpart I.A discusses the importance of the freedom of disposition to the inheritance system and introduces the key concepts of donative intent and donative error. Subpart I.B examines formalism and how the formalistic legal environment interacts with an individual's internal characteristics, external resources, and social environment to create either a successful or unsuccessful will execution. Subpart I.C describes the need for a distributive analysis in inheritance law, as such analyses are rare in existing scholarship.

A. Freedom of Disposition

The *freedom of disposition* is the governing principle of American inheritance law.³⁰ This freedom is best understood as a property right—the right to transmit property after death—one of the many in the bundle of property “sticks” that one might possess.³¹ The U.S. Supreme Court has recognized this right as being on par with the right to exclude, highlighting its importance in our jurisprudence.³²

30. See *In re Caruthers' Estate*, 151 S.W.2d 946, 948 (Tex. Civ. App. 1941) (“A testator’s right to bestow his property by will at death is as absolute as his right to convey it during his life time.”); John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) (“[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.” (citing *In re Caruthers' Estate*, 151 S.W.2d 948)); see also Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 5–14 (1992) (discussing the various rationales advanced to justify the freedom of disposition).

31. See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (noting that the dominant metaphor of property law is the bundle of sticks).

32. See *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987) (making the comparison to the right to exclude and holding that the regulation of the right to transmit wealth raises constitutional issues in the context of takings); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740 (1998) (arguing that the right to exclude is fundamental to property law).

Compared to the rest of the world, the United States is an outlier on this front.³³

The freedom of disposition, however, is not absolute, even in the United States.³⁴ There are temporal limits on how long one can exert dead-hand control over property, provided primarily by the Rule Against Perpetuities.³⁵ Another limit revolves around family protection: While children are not protected from disinheritance, spouses can often claim a share of a deceased spouse's estate, even if the decedent tried to disinherit them.³⁶ And for the extremely wealthy, the state is able to take a share of a decedent's wealth against her will through estate, gift, and generation-skipping transfer taxes.³⁷ These are exceptions, each of which embodies a different policy that overrules the freedom of disposition in particular circumstances. Yet, in the absence of a testator's attempt to control property for a long time, to disinherit a spouse, or to plan for estate taxes, the freedom of disposition still reigns supreme.

The supremacy of the freedom of disposition has led inheritance law to be almost singularly focused on *donative intent*, or the testator's desires with respect to the gift, including its amount, terms, and recipients.³⁸ While intent-based inquiries are certainly not unique to this area of law, they perhaps do not

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33. See Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1198 (1990) (noting that many countries protect children from disinheritance).
 34. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 355 ("Arguably, freedom of testation must be limited in order to preserve the very principle which supports it—the market or property principle.").
 35. See JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (Roland Gray ed., 4th ed. 1942) (stating the orthodox form of the rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest"); Robert J. Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219, 219 (1989) (noting that the Rule invalidates will or trust provisions regardless of settlor or testator intent). Even this limit is falling by the wayside as many states move to abolish the Rule in certain contexts. See Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 81 (2015) (discussing the move by many jurisdictions to abrogate or repeal the Rule).
 36. See, e.g., 755 ILL. COMP. STAT. 5/2-8 (2016) (giving the spouse one-third of the estate if there is a descendant of the decedent and one-half of the estate if there is not).
 37. See 26 U.S.C. § 2001(a) (Supp. 2017) ("A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."); *id.* § 2601 ("A tax is hereby imposed on every generation-skipping transfer . . ."); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 825–27 (2001) (justifying the estate tax as promoting democratic values).
 38. See *Houts v. Jameson*, 201 N.W.2d 466, 468 (Iowa 1972) ("[T]he testator's intent is the polestar and must prevail . . ."); *In re Gustafson*, 547 N.E.2d 1152, 1153 (N.Y. 1989) ("[The court's] primary function is to effectuate the testator's intent . . ."); *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983) ("In the first place, in considering a will, it is the long-accepted position of this court that intent of the testator must govern.").

receive as strong of an emphasis elsewhere.³⁹ What makes the task of discovering donative intent complex in this context is clear—the donor is dead and so cannot explain what she wants done with her property.⁴⁰ She must speak through legal documents, such as wills and trusts, or her voice must be presumed through default rules contained in the intestacy regime.⁴¹ Thus, much turns on interpreting these documents and constructing these default rules.

Put another way, the tasks of interpretation and construction are aimed at reducing donative errors. A *donative error* is a situation in which an outcome of the legal system deviates from an individual's donative intent, and not because an accepted contrary principle demands that result. For example, if an estate is distributed according to the dictates of a forged will that does not reflect the decedent's intent, then there is donative error.⁴² The legal system has failed to prevent that will from governing the distribution of the estate, and no contrary principle supports probating forged wills. In contrast, when part of an estate is distributed to the government in the form of estate taxes, this does not constitute a donative error, even if the decedent did not want that result. The taxation of wealth runs counter to donative intent in most cases, although it is an accepted contrary principle of the legal system. Therefore, the legal system is functioning as intended.

Donative error primarily harms the deceased by violating her right to dispose of her property as she wishes after death, but it may secondarily harm those who expect to receive the property but do not, as was the case in the Introduction's example. It also constitutes the unjust enrichment of those who

39. See, e.g., Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 657–58 (2001) (examining the role of intent in antitrust law); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886–87 (1985) (examining the intent of the Founders with respect to originalist constitutional analysis).

40. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941) (“[T]he testator will inevitably be dead and therefore unable to testify when the issue is tried.”).

41. See John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993)) (“[O]ur probate procedure follows a ‘worst evidence’ rule. We insist that the testator be dead before we investigate the question whether he had capacity when he was alive”).

42. Donative errors vary in magnitude. For example, if an individual intends to leave all of her money to a spouse, and it is indeed all left to a spouse, then her donative intent is perfectly satisfied. If, however, half of that money is left to charity instead, her donative intent is only partially satisfied. This outcome is nonetheless superior to having all of the money left to charity, an outcome that would in no way satisfy the individual's donative intent.

receive the property because of the donative error.⁴³ Despite this panoply of potential harms, it is often difficult to determine whether there is actual donative error, as the decedent is unable to comment on the situation. Thus, as is the case with discerning donative intent in general, we must infer when there likely is donative error by using contextual factual information, the probable sources of donative error, and the (unfortunately) limited, but growing, empirical research on testation.⁴⁴

Despite this lack of solid empirical grounding, legal architects try their best to construct a system that actualizes donative intent and avoids donative error. The next Subpart surveys the resultant legal architecture and its defining feature: formalism.

B. Formalism and Donative Error

Formalism is a demanding doctrine. It compels a rule-based law, where the language of rules trumps the policies they embody.⁴⁵ It also requires legal decisionmakers to strictly follow these rules even if it might not make sense in the individual case.⁴⁶ While seemingly draconian, rule-based formalism has several virtues. One virtue is its predictability; if the law is straightforward and

43. See *In re Estate of Tolin*, 622 So.2d 988, 990 (Fla. 1993) (“A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011) (discussing the nature of unjust enrichment and restitution); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 524–25 (1982) (noting the unjust enrichment implications of courts’ permitting errors to go unfixed).

44. See LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 5–6 (2009) (noting the relative lack of empirical work in this area); Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 354 n.53–54 (2016) (collecting the empirical studies of probate files).

45. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (“At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to rule. Formalism ... screen[s] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”). The alternative, of course, would be to employ standards. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) (“At the opposite pole from a formally realizable rule is a standard or principle or policy. A standard refers directly to one of the substantive objectives of the legal order.”).

46. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (describing the three formalist strategies as “promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case),” “ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case),” and “constraining the discretion of judges in deciding cases”).

not subject to judicial discretion, individuals are able to plan their behavior and have their expectations satisfied accordingly.⁴⁷ The second virtue of rule-based formalism is that rules are low-cost for judges to apply, as they do not require consideration and application of background policies to each individual case.⁴⁸ In addition, formalists generally prefer that a court confine its analysis to the four corners of the relevant legal document rather than examining extrinsic evidence, which also preserves judicial resources in many cases.⁴⁹

Formalism manifests in several ways in the probate system, the public system governing the transfer of property upon death and the focus of this Article.⁵⁰ This system is overseen by probate courts, which have jurisdiction over the distribution of the decedent's property whether she died intestate (without a will) or testate (with one).⁵¹ In the case of intestacy, formalism is

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47. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (lauding the predictability of rules). This value is at its apogee when the legal system contains repeat players who will benefit from the predictability over repeated interactions, such as with contracts between sophisticated business entities. See Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 532 (2010) ("If the contract involves two repeat players, adherence to formalism is appropriate . . ."). This is, notably, not the situation in inheritance law, where there is by definition only one death and administration of the estate.
 48. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585 (1992) (describing how rules are lower cost when they are applied to multiple cases, making ex ante information gathering more efficient).
 49. See *In re Estate of Kime*, 193 Cal. Rptr. 718, 727–28 (Ct. App. 1983) (discussing the historical tension between formalism and donative intent). This is a dispute that is not unique to the law of wills. See Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PA. ST. L. REV. 397, 398–99 (2004) (noting how contextual and formalistic theories clash in the law of contracts as well).
 50. This is not to downplay the importance of the private nonprobate system, which encompasses assets such as life insurance, retirement accounts, joint accounts, and revocable trusts. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (listing these as the "pure" will substitutes, in contrast to joint tenancies). More wealth actually passes through these types of legal instruments than through the probate system. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 654 (2014). However, the probate system may hold several advantages for the middle-income families that are the focus on this Article. See David Horton, *In Partial Defense of Probate: Evidence From Alameda County, California*, 103 GEO. L.J. 605, 652–55 (2015) (describing the potential advantages of probate as compared to trusts). Further, the nonprobate system lacks the formalism of the probate system and thus raises different issues that are beyond the scope of this Article. See, e.g., Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 81–110 (2015) (discussing fragmentation problems in the nonprobate system).
 51. See UNIF. PROBATE CODE § 1-302 (amended 2010) (describing the subject matter jurisdiction of probate courts as encompassing decedent's estates, trusts, and the protection of minors and incapacitated persons); Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 758 (2008) ("Broadly

evident in states' intestacy statutes. These statutes provide sets of default rules dictating how the estate should be distributed when there is no will.⁵² These rules, in turn, aim to mimic what a decedent would have wanted had she written a will, in order to maximize satisfaction of her presumed donative intent.⁵³ Intestacy codes normally dictate that property flow to those related to the decedent by blood, adoption, or marriage, with most statutes distributing assets first to a spouse, followed by descendants, ancestors, and collateral kindred, such as cousins and aunts.⁵⁴ These statutes are notoriously rigid. An individual who does not fit into one of the statutorily-defined categories of family receives nothing from the decedent's estate, even if the decedent would have considered that individual to be family.⁵⁵ In other words, courts do not typically inquire into the nature of the decedent's relationships to determine whether the decedent actually would have wanted her property to pass on to other individuals not listed in the intestacy statute.⁵⁶

speaking, *probate* refers to the body of substantive and procedural rules that govern the devolution of decedents' estates by will or intestacy.”).

52. See *Dampier v. Williams*, 493 S.W.3d 118, 124 (Tex. App. 2016) (“Intestacy law provides the default rules on how ‘to distribute an intestate decedent’s estate according to which of his heirs survive him.’” (quoting *Kirkpatrick v. Estate of Kane*, 743 S.W.2d 371, 372 (Tex. App. 1988))); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1036 (2004) (calling intestacy rules “the quintessential default rule in the inheritance field”).
53. See *King v. Riffe*, 309 S.E.2d 85, 87–88 (W. Va. 1983) (“The purpose of these statutes, then, is to provide a distribution of real and personal property that approximates what decedents would have done if they had made a will.”). In the past, intestacy formalism was also seen as a way of protecting the family. See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *L. & INEQ.* 1, 27 (2000) (“Intestacy statutes attempt to distribute a decedent’s property to the decedent’s family, either because the intestacy statute strives to approximate the decedent’s wishes or because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will.” (footnote omitted)).
54. See, e.g., NEV. REV. STAT. §§ 134.030–134.210 (2015); TENN. CODE ANN. § 31-2-104 (2015); see also RALPH C. BRASHER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 4 (2004) (noting the “universal inclusion of the surviving spouse” in intestacy); Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 *B.C. L. REV.* 1647, 1679 (2015) (“[In] intestacy statutes, the state delineates classes of people who are entitled to some right by virtue of their family connection to the person or incident at issue.”).
55. This rigidity has been tempered by the increasing complexity of such statutes, to account for the wider number of acceptable family forms. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 *N.C. L. REV.* 199, 228–30 (2001) (describing various ways in which scholars have attempted to expand family definitions to reflect modern families).
56. The largest exception to this is the slayer rule, which prevents individuals who killed the decedent from acquiring property under intestacy. See, e.g., WASH. REV. CODE ANN. § 11.84.020 (West Supp. 2017) (“No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent”); *In re Estate of Mahoney*, 220 A.2d 475, 477 (Vt. 1966) (applying the slayer rule in the form of an equitable principle).

