
Waking the Dead: An Empirical Analysis of Revival of Wills

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The problem of revival arises when a testator executes a first will, subsequently executes a second will that functions to revoke the first one by subsequent executed writing, and then later revokes the second will by act. Does this sequence of events reinstate the first will (“revival”) or leave the testator intestate (“anti-revival”)? Most states, together with the Uniform Probate Code, create either a conclusive or rebuttable presumption of anti-revival. This Article argues that, as a matter of policy, lawmakers should impose whichever presumption most testators would assume to apply, in order to minimize the risk of error. The Article presents evidence from an electronic survey finding that around seventy-five percent of respondents believe that this scenario would result in the revival of their first wills. This evidence indicates that a presumption of revival would correspond with popular assumptions and should replace the prevailing presumption of anti-revival. The Article further argues that the presumption should be rebuttable, in order to maintain consistency with other elements of the law of will revocation. Finally, the Article explores the significance of the lopsidedness of the data and applies Bayesian probability theory to suggest the possibility of imposing a clear-and-convincing evidence standard when a “supermajoritarian” default is discovered to exist — a contribution to default rule theory.

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INTRODUCTION

From time to time, testators resolve to revise their estate plans. Sometimes they even reverse themselves, circling back to previous schemes of testamentary division. Ideally, testators who wish to do either of those things execute updated wills specifying their new (or old) distributive preferences. When testators change their estate plans in less clear-cut ways, trouble follows.

Suppose a testator executes a first will but at a later time executes a second will modifying the allocation of the estate. Still later, the testator has another change of heart and tears up the second will with the intent of revoking it but keeps the first will intact. If the testator were now to die, what estate plan would take effect? The testator had revoked the first will by subsequent executed writing but then revoked in turn the second will by act. Once the first will was revoked by virtue of having been superseded, does it remain revoked unless the testator affirmatively republishes it? Assuming so, intestacy would result. Alternatively, does the revocation of the second will function to restore the estate plan memorialized in the first will?

This is the problem of *revival of wills*. States have resolved the problem in all manner of ways, as we shall see — lawmakers have not contemplated revival as a simple either-or choice. Yet, as a matter of policy, the problem has generated only murmurs of discussion. Apart from a comment by the drafters of the Uniform Probate Code, which we shall unpack in due course, not a single modern scholar has addressed revival. Arising in a near vacuum of theory, existing rules show little evidence of thoughtful composition.

This Article endeavors to map a framework from which to approach the problem of revival more rigorously and also undertakes the first-ever quantitative analysis of revival — thereby casting light on a patch of the legal landscape that empiricists have overlooked.¹

The Article will progress in stages. Part I describes the evolution and proliferation of rules of revival. In Part II, we turn to public policy, proposing an approach to revival that cries out for empirical study — a study presented in Part III. In Part IV, we examine issues related to evidence of intent to revive a will. Finally, in Part V, we home in on the consistency of the data presented in this study, which could speak to the standard of proof best suited to these cases.

¹ See Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1035 n.5 (1992) (“Unlike other areas of trusts and estates . . . no empirical study of the procedures for will revocation [and revival] has been attempted.”).

I. DOCTRINE

The doctrine of revival has a tangled history, beginning in the English case law. The first reported cases date to early in the eighteenth century.² In that era, jurisdiction over inheritance was split between common-law courts, with authority over realty, and ecclesiastical courts, responsible for personal property, operating under rules derived from civil law.³ Inevitably, rifts developed between these tribunals, including one over the issue of revival.⁴ Common-law courts took the view that the revocation by act of a subsequent will automatically revived the former one, assuming the testator had not also revoked the original will by act.⁵ By contrast, ecclesiastical courts held that the effect of revocation of a subsequent will depended on extrinsic evidence of intent either to revive or not to revive the testator's former will, without establishing a presumption one way or the other.⁶

The early opinions failed to suggest a substantive rationale for either position. Their disagreement stemmed rather from dueling abstractions. As seen by the common-law judges, a testator took no performative actions until death; accordingly, courts should assess a testator's estate plan at that moment, when the first will would comprise the singular, operative document.⁷ But in the view of the ecclesiastical-court judges, pre-mortem acts by testators had immediate legal consequences and

² See *Burt v. Burt* (Prerog. Ct. 1718), noted in *Moore v. Moore* (1817) 161 Eng. Rep. 1026, 1028; 1 Phill. Ecc. 406, 412-13.

³ This division lasted until 1857, when jurisdiction over decedents' estates in Great Britain was unified in a new Court of Probate. See Court of Probate Act 1857, 20 & 21 Vict. c. 77 (Eng.).

⁴ Courts acknowledged the conflict. See, e.g., *Moore v. Moore* (1817) 161 Eng. Rep. 1026, 1027-28; 1 Phill. Ecc. 406, 410-12.

⁵ See, e.g., *Goodright v. Glazer* (1770) 98 Eng. Rep. 317, 319; 4 Burr. 2512, 2514.

⁶ See, e.g., *Usticke v. Bawden* (1824) 162 Eng. Rep. 238, 238, 241; 2 Add. 116, 116, 125-26. In the absence of any evidence (which the court regarded as "next to impossible"), a subsequent court would have to establish a presumption "according to the best of its judgment, pro re natâ." *Id.* at 241; 2 Add. at 126. Early ecclesiastical-court cases, however, had created a rebuttable presumption against revival. See, e.g., *Helyar v. Helyar* (1754) 161 Eng. Rep. 174, 189-90; 1 Lee 472, 512-14. The ecclesiastical-court judges traced their rule to Justinian's Institutes. See, e.g., *Moore*, 161 Eng. Rep. at 1027; 1 Phill. Ecc. at 410-11. Nonetheless, Roman law had not addressed the issue directly. See INSTITUTES OF JUSTINIAN bk. 2, tit. 17, § 2 (Thomas Collett Sandars ed. 1922).

⁷ See *Goodright*, 98 Eng. Rep. at 319; 4 Burr. at 2514 ("A will is ambulatory till the death of the testator . . . Here . . . the second [will] . . . is no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.") (Mansfield, J.).

hence intent to revoke, or to revive, a will affected the testator's estate plan.⁸

Parliament resolved the impasse with the passage of the Wills Act of 1837, veering away from both judicial approaches. This act created a conclusive presumption against revival (*viz.* "anti-revival") in respect of both real and personal property.⁹ The rule applied expressly to wills and codicils alike.¹⁰ If, for example, a testator were to execute a first will leaving the entire estate to a sole beneficiary, followed by a codicil making a bequest of \$1,000 to another beneficiary, and then subsequently revoked the codicil by act, the original sole beneficiary would receive the entire estate minus \$1,000, which would go to the heirs.¹¹ This provision of the Wills Act remains in effect in Great Britain to this day.

The United States underwent a similar transition from judicial to codified law on this subject, with one difference — on our shores, no one doctrine of revival ever gained primacy.¹² Originating late in the eighteenth century, lines of American cases immediately began to splinter.¹³ Some courts followed the common-law rule of conclusive

⁸ See, e.g., *Helyar*, 161 Eng. Rep. at 189; 1 Lee at 512.