Assuming a property owner knows the default rules of distribution and disagrees with them, she may write a will to opt out of that default regime. There are, however, a variety of formalistic legal rules that govern the execution and construction of wills as well.⁵⁷ For example, all states require that a will be executed with certain formalities to be valid, typically including at least a writing, signature, and attestation by two witnesses.⁵⁸ This type of wills formalism was initially seen as protective of donative intent because it prevented the admission of fraudulent documents purporting to be wills.⁵⁹ As a result, courts applied a strict compliance rule in enforcing these requirements, and many states continue to do so.⁶⁰ Unfortunately, in many cases such strict compliance has actually undermined donative intent. For example, courts reject wills on technicalities, as in the example in the Introduction, where the execution of a will with only one witness proved fatal even though there was no serious dispute as to the document's authenticity. Cases like these have helped turn scholarly opinion against

57. See David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 554–56 (2017) (describing the Wills Act of 1837, 4 & 1 Vict. c. 26 (Eng.), and this history of formalism).

58. See, e.g., KAN. STAT. ANN. § 59-606 (2005) (“Every will . . . shall be in writing, and signed at the end by the party making the will Such will shall be attested and subscribed in the presence of such party by two or more competent witnesses”); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 550 (1990) (noting how these three requirements have persisted in various forms). These formalities have value, as they serve various functions for the legal system. See Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 34–36 (2016) (summarizing the various functional arguments).

59. As one court explained:

The purpose of the statutory requirements with respect to the execution of wills was to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. To effectually accomplish this, the statute must be strictly followed.

Savage v. Bowen, 49 S.E. 668, 669 (Va. 1905).

60. See SITKOFF & DUKEMINIER, *supra* note 11, at 176 & n.56 (noting that only eleven states have adopted harmless error by statute and that many limit its application to only certain types of errors); see, e.g., Stevens v. Casdorph, 508 S.E.2d 610, 613 (W. Va. 1998) (rejecting a will because the witnesses did not sign the will in each other's presence). Sometimes, however, courts provide ad hoc relief from the strict compliance rule. See, e.g., *In re Snide*, 418 N.E.2d 656, 658 (N.Y. 1981) (excusing the mistakes of a married couple who accidentally signed each other's wills); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 376 (2017) (questioning whether strict compliance is in fact very strict in practice). This is an insufficient solution, however, as it leads to inconsistent results and uncertainty about how courts might adjudicate future wills disputes.

formalism, and it is now seen as a force for defeating rather than actualizing donative intent.⁶¹

Once a will has been deemed valid, formalism still guides courts' efforts at will construction.⁶² Here, many courts apply a combination of the plain meaning rule, which bars the consideration of extrinsic evidence that alters the plain meaning of the will's text, and the no reformation rule, which prevents reforming the words of a will even if reformation would correct obvious mistakes or typos in will drafting.⁶³ For example, in the case of *In re Patrick*,⁶⁴ the testator executed a will giving his house to his daughter, on the belief that she was the only one of his children who did not own her home.⁶⁵ He even signed an affidavit on the day of the will execution explaining that this was his sole reason for doing so.⁶⁶ Yet he was mistaken: Two of his other children also did not own their homes. The court refused to correct the mistake, saying that it was obliged to examine only the words of the will, which were clear and unambiguous.⁶⁷ Many courts in other jurisdictions would render the same outcome in this case, as only a minority of states give courts the power to reform wills.⁶⁸

61. See David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1112–20 (2015) (describing the historical scholarly turn against formalism and the subsequent problems integrating nonformalist reforms into a formalist field).

62. See Joseph W. deFuria, Jr., *Mistakes in Wills Resulting From Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 2 (1990) ("Testators would be shocked to learn that relatively 'minor' scriveners' errors can completely thwart their last wishes." (footnote omitted)).

63. See, e.g., *Burnett v. First Commercial Tr. Co.*, 939 S.W.2d 827, 829–30 (Ark. 1997) (refusing to reform will to correct a clerical error that resulted in partial intestacy); *MacKinnon v. Advance Pattern Co.*, 123 N.E.2d 89, 89 (N.Y. 1954) (mem.) (refusing to admit extrinsic evidence to vary the will's plain meaning and intent). Sometimes, courts provide ad hoc relief from this plain meaning rule, just as they do in the will execution context, but with similar problems. See, e.g., *In re Estate of Gibbs*, 111 N.W.2d 413, 418 (Wis. 1961) (concluding that the court could ignore "details of identification" in a will).

64. 728 N.Y.S.2d 354 (Sur. Ct. 2001).

65. *Id.* at 354.

66. *Id.*

67. *Id.* at 355 ("[T]o reform a will that has no ambiguities results in a will that is not that of the decedent. When the words used in a will are clear and definite there is no power to change them." (citing *In re Watson*, 186 N.E. 787, 789 (N.Y. 1933))). Of course we cannot know with certainty what the testator would have done if he had known about his other children's property ownership, but his stated reasons for the disposition clearly did not apply to the disposition he made.

68. See, e.g., *Noble v. Bruce*, 709 A.2d 1264, 1277 (Md. 1998) (noting "the longstanding rule in this state against the reformation of wills" (citing *Shriners Hosps. v. Md. Nat'l Bank*, 312 A.2d 546, 555 (1973))); *Flannery v. McNamara*, 738 N.E.2d 739, 745 (Mass. 2000) ("Reformation of wills is presently prohibited in Massachusetts."); *In re Lyons Marital Tr.*, 717 N.W.2d 457, 462 (Minn. Ct. App. 2006) ("[T]here is no authority for the Minnesota

Thus, formalism can contribute to donative error, but it is only one part of a broader picture. The ability to create a valid will is the product not only of the background legal environment but also of several other factors, including a testator's internal characteristics, external resources, and social environment.⁶⁹ These factors interact in dynamic ways with the legal context, but each also holds independent importance. With regard to internal characteristics, one must have the capacity to form donative preferences and the motivation to fulfill those preferences by creating a will.⁷⁰ Possessing that motivation is no small feat in this context; laziness, procrastination, and discomfort confronting topics such as disability and death can easily defeat an attempt at estate planning.⁷¹ Therefore, some degree of mental fortitude is required to think through and operationalize one's donative preferences. The failure to do so has consequences—donative error. It produces donative errors when there is a mismatch between an individual's donative preferences and the law's intestacy provisions. Alternatively, donative errors may also be generated when a testator fails to diligently update her will once her preferences or property interests change.⁷²

One may have the motivation to engage in estate planning but lack the resources to do so effectively, as a free-floating preference will not be actualized

courts to reform an unambiguous will.”); Sitkoff, *supra* note 50, at 651–52 (“[A] minority but growing number of courts permit recourse to extrinsic evidence to clarify and even reform the terms of a will.”). For an example of the modern trend, see *In re Estate of Duke*, 352 P.3d 863, 865 (Cal. 2015), which states: “We conclude that the categorical bar on reformation of wills is not justified . . .”.

69. See Elizabeth Anderson, *Justifying the Capabilities Approach to Justice*, in MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES 81, 96 (Harry Brighouse & Ingrid Robeyns eds., 2010) (noting that a given person's capabilities are a “product of her internal endowments, her external resources, and the social and physical environment in which she lives”).

70. The capacity element is understood by the legal system as a test of one's capacity to make a will. For example, one court noted:

[A] testatrix possesses the capacity to make a will if, at the time of executing it, she understands that a will is intended to dispose of her property after her death, is capable of remembering generally what property and persons related to her are subject to the will's disposition, and is capable of setting forth an intelligent scheme to dispose of her property.

Patterson-Fowlkes v. Chancey, 732 S.E.2d 252, 253 (Ga. 2012) (citing *Strong v. Holden*, 697 S.E.2d 189 (2010)).

71. See Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008) (discussing reasons why people do not execute wills). Further, these unfortunate tendencies are not the province of any particular economic group. See Horton, *supra* note 61, at 1123 (suggesting that intestacy affects estates regardless of the size of the estate).

72. See Mark Eghari, *6 Reasons to Revise Your Estate Plan as Soon as Possible*, FORBES (Jan. 2, 2017, 12:31 PM), <http://www.forbes.com/sites/markeghrari/2017/01/02/6-reasons-to-revise-your-estate-plan-as-soon-as-possible> [<http://perma.cc/7RZM-5CDF>] (describing the various circumstances in which an estate plan might need updating).

on its own. One important resource is the specialized legal knowledge about formalistic inheritance law doctrines. This includes not only substantive knowledge of the body of law in a given state but also knowledge of how to communicate one's donative preferences in a way that is intelligible to that state's probate system. For example, the layperson may not know that it is best practice to include a residuary clause in a will to account for all property that she might own at death.⁷³ This is because donors are one-time players in the game of life and death, and so lack the experience to know the various rules that apply or contingencies that might arise.⁷⁴ Thus, this type of knowledge is likely to be rare in the population.⁷⁵ The Internet may help to bridge this gap by providing access to estate planning forms that an individual can fill out. However, in a formalistic legal environment that is unforgiving of mistakes by lay estate planners, these forms will be, at best, an incomplete substitute for knowledge of the law and how it might interact with the substance of those forms.⁷⁶

If one does not have the necessary legal knowledge, there is always the option of hiring an attorney. But attorneys must be paid, and the market rates for legal services put them out of reach for many middle-class households.⁷⁷ Even without the economic resources to hire an attorney, a person may have a qualified lawyer who is a friend or family member in her social network. With luck, that individual may be willing to work for free. Consequently, one's social

73. See *Cook v. Estate of Seeman*, 858 S.W.2d 114, 115 (Ark. 1993) (holding that a will lacking a residuary clause resulted in partial intestacy).

74. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012) ("Unlike other acts of legal significance, such as entering into a marriage or consumer contract, the will-making process is unfamiliar to most individuals and requires legal draftsmanship and compliance with testamentary formalities.").

75. See Arden Rowell, *Legal Rules, Beliefs, and Aspirations 1* (Oct. 14, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903049 (noting that the general population tends to conflate formal legal rules with subjective legal beliefs and normative legal aspirations). Knowledge of the inheritance system may even be uncommon among the lawyer population, as attorneys frequently specialize heavily in their own areas. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 803 (1983) ("[W]ith the dramatic growth of available knowledge, it is becoming increasingly difficult for any individual to be proficient—or even competent—in all fields.").

76. See Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, EST. PLAN., Aug. 2011, at 27, 28–30 (detailing some of the pitfalls of estate planning using Internet resources).

77. See Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 2 (2009) ("Millions of people in our country who do not qualify for subsidized civil legal services, but who do not make enough money to hire an attorney at market rates of \$200 to \$350 an hour, have few means of obtaining adequate representation for the myriad of unavoidable legal problems they routinely encounter.").

environment may be able to overcome one's lack of financial means in certain circumstances.

There is, however, a dark side to leveraging one's social environment for estate planning. Despite having the motivation or resources to execute a valid will, one might still fall prey to third-party wrongdoing or negligence. Wrongdoing may be overt, such as threats and intimidation to create a will that does not comport with one's wishes.⁷⁸ Alternatively, a third party might act subtly, influencing or deceiving a vulnerable individual to execute a will that does not reflect her donative intent.⁷⁹ Or third parties might act after the decedent's death, by trying to pass off a document as a valid will when it is not or by trying to destroy a valid will that is not favorable to them.⁸⁰ It is also possible that, even absent intentional wrongdoing, a retained attorney was not competent or diligent in carrying out her duties, making errors in the drafting or execution of the will.⁸¹ In fact, many of the cases in which there is clear donative error fall into this category.⁸² The third-party conduct in these cases is not intentional, but it still creates donative error. Yet many courts will not correct the mistake. Such mistakes are less likely to plague higher-income individuals, who can retain skilled trusts and estates attorneys, but middle-income households have to rely on general practitioners who may be more prone to error.⁸³

Thus, given a formalistic legal environment, donative errors can have many sources. First, donative errors can arise from a lack of engagement with

78. See, e.g., *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948) (noting that heirs exerted "physical force" or created a "disturbance" to prevent the decedent from executing a will in favor of her friend).

79. See, e.g., *McDaniel v. McDaniel*, 707 S.E.2d 60, 61–63 (Ga. 2011) (describing how one son took advantage of his elderly's father weak mental state and lied to him so that he would disinherit his other son).

80. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. LAW INST. 1999) (discussing the presumption that a testator is considered to have revoked a will that cannot be found after death if the will was last known to be in the testator's possession, a presumption that unscrupulous relatives could use to their advantage).

81. See, e.g., *Simpson v. Calivas*, 650 A.2d 318, 320–21 (N.H. 1994) (describing an attorney who imprecisely described real property in the will, causing an unintended disposition).

82. See Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 33–37, 45–48 (2016) (discussing seminal cases of the application of harmless error, in which the testator had the benefit of counsel).