⁹ See Wills Act 1837, 1 Vict. c. 26, § 22 (Eng.). In effect, Parliament accepted the ecclesiastical-court judges' theory that testators' pre-mortem actions have instantaneous consequences but applied that theory in a different way. Under this act, "words of revocation contained in a will operate immediately upon its execution, so effectually, that . . . the revoked testament has thenceforward no existence." *Barkwell v. Barkwell*, [1928] P.D. 91, 101.

¹⁰ See Wills Act 1837, 1 Vict. c. 26, § 22 (Eng.) ("No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof . . .").

¹¹ See *Osburn v. Rochester Tr. & Safe Deposit Co.*, 102 N.E. 571, 572-73 (N.Y. 1913) (applying the British rule); *In re Danklefsen's Will*, 157 N.Y.S. 119, 121 (App. Div. 2nd Dept. 1916) (same). The same principle applied to specific bequests. See *In re Estate of Creech*, 989 A.2d 185, 186, 190 (D.C. Cir. 2010).

¹² See *Blackett v. Ziegler*, 133 N.W. 901, 902-03 (Iowa 1911) ("Upon no subject relating to the law of wills are the authorities in such hopeless and irreconcilable conflict.").

¹³ The problem of revival has generated around 150 published cases over the course of American history. For compilations and analyses of the case law, see 2 PAGE ON THE LAW OF WILLS §§ 21.50-56 (Anderson Publ'g Co. rev. ed. 2003) [hereinafter PAGE]; L. S. Tellier, Annotation, *Revocation of Later Will as Reviving Earlier Will*, 162 A.L.R. 1072 (1946); W.A.E., Annotation, *Revocation of Later Will as Reviving Earlier Will*, 28 A.L.R. 911 (1924); W.F. Zacharias & G. Maschinot, *Revocation and Revival of Wills*, 25 CHI.-KENT L. REV. 185 *passim* (1947) [hereinafter *Revocation: Part I*]; W.F. Zacharias & G. Maschinot, *Revocation and Revival of Wills: Part II*, 25 CHI.-KENT L. REV. 271 *passim* (1947); W.F. Zacharias & G. Maschinot, *Revocation and Revival of Wills: Part III*, 26 CHI.-KENT L. REV. 107 *passim* (1948) [hereinafter *Revocation: Part III*].

revival.¹⁴ Others transplanted the ecclesiastical-court rule admitting extrinsic evidence of intent, despite the absence of church courts in America.¹⁵ Still other courts established as judicial doctrine the British statutory rule of conclusive anti-revival.¹⁶ And yet others developed novel strains of doctrine, thereby adding to the jumble: Some tweaked the ecclesiastical-court rule into a rebuttable presumption of either revival¹⁷ or anti-revival.¹⁸ Some carved out a new exception, creating a conclusive presumption of anti-revival only if the subsequent will contained an express revocation clause,¹⁹ a distinction other courts expressly rejected.²⁰

As early as 1829, legislators began enacting statutory rules of revival, typically along the lines of the British act, although these rules also branched off.²¹ Eventually, law modelers joined the melee. The Model Probate Code of 1946 reproduced the British statutory rule of conclusive anti-revival.²² Following a series of preliminary drafts that

¹⁴ See, e.g., *Dawson v. Smith*, 8 Del. 92, 95-96 (Super. Ct. 1865); *Taylor v. Taylor*, 11 S.C.L. 482, 485-86 (Const. Ct. App. 1820).

¹⁵ See, e.g., *McClure v. McClure*, 6 S.W. 44, 46 (Tenn. 1887); *Blackett*, 133 N.W. at 905. One court considered, but rejected as senseless, the possibility of reproducing the original conflict by establishing the common-law rule of revival for devises of real property and the ecclesiastical-court rule of revival for bequests of personal property. See *Taylor*, 11 S.C.L. at 486.

¹⁶ See, e.g., *Harwell v. Lively*, 30 Ga. 315, 321 (1860) (looking to the British act for guidance); *Bohanon v. Walcot*, 2 Miss. 336, 339-40 (1836) (antedating the British act by one year).

¹⁷ See, e.g., *Colvin v. Warford*, 20 Md. 357, 393 (1863); *Lawson v. Morrison*, 2 U.S. 286, 290 (1792).

¹⁸ See, e.g., *Pickens v. Davis*, 134 Mass. 252, 256-57 (1883); *Lane v. Hill*, 44 A. 393, 397 (N.H. 1895).

¹⁹ See, e.g., *James v. Marvin*, 3 Conn. 576, 578-79 (1821); *Scott v. Fink*, 7 N.W. 799, 801-02 (Mich. 1881).

²⁰ See, e.g., *In re Block's Estate*, 190 A. 315, 318 (N.J. Orphans' Ct. 1937); *Bates v. Hacking*, 68 A. 622, 628-29 (R.I. 1908).

²¹ The first statute appeared in New York and anticipated by eight years the British statutory rule of conclusive anti-revival. See 2 THE REVISED STATUTES OF THE STATE OF NEW-YORK ch. 6, § 53 (1829). Some of these acts, including the one in New York, were not free from ambiguity, however. See W.W. Ferrier, Jr., *Revival of a Revoked Will*, 28 CALIF. L. REV. 265, 266 n.7 (1940); Owen J. Roberts, *The Revival of a Prior by the Revocation of a Later Will*, 48 AM. L. REG. (o.s.) 505, 511-12 (1900). For the statutory landscape in 1929, see Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 283, 309-10 (1929). And in 1947, see Zacharias & Maschinot, *Revocation: Part I*, *supra* note 13, at 208-15. And in 1960, see John B. Rees, Jr., *American Wills Statutes: II*, 46 VA. L. REV. 856, 891-92 (1960).

²² See LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW: INCLUDING A MODEL PROBATE CODE § 55 (1946) [hereinafter MODEL PROBATE CODE].

were all over the map,²³ the original Uniform Probate Code of 1969 settled on a rebuttable presumption of anti-revival.²⁴ Finally, as revised in 1990, the Uniform Probate Code differentiated the rules of revival, depending on whether a will-will or will-codicil sequence lay at issue. Where testators execute wills followed by subsequent wills that testators thereafter revoke by act, the revised Code retained a rebuttable presumption of anti-revival. But where testators append codicils to wills and later revoke by act those codicils, the revised Code flipped to a rebuttable presumption of revival, reinstating whatever part of the will the codicil had superseded.²⁵ The third Restatement of Property endorses this bifurcated approach.²⁶

Today, forty American states treat revival by statute.²⁷ And the statutes vary: fifteen states by statute, plus two more by case law, impose a conclusive presumption of anti-revival — the modern plurality rule, as under the Model Probate Code and the British act.²⁸ Five states by statute, and two more by case law, create a rebuttable presumption of anti-revival, as under the original Uniform Probate Code.²⁹ Fifteen

²³ Elements of these drafts will be noted and addressed hereinafter. *See infra* notes 74, 101–04, 126, 152 and accompanying text.

²⁴ *See* UNIF. PROB. CODE § 2-509 (pre-1990 art. 2) (UNIF. LAW COMM'N 1969), 8 pt. 1 U.L.A. 537 (2013). The final text followed closely a provision proposed within a critique of the Model Probate Code published a generation earlier, in 1948. *See* Philip Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 511-12 (1948).

²⁵ *See* UNIF. PROB. CODE § 2-509 (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 226 (2013).

²⁶ *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.2 cmts. f-g (AM. LAW INST. 1999). The second Restatement had failed to address revival. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.2 (1992).

²⁷ The ten outliers are: Connecticut, Delaware, Louisiana, Mississippi, New Hampshire, Rhode Island, Tennessee, Texas, Vermont, and Wyoming. The number of states with statutes on point has grown over time. In 1929, twenty-four states (including Alaska and Hawaii, then territories) had a codified rule. *See* Bordwell, *supra* note 21, at 309-10. By 1960, that number had climbed to twenty-eight. *See* Rees, Jr., *supra* note 21, at 891-92.

²⁸ *See* ARK. CODE ANN. § 28-25-110 (2020); IND. CODE § 29-1-5-6 (2020); IOWA CODE § 633.284 (2020); KAN. STAT. ANN. § 59-612 (2020); KY. REV. STAT. ANN. § 394.100 (2020); MD. CODE ANN., EST. & TRUSTS § 4-106 (2020); NEV. REV. STAT. § 133.130 (2020); N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (2020); N.C. GEN. STAT. § 31-5.8 (2020); OHIO REV. CODE ANN. § 2107.38 (2020); OKLA. STAT. tit. 84, § 106 (2020); OR. REV. STAT. § 112.295 (2020); 20 PA. CONS. STAT. § 2506 (2020); VA. CODE ANN. § 64.2-411(2020); W. VA. CODE § 41-1-8 (2020); *Deposit Guaranty Nat'l Bank v. Cotten*, 420 So. 2d 242, 244-45 (Miss. 1982); *Brackenridge v. Roberts*, 267 S.W. 244, 247-48 (Tex. 1924); *see also* D.C. CODE § 18-109(b) (2020).

²⁹ *See* ALA. CODE § 43-8-138 (2020); CAL. PROB. CODE § 6123 (2020); IDAHO CODE § 15-2-509 (2020); MO. REV. STAT. § 474.410 (2020); NEB. REV. STAT. § 30-2334 (2020);

states by statute couple a rebuttable presumption of anti-revival for will-will sequences with a rebuttable presumption of revival for will-codicil sequences, as the revised Uniform Probate Code recommends.³⁰ Four more states by case law observe the common-law rule of conclusive revival.³¹ Two states by case law admit extrinsic evidence of intent and create no presumption one way or the other, parroting the English ecclesiastical courts.³² The remaining five states feature four additional statutory variations.³³

A pair of commentators has likened the American rules of revival to a “kaleidoscope.”³⁴ Seen early on, this pattern became more pronounced once states moved to codify revival, along with other doctrines of inheritance. By its nature, codification encouraged pluralism.³⁵ But

May v. McCormick, 769 P.2d 395, 396 (Wyo. 1989); Lane v. Hill, 44 A. 393, 397 (N.H. 1895).

³⁰ See ALASKA STAT. § 13.12.509 (2020); ARIZ. REV. STAT. ANN. § 14-2509 (2020); COLO. REV. STAT. § 15-11-509 (2020); HAW. REV. STAT. § 560:2-509 (2020); ME. STAT. tit. 18-C, § 2-508 (2020); MASS. GEN. LAWS ch. 190B, § 2-509 (2020); MICH. COMP. LAWS § 700.2509 (2020); MINN. STAT. § 524.2-509 (2020); MONT. CODE ANN. § 72-2-529 (2020); N.M. STAT. ANN. § 45-2-509 (2020); N.D. CENT. CODE § 30.1-08-09 (2020); S.D. CODIFIED LAWS § 29A-2-509 (2020); UTAH CODE ANN. § 75-2-509 (2020); WASH. REV. CODE § 11.12.080 (2020); WIS. STAT. § 853.11(6) (2020).

³¹ See Whitehill v. Halbing, 118 A. 454, 456-58 (Conn. 1922); Dawson v. Smith, 8 Del. 92, 95-96 (1865); *In re Will of Kuklinski*, No. 108189, 1995 WL 106504, at *7 (Del. Ch. Feb. 7, 1995); *Succession of Dambly*, 186 So. 7, 13 (La. 1938) (applying civil law); Bates v. Hacking, 68 A. 622, 630 (R.I. 1908).

³² See *In re Estate of McKelvey*, No. M2017-01298-COA-R3-CV, 2018 WL 2264087, at *4 (Tenn. Ct. App. May 17, 2018); *Wrinkle v. Williams*, 260 S.W.2d 304, 309 (Tenn. Ct. App. 1953); *In re Gould’s Will*, 47 A. 1082, 1083 (Vt. 1900).

³³ New Jersey and South Carolina by statute create a rebuttable presumption of anti-revival for will-will sequences and a rebuttable presumption of revival for will-codicil sequences, but make both *strong* presumptions. See N.J. STAT. ANN. § 3B:3-15 (2020); S.C. CODE ANN. § 62-2-508 (2020). Illinois by statute establishes a conclusive presumption of anti-revival for will-will sequences and a conclusive presumption of revival for will-codicil sequences. See 755 ILL. COMP. STAT. 5/4-7(c) (2020). Florida by statute creates a conclusive presumption of anti-revival for will-will sequences and a rebuttable presumption of revival for will-codicil sequences. See FLA. STAT. § 732.508 (2020). Georgia by statute creates a rebuttable presumption of anti-revival for a will-will sequence if the subsequent will included an express revocation clause, a rebuttable presumption of revival for a will-codicil sequence if the codicil expressly amended the will, and a conclusive presumption of revival for both will-will and will-codicil sequences if the subsequent will or codicil revoked the original will entirely or in part by implication. See GA. CODE ANN. §§ 53-4-42(c), 53-4-45(b), (d) (2020).

³⁴ Zacharias & Maschinot, *Revocation: Part III*, *supra* note 13, at 146. For an earlier observation of the doctrine’s heterogeneity, see *Blackett v. Ziegler*, 133 N.W. 901, 903-04 (Iowa 1911) (quoted *supra* note 12).

³⁵ For a further discussion and references, see Adam J. Hirsch, *Teaching Wills and Trusts: The Jurisdictional Problem*, 58 ST. LOUIS U. L.J. 681, 681 (2014). *But cf.* William

variegation to this extent is unusual and, having deeper roots, must have implicated more than just escape from the gravitational pull of a common-law system. Doubtless, under-theorization also played a part. Judges and legislators are most apt to scatter their aim when they lack a clear target. And on top of that, the want of empirical data has clouded the firing range, spoiling the aim even of lawmakers who have identified a target.