83. See Mark A. Armitage, *Regulating Competence*, 52 EMORY L.J. 1103, 1103 (2003) (noting that failures of diligence and competence often go hand in hand); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 596 (1994) (describing how many people have to "lump it" on many legal matters and get low-cost or minimal representation on many others").

the estate planning process, which may lead to errors if there is a mismatch between the dictates of the intestacy statute and the decedent's donative intent.⁸⁴ Second, they can derive from a lack of personal knowledge of inheritance law and the lack of a knowledgeable attorney. These are costly errors because wills may be misconstrued by the probate courts or rejected for failing to comply with formalities. Third, donative errors can come from a third party, such as a family member or incompetent attorney, who interfered with or mishandled the estate planning process in a way that warped or misrepresented donative intent. Donative errors flow here in two possible ways: Either the resulting will does not reflect actual donative preferences, or it does but will nonetheless be rejected or misconstrued by the court.

Formalism is a primary contributor to donative errors, but it interacts in significant ways with background social and economic conditions that are often unequal. The next Subpart surveys the existing scholarly literature on formalism and donative intent, identifies a lack of distributive analyses in that literature, and argues that such an analysis is needed.

C. The Need for a Distributive Analysis

The probate system's embrace of formalism is clearly in tension with its emphasis on donor intent.⁸⁵ Scholars of different stripes have pointed this out and critiqued the legal system for its inefficiency, as it increases the overall number of donative errors.⁸⁶ Early scholars and reformers made it their explicit goal to maximize the legal system's intent-serving outcomes, or in the language of this Article, to minimize the number of donative errors.⁸⁷ Working in a more doctrinal tradition, they urged courts to transplant doctrines such as substantial compliance or harmless error to the realm of wills law, which had a strong tie to formalism that eschewed such approaches.⁸⁸

84. See Gary, *supra* note 53, at 1 ("An analysis of intestacy law must begin with the recognition that an intestacy statute cannot work equally well for every potential decedent. Indeed, developing an intestacy statute that will meet the needs or wishes of all persons is both unnecessary and impossible.").

85. See, e.g., *In re Estate of Cole*, 621 N.W.2d 816, 817–18 (Minn. Ct. App. 2001) (describing these as the two "overriding rules" in inheritance law); Baron, *supra* note 22, at 159; Lindgren, *supra* note 22, at 1010.

86. While there has been strong scholarly consensus on this, it is not unanimous. See, e.g., John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73, 80–81 (2008) (questioning the adoption of a harmless error rule).

87. See, e.g., Langbein & Waggoner, *supra* note 43, at 529 (noting that reformation is supported by the policies of the Wills Act, policies which are meant to be intent-serving).

88. See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53–54 (1987)

Modern scholars working in the law and economics tradition have picked up the baton and advanced the discussion by focusing on donative intent in terms of system design and error reduction.⁸⁹ These scholars have brought the powerful tool of economic analysis to the conversation, which has helped clarify the issues at stake and the range of potential reform options. What unites these two groups of scholars is a focus on efficiency—reducing the overall number of donative errors and thereby maximizing the realization of donative intent.

These scholarly accounts have added much to the discussion of donative intent, but they are incomplete. What is missing is a distributive analysis, or a normative evaluation of how the relevant legal arrangements “distribut[e] perceived goods and ills over persons.”⁹⁰ To date, there has been no sustained analysis of the distribution of donative errors in the population or of the connection between those errors and broader distributions of socioeconomic advantage in the population.⁹¹ This Article provides this crucial distributive analysis by inquiring into who bears the burdens of donative errors in the probate system.

Those who likely bear this burden have not been the traditional focus of inheritance law practice or scholarship. Trusts and estates practitioners typically have clients who are on the wealthier side of the socioeconomic spectrum, which makes sense insofar as such individuals have significant property to transmit and so can retain attorneys for that task.⁹² Inheritance law scholarship has predictably followed suit, with distributive analyses confined primarily to discussions of inheritance in the context of taxes and wealth inequality.⁹³ There has been less scholarly focus on the effects of probate

(advocating for harmless error); Langbein, *supra* note 30, at 489 (arguing for the substantial compliance doctrine).

89. See, e.g., Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 348–49 (2016) (analyzing will execution doctrines in terms of false positive and false negative errors); Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 862–63 (2012) (urging and performing a more systematic economic analysis of the Uniform Probate Code); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 648–49 (2004) (applying an agency costs analysis to the law of trusts, using donative intent as the primary value).

90. See Robert Hockett, *Putting Distribution First*, 18 THEORETICAL INQUIRIES L. 157, 165 (2017).

91. See Crawford & Infanti, *supra* note 23, at 340.

92. See Cahn & Zietlow, *supra* note 27, at 326–27.

93. See, e.g., Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 78 OHIO ST. L.J. (forthcoming 2018). For one possible exception, see Adam S. Hofri-Winogradow, *The Stripping of the Trust: A Study in Legal Evolution*, U. TORONTO L.J.,

doctrines on the donative intent of less well-off members of the donor population, such as those in the middle class.

A focus on this subpopulation is warranted for two reasons. First, the donor population is heterogeneous in terms of economic resources, rather than being homogeneously wealthy. The probate property of those in the middle class might simply be heirlooms or keepsakes, such as an antique ring or a chest of photos. These can be imbued with sentimental significance, and giving them away can help the decedent express the meaning of relationships she had during life.⁹⁴ But the estate might also consist of modest financial assets such as a small family home or inheritance from another family member. These assets can provide stability or economic opportunity for lower-income families, and their effective transmission through a will can be of utmost importance to the decedent as well as to her survivors.⁹⁵ Second, even those of more modest means may find themselves needing to interact with the inheritance system for a variety of reasons. The probate system in particular serves many functions that are useful to middle-class families, including dealing with creditors,⁹⁶ transferring title to the family home,⁹⁷ or resolving intrafamilial disputes over the estate.⁹⁸ Given the importance of this segment of the population, a goal of this Article is to provide the theoretical basis for a new direction in inheritance law scholarship that focuses more on middle-class individuals and their interactions with the probate system.

While distributive analyses typically play second-fiddle to efficiency analyses in legal scholarship,⁹⁹ the lack of any distributive analyses in this

Winter 2015, at 1, which explores some distributive consequences of trust law reform efforts.

94. See Cahn & Zietlow, *supra* note 27, at 341–42 (describing how these keepsakes often constitute a type of “emotional inheritance”); Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 276–83 (2016) (describing how “cherished possessions” are intertwined with identity and life narratives).
95. See Goodwin, *supra* note 24, at 954–56.
96. See, e.g., *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 (Mo. 2010) (en banc) (authorizing the barring of a creditor’s claim after a probate proceeding).
97. See, e.g., *In re Chenoweth*, 132 B.R. 161, 164 (Bankr. S.D. Ill. 1991) (“The purpose of probate is to establish the legal status of the will and furnish record evidence of the rights to property existing under the will.” (first citing *Ashmore v. Newman*, 183 N.E. 1, 8 (1932); then citing *Havill v. Havill*, 163 N.E. 428, 430 (1928); and then citing *Crooker v. McArdle*, 163 N.E. 384, 385 (1928))).
98. See James N. Zartman, *Independent Administration in Illinois*, 12 PROB. L.J. OHIO 71, 71 (2002) (noting that the core function of probate courts is to settle disputes).
99. See Hockett, *supra* note 90, at 158–59 (noting the focus on efficiency analyses instead of on distributive ones).

domain is surprising given their presence in several other legal fields.¹⁰⁰ Further, the distributive analysis suggested here does not face some of the analytical roadblocks that hinder distributive analyses in other domains. For reasons elaborated in Parts II and III, the development of a distributive analysis of donative intent need not be in tension with traditional efficiency analyses,¹⁰¹ even though efficiency and equality are often painted as being in tension.¹⁰²

A crystallized distributive analysis would perhaps also help efforts at wills reform, which have unfortunately not been successful in a majority of jurisdictions. Consider the primary doctrinal debate in will construction. As noted earlier, many courts follow the plain meaning of the words in the will, even if the results would likely frustrate donative intent.¹⁰³ Scholars have urged states to adopt a reformation rule instead, which would give the courts power to correct errors if there were clear and convincing evidence of the testator's donative intent.¹⁰⁴ Only a minority of states and courts have signed on.¹⁰⁵ The reform results are even worse in the realm of will execution, where scholars have urged states to adopt a harmless error rule. This rule would permit the

100. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24–31 (1970) (introducing distributive justice concerns into the analysis of tort law); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980) (defending the pursuit of distributional goals in contract law).

101. See *infra* Part II.A (discussing how the nature of donative intent satisfaction, viewed as a good, contributes to this conclusion); Part III.B (discussing how the analysis here supports similar reforms to those proposed by efficiency-based analyses because the targeted population is the same).

102. See generally ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975) (painting equality and efficiency as oppositional); Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 557–59 (1980) (discussing the potential tradeoffs between efficiency and distributive concerns). This Article embraces value pluralism and does not suggest that there should be a singular focus on equality in the design of inheritance system. See Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2143 (1990) (“Value pluralism is the view that public values—those values at stake in political choice—ought to be understood to be diverse in a particular and profound way: these choices typically implicate very different kinds of values or even very different conceptions of values.”).

103. See *Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) (declining to attribute the testator's obvious meaning to “heir” in a will and to consider the testimony of the drafting attorney as extrinsic evidence); *supra* text accompanying notes 62–68.

104. See UNIF. PROBATE CODE § 2-805 (Unif. Law Comm’n 2010) (“The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence . . .”); Langbein & Waggoner, *supra* note 43, at 577–80 (arguing for reformation).

105. See SITKOFF & DUKEMINIER, *supra* note 11, at 341 (“Although still a minority position, reformation of a will to correct a mistake that is proved by clear and convincing evidence is no longer uncommon.”).

probate of wills with technical defects if there were clear and convincing evidence that the testator intended the document to be her will.¹⁰⁶ Only eleven states have adopted harmless error, and many have limited its application to only certain types of errors.¹⁰⁷

In sum, a distributive analysis would enhance and deepen the existing scholarship on donative intent, center the scholarship on middle-class individuals who interact with the probate system, and crystallize distributive arguments for reformers in their efforts to achieve legal change. The next Part lays out the structure of such a distributive analysis, drawing on principles derived from theories of distributive justice.

II. THE DISTRIBUTIVE ANALYSIS

In a perfect world, the probate system would eliminate donative errors at zero cost. But we do not live in a perfect world. First, there are donative errors that result from human error, and some of these are unavoidable so long as the legal system requires humans for its operation.¹⁰⁸ Second, there are donative errors produced by the legal regime as it interacts with the social world. It is these more structural sources of donative error that are the focus of this Article and give rise to the distributional question: Who should bear the costs of this imperfect legal system?¹⁰⁹ This focus on distribution is not meant to downplay the importance of efficiency (reducing the overall number of donative errors) or decision costs (reducing the resources required to run the probate system),¹¹⁰ but merely to develop the missing distributive element in the legal scholarship on donative intent. The aim is not to present or defend a comprehensive view of distributive justice, nor are all possible distributive principles considered. Rather, the goal is to draw upon certain legally relevant

106. See MONT. CODE ANN. § 72-2-523 (2015).

107. See SITKOFF & DUKEMINIER, *supra* note 11, at 176, 176 n.56.

108. See Derk Bodde, *Age, Youth, and Infirmary in the Law of Ch'ing China*, 121 U. PA. L. REV. 437, 463 (1973) ("Some degree of whim and error is inevitable in every legal system.").

109. See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015) ("[Distributional analysis] involves meticulous and deliberate contemplation of the many interests affected by the existing . . . law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time.").

110. This Article assumes a constant amount of resources devoted to the probate system. While it is worth asking how costly different probate regimes might be and how probate funding should be prioritized against other societal goals, these questions are beyond the scope of this Article. In addition, further research in a distributive vein might explore how the underfunding of the probate system contributes to donative errors and how these errors might systematically fall on certain sectors of the population.

distributive principles to create the analytical framework that will be applied in Part III.

Each Subpart in this Part responds to a different crucial question for the distributive analysis. Subpart II.A responds to the question: What is being distributed? Framed in terms of a benefit, the answer is the satisfaction of donative intent; framed in terms of a burden, it is donative error. Subpart II.B replies to the question: Among whom is the good being distributed? The response is the population of individuals whose property passes through the probate system after death, termed the donor population. Subpart II.C answers the question: What are the rules of distribution? Equality is the normative baseline, and the principles of desert and priority clarify which departures from equality are particularly normatively objectionable.

A. The Good

The first question for any distributive analysis is what good is being distributed, and all goods can typically be conceptualized as either benefits or burdens.¹¹¹ Framed in terms of a benefit, the good at issue here is the satisfaction of donative intent with respect to property owned at death. Framed instead in terms of a burden, what is distributed is donative error. The satisfaction of donative intent is not in and of itself a scarce good. In contrast to a good like land, which is limited by the surface area of the Earth, there is no limited pool of donative intent satisfaction. Thus, there is no zero-sum game between claimants on the resource.¹¹² Since the legal system simultaneously creates and distributes the good, it is not the case that satisfying one person's donative intent necessarily means that another person's donative intent cannot be satisfied.