II. POLICY

Historically, lawmakers have been tight-lipped about the policies underlying the law of revival. The British act establishing a conclusive presumption of anti-revival disregarded the counsel of the commissioners advising Parliament.³⁶ The legislators' reasons for doing so were nowhere recorded or explained. A century later, the provisions of the Model Probate Code section adopting the Parliamentary rule likewise failed to include a comment or other explanatory material.³⁷ Its text followed the language of the British act so closely as to suggest mindless copying.³⁸

The commissioners advising Parliament had preferred a rule of revival on the theory that it would prove less vulnerable to fraud. Under a rule of anti-revival, "[w]ills might be defeated by parol evidence that subsequent [w]ills had been made and destroyed."³⁹ Yet, on reflection, wills appear susceptible to fraud under either rule. Operating under a regime of revival, perpetrators of a fraud could introduce evidence intended to prove that the testator had made a lost will, viz., a will that went missing that the testator never revoked. If accepted, this evidence could function to invalidate the surviving will as having been revoked

Magnuson, *The Race to the Middle*, 95 NOTRE DAME L. REV. 1183, 1200-15 (2020) (identifying structural pressures for legislative conformity among the states).

³⁶ The commissioners had recommended a conclusive rule of revival, as under the common law, where a second will is revoked by act and the first will "is left perfect." FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 34 (1833) [hereinafter FOURTH REPORT].

³⁷ See SIMES & BASYE, MODEL PROBATE CODE, *supra* note 22, § 55.

³⁸ Compare *id.*, with Wills Act 1837, 1 Vict. c. 26, § 22 (Eng.). A contemporary commentator noticed the resemblance. See Mechem, *supra* note 24, at 510.

³⁹ FOURTH REPORT, *supra* note 36, at 34. For an American expression of this concern, see *In re Andrews' Will*, 88 N.Y.S.2d 32, 38 (Sur. Ct. 1949). In some instances, American courts have rejected allegations of subsequent, missing wills. See *In re Crawford's Will*, 98 S.E.2d 29, 31-32 (N.C. 1957); *Betts v. Betts*, 395 S.W.2d 673, 674-76 (Tex. Civ. App. 1965).

by subsequent executed writing.⁴⁰ And if the terms of the purported lost will could not be reconstructed to the court's satisfaction, it would hold the testator intestate, just as in the commissioners' scenario for fraud under a regime of anti-revival.⁴¹ Is proof of a subsequent, lost will more difficult to fabricate than proof of a subsequent, revoked will? At most, the difference is a matter of small degree.⁴²

The original Uniform Probate Code of 1969, softening anti-revival into a rebuttable presumption, laid down the mechanics of the doctrine but offered no reason for it.⁴³ Legislative history indicates clashes over the wisdom of admitting extrinsic evidence to override the rule, but not over the presumption of anti-revival.⁴⁴ Finally, the revised Code of 1990, carving out an exception from the presumption of anti-revival where the second instrument is a codicil, set forth a rationale for the doctrine. Its rationality is another matter. According to the Uniform Law Commissioners,

the presumption against revival . . . is justified because where Will #2 wholly revoked Will #1, the testator understood or should have understood that Will #1 had no continuing effect. Consequently, [this section] properly presumes that the testator's act of revoking Will #2 was not accompanied by an intent to revive Will #1. . . . [But] where Will #2 only partly revoked Will #1, . . . the testator knows (or should know) that Will #1 does have continuing effect. Consequently, [the section] properly presumes that the testator's act of revoking Will #2 (the codicil) was accompanied by an intent to revive or reinstate the revoked parts of Will #1.⁴⁵

This analysis is exquisitely strange. On one level, it sounds like an echo of eighteenth-century claims about the abstract timing of

⁴⁰ See 2 PAGE, *supra* note 13, § 21.48, at 459-62.

⁴¹ See, e.g., *In re Brackenridge's Estate*, 245 S.W. 786, 794 (Tex. Civ. App. 1922).

⁴² The perpetrator of the fraud would need to fabricate evidence showing that the lost will either contained an express revocation clause or was inconsistent with the prior will. See 2 PAGE, *supra* note 13, § 21.48, at 459-62.

⁴³ See UNIF. PROB. CODE § 2-509 cmt. (pre-1990 art. 2) (UNIF. LAW COMM'N 1969), 8 pt. 1 U.L.A. 537 (2013).

⁴⁴ See *infra* notes 101-104 and accompanying text.

⁴⁵ UNIF. PROB. CODE § 2-509 cmt. (revised 2019) (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 227 (2013) (emphasis in original). This rationale was added to the comment late in the drafting process, failing to appear in either of the first two drafts of the revised provision. See UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM'N, Discussion Draft for Dec. 1-3, 1989 meeting); UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM'N, Discussion Draft for Feb. 2-4, 1990 meeting).

performative acts. Policy choices in the twenty-first century ought not to hinge on such formalisms. But even considered on this level, who is to say whether the ecclesiastical courts got their abstractions right and the common-law courts got them wrong? In rejecting the ecclesiastical courts' notion that a revocation by subsequent executed writing operated instantaneously, the common-law courts had offered "[a] quite plausible theory, supported by highly reputable authorities."⁴⁶ Can the Uniform Law Commissioners reasonably contend that a "testator understood or should have understood" what the towering figure of Lord Mansfield failed to understand?⁴⁷

On another level, the Uniform Law Commissioners fail even to apply their preferred abstraction in a consistent manner. If, by hypothesis, the ecclesiastical courts were right and revocation operates *in praesenti*, then the theory pertains to wills and codicils alike. The will has "continuing effect," in the Commissioners' phrasing,⁴⁸ only to the extent that it is not superseded by a subsequent executed writing. Hence, when a testator executes a second will, the original one has no continuing effect. And when a testator executes a codicil, that part of the will which the codicil supersedes likewise has no continuing effect. Following the Commissioners' logic, shouldn't the testator know that fact, too?

More to the point, what are the Uniform Law Commissioners seeking to accomplish here? Their comment fails to articulate a substantive policy at issue in this area of the law.⁴⁹ And we can posit a number of possibilities.

One conceivable rationale for a rule of anti-revival is favoritism for heirs. New York established a conclusive presumption of anti-revival in 1829 as part of a sweeping revision of state law, anticipating its British counterpart by eight years.⁵⁰ The revisers justified their rule with a comment of their own: "We may safely lean in favor of intestacy; since it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides."⁵¹

⁴⁶ Mechem, *supra* note 24, at 510.

⁴⁷ See *supra* note 7 and accompanying text. For an early recognition of the dangers of formalistic reasoning in connection with revival, see *Lively v. Harwell*, 29 Ga. 509, 515-16 (1859).

⁴⁸ See *supra* text accompanying note 45.

⁴⁹ We shall return to the Commissioners' comment in pages following. See *infra* notes 84-89 and accompanying text.

⁵⁰ See 2 THE REVISED STATUTES OF THE STATE OF NEW-YORK ch. 6, § 53 (1829).

⁵¹ Report of Revisers of N.Y. Statutes of 1827-1828, *quoted in* Ferrier, *supra* note 21, at 267.

This assertion fits into a pattern that some commentators discern within inheritance law generally: Even as lawmakers exalt freedom of testation as a “bedrock principle,”⁵² they have taken steps, often covertly, to help family members defeat the whims of patriarchs, transcending the overt, but limited, protection afforded by forced-share laws.⁵³ One commentator perceives a dynamic element in this policy, asserting that “[i]n the past . . . family protectionism has competed with freedom of disposition for influence over the development of the law of succession” but “long ago” gave way to freedom “as the primary policy objective” of inheritance law.⁵⁴ In this model, elements of the law that protect the family indirectly or covertly survive today as vestiges of a policy that previously held greater sway than it does now.⁵⁵

The historical claim of ideological transition — suggesting in the present context that anti-revival might have begun as a pro-heir policy but has become anachronistic — is doubtful. Legal history is never that simple.⁵⁶ During the Middle Ages, British law did indeed favor intestacy in various, fluctuating ways when it served to ensure the uninterrupted performance of feudal services. Feudalism as a social system broke down in Great Britain during the War of the Roses, was resurrected by

⁵² *In re Estate of Kuralt*, 15 P.3d 931, 934 (Mont. 2000).

⁵³ See, e.g., Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate’s Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 413, 453 (2009); Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 299-303 (1944); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235-38, 258-68 (1996).

⁵⁴ Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 631-36 (2016) (quotations at 631-32). Professor Glover does not attempt to date this shift in ideology, suggesting only that it occurred “at some point in the past.” *Id.* at 635.

⁵⁵ See *id.* at 636.

⁵⁶ Overt, mandatory protection for a surviving spouse has waxed and waned in Great Britain. Testators could defeat dower by will after 1833. See *Dower Act 1833*, 3 & 4 Will. 4 c. 105, § 4 (Eng.). Dower was abolished altogether in 1925, see *Administration of Estates Act 1925*, 15 & 16 Geo. 5 c. 23, § 45 (Eng.), but was replaced by protection at the discretion of the court after 1938. See *Inheritance (Family Provision) Act 1938*, 1 & 2 Geo. 6 c. 45, § 1 (Eng.). Subsequent legislation in Great Britain operated to broaden judicial discretion. See Elizabeth Travis High, *The Tension Between Testamentary Freedom and Parental Support Obligations: A Comparison Between the United States and Great Britain*, 17 CORNELL INT’L L.J. 321, 323-30 (1984). The American trend has favored increasing protection for surviving spouses over time. See Adam J. Hirsch, *Inheritance: United States Law*, in 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 236-37 (Stanley N. Katz ed. 2009) [hereinafter *Inheritance*]. Nonetheless, no American state has seen fit to grant courts the sort of broad discretion to protect the family that exists today in Great Britain, although several states have considered such legislation. See Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP. TR. & EST. L.J. 175, 265 (2015) [hereinafter *Airbrushed Heirs*].

the Tudors, and then collapsed for good during the English Civil War.⁵⁷ Those events all occurred before rules of revival and other formalizing rules for wills took shape.⁵⁸ But even during the age when intestacy remained a feudal imperative, it functioned to protect the family in Great Britain only in the narrowest sense — the eldest son comprised the exclusive heir to land, sharing nothing with younger children, nor did the spouse comprise an heir even in the absence of children, under rules of intestacy that persisted until 1925.⁵⁹ As early as the eighteenth

⁵⁷ For a discussion, see JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 271-78 (5th ed. 2019). Parliament formally abolished the feudal incidents upon the Restoration in 1660. See Tenures Abolition Act 1660, 12 Car. 2 c. 24 (Eng.).

⁵⁸ The earliest rules of revival dated to the eighteenth century. See *Burt v. Burt* (Prerog. Ct. 1718), noted in *Moore v. Moore* (1817) 161 Eng. Rep. 1026, 1028; 1 Phill. Ecc. 406, 412-13. Professor Glover offers his analysis specifically to suggest that “the law of will-execution developed under conditions in which protection against familial disinheritance perhaps tempered the decedent’s freedom of disposition to a greater extent than it does today.” Glover, *supra* note 54, at 636. “By requiring the testator to strictly comply with a variety of formalities, the conventional law of will execution impedes the decedent’s exercise of this freedom.” *Id.* at 633. Britain first established will formalities, confined to devises of real property, in 1677, a generation after the formal abolition of feudal incidents. See Statute of Frauds 1677, 29 Car. 2 c. 3 (Eng.). The stimulus for the act of 1677 (as its title implied) was a notorious case of testamentary fraud, the historical memory of which lingered when Parliament revisited will formalities in 1837. See ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 9 (1928); FOURTH REPORT, *supra* note 36, at app. 27. In establishing will formalities, Parliament “did not mean to restrain testamentary dispositions of land” but rather had “thought [the formal requirements] would soon be universally known, and might very easily be complied with.” *Windham v. Chetwynd*, 97 Eng. Rep. 377, 381 (K.B. 1757) (Mansfield, J.). Early in the nineteenth century, Parliament began chipping away at will formalities. In 1837, it reduced the requisite number of witnesses from three to two (even while extending will formalities to bequests of personal property). See Wills Act 1837, 1 Vict. c. 26 (Eng.). In so doing, Parliament responded to the concern that thick formalities “would impose too great a restraint upon the power of testamentary disposition” and sought to minimize the “burthen” on testators. FOURTH REPORT, *supra* note 36, at 3, 17-18. Then in 1852, Parliament liberalized the signature requirement, no longer requiring that it appear directly at the foot of the will. See Wills Act Amendment Act 1852, 15 & 16 Vict. c. 24, § 1 (Eng.). Early American legislation was modelled on these British acts. See Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 1, 4 (1928). American courts have long maintained that will formalities should not “increase the difficulty of the transaction to such an extent as to practically destroy the right of the uninformed layman to dispose of his property by will.” *Savage v. Bowen*, 49 S.E. 668, 669-70 (Va. 1905); see also Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 805 nn.39-40 (2014) (citing additional opinions). The available evidence thus belies Glover’s conjecture.

⁵⁹ See Administration of Estates Act 1925, 15 & 16 Geo. 5 c. 23, § 46 (Eng.); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 284 (2d ed. 1986). Traditional intestacy law did, however, function to exclude “utter strangers.” 2 WILLIAM BLACKSTONE, COMMENTARIES

century, English courts and commentators identified *testation* as a superior means of protecting families.⁶⁰

Several American colonies extended intestate succession to spouses and all children from the time of their establishment, and the rest followed suit following the Revolution.⁶¹ Intestacy thus took on a family orientation from an earlier date in America than in England. We can point to rare instances where lawmakers have looked favorably upon intestacy as meriting promotion — and they have continued to do so with equal rarity into modern times.⁶² But we can also identify countless counterexamples, from the eighteenth century onward: The United States Supreme Court dismissed a preference for heirs as reflecting “feudal policy” in 1852.⁶³ The Supreme Court of Hawaii labelled the same preference “archaic” in 1919.⁶⁴ And so on.⁶⁵ If any meaningful

*373. By contrast, succession to personal property was uncertain, and it could be appropriated by administrators prior to 1670, when Parliament mandated an inflexible scheme of succession whereby the spouse and all children shared as next-of-kin. See Statute of Distributions 1670, 22 & 23 Car. 2 c. 10, § 3 (Eng.). This statute appears to have been based on Roman law and customary law in the city of London. For a further discussion, see Harold I. Elbert, *Advancements: I*, 51 MICH. L. REV. 665, 670-71 (1953). Still, relative to land, chattels held small value prior to the industrial revolution in the nineteenth century.