Because of the unique features of this good, there will be less tension between the distributive analysis presented here and an efficiency analysis focused on maximizing donative intent or reducing donative errors. Indeed, the two analyses would complement each other. Efforts to reduce donative

111. See Daphne Barak-Erez, *Distributive Justice in National Security Law*, 3 HARV. NAT'L SECURITY J. 283, 291 (2012) (noting that "benefits and burdens are almost inherently interconnected" in considering distributive justice matters); Hockett, *supra* note 90, at 165 ("Legal rules and rulings, statutory enactments, government programs and policies all tend to yield 'winners' and 'losers'—recipients of benefits and burdens at the receiving end, recipients by whom we wish to do right.").

112. This may explain in part why judges do not see the distributive issue in current probate doctrines. See Frank H. Easterbrook, *The Supreme Court: 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 12 (1984) ("Judges who see economic transactions as zero-sum games are likely to favor 'fair' divisions of the gains and losses.").

errors to zero may very well also reduce inequalities in the distribution of donative errors if the primary subpopulation subject to donative errors is the less well-off in the relevant population, as described below. This would mean that satisfying the donative intent of this group serves both to reduce the overall number of donative errors and to reduce the unjustified inequalities in the distribution of errors. Therefore, efficiency and equality analyses would reinforce rather than undermine each other.

While the satisfaction of donative intent, or the avoidance of donative error, is the primary object of analysis in this Article, some mention must be made of the broader distribution of well-being in society as well. There are two reasons for this. First, the distributions of donative error and well-being in society are conceptually linked: The availability of social or economic resources impacts the capacity of individuals to engage successfully with the probate system, just as the structure of the legal system affects one's ability to acquire said resources.¹¹³ Second, the distributive principle of priority requires an understanding of who is better off and worse off by some measure in the population. Accordingly, locating individuals or groups in the distribution of well-being is necessary to understanding the normative attractiveness of a given distribution of donative errors.¹¹⁴

Mentioning this broader distribution of well-being raises the question of how to define well-being. This is a question, however, that this Article does not seek to answer. Theorists of distributive justice have debated at length what the proper "currency" of distributive justice should be, offering up such possibilities as primary goods, economic resources, utilities, or capabilities.¹¹⁵ For the purposes of this analysis, it is sufficient to note the uncontroversial fact that there are currently inequalities in the well-being distribution, whichever metric is employed.¹¹⁶ The simple presence of this inequality—that some are better off and some are worse off—facilitates the later prioritarian analysis. In addition, because there is significant overlap between measures of well-being, there will

113. See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 491–93 (2010) (discussing the destructive effects of intestacy law on lower-income individuals).

114. See *infra* Part II.C.3.

115. See Amartya Sen, *Capability and Well-Being*, in *THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY* 270, 283 (Daniel M. Hausman ed., 3d ed. 2008) (discussing the different currencies of well-being).

116. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 336–76 (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2014) (tracing the inequality in wealth over time).

likely also be overlap in the sets of reforms supported by those who advocate different currencies of distributive justice.¹¹⁷

B. The Population

The second task for any distributive analysis is to determine the population that is subject to the distribution.¹¹⁸ The population at issue in this Article is the *donor population*, defined as any person whose property interacts with the probate system after death.¹¹⁹ Thus, there are two conditions for being a member of the donor population. First, one must have property to transmit. This could include valuable property such as real estate or financial assets, but it could also include property that is emotionally laden but not otherwise monetarily valuable, such as family heirlooms or photographs. Second, at least some of that property must be transmitted through the probate system. This includes any property that is transferred in probate court through a will or through the application of the relevant intestacy statute.

The donor population is neither uniform nor coextensive with the population at large. It is diverse in that it includes those wealthy enough to employ attorneys as well as those who do not have significant assets. It diverges from the general population because some do not meet the first condition of inclusion and simply do not have property to transmit.¹²⁰ Consequently, the donor population does not encompass those who are worst off in society as a whole, and the worst off in the donor population will still fall somewhere in the

117. See Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1257–59 (2013) (demonstrating how different conceptions of welfare can converge in support of certain legal reforms).

118. See GRZEGORZ LISSOWSKI, *PRINCIPLES OF DISTRIBUTIVE JUSTICE* 35 (Tomasz Bigaj trans., Barbara Burdich Publishers 2013) (2008) (“For a full description of the distribution situation it is necessary to determine ... the number of distribution participants.”); Hockett, *supra* note 90, at 170 (“Where there are distributions, there are beneficiaries or victims—those to whom desirable or undesirable things are distributed.”).

119. This definition makes the donor population dependent on the governing legal regime. In other words, changes to the probate or nonprobate systems could alter how many and which individuals are included in the donor population. Thus, it is worth paying attention to how reform options might affect both who will be included in the donor population as well as the distribution of donative errors within that population. The shrinkage or expansion of the donor population is not necessarily problematic in and of itself, provided that individuals’ donative intent is being satisfied in some inheritance system and the distribution of donative errors falls within an acceptable range.

120. Many, though, will have at least some personal effects that could be passed on. See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 227–54 (1961) (describing the importance of even meager amounts of property to patients in a mental health hospital).

middle class. In addition, there are those whose property does not engage significantly with the probate system, as it passes through the private nonprobate system or is divided using more informal mechanisms of transfer.¹²¹

C. The Distributive Principles

The final question for a distributive analysis is what the rules of distribution should be, and thus, what the ideal distribution looks like.¹²² The short answer is that the distribution should contain no unjustified inequalities. This Article adopts equality as the normative baseline not only because of its importance in the legal system but also because of its normative weight in Western thought.¹²³ Therefore, donative errors should ideally fall equally on the donor population, or everyone's donative intent should be equally satisfied. But not all inequalities are created equal. Inequalities are particularly normatively undesirable if they violate both the principles of desert and priority. The desert principle requires that the burdens of donative error not be deserved, in that they do not result from an individual's relevant voluntary actions. The priority principle dictates that the burdens of donative error should not fall on those who are already experiencing other forms of social or economic disadvantage, or those who are less well-off in the donor population.

These three distributive principles of equality, desert, and priority are not the only ones that could have been chosen, and this Article is not intended as an exhaustive evaluation of how all distributive rules could be applied to the distribution of donative errors. There are two reasons, however, why these three distribution rules are especially well-suited to this project. First, each of them is particularly salient in Western thought generally and legal discourse specifically, as described in the relevant sections below. This makes it easier to bridge the philosophical discussion of distributive justice and the legal dialogue over donative intent and wills doctrines. Second, while these principles are not necessarily incompatible, they do not always exist in harmony. As a result, this

121. See OR. REV. STAT. § 114.515 (2015) (describing the small estates affidavit process, in which a personal representative can allocate the estate without needing to go through probate, unless there is a dispute); *supra* note 50 (discussing the nonprobate system).

122. See Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 535 (1992) ("In distributive justice, things are allocated to persons in accordance with a criterion of distribution. The criterion will be chosen in the light of, and will be applied to promote, the purpose that a given distribution is intended to realize.").

123. See Richard M. Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149 (2017) (tracing the importance of the legal equality norm through the judicial oath to do equal right to the poor and to the rich); *infra* notes 125–129 and accompanying text.

analysis is an exercise in establishing a sort of “overlapping consensus,”¹²⁴ as a way to make the project appealing to multiple ideological camps. When the results of the distributive analyses converge, there will be strong support from various sectors for reform. In contrast, when an inequality only violates the principle of priority, but not desert, then it has a mixed status. It will only receive qualified support from the distributive analysis presented here as well as a lower ranking in the order of inequalities to address in legal reforms. Consequently, the use of these three principles may also provide a way to prioritize targets for legal reform.

1. Equality

Equality is a principle that holds high status in Western thought and law.¹²⁵ Numerous thinkers have conceptualized, applied, and critiqued it, and the expansive and diverse literature on egalitarianism evidences its centrality.¹²⁶ Equality exerts something of a gravitational pull on all theories of distributive justice, which either require it explicitly or have some egalitarian assumption at their core.¹²⁷ Further, there is emerging empirical evidence that an aversion to inequality emerges in childhood across cultures, demonstrating its near universal appeal.¹²⁸ Thus, equality has assumed the role of the starting point or

124. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987) (defining overlapping consensus as a consensus “affirmed by the opposing religious, philosophical and moral doctrines likely to thrive over generations”).

125. See STUART WHITE, EQUALITY 1 (2007) (“The demand for equality is central to modern politics. It has inspired many of the major political struggles of the past two centuries . . .”). Equality may have either intrinsic or instrumental value. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 177 (1986) (making this distinction between intrinsic and instrumental value); see also Thomas Nagel, *Equality*, in *THE IDEAL OF EQUALITY* 60, 62 (Matthew Clayton & Andrew Williams eds., 2000) (noting that there are individualistic and communitarian arguments for equality as an intrinsic good).

126. The literature is immense. Some helpful starting points include EQUALITY (David Johnston ed., 2000), and EQUALITY: SELECTED READINGS (Louis P. Pojman & Robert Westmoreland eds., 1997).

127. See AMARTYA SEN, INEQUALITY REEXAMINED 3 (1992F) (“[T]he major ethical theories of social arrangement all share an endorsement of equality in terms of *some* focal variable, even though the variables that are selected are frequently very different between one theory and another.”). Sen gives the example of libertarianism, which focuses on “extensive liberties to be *equally* guaranteed to each.” *Id.* Another example is utilitarianism, a distributive theory often portrayed as being at odds with egalitarian theories, whose egalitarian cornerstone, attributed to Jeremy Bentham, is “everybody to count for one, nobody for more than one.” See JOHN STUART MILL, *UTILITARIANISM* 93 (7th ed. 1879) (1861).

128. See, e.g., P.R. Blake et al., *The Ontogeny of Fairness in Seven Societies*, 528 NATURE 258, 259–60 (2015) (finding that advantageous inequity aversion arises in early childhood while disadvantageous inequity aversion arises in later childhood, with some variation by

baseline for analysis, with any departure from it needing explanation or justification.¹²⁹

For the analysis here, there are three main senses in which the concept of equality is important. First, there is *moral equality*, or the notion that each person has equal moral worth and deserves equal respect.¹³⁰ This principle, if not the practice, has been ensconced in American law since the founding of the Republic, enshrined as it is in the Declaration of Independence.¹³¹ It garners practically universal adherence in Western thought, as it derives from the Enlightenment belief that humans are moral equals rather than worthy based on their status in a social hierarchy.¹³²

Second, there is *formal legal equality*, or the notion that individuals should be treated equally before the law. At a basic level, this means that there must be universal laws that apply to all with no one being “above the law.”¹³³ In terms of the judicial system, it requires that like cases be treated alike and that unlike cases be treated unlike.¹³⁴ This formal legal equality is a well-established part

society). A sense of fairness based on equal treatment may exist in other species as well. See Sarah F. Brosnan & Frans B.M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297, 298–99 (2003) (finding that capuchin monkeys rejected unequal rewards for the same task).

129. See, e.g., Richard Wollheim & Isaiah Berlin, *Equality*, 56 PROC. ARISTOTELIAN SOC'Y 281, 305 (1956) (“The assumption is that equality needs no reasons, only inequality does so; . . . differences, unsystematic behaviour, change in conduct, need explanation and, as a rule, justification.”); see also PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE 232–33 (1990) (defining the logical structure of the presumption of equality).
130. See, e.g., JEREMY WALDRON, ONE ANOTHER’S EQUALS: THE BASIS OF HUMAN EQUALITY 1–2 (2017) (termining this form of equality “basic equality”); see also, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977).
131. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . .”).
132. See JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 71 (J.W. Gough ed., 1948) (1690) (noting that governments “govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the countryman at plough”); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687, 1700–01 (1986) (“[S]ince the eighteenth century Western society has valued the proposition that individuals are morally equal.” (citing AMY GUTMANN, LIBERAL EQUALITY 18 (1980))).
133. See WHITE, *supra* note 125, at 4–5 (defining legal equality as the combination of universal laws where no one is above the law, impartial application of laws, and equal protection of citizens).
134. See Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 5 (1974) (“Thus, a law is justly applied when applied to all those and only those who are alike in satisfying the criteria specified in the law. . . . [It is] without prejudice, interest, or caprice.”). This maxim has an ancient pedigree, deriving from Aristotle. See ARISTOTLE, THE NICOMACHEAN ETHICS 112 (David Ross trans., J.L. Ackrill & J.O. Urmson eds., Oxford

of our constitutional regime and finds explicit statutory expression in antidiscrimination law as well.¹³⁵ This is not to say that formal legal equality has been achieved, either historically or in the present day, but it remains a central aspiration.¹³⁶

Third, there is *substantive equality*, or the principle that benefits and burdens should be distributed among the relevant population members in an equal fashion.¹³⁷ Substantive equality has both a social and an economic dimension. There is social equality when there is a widespread belief that no one is superior to any other person on the basis of class, gender, race, or other social characteristics.¹³⁸ There is economic equality when resources are equally distributed among society members so that these members have equal opportunities.¹³⁹ At a fundamental level, substantive equality represents equality in fact or equality on the ground, whereas moral and legal equality are more abstract in nature.

These three senses of equality are related and complementary. Moral equality provides the theoretical basis for why we should treat individuals equally before the law or why society's resources should be distributed more or less equally among its members.¹⁴⁰ Legal equality ensures that the aspirations of moral equality are enforced through respect for rights recognized by the law,

Univ. Press 1991) (1568) (“[T]his is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares.”).

135. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); 42 U.S.C. §§ 2000e to 2000e-16 (2012) (codifying Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, sex, national origin, and religion); *Romer v. Evans*, 517 U.S. 620, 629–36 (1996) (applying equal protection principles in the context of sexual orientation); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting that Title VII requires the removal of discriminatory barriers to employment).

136. See Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 252 (1983) (“America’s devotion to ideals of equality has always been ambivalent. Thomas Jefferson, who drafted the Declaration of Independence, may have been troubled about owning slaves, but he was not wholly convinced that black people were the equals of whites.” (citing WINTHROP D. JORDAN, *WHITE OVER BLACK* 430–40 (1968))).

137. See IWAO HIROSE, *EGALITARIANISM* 1 (2015) (“*Egalitarianism*: a class of distributive principles, which claim that individuals should have equal quantities of well-being or morally relevant factors that affect their life.”).

138. See Samuel Scheffler, *The Practice of Equality*, in *SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUALS* 21, 21–22 (Carina Fourie et al. eds., 2015) (understanding this as a relational view of equality, as opposed to a distributive view of equality).

139. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 356–58 (2011).

140. See RONALD DWORKIN, *SOVEREIGN VIRTUE* 1 (2000) (“Equal concern is the sovereign virtue of political community—without it government is only tyranny—and when a nation’s wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect.”).

and it is often a mechanism through which substantive equality can be achieved.¹⁴¹ Substantive equality also reflects the aspirations of moral equality, and it creates the conditions for truly equal legal outcomes, which may not always be guaranteed by formal legal equality alone.¹⁴² This is because treating individuals who are alike on one legally salient dimension may not always be appropriate if the material conditions of those two individuals are different.¹⁴³ Those with more material goods, improved social position, or simply more power are better able to take advantage of the legal system to achieve desired outcomes.¹⁴⁴

Just as equality is an aspiration of the broader legal system, it is also an aspiration of the probate system. Moral equality manifests as an equal respect for an individual's donative intent, regardless of the content of that donative intent or the amount of property one owns at death.¹⁴⁵ In other words, fulfilling

141. See, e.g., TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 17–19 (2007) (arguing for introducing an egalitarian sensitivity into tort law); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 217–18 (1980) (noting the possibility for common law decisions to be redistributive); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 1 (2011) (describing the family as a legal institution at the nexus of social and economic distribution).

142. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986) (“Individual needs and positions may have to be taken into account in any particular situation in order to achieve equality of outcome.”).

143. As Max Weber has explained:

Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency.

MAX WEBER ON LAW IN ECONOMY AND SOCIETY 228 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954); Nagel, *supra* note 125, at 60 (“It is a commonplace that real equality of every kind is sensitive to economic factors.”). Feminists have developed this point extensively in legal theory with respect to social equality, pointing out that legal equality will not lead to substantive equality so long as men and women are differentially situated in society. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 397–401 (1984) (summarizing some of the feminist contributions to the substantive equality discourse).

144. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 397 (“Yet as is often the case, guarantees of formal liberty and formal equality generally favor those groups in society that are already the most powerful.”); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1287 (1991) (“Inequality is treating someone differently if one is the same, the same if one is different. Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself.”).

145. See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 630 (1988) (arguing that the legal system should enforce this through the principle of “equal planning under the law”).

the donative intent of a farmer passing on the family farm to her kids is just as important as the satisfaction of a billionaire's wishes to create trust funds for her pets.¹⁴⁶ Legal equality requires that individuals have equal rights to pass on their property at death. If two individuals execute valid wills, the probate court should treat them the same way, enforcing their demands regardless of content. Likewise, the probate court must apply the intestacy statute the same way to all individuals who die intestate, not changing the distribution because of the particulars of a given case. Even if this formal legal equality were achieved, however, it is not the case that every person's donative intent would be satisfied in equal fashion, creating the specter of substantive inequality. For example, consider two individuals who execute wills with identical provisions; one complies with will execution rules because she had access to quality counsel while the other does not because she did not. Formal legal equality demands that we treat these cases as unlike because one complied with the necessary will formalities while the other did not. However, the reason why they are unlike may be because of unequal conditions that made obtaining quality counsel difficult for the second person. Thus, the legal outcomes diverge, as required by formal legal equality, but this leads to a substantive inequality with respect to donative intent, compounding an existing socioeconomic inequality. This situation highlights the tension between these two forms of equality in the probate system.

Equality, however, is only the starting point for the analysis. A distribution that contains inequalities may not necessarily be unjust from a distributive perspective, though it may still be subject to critique on efficiency grounds. The next two Sections explore those inequalities that are particularly normatively undesirable.

2. Desert

Like equality, desert plays an outsized role in the law.¹⁴⁷ It is strongly connected to the concept of responsibility, or the idea that everyone has free will to pursue certain courses of action and may benefit or suffer from the consequences of whatever course has been chosen.¹⁴⁸ Many of these consequences

146. See Buckley, *supra* note 12.

147. Also, like equality, desert may have both intrinsic and instrumental value. See SHELLY KAGAN, *THE GEOMETRY OF DESERT* 15–19 (2012) (discussing the nature of desert's value). For an argument against desert, see Alan Zaitchik, *On Deserving to Deserve*, 6 PHIL. & PUB. AFF. 370 (1977).

148. See Marc Fleurbaey, *Four Approaches to Equal Opportunity*, in RESPONSIBILITY AND DISTRIBUTIVE JUSTICE 77, 81–82 (Carl Knight & Zofia Stemplowska eds., 2011) (“[W]hen

will be legal in nature. This is apparent in criminal law, where the basis for punishments is often put in terms of desert.¹⁴⁹ It also governs large swaths of tort law, which has adopted legal concepts such as assumption of risk and contributory negligence to limit recovery when plaintiffs are in some way at fault.¹⁵⁰ Desert even crops up in areas of law that one would not necessarily expect, such as contracts,¹⁵¹ intellectual property,¹⁵² and even personal jurisdiction.¹⁵³ This ubiquity in law reflects widely held beliefs that the distribution of benefits and burdens in society—in this case legal entitlements—should in some way reflect the actions of the individuals who are receiving those benefits and burdens.¹⁵⁴

Because of the importance of desert in Western thought and law, philosophers have incorporated it into egalitarian theories, attempting to meld equality and desert together. This branch of egalitarian theory is called luck egalitarianism.¹⁵⁵ Its central idea is that inequalities in a given distribution may

two individuals are held responsible for the differences that create unequal achievements between them, this normally means that redistribution between them is not needed.”); see also DAVID MILLER, *SOCIAL JUSTICE* 95–102 (1976) (examining whether determinism undermines the concept of desert and concluding that it does not).

149. See, e.g., PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 11 (2008) (describing “empirical desert” as a basis for criminal punishment); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (arguing that utility and desert are compatible and mutually reinforcing in criminal law).
150. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520 (2003) (describing the historical emergence of assumption of risk and contributory negligence); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665 (1985) (examining the role of desert in tort law).
151. See Todd D. Rakoff, *The Five Justices of Contract Law*, 2016 WIS. L. REV. 733, 765–78 (2016) (examining the role of desert in contract law).
152. See Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 454–56 (2013) (examining the role of the “labor-desert” concept in intellectual property law).
153. See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 191–93 (1998) (applying desert theories to personal jurisdiction).
154. See generally David Miller, *Distributive Justice: What the People Think*, 102 ETHICS 555 (1992) (summarizing empirical research on when individuals perceive desert versus equality as being the operative distributive principle). The desert analysis presented here regards institutionalized desert claims. See John Kleinig, *The Concept of Desert*, 8 AM. PHIL. Q. 71, 71 (1971) (“Institutionalized desert claims, which have the (at least implicit) general form: ‘X deserves A of Y in virtue of B.’ The deserved treatment in these cases presupposes a context of legal or quasi-legal rules . . .”).
155. See generally G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). This school of thought is not without its critics. See, e.g., S.L. HURLEY, *JUSTICE, LUCK, AND KNOWLEDGE* (2003) (arguing that responsibility does not offer adequate guidance in the

be justified if those inequalities are in some sense deserved.¹⁵⁶ To be deserved, an outcome must derive from either voluntary action or “option luck,” rather than “[b]rute luck.” Option luck “is a matter of how deliberate and calculated gambles turn out—whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined.”¹⁵⁷ In contrast, brute luck is “a matter of how risks fall out that are not in that sense deliberate gambles.”¹⁵⁸ For example, we would view losing all of one’s wealth due to an unforeseen earthquake more sympathetically than losing all of one’s wealth due to a conscious decision to play the slot machines in Las Vegas.

There is a second sense in which desert comes into play in evaluating inequalities. This is when a particular “desert basis,” or characteristic or prior activity of a person, makes that person deserve some sort of treatment.¹⁵⁹ To do so, the desert basis must trigger some kind of appraising attitude.¹⁶⁰ This necessarily imports external values into the desert analysis, as appraising attitudes may differ based on the social context.¹⁶¹ In the case of good desert, this attitude may be admiration, approval, or gratitude.¹⁶² For example, a person who saves a child from drowning will trigger a positive appraising attitude from others. As a result, we may want to reward that person with respect, esteem, or possibly even money. In contrast, bad desert involves a

distribution of goods); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999) (arguing that the point of equality is to eliminate oppression rather than to eliminate the effects of brute luck); Samuel Scheffler, *Choice, Circumstance, and the Value of Equality*, 4 POL. PHIL. & ECON. 5 (2005) (arguing that adopting conservative notions of choice and responsibility undermines the egalitarian project).

156. See SHLOMI SEGALL, *WHY INEQUALITY MATTERS: LUCK EGALITARIANISM, ITS MEANING AND VALUE* 23–24 (2016) (defending the egalitarian view that equality is intrinsically valuable so long as inequalities derive only from the fault of one’s own actions); Larry Temkin, *Equality, Priority, and the Levelling Down Objection*, in *THE IDEAL OF EQUALITY*, *supra* note 125, at 129 (“Non-instrumental egalitarians care about *equality*. More specifically, on my view, they care about *undeserved, nonvoluntary*, inequalities, which they regard as bad, or objectionable, because unfair.”).

157. Dworkin, *supra* note 155, at 293.

158. *Id.*

159. See JOEL FEINBERG, *DOING & DESERVING* 58 (1970) (“If a person is deserving of some sort of treatment, he must, necessarily, be so *in virtue of* some possessed characteristic or prior activity.”).

160. In other words, it is about “fitting desired forms of treatment to qualities and actions.” MILLER, *supra* note 148, at 86.

161. See Julian Lamont, *The Concept of Desert in Distributive Justice*, 44 PHIL. Q. 45, 49 (1994) (“When people make desert-claims they are not simply telling us what desert itself requires. They unwittingly introduce external values, and make their desert-judgements in the light of those values.”).

162. See MILLER, *supra* note 148, at 85 (“[G]ood desert (i.e. deserving benefit as opposed to punishment) is a matter of fitting desired forms of treatment to qualities and actions which are generally held in high regard.”).

performance or activity that triggers a negative appraising attitude, such as disapproval or disgust. If, instead of saving the child, a person laughed at the child's misfortune, this would trigger such a negative appraising attitude. That person may be subject to negative social sanctions, such as loss of respect and esteem. Further, if this happens in a jurisdiction that has a duty to rescue rule, there may be legal consequences as well.¹⁶³

With respect to the distribution of benefits and burdens, then, one must ensure that a given distribution actually tracks the desert basis, and not some irrelevant factor or one outside of the individual's control.¹⁶⁴ For example, the movement to abolish pay inequity based on sex has moral force because compensation is tracking sex rather than performance.¹⁶⁵ Sex is not something that is within the control of the individual, relevant to workplace compensation, or a voluntary performance that triggers a relevant appraising attitude. In other words, it is an invalid desert basis. If the distribution of benefits and burdens is tracking such an invalid desert basis, whatever inequality that results cannot be justified by the principle of desert.

Therefore, desert helps us identify inequalities that are particularly worthy of critique because they are unrelated to an individual's voluntary choices. But a second condition must be met before the inequalities can become a certain target of reform. The next Subpart isolates those inequalities that are unjustified because they work to the detriment of those who are less well-off.

3. Priority

Once we have a picture of what inequalities might be deserved or undeserved, we can further scrutinize any inequalities in the legal system using the principle of priority. Priority is the principle that benefitting people matters more the worse off they are.¹⁶⁶ In other words, it is better to provide a benefit to

163. See, e.g., V.T. STAT. ANN. tit. 12, § 519 (2002) (requiring assistance to those who are exposed to grave physical harm).

164. See DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 142 (1999) ("One kind of criticism is that the institutional allocation is tracking not performance at all, but some irrelevant characteristic like sex or geographical location . . ."); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 908 (1989) ("I believe that the primary egalitarian impulse is to extinguish the influence on distribution of both exploitation and brute luck.").

165. See Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 *GEO. J. GENDER & L.* 159, 187–88 (2011) (discussing how preconceived notions can inappropriately influence the estimated worth of female employees).

166. Derek Parfit provides the following explanations:

someone who is worse off rather than to someone who is better off. Conversely, it is worse to impose a burden on someone who is worse off rather than on someone who is better off.¹⁶⁷ Thus, we must have some sense of where individuals fall in the distribution of overall well-being to effectively perform a prioritarian analysis of the distribution of donative errors.¹⁶⁸

The priority principle finds ample support in Western thought. For example, Christian religious doctrine openly and often calls for believers to support the needy over those who are better off.¹⁶⁹ In the secular philosophical realm, the most famous articulation of a priority principle comes from John Rawls's theory of justice. His Difference Principle would only permit inequalities in the basic structure of society that serve the least well off.¹⁷⁰

The principle also finds expression in legal doctrine and the structure of the legal system. A prime example is the inequality of bargaining power doctrine in contract law.¹⁷¹ This is a contextual factor that courts may assess to

For Utilitarians, the moral importance of each benefit depends only on how great this benefit would be. For Prioritarians, it also depends on how well off the person is to whom this benefit comes. We should not give equal weight to equal benefits, whoever receives them. Benefits to the worse off should be given more weight.

Derek Parfit, *Equality and Priority*, 10 *RATIO* 202, 213 (1997). For an argument against this view, see Michael Otsuka & Alex Voorhoeve, *Why It Matters That Some Are Worse Off Than Others: An Argument Against the Priority View*, 37 *PHIL. & PUB. AFF.* 171 (2009), which argues against the priority view based on its treatment of intrapersonal and interpersonal tradeoffs.

167. From a pure efficiency perspective, one would be agnostic as between these two options, as the focus is on providing the greatest amount of benefit, or the least amount of harm, to the population at large. The principle of priority, however, emphasizes that this still can be an important choice in deciding how to distribute benefits and burdens.

168. Cf. text accompanying notes 114, 117.

169. The book of *Matthew* states:

Then they in turn will ask: "Lord, when did we see you hungry or thirsty or away from home or naked, or ill or in prison and not attend you in your needs?" He will answer them: "I assure you, as often as you neglected to do it to one of these least ones, you neglected to do it to me."

Matthew 25:44–45; see also RONALD J. SIDER, *RICH CHRISTIANS IN AN AGE OF HUNGER* 62–68 (1977) (collecting other Biblical verses about mistreatment of poor populations); Adam S. Chodorow, *Biblical Tax Systems and the Case for Progressive Taxation*, 23 *J.L. & RELIGION* 51 (2007) (arguing from a biblical perspective that progressive taxation is consistent with principles found in the Bible).

170. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 42–43 (Erin Kelly ed., 2001) ("Social and economic inequalities are ... to be to the greatest benefit of the least-advantaged members of society (the difference principle)."). For a further exposition and defense of this principle, see Joshua Cohen, *Democratic Equality*, 99 *ETHICS* 727 (1989).

171. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000) (finding inequality of power between employer and employee as relevant to determining the legality of an arbitration provision); *Wille v. Sw. Bell Tel. Co.*, 549 P.2d 903, 907 (Kan.

level the playing field for the less powerful party in a bilateral transaction.¹⁷² A systemic example would be the congressional funding of legal aid services, which sustains organizations that provide assistance to low-income people in asserting their legal rights.¹⁷³ Again, the emphasis is on assisting those who are in the lower tiers of the distribution of well-being, and this assistance will help individuals achieve equality in fact with respect to their legal rights.

Priority is consonant with equality in that benefitting people who are less well off in the population will often produce more egalitarian results.¹⁷⁴ At the same time, it is distinct from equality because it is concerned with improving the absolute well-being of individuals, rather than improving well-being relative to other individuals in the population.¹⁷⁵ Consequently, in the allocation of benefits and burdens, we should be particularly incensed when burdens fall on those who are already worse off, and we should be pleased when benefits flow to them.

As a conceptual matter, this principle is important because it explicitly links the distribution of donative errors to the distribution of overall well-being.

1976) (describing inequality of bargaining power as one of the factors that contributes to finding a contract unconscionable).

172. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 150 (2005) (“[T]he legal doctrine represents an attempt by the legal system to assign legal consequences to perceived gross disparities of bargaining power in a transaction and to assess the degree of those disparities post hoc through the judicial process.”). A key feature of this doctrine is its embrace of a contextual inquiry, similar to many proposed reforms of inheritance law.

173. See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. L. REV. 241, 245–64 (1998) (tracing the history of congressional funding). But see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2191–98 (1999) (detailing the funding restrictions put in place by Congress in the 1990s).

174. See Derek Parfit, *Equality or Priority*, in *THE IDEAL OF EQUALITY*, *supra* note 125, at 106 (“But, since [the priority] view has a built-in bias towards equality, it could be Egalitarian in a second, looser sense. We might say that, if we take this view, we are *Non-Relational Egalitarians*.”); see also HIROSE, *supra* note 137, at 93–94 (noting the convergence between prioritarianism and egalitarianism in that prioritarianism satisfies the Pigou-Dalton condition).

175. See Dennis McKerlie, *Equality and Priority*, in 6 UTILITAS 25, 26 (1994) (“The priority view does not see any value in equality understood as a relationship between people. Like utilitarianism, it aims exclusively at improving the content of people’s lives.”); see also Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 310–11 (1974) (distinguishing between comparative and noncomparative theories of justice). Because of its noncomparative nature, the priority principle also avoids one of the most powerful arguments against egalitarian theories: the levelling down objection. See generally Nils Holtug, *Egalitarianism and the Levelling Down Objection*, 58 ANALYSIS 166 (1998) (discussing the objection and responses).

A donative error is a burden that society should seek to avoid in general, just as one should avoid other harms to the population. From the perspective of the priority principle, however, society should especially seek to avoid imposing that burden on those in society who already lack resources, opportunities, or other aspects of advantage.¹⁷⁶ Thus, if inequalities in a given distribution work solely to the detriment of those who are better off, they may be justifiable in a prioritarian analysis. On the other hand, if they harm those who are worse off in the relevant population, they are particularly undesirable from a prioritarian perspective.

In terms of the distributive analysis, equality forms the baseline, while desert and priority help to identify those inequalities that are particularly unjustified and worthy of critique. These are inequalities either that are not deserved or that disadvantage members of the population who are less well-off, or both. Inequalities that only satisfy one of these two conditions, desert and priority, will receive only qualified support from this analysis. Those inequalities that satisfy both should be the primary targets for reform, a topic that is taken up in the next Part.

III. APPLICATION

The theoretical principles of distributive justice are relevant and useful to the field of inheritance law because they help to identify arguments and avenues for reform. This Part applies the analytical framework developed in Part II to the probate system and sources of donative error explained in Part I. Subpart III.A examines the sources of inequality in the distribution of donative errors and applies the distributive principles of desert and priority to them. Subpart III.B discusses reforms of the legal system that are supported by the distributive analysis. These reforms revolve around simplifying will execution and enabling judicial discretion to facilitate donative intent in the wills domain.

A. The Deserving and Disadvantaged Decedent

We now shift focus from abstract distributive principles to the particular individual who might experience donative errors: the deserving and disadvantaged decedent. This stylized individual is deserving of having her

176. That being said, the claim is not that a donative error is on par with these other forms of disadvantage, or even that reducing donative errors should be the first priority. Instead, the priority analysis with respect to donative intent simply requires that this particular harm of donative error not fall on those who are worse off, by whatever metric.

donative intent satisfied because she engages in certain voluntary actions relevant to inheritance law that trigger a positive appraising attitude.¹⁷⁷ She is disadvantaged in the context of the donor population because she lacks the privileges that other donors might have, be they economic assets, social resources, or capabilities. In other words, she is likely to be among the middle class: worse off than others in the donor population, but not so disadvantaged that she has no property to transmit.¹⁷⁸ The rest of this Subpart fleshes out how the principles of desert and priority both affect individuals encountering the probate system and create inequalities in the distribution of donative errors.

A helpful place to begin the analysis is to examine how the current system implements the desert principle. The implicit desert basis of traditional wills doctrines is perfect will execution with all the necessary formalities as well as perfect drafting so that there are no mistakes in the will itself.¹⁷⁹ In this context, the reward for one's performance of perfect will execution and drafting is the actualization of donative intent, or the avoidance of donative error. Thus, under traditional doctrine, if a decedent fails to plan or draft perfectly, she then theoretically deserves the donative errors that may result from the mismatch between the intestacy codes and her donative intent.

This desert basis, however, sets the bar too high. A superior desert basis would be the good faith attempt to engage in will drafting and execution, regardless of whether one does so perfectly.¹⁸⁰ This less demanding desert basis is a cut above for three reasons. First, it is the core of what we might find admirable, which is the effort to engage in estate planning in the first place. It demonstrates that one possesses the wherewithal and motivation to overcome fear, laziness, procrastination, and a social context that discourages

177. See *supra* Part II.C.2.

178. See *supra* Part II.B, Part II.C.3.

179. As one court explained:

It is presumed citizens know the law, including the intestacy laws, and it is up to any person who does not want those laws applied to his or her estate to opt out by preparing a will setting forth other dispositions. Decedent did not so provide and therefore is presumed to endorse application of the default intestacy laws.

In re Estate of Dye, 112 Cal. Rptr. 2d 362, 368 (Cal. Ct. App. 2001). This is relaxed somewhat for updating one's estate plan. See *infra* text accompanying notes 185–188.

180. Desert theorists have favored focusing on the effort of individuals rather than the end achievement. See Heather Milne, *Desert, Effort and Equality*, 3 J. APPLIED PHIL. 235, 240 (1986) ("The well-being desert theorist must make use of a *principle of purposeful effort* so as to rule out the possibility of rewarding costs incurred through *any* type of effort. . . . [T]he effort that forms the basis of a desert claim must be directed towards some end that we view favourably.").

engagement with topics related to death.¹⁸¹ It is also a relatively unique performance, as a majority of Americans do not currently have a will.¹⁸² From the perspective of those left behind, advance planning on property or other matters is typically quite helpful, and studies have found time and again that it is met with gratitude by survivors.¹⁸³ This is because those left behind do not have to sort through difficult issues of health care decisions or property allocation at a sensitive time. Finally, from the perspective of the legal system, it assists with divining a decedent's donative intent, as the best way to know a person's intent is if she proclaimed it.

Second, the willingness to engage in will execution is something that courts have recognized as admirable as a doctrinal matter. When a testator does execute a will, she benefits from the presumption against intestacy, or the principle that the court should construe the will to avoid distributing any property in the estate by the default rules of intestacy.¹⁸⁴ Courts are also much more lenient if one makes estate planning mistakes after a will is executed.¹⁸⁵ An example of the above is the doctrine of dependent relative revocation. Under this doctrine, if you revoke a will based on a mistake of law or fact, the court will revoke the revocation to put a previously existing will back into effect.¹⁸⁶ The willingness of many courts to correct mistakes in will

181. See Allan Kellehear, *Are We a 'Death-Denying' Society? A Sociological Review*, 18 SOC. SCI. & MED. 713, 715 (1984) (advancing the thesis that our society is in denial of death). But see Philip A. Mellor, *Death in High Modernity: The Contemporary Presence and Absence of Death*, 40 SOC. REV. 11, 11 (1993) (arguing that although there is increasing academic discussion of death, the topic remains sequestered away from the public square).

182. See Jeff Reeves, *Plan Ahead: 64% of Americans Don't Have a Will*, USA TODAY (Apr. 26, 2016, 12:51 PM), <https://www.usatoday.com/story/money/personalfinance/2015/07/11/estate-plan-will/71270548> [<https://perma.cc/KU9Y-ME9Z>] (reporting on results of a recent survey).

183. See Cahn & Zietlow, *supra* note 27, at 331 (noting how family members expressed appreciation for the guidance and emotional understanding that estate planning provides).

184. For example, one court noted:

A testator, by the act of the making of a will, casts grave doubt on any assumption that he expressly intends to chance dying intestate as to any portion of his property. . . . [T]he courts favor a construction which avoids partial intestacy and adopt one which results in a complete disposition of the estate.

In re Fabbri's Will, 140 N.E.2d 269, 273 (N.Y. 1957) (first citing *Haug v. Schumacher*, 60 N.E. 245, 246 (1901); then citing *Lewis v. Howe*, 66 N.E. 975, 977, 1101 (1903)). Another court put it succinctly: "[T]he testator is presumed to intend to avoid intestacy otherwise he or she would not have bothered to make a will." *In re Estate of Herceg*, 747 N.Y.S.2d 901, 903 (Sur. Ct. 2002).

185. See Baron, *supra* note 82, at 70–75 (discussing the differential treatment of the testator in these two situations).

186. See, e.g., *In re Estate of Alburn*, 118 N.W.2d 919, 923 (Wis. 1963) (applying the doctrine of dependent relative revocation to revive an older will that was closer to the decedent's donative intent than intestacy); see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER

revocation, when courts are typically less willing to do so for will execution, demonstrates that courts recognize some valuable performance in engaging in the estate planning process itself, rather than in doing so perfectly.