⁶⁰ See *Banks v. Goodfellow* (1870) 5 LRQB 549, 564; Jeremy Bentham, *Principles of the Civil Code*, in 1 THE COLLECTED WORKS OF JEREMY BENTHAM 297, 336-37 (John Bowring ed. 1843) (ms. c. 1775-1802). The same theme emerged in the United States, despite the broader range of heirship under American law. See *Rapp v. Reehling*, 23 N.E. 777, 778 (Ind. 1890) (“[Wills] enable the testator to provide in a proper manner for those who are the objects of his bounty, giving to those who need, and who ought to receive, his bounty, but who would not, were it not for the right of testamentary disposition of property.”).

⁶¹ For a further discussion, see Hirsch, *Inheritance*, *supra* note 56, at 235-36.

⁶² See GA. CODE ANN. § 53-2-9 (repealed 1997) (“A testator may bequeath his entire estate to strangers, to the exclusion of his spouse and children. In such a case the will should be closely scrutinized; and, upon the slightest evidence of aberration of intellect . . . probate should be refused.”); see also Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1066 n.30 (1996) (identifying opinions).

⁶³ *Bosley v. Wyatt*, 55 U.S. 390, 397 (1852).

⁶⁴ *In re Estate of Lopez*, 25 Haw. 197, 200 (1919).

⁶⁵ The high court of Virginia in 1831:

Nor ought courts, in their decisions on wills, to be at all influenced by the reflection, that the law has made a just distribution for such as die intestate: that law never meant to interfere with the right of every man to dispose, at his will and pleasure, of the property which it had been the labour of a life to acquire; a right dear to him, and held sacred wherever civilization has made progress, or law bears the semblance of science.

Boyd v. Cook, 30 Va. 32, 50-51 (1831); see also, e.g., *Holmes v. Williams*, 1 Root 335, 340 (Conn. 1795); *Smith v. Furbish*, 44 A. 398, 414 (N.H. 1894); *Brush v. Wilkins*, 4

transformation occurred in respect of the ideology of testation over the course of American legal history, it has yet to be shown in a comprehensive study.

In sum, we cannot identify favoritism for heirs as an influential policy historically, at least beyond the feudal era.⁶⁶ Its articulation by the New Yorkers should be taken as an outlier.⁶⁷ But assuming that we posited a policy of protecting the family as influencing our law covertly today, as some believe,⁶⁸ a presumption of anti-revival would not promote that policy in a desirable way. Whatever form it takes, a rule of revival comprises a default rule. Even under a conclusive presumption of anti-revival, testators would remain free to republish former wills by re-executing them, although they could not revive them. If, then, anti-revival contradicted the wishes of a majority of testators, it would represent a “social” default — to wit, a default rule designed to favor an outcome lawmakers assess as in the public interest, notwithstanding testators’ preferences.⁶⁹

The argument in favor social defaults is that they operate only in situations where parties do not care enough to override them and thereby potentially achieve efficiency.⁷⁰ The argument against social defaults is that they force parties to bear transaction costs to gain results that a rule geared to parties’ preferences would avoid — thereby

Johns. Ch. 506, 518-19 (N.Y. 1820); *Vandevent v. Dep’t of Revenue*, 9 Or. Tax 157, 160 (1982); *Gardner v. Gardner*, 35 A. 558, 560 (Pa. 1896) (affirming requested charge to the jury); Hirsch, *Airbrushed Heirs*, *supra* note 56, at 183-84 (citing additional opinions).

⁶⁶ We can, however, point out one example of heir-oriented policy that crystalized as doctrine during the feudal era and then persisted as an anachronism into modern times. Under the common law, only a will beneficiary could disclaim an inheritance — an heir could not renounce an inheritance for the archaic reason that doing so would avoid the heir’s feudal obligations to his overlord. This distinction survived in a few American states lacking statutory rules of disclaimer as late as the 1990s. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 591, 596 (1989); Christian Marius Lauritzen, II, *Only God Can Make an Heir*, 48 NW. U. L. REV. 568, 568-76 (1953).

⁶⁷ One legal historian who touched on the issue identified the theme of protectionism for heirs as appearing “occasionally” in the case law. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1049 n.63 (1994).

⁶⁸ See sources cited *supra* note 53.

⁶⁹ For a further discussion, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1044 (2004) [hereinafter *Default Rules*].

⁷⁰ See *id.* at 1045-46. For an economic model demonstrating the efficiency of social defaults in a limited range of circumstances, see *id.* app. at 1097-99.

reducing efficiency.⁷¹ What is more, social defaults are discriminatory. They disproportionately hamper poorer testators, who are less able to afford the legal counsel that would help them to identify and override social defaults.⁷²

Orthodox theory tells us that lawmakers should instead set default rules to correspond with what a majority (or plurality) of parties prefer. Such “majoritarian” defaults, so called, effectuate intent while minimizing transaction costs.⁷³ In the instant situation, if lawmakers establish a rule of revival that corresponds with the preferences of most testators, then fewer of them will need to go to the trouble and expense of executing new estate plans to reflect changed intent. Poorer testators would enjoy the same advantages as better-counselled elites.

The difficulty we face, however, is that, unlike typical default rules, any given rule of revival must choose between two fluid alternatives — intestacy (producing a limited array of alternatives) and a will (producing an unlimited one). As a consequence, the option most testators would prefer is indeterminate. Whether testators would elect intestacy over the terms of an original will depends on what each provides. If posed to testators in the abstract, the question would appear meaningless.⁷⁴

We could, though, approach the problem as an exercise in averaging. The rules of intestacy ostensibly correspond with the typical preferences of decedents, sometimes substantiated by empirical evidence.⁷⁵ This characteristic might lead us to anticipate that rules tilted toward intestacy will, on average, reflect intent more closely than rules tilted in any other direction. Yet, in this instance, the alternative is a will the testator executed to effectuate intent at a prior moment in time. Naturally, a current will would reflect intent more accurately than the

⁷¹ See *id.* at 1044-45.

⁷² See *id.* at 1046-52.

⁷³ See *id.* at 1039-42.

⁷⁴ Cf. William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1074 (1966) (commenting that the common-law rule of conclusive revival, reflected in the first tentative draft of the Code which he participated in drafting, see UNIF. PROB. CODE § 248 (UNIF. LAW COMM'N, Reporters' Draft No. 1, Aug. 1966), was “designed to effectuate probable intent”); see also Samuel A. Persky, Comment, *Effect Upon a Prior and Existing Will of the Revocation of a Subsequent Will Containing an Express Revocatory Clause*, 32 Yale L.J. 70, 74 (1922) (inferring similarly that revival of the original will “will more often than not coincide with the testator’s desires”). Professor Fratcher expounded a hypothetical where the common-law rule would likely have coincided with the testator’s substantive intent. See Fratcher, *supra*, at 1074-75. Yet, surely, we could just as easily construct hypotheticals where the opposite was true.