The various doctrines that automatically update one's estate plan in light of changed circumstances bolster this conclusion. For example, if one executes a will and then fails to update it after a divorce, the doctrine of revocation upon divorce will revoke all dispositions in favor of the ex-spouse, on the theory that one would not have wanted property going to an ex.¹⁸⁷ Similarly, if one executed a will before one had a child but did not update it to include the new descendant, the pretermitted heir doctrine will still allow those children to inherit to prevent unintentional disinheritance.¹⁸⁸ All of these doctrines point to recognizing the good faith effort at estate planning rather than the perfect maintenance of an up-to-date will before death.

The third reason why the good faith effort at estate planning is a superior desert basis when compared to the perfect execution of an estate plan is that the latter desert basis may actually track irrelevant characteristics, such as education or economic status, rather than some meaningful characteristic or action by the decedent. In other words, the valid execution and drafting of a will may have more to do with having a legal education or the economic resources to hire a quality attorney than any action or characteristic intrinsic to the person receiving the reward of having her donative intent respected.¹⁸⁹ Of course, failing to validly execute a well-drafted will is not necessarily indicative of socioeconomic status. For example, many were shocked that the musical artist Prince died without a will, despite his significant wealth and routine contact with attorneys for other legal issues.¹⁹⁰ But in cases where will

DONATIVE TRANSFERS § 4.3 (AM. LAW INST. 1999) (describing the circumstances under which this doctrine can be applied).

187. See UNIF. PROBATE CODE § 2-804 (UNIF. L. COMM'N 2010) (detailing how divorce serves as a changed circumstance that revokes bequests to a spouse by operation of law).

188. See ALA. CODE § 43-8-91 (1991) ("If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate . . .").

189. See MILLER, *supra* note 164, at 142 (noting the problem when the desert basis is "tracking not performance at all, but some irrelevant characteristic like sex or geographical location").

190. Journalist Ben Sisario explained:

In the music business, Prince . . . was known as a mercurial star who cycled through lawyers and representatives frequently, and who often preferred to deal personally with record companies, concert promoters and even digital music services. But that history of self-sufficiency could have severe consequences if Prince did not

execution was attempted and the resulting document was clearly intended to be a will, one has demonstrated the motivation and good faith effort to engage in estate planning that should be rewarded.

To summarize, we should attempt to protect decedents who made a good faith attempt to engage in will execution from donative error. In other words, an inequality in the distribution of donative errors that harms those who do not deserve it is particularly normatively undesirable. This is the primary reason why the legal system provides some degree of protection to individuals from misdeeds of third parties in the estate planning process through the doctrines of undue influence,¹⁹¹ fraud,¹⁹² duress,¹⁹³ and tortious interference with an expectancy.¹⁹⁴ Even those who are the victims of negligent attorneys have the imperfect solution of malpractice actions against the offending attorneys, which, along with the ethics complaints, can have serious reputational effects.¹⁹⁵ The desert analysis suggests extending this type of protection to other deserving individuals as well.

While the principle of desert provides theoretical justification for the protection of the deserving decedent, the principle of priority does the same for the disadvantaged decedent. The priority principle identifies those systematic inequalities in the distribution of donative errors that would be normatively undesirable because they compound or amplify existing disadvantages that an individual in the donor population might experience. In the probate context, these disadvantages revolve around socioeconomic status, as one's social and

leave an orderly estate—a strong possibility if no will turns up, several music-industry lawyers and executives said.

Ben Sisario, *Prince Died Without a Will, According to Court Documents Filed by His Sister*, N.Y. TIMES (Apr. 26, 2016), <https://www.nytimes.com/2016/04/27/arts/music/prince-died-without-a-will-according-to-court-documents.html>.

191. See *Estate of Lakatos*, 656 A.2d 1378, 1382–83 (Pa. Super. Ct. 1995) (noting that will contestants can shift the burden to a proponent of the will to disprove undue influence).
192. See *Rood v. Newberg*, 718 N.E.2d 886, 892 (Mass. App. Ct. 1999) (“In order to prove fraud by deceit, a plaintiff ordinarily must show that the defendant made a false statement of a material fact with knowledge of its falsity in order to induce the plaintiff to act . . .”).
193. See RESTATEMENT (THIRD) OF PROP. WILLS AND 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.”).
194. See *Schilling v. Herrera*, 952 So.2d 1231, 1234 (Fla. Dist. Ct. App. 2007) (describing the cause of action that protects a beneficiary who has no probate remedies).
195. See AM. BAR ASS’N, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2008–2011, at 5 (2012) (noting that a 2011 study found over ten percent of ethics complaints are in fact lodged in trusts and estates matters); Martin D. Begleiter, *First Let’s Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325, 327 (2000) (noting that only six states maintain the absolute privity defense that bars beneficiaries from suing the drafting attorney).

economic resources control one's ability to access the specialized legal knowledge needed to navigate the formalistic legal environment. This is not to suggest that all those who lack economic resources are unsophisticated and lack legal knowledge, or that all those who possess such resources are sophisticated about legal rules. The degree to which different forms of advantage or disadvantage overlap within segments of the population is an empirical question, but this Article assumes that there is at least some relationship between different sources of disadvantage relevant to the inheritance system.¹⁹⁶

There are three ways in which the legal environment, the specialized legal knowledge it requires, and preexisting disadvantage may be connected. First, an individual may lack sufficient education to know about the legal utility of wills or the specialized knowledge required to comply with formalistic doctrines if she were to attempt willmaking on her own.¹⁹⁷ Second, this lack of knowledge may be duplicated in one's social network as well. Whereas well-off individuals may have attorneys in the family with exposure to the importance of wills in estate planning or with the ability to draft a will at little or no cost, this low-cost option would not necessarily be available to those without such social connections.¹⁹⁸ Third, those with fewer economic resources may not be able to enter the market to retain an attorney. Even if an attorney is available at an affordable cost, it is likely that attorney quality varies with cost, meaning that the attorneys available to lower-income people would be lower-quality and so more likely to make mistakes.¹⁹⁹ In other words, because formalistic probate doctrines require specialized legal knowledge, it is those with fewer resources—legal knowledge, networks that involve an attorney, or economic resources to hire an attorney—who will bear the brunt of these doctrines.²⁰⁰

196. See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 280 (2002) (noting the ways in which “systems of subordination” reinforce each other).

197. See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 48–51 (2009) (noting that those with lower levels of education and income suffer higher rates of intestacy). This group could be further subdivided along other demographic characteristics, such as race, age, and sex. See *id.* at 42–45, 51–52. One could also argue that individuals experiencing disadvantage due to their sexual orientation also experienced systematic disadvantage, as same-sex relationships were not intelligible to the law until recently. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (legalizing same-sex marriage).

198. See Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899, 905 (2005) (noting how social networks can perpetuate racial inequality if they remain relatively homogeneous).

199. See sources cited *supra* note 83.

200. See George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession's Shift to a Corporate Paradigm*, 70

The principles of desert and priority will not necessarily highlight the same types of inequalities as worthy of critique, nor will they encompass the same individuals who suffer donative errors. For example, one might be a wealthy individual who attempts to engage in will execution but fails to do so correctly, even though she had the resources to hire a high-priced attorney. The donative error that this individual experiences will be pernicious from a desert perspective, but not necessarily from a priority perspective. Alternatively, one might not have had the resources to hire such an attorney or the legal knowledge to execute a will on one's own, but never even bothered to try to execute a will. In this case, a desert-based analysis would not see the donative error generated as particularly problematic, but a prioritarian analysis would still find harmful the fact that the burden of donative error falls on someone who is less fortunate.

The most sympathetic cases—and thus the ones that most strongly demand legal reform—are those in which both the principles of priority and desert apply. These cases involve individuals who may not have had the social or economic resources to hire a competent attorney or draft a valid will on their own, but who regardless made a good faith effort to do so. Those reforms that address the circumstances of these individuals will receive the strongest support from the distributive analysis presented here. At the same time, certain doctrinal reforms might have spillover effects that will help individuals with a mixed status like those described above. The final section explores the options for legal reform.

B. Legal Reform

One could attack the unjustified inequalities in the probate system at many levels, and this Subpart addresses the levers that are available to do so within legal doctrine. One could of course dream bigger and instead tackle the broad economic and social inequalities that drive the inequalities in inheritance law.²⁰¹ This addresses the root problem head on, rather than using the legal system to try to remedy the pernicious side effects of societal inequality after the

FORDHAM L. REV. 775, 775 (2001) (“Recent empirical surveys by bar associations tend to confirm that middle-class Americans often lack access to affordable legal services. These studies suggest that, more often than not, ‘ordinary’ people with a need for legal services go without.”).

201. See Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1066–67 (2014) (arguing that the rule of law may require some redress of economic inequalities if there is an economic prerequisite to the application of the law itself).

fact.²⁰² It also clarifies and simplifies the application of the distributive justice rationale to the probate system; if unjustified social and economic inequalities were eliminated, then the remaining donative errors would more likely derive from an individual's lack of motivation to engage in estate planning or an individual's conscious choice to allocate resources towards other activities that are deemed more important.

The main drawback to the broader approach is that eliminating social and economic inequality is not an easily realizable goal. At the very least, it is not one that is easily realizable in the short term.²⁰³ Thus, if this were the singular strategy for addressing the inequalities in the inheritance system, many individuals would not see their donative intent realized in the interim before full societal equality was achieved.²⁰⁴ This is not to say that we should abandon legal or political reform efforts to address more systemic forms of social and economic inequality. To the contrary, to the extent that this Article draws attention to another negative effect of socioeconomic inequality—namely the effect on the distribution of donative errors—it adds to the lengthy list of reasons to address broad societal inequality.

While such broader reform efforts are laudable, this Article focuses on reforms of the probate system. These reforms are all geared towards reducing the unequal distribution of undeserved donative errors that fall on those who are less well-off in the donor population. The reforms overlap with but do not mirror those that have been advocated by other scholars, who have typically focused on efficiency-based concerns of reducing the overall number of donative errors. A positive feature of this distributive analysis is that it does not necessarily conflict with a focus on efficiency.²⁰⁵ In other words, one need not sacrifice an overall reduction in donative errors to achieve a more egalitarian

202. See Matthew Dimick, *Should the Law Do Anything About Economic Inequality?*, 26 CORNELL J.L. & PUB. POL'Y 1, 2–3 (2016) (noting that the law and economics scholarship generally believes that the legal system should not generally be used for distributive goals).

203. See David B. Grusky & Alair MacLean, *The Social Fallout of a High-Inequality Regime*, 663 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 39–46 (2016) (discussing the modernization and marketization explanations for economic inequality); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 868–74 (2013) (discussing the reasons why there has not been a substantial social movement for economic equality).

204. That being said, there is at least one prominent example of this strategy's succeeding, and rapidly: same-sex marriage. The movement for marriage equality succeeded faster than many had thought possible and before states recognized nonmarital same-sex partners in intestacy codes. See Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN'S L. REV. 143, 144 (2015) (noting that the marriage equality movement has advanced at “legal warp speed”).

205. See *supra* text accompanying notes 112–113.

distribution of those errors. This is because the primary subpopulation afflicted by donative errors is likely those who are less well-off in the donor population, or those who lack access to legal knowledge or socioeconomic resources to retain an attorney. Therefore, helping to satisfy the donative intent of this population through modifications of the probate system serves to reduce both the number of donative errors and any inequalities in the distribution of errors.

The following subsections describe some illustrative examples of the types of legal reforms that receive the support of the distributive analysis presented in this Article. The first subsection deals with simplifying will execution to ensure that individuals regardless of all wealth can express their donative intents. The second subsection discusses the work of probate courts in sorting through imperfectly drafted or executed wills.

1. Simplifying Will Execution

The estate planning process is complicated, and the formalistic legal doctrines that govern the willmaking process do not help the average person to express donative intent.²⁰⁶ Disparate access to the legal knowledge needed to execute a will interacts with these doctrines to create inequalities in the distribution of donative errors.²⁰⁷ Because increasing the legal knowledge of the general population is likely to fail,²⁰⁸ an alternative would be to adjust the law to meet the knowledge level of the general population, provided it still accomplishes the goals of the probate system.

There are several ways to adjust the law accordingly. For example, legislatures could reduce the level of formalities required to execute a will—typically a writing, signature, and attestation by two witnesses—to bring it in line with popular understandings of what the law is. One possibility would be to increase the options for satisfying the attestation requirement, by continuing to allow the traditional option of two witnesses but adding the alternative of attestation by a lone notary.²⁰⁹ The advantage of this approach is that many

206. See *supra* Part I.B.

207. See *supra* Part I.B.

208. See Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 135 (2015) (noting that the complexity and enormity of the legal and regulatory system prevents individuals from fully grasping its content).

209. See UNIF. PROBATE CODE § 2-502(a)(3) (UNIF. LAW COMM'N 2010) (permitting attestation “before a notary public or other individual authorized by law to take acknowledgments”).

individuals think that getting a document notarized is what makes it “legal.”²¹⁰ Unfortunately, the notarization approach to will execution has only been implemented in two states.²¹¹ The tradition of conforming law to custom in this way has a strong tradition in the law, though it has more often been applied to contexts with sophisticated commercial entities.²¹² When it has salutary effects for less sophisticated actors and does not harm the policy purposes behind the formalities of will execution, adopting notarization is a reasonable reform that will reduce inequalities in the distribution of donative errors.

A second general strategy in this vein—doubtless one that will be unattractive to the estate planning bar—is to make it easier to execute a will without an attorney.²¹³ This could involve authorizing other classes of professionals to help facilitate the creation of legal documents, as California has done with Legal Document Assistants.²¹⁴ Alternatively, it could be providing ways for individuals to be self-reliant in their own legal planning. For example, states could expand the permissibility of holographic wills, or wills that are completely in the handwriting of the testator so that they do not need to be

210. See Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83, 85 (2008) (“The public is accustomed to thinking that a document is made ‘legal’ by getting it notarized. To some, this conception is mistakenly but understandably carried over to executing a will.”) (footnotes omitted); see also UNIF. PROBATE CODE § 2-502 cmt. (UNIF. LAW COMM’N 2010) (“In addition, lay people (and, sad to say, some lawyers) think that a will is valid if notarized, which is not true under non-UPC law.”).

211. See COLO. REV. STAT. § 15-11-502 (2013); N.D. CENT. CODE § 30.1-08-02 (2010).

212. See U.C.C. § 1-103 (UNIF. LAW COMM’N 2014) (“[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: . . . (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties”); K. N. Llewellyn, *The First Struggle to Unhobble Sales*, 52 HARV. L. REV. 873, 903 (1939) (making “a plea for merchants’ law to be recognized, and to be further made for merchants”).

213. See Richard V. Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 U. ARK. LITTLE ROCK. L.J. 1, 15 (1979) (“What lawyers usually fail to perceive, possibly because of conflicting interests in the fees that come from assisting persons with wills, is that the public plainly insists on being permitted to use a ‘do-it-yourself’ approach to will making, as is permitted in virtually every other enterprise.”). The criticism that having to obtain an attorney to engage in estate planning is not new. See Sir Edward Sugden, Speech in the House of Commons (Dec. 4, 1837), in *THE LAW OF WILLS BILL 16* (John Murray ed., 1838) (calling the need to consult an attorney a “clog upon the transmission of property by Will”).

214. See CAL. BUS. & PROF. CODE § 6401.6 (West 2003) (authorizing the existence of legal document assistants but requiring that they not engage in the practice of law); see also Jennifer S. Bard & Larry Cunningham, Opinion, *The Legal Profession Is Failing Low-Income and Middle-Class People. Let’s Fix That.*, WASH. POST (June 5, 2017), http://wapo.st/2rt8MLZ?tid=ss_tw&utm_term=.c2dc7cfd2bed [https://perma.cc/43XL-APWF] (advocating for different tiers of legal professionals).

attested by witnesses.²¹⁵ Currently, only a slight majority of states permit this type of final testament.²¹⁶ This would target those who do not know of the attestation requirement at all and try to execute wills themselves without an attorney.²¹⁷ A recent empirical study found that holographic wills were not as prone to drafting errors, fraud, or forgery as one might initially assume.²¹⁸ Further, the proliferation of wills forms on the Internet makes this an attractive option, though it requires modifying applicable statutes to allow that some of the holographic will not be in the testator's handwriting.²¹⁹

A final reform of this type is Professor Reid Kress Weisbord's innovative proposal for a "testamentary schedule," an optional form attached to state income tax returns that could express donative intent and be updated electronically as needed. This proposal would both simplify the estate planning process and connect it to the task of paying taxes, which many in the donor population engage with anyway.²²⁰ This type of "one-stop shopping" is considered a valuable way of delivering legal and other professional services simultaneously, and it may prove fruitful in allowing individuals to accomplish multiple planning and administrative tasks at once as well.²²¹

The primary advantage of these approaches is that they address the incidents of social and economic inequalities, even if they do not eliminate the inequalities themselves. However, these types of strategies have their limits as well, as ease of will execution can be in tension with other goals of the estate

215. See UNIF. PROBATE CODE § 2-502(b) (UNIF. LAW COMM'N 2010) ("(b) [Holographic Wills.] A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.").

216. See SITKOFF & DUKEMINIER, *supra* note 11, at 198 (indicating which states have permitted holographic wills).

217. See Kevin R. Natale, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 160 (1988) ("Legislatures authorize holographic wills as a means of convenience to testators, enabling those who are either unable or unwilling to obtain legal assistance to make a valid will in their own handwriting." (citing *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982))).

218. See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 52–53 (2008) (noting that while not error-free, holographic wills provide an affordable way to engage in estate planning that does not raise the specter of litigation).

219. See *In re Estate of Muder*, 765 P.2d 997, 1000 (Ariz. 1988) (holding that filling out the material portions of a preprinted form in one's own handwriting was sufficient to qualify as a holographic will).

220. See Weisbord, *supra* note 74, at 924–35.

221. See Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals Into the Attorney-Client Relationship*, 80 TENN. L. REV. 1, 12 (2012) (highlighting the benefits of such a model).

planning process.²²² For example, formalities in the will execution process serve various functions,²²³ and there is some debate about whether the lack of witnesses for holographic wills serves to protect the testator from being unduly influenced or coerced.²²⁴ In addition, the estate planning bar still provides useful guidance in understanding what types of property interests an individual might hold, the interrelationship between probate and nonprobate assets, and contingency planning for events that the lay person may not contemplate or understand on her own.²²⁵ These concerns should be weighed against the benefits of reducing inequality in the distribution of donative errors.

2. Enabling Judicial Discretion

While the previous set of reforms addressed the will execution process, this group of reforms focuses on what probate courts may do with the fruits of those often imperfect will execution attempts. There have been many reforms suggested of the formalistic doctrines in the probate system, ranging from proposed modification of the intestacy regime to a re-imagination of will execution and construction.²²⁶ These reforms share an emphasis on more contextual approaches, which have three distinct features. First, they permit judges to examine a wider range of evidence, not just the text of a relevant document or the legal relationship between the decedent and an heir.²²⁷

222. Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 162 (2008) (describing how an estate planning attorney can continue to be useful, especially in the context of proliferating nonprobate forms of transfer).

223. See sources cited *supra* note 58.

224. See Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96–100 (2006) (describing the policies behind will formalities and how holographs are problematic with respect to them). *But see* Lindgren, *supra* note 58, at 572–73 (advocating the abolition of the attestation requirement altogether).

225. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 750 (1988) (“Increasingly, estate planning services for the middle and upper-middle classes have the quality of contingency planning.”). This points to a more general tension in how the law serves the population. See Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 165–66 (2002) (discussing the tradeoffs between providing high-quality services and equal access to services).

226. See T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 82–90 (2004) (proposing the inclusion of domestic partners in intestacy law); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1089–90 (1999) (discussing a proposal by Professor Waggoner in the same vein); *supra* text accompanying notes 103–107 (discussing reform proposals of wills doctrines).

227. See, e.g., *Concerned Residents of Santa Fe N., Inc. v. Santa Fe Estates, Inc.*, 182 P.3d 794, 807 (N.M. Ct. App. 2008) (“[A] court may go beyond the four corners and consider

Second, they give judges discretion to apply background policies directly rather than mandating following rule-like directives to the letter.²²⁸ Third, these more fact-intensive inquiries raise the specter that more judicial resources will be consumed in carrying them out.²²⁹ It is this third feature that may make legislatures unwilling to adopt such reforms, despite the argument that doing so would be more efficient by reducing the overall number of donative errors.²³⁰ The distributive argument presented here may help justify expending resources on some of these reforms, as it reveals that the resources would go toward remedying inequalities that affect many middle-class citizens, including many legislators' own constituents.

However, one significant set of reforms—those of the intestacy system—do not receive the unqualified support of the distributive analysis presented here. Several scholars have suggested reforming those statutes so that the court may inquire into caregiving or functional family relationships to decide how to distribute property more in line with donative intent.²³¹ This would require an analysis by the court of information beyond just the legal relationship of blood, adoption, or marriage between the decedent and another person. Decedents who experience intestacy tend to have lower levels of education and income, and they may represent worse-off elements of the donor population.²³² Thus, from a prioritarian perspective, the donative errors experienced by this group are particularly pernicious. These individuals who did not attempt to execute a will can also be said to have assumed the risk that intestacy codes would not match their donative preferences, leading to donative error. In other words,

evidence outside the contract itself to explain the purposes or context of the contract. This is called 'the contextual approach to contract interpretation' (quoting *Mark V, Inc. v. Mellekas*, 845 P.2d 1232, 1235 (N.M. 1993)).

228. See, e.g., N.J. STAT. ANN. § 3B:3-33.1 (West 2016) (requiring that the normal rules of construction "shall apply unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary"); see also Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 603 (2016) ("[T]he harmless error rule and the reformation doctrine give courts significantly more discretion in deciding issues of testamentary intent than under traditional law.").

229. See Catharine Wells, *Situated Decisionmaking*, 63 S. CALIF. L. REV. 1727, 1740 (1990) (noting that contextual approaches can be time-consuming).

230. See *supra* text accompanying notes 103–107.

231. See, e.g., Gary, *supra* note 53, at 71–73 (arguing for court discretion to find a functional parent-child relationship for intestacy purposes); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 258 (2002) (advocating inclusion of committed unmarried partners in intestacy codes); see also Foster, *supra* note 55, at 257–68 (critiquing intestacy laws for their rigidity in not recognizing caregiving relationships that may not be captured by blood, adoption, or marriage).

232. See DiRusso, *supra* note 197, at 48–51.

these donative errors are traceable to the decedent's failure to act, a behavior not worthy of praise. So from a desert perspective, the donative errors that befall this group may be in fact justified. Because the principles of priority and desert point in different directions here, such reforms would be a lower priority. However, these reforms might still be worth pursuing, as many might be convinced by the prioritarian analysis coupled with the standard efficiency arguments. These prioritarian and efficiency arguments, however, would have to be weighed against the likely increase in decision costs that such reforms would entail.

In contrast to intestacy, both the principles of desert and priority favor reforms in the areas of will execution and construction. In this context, individuals have actually tried to produce something that purports to be a will, unlike the nonplanners above. As noted in Subpart I.B, the strict compliance and plain meaning rules that currently govern will execution and construction are harsh on any mistakes made by these planners.²³³ These mistakes are more likely when an individual lacks specialized legal knowledge or the economic resources to hire a skilled attorney. This, in turn, creates inequalities in the distribution of donative errors when courts adhere to them, all despite a planner's best efforts. Therefore, reforming these doctrines should be a priority.

The harmless error and reformation rules are positive steps in that direction. Harmless error doctrine excuses a noncompliant will if there is clear and convincing evidence that the testator intended the document in question to be her will.²³⁴ Likewise, the reformation rule allows courts to reform mistakes if there is clear and convincing evidence of what the decedent's drafting intention was and if the terms of the document were the product of a mistake.²³⁵ These doctrines have similar structures, as they use contextual inquiries coupled with heightened evidentiary burdens rather than bright-line rules to police the admission and construction of wills by probate courts.²³⁶ While some have

233. See *supra* Part I.B.

234. See MONT. CODE ANN. § 72-2-523 (West 2015).

235. *Erickson v. Erickson*, 716 A.2d 92, 98 (Conn. 1998) (ruling that if a scrivener's error and the testator's intent can be established by clear and convincing evidence, errors may be corrected).

236. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2003) ("Tilting the risk of an erroneous factual determination in this fashion is appropriate because the party seeking reformation is seeking to establish that a donative document does not reflect the donor's intention. This tilt also deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence.").

criticized these as increasing judicial decision costs, evidence from other countries indicates that they do not necessarily do so.²³⁷

This Part has applied the distributive analytical framework to the probate system and the individuals who pass through it. The focus is on those individuals who performed the relevant desert basis—a good faith attempt at will execution—and are more likely to be at the lower end of the socioeconomic spectrum in the donor population, even if they might not be in the lower socioeconomic strata of the overall population. Reforms addressed to this group fall into two categories. First, the legal system might simplify the will execution process, either by reducing the formalities for will execution or by creating time-saving ways to engage in estate planning. Second, the legal system might enable probate judges to admit imperfect wills and fix obvious drafting mistakes in wills that are admitted. These broad strategies, however, are not exhaustive; other types of reforms, such as those of the intestacy regime, might receive some support from the distributive analysis presented here as well.

CONCLUSION

Inheritance law scholarship and practice have long focused on those with the most property in the donor population, and discussion of reform has traditionally focused on reducing the overall level of donative errors. This Article highlights the needs of the middle class and emphasizes significant distributive concerns. The hope is that this will provide reformers with further arguments for changes in law and practice, urge scholars to think about and openly discuss the distributive effects of their proposals, and prompt practitioners to imagine ways to help those individuals who might have only modest property to transfer at death.

237. See Langbein, *supra* note 88, at 45–52 (examining the implementation of harmless error in Australia, Canada, and Israel, and finding that neither litigation nor drafting errors increased as a result of the new doctrine); see also Stephanie Lester, Comment, *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, 603–06 (2007) (conducting a follow-up study and finding that harmless error continues to be successful).