⁷⁵ See Hirsch, *Default Rules*, *supra* note 69, at 1080.

off-the-rack estate plan created by an intestacy statute. Whether a *generalized* plan of intestacy is more likely to reflect intent on average than an *individualized but superseded* plan of testation — the issue we confront in the context of revival — is unclear.⁷⁶

A different, and ultimately more productive, way to approach the problem is to focus not on intent, but on error. What would the typical testator suppose that he or she is doing when he or she revokes a will by act while leaving a prior will intact? By matching a rule of revival with the result that a majority of testators would expect to follow from performing this act in the absence of knowledge about the operative rule, lawmakers would spare testators from either the information cost of learning the rule or the error cost of making a false assumption about what the operative rule is. In earlier work, I dubbed rules of this sort as “error-minimizing” defaults.⁷⁷ Secondly, error-minimizing defaults perform a leveling function, protecting poorer testators who are less likely to become apprised of the law, and relieving all testators from the need for counsel that poorer testators are less able to afford.⁷⁸

In other corners of the Uniform Probate Code, its drafters have taken pains to align rules with popular assumptions. The Code’s provision on choice-of-law, giving effect to wills that satisfy execution formalities in the state where they were executed, or where the testator was then domiciled, even if void under the formalizing rules of the testator’s domicile at death, is intended “to provide a wide opportunity for validation of expectations of testators.”⁷⁹ Likewise, the Code includes a provision giving effect to notarized wills that are otherwise unwitnessed because “lay people (and, sad to say, some lawyers) think that a will is valid if notarized.”⁸⁰ Accordingly, the provision “reduce[s] confusion

⁷⁶ Cf. Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 463 n.49 (2002) (making a related observation in a different context).

⁷⁷ See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 633-35 (2009) [hereinafter *Text and Time*]. For an economic model of error-minimizing defaults, demonstrating their potential efficiency in comparison to majoritarian defaults, see *id.* app. at 659-63.

⁷⁸ For a defense of what one commentator calls the ideal of “equal planning under law,” see Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 613 (1988). For additional discussions, see Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 350-54 (2018); Hirsch, *Default Rules*, *supra* note 69, at 1051-52.

⁷⁹ UNIF. PROB. CODE § 2-506 cmt. (UNIF. LAW COMM’N 2019), 8 pt. 1 U.L.A. 221 (2013).

⁸⁰ *Id.* § 2-502 cmt., 8 pt. 1 U.L.A. 209 (2013).

and chance for error.”⁸¹ We can spy the same deference to popular assumptions as supporting other rules within the Code,⁸² as well as rules located in other legal categories, such as contract law.⁸³

In this context, the Uniform Law Commissioners’ comment, quoted earlier, that testators “underst[and]” the implications of revocation could be read to imply that testators expect original wills not to be revived when they revoke by act subsequent wills (and vice versa for codicils).⁸⁴ If the Commissioners meant to posit such an expectation,⁸⁵ then it is one they inferred, in want of any evidence from which to draw the conclusion. And it is an inference that others dispute⁸⁶: A group of

⁸¹ *Id.*

⁸² Under the Uniform Probate Code, if a testator executes a will bequeathing to a spouse, is later divorced from the spouse, which thereby revokes the bequest by operation of law, and still later remarries the same spouse, without ever amending the estate plan through other means, the original bequest to the spouse is revived. *See id.* § 2-804(e), 8 pt. 1, U.L.A. 330 (2013). Although the accompanying comment fails to discuss this doctrine, *see id.* § 2-804 cmt., courts have justified it as an error-minimizing rule: “It is understandable that a man or woman having already written one will — and none subsequently — would see no necessity to republish it or write another if the natural object of his or her bounty were the same after remarriage.” *Blanchard v. Blanchard* (*In re Estate of Blanchard*), 218 N.W.2d 37, 39 (Mich. 1974); *see also* *Smith v. Smith*, 519 S.W.2d 152, 154 (Tex. Civ. App. 1974) (making a similar observation).

⁸³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981) (enforcing promises unsupported by consideration that a “promisor should reasonably expect to induce action or forbearance”).

⁸⁴ UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM’N 2019), 8 pt. 1 U.L.A. 226 (2013); *see supra* text accompanying note 45.

⁸⁵ We have some reason to think so. The Reporter for the revised Uniform Probate Code, Lawrence Waggoner, doubled as Reporter for the Restatement. And the Restatement justifies a presumption of revival for will-codicil sequences on the ground that “a person revoking an amending document [i.e., a codicil] ordinarily thinks that he or she has revoked the amendments, leaving the original document unamended.” RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.2 cmt. g (AM. LAW INST. 1999). Because the Restatement simultaneously endorses a presumption of anti-revival for will-will sequences, the Reporter may have surmised that people ordinarily think differently about the consequences of revocation of a subsequent will, although the relevant comment fails to address the matter. *See id.* cmt. f.

⁸⁶ An academic commentator asserted that “[i]t is natural . . . for one unfamiliar with the technicalities of the law to assume that any will which he has properly executed will be effective so long as it is the only will which he leaves on his death,” and accordingly a rule of anti-revival created “a pitfall for testators.” Ferrier, *supra* note 21, at 273; *cf.* Whitman, *supra* note 1, at 1056 (making the same observation but limiting it to will-codicil sequences). Courts have divided on the question. *Compare In re Andrews’ Will*, 88 N.Y.S.2d 32, 38 (Sur. Ct. 1949) (assuming a presumption of revival to be “very natural[.]”), and *In re Will of Farr*, 175 S.E.2d 578, 582 (N.C. 1970) (making the same observation in connection with a will-codicil sequence), with *Pickens v. Davis*, 134 Mass. 252, 256 (1883) (asserting that a presumption of revival “does not correctly

Commissioners who drafted the original version of the Uniform Probate Code had supposed “there is a general understanding among non-lawyers that the earlier will, still intact, is good if the revoking instrument is destroyed.”⁸⁷ Yet, those same Commissioners failed to grasp the significance of their hypothesis — on this basis, they proposed to make the presumption of anti-revival rebuttable, rather than to create a presumption of revival.

The current Uniform Law Commissioners, though, take their analysis a step further. The rule depends, they submit, not just on testators’ understandings when they revoke subsequent wills, but on what testators “*should* have understood,” what they “*should* know.”⁸⁸ Here, the Commissioners’ analysis skates toward anomaly, or even inanity. Obviously, testators should know whatever the rule of revival happens to be, but then the rationale becomes circular as a guide to lawmaking. The precept that testators should know and understand principles of law only applies *ex post*, never *ex ante*.⁸⁹

In order to craft an error-minimizing default in the context of revival, we must inform the rule with empirical evidence concerning the nature and prevalence of popular assumptions. In so doing, we can discern a certain irony. The *argumentum ad numeram* fallacy warns that just because most people believe something to be true does not make it true. But in law, an *argumentum ad numeram* holds greater authority. If most people believe something to be true, then a rule reflecting that consensus causes them to make fewer mistakes. And so it seems, logical fallacies can translate into legal verities — for our law follows its own, peculiar logic.

represent the actual operation of the minds of testators”), and *Ewell v. Rucker*, 187 S.W.2d 644, 647 (Tenn. Ct. App. 1945) (making a similar observation).

⁸⁷ UNIF. PROB. CODE § 2-508 & cmt. (UNIF. LAW COMM’N, Discussion Draft, Summer 1967); UNIF. PROB. CODE § 2-508 cmt. (UNIF. LAW COMM’N, Third Working Draft, Nov. 1967).

⁸⁸ UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM’N 2019), 8 pt. 1 U.L.A. 226 (2013) (emphasis added); see *supra* text accompanying note 45.

⁸⁹ In applying a rule of anti-revival, “[e]veryone is presumed to possess knowledge of the legal consequence of his acts” *Parker v. Mobley*, 577 S.W.2d 583, 585-86 (Ark. 1979). The same assumption extends to other rules of inheritance. See, e.g., *Hedlund v. Miner*, 69 N.E.2d 862, 867 (Ill. 1946); *Maxwell v. Maxwell*, 193 A. 719, 720 (N.J. Ch. 1937). But cf. *Ferrier*, *supra* note 21, at 273 (“[T]estators . . . can scarcely be expected to know of [the] provisions” of a revival statute.).

III. THE DATA

In order to determine how most persons would assess in the abstract the issue at hand, I performed an electronic survey of 1,046 respondents, positing a hypothetical case of revival:

Suppose you wrote a will, and then a few years later you changed your mind about some things and wrote a new will. You later decided that the second will was not to your liking and destroyed it, but you never destroyed your original will. When you die, which of these do you think would govern your estate?

Fully 74.2% of respondents believed that their original wills would take effect under these circumstances. Only 25.8% thought they would have “no effective will.”⁹⁰ A follow-up question asked respondents whether they had based their answers on “knowledge of the law,” “a logical assumption of what the law is,” or “a guess.” Here, 21.8% of respondents asserted that they knew the law, 51.4% had made a logical assumption, and 26.8% had taken a guess. When the guessers (who presumably would be least likely to act without legal advice) are omitted from the data set, the fraction of respondents who believed they would revive their original wills under this scenario rises slightly, to 76.9%. Among respondents who claimed they knew the law (hence, who presumably would be most likely to act without legal advice), the fraction of respondents who believed they would revive their original wills falls, but again only slightly, to 70.2%.⁹¹

A second study, performed by another electronic polling firm with a different set of 1,009 respondents, changed the hypothetical scenario from a will-will sequence to a will-codicil sequence.⁹² In light of the

⁹⁰ The survey was conducted by Qualtrics, an electronic polling firm, in October 2017. The order of the answer choices alternated randomly. The raw data are available on request from the author.

⁹¹ Given the large majority of states in which a rule of anti-revival prevails, the decrease in the number of respondents who anticipated revival when they claimed to know the law suggests the dissemination of some knowledge about the operative rule. Nonetheless, the large fraction of respondents who anticipated revival even when they claimed to know the law suggests that many harbored illusions about the extent of their knowledge. Hence, these data provide evidence of a Dunning-Kruger effect (or “meta-ignorance”), whereby ignorant persons believe themselves to be more knowledgeable than they actually are. See David Dunning, *The Dunning-Kruger Effect: On Being Ignorant of One’s Own Ignorance*, 44 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 247, 250-52, 259-62 (2011).

⁹² The survey was conducted by Ipsos, another electronic polling firm, in August 2019. The question asked:

evidence gleaned from the first study, I hypothesized that an even larger majority of respondents would envision a rule of revival in connection with will-codicil sequences. If a rule of anti-revival applied to wills is counter-intuitive, then such a rule applied to codicils appears even more so.⁹³ But in fact, data from the second study proved remarkably consistent with data from the first study — 75.4% of respondents believed that the revocation of a codicil would revive the original will, and 24.6% thought otherwise.

These data suggest that a rule reviving wills following the revocation by act of either a subsequent will or codicil would serve as an error-minimizing default. Although currently predominant among the states, a rule of anti-revival functions instead as an error-maximizing default.⁹⁴ That rule is perverse from the standpoint of public policy.

One fringe benefit of conflating the categories of will-will and will-codicil sequences would be to avoid litigation over how to categorize the second instrument in the sequence. As codicils grow more complete, covering a larger part of the testator's estate plan, they become increasingly difficult to distinguish from wills.⁹⁵ Under the revised

Suppose you signed a will leaving your entire estate to Mary. A few years later you signed a document amending your will to leave \$1,000 to Sam. When the two documents are read together, \$1,000 goes to Sam, and everything else goes to Mary. You later decide that the document leaving \$1,000 to Sam is not to your liking and you destroy it. When you die, which of the following do you believe is likely to occur?

The order of the answer choices alternated randomly between “Mary receives the entire estate” and “Mary receives the entire estate minus \$1,000, which goes to your closest relatives.” Budget constraints foreclosed a follow-up inquiry into the basis of respondents' answers, as in the Qualtrics survey, so I added an instruction: “If you are unsure, please select your best guess.” Although it is not impossible that some respondents in the Qualtrics study also participated in the Ipsos study, any overlap between the panels is likely to be small. The raw data are available on request from the author.

⁹³ See *supra* note 11 and accompanying text.

⁹⁴ For anecdotal examples of testators who have fallen prey to this mistake, see *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Allan* (*In re Allan's Estate*), 59 P.2d 425, 428 (Cal. Ct. App. 1936); *In re Will of Farr*, 175 S.E.2d 578, 582 (N.C. 1970); *Ruedisili v. Henkey* (*In re Estate of Alburn*), 118 N.W.2d 919, 922-23 (Wis. 1963).

⁹⁵ The revised Uniform Probate Code does not distinguish wills from codicils but instead speaks of “a subsequent will that wholly revoked a previous will” in contradistinction to “a subsequent will that partly revoked a previous will.” UNIF. PROB. CODE § 2-509(a)-(b) (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 226 (2013). This language accords with the Code's definition of wills to include codicils (which are not independently defined), see *id.* § 1-201(57), 8 pt. 1 U.L.A. 50 (2013), but still leaves uncertainties of construction. What does “wholly” mean? See *infra* note 96. And suppose a testator executes a first codicil to a will, then adds a second codicil

Uniform Probate Code, which applies contradictory presumptions to each sequence, this continuum yields a catastrophic discontinuity at the margin.⁹⁶

Nor is that all. The distinction between wills and codicils also blurs when they function identically. Suppose the original will makes a specific bequest to A and a residuary bequest to B. Later, the testator executes another instrument that changes the beneficiary of the specific bequest to C and repeats the residuary bequest to B. Is the second instrument a will, “wholly revok[ing]” (in the language of the Code) the initial will, which would yield a presumption of anti-revival under the Code if the testator were now to revoke by act the second instrument, or is the second instrument a codicil, “partly revoking” the original will, which would yield a presumption of revival?⁹⁷ On one hand, the second instrument was complete, having included a residuary clause. On the other hand, the testator could have achieved the same

functioning to supersede the first one, and finally revokes the second codicil by act. See *In re Levin's Will*, 208 N.Y.S.2d 731, 732 (Sur. Ct. 1960). Did the second codicil “partly revoke[] a previous will” because each codicil only affected part of the estate plan, yielding a presumption of revival, or did it “wholly revoke[] a previous will,” because it completely superseded the first codicil, which under the Code’s terminology comes within the meaning of a will, yielding instead a presumption of anti-revival? See *id.* at 732 (failing to resolve the issue because New York applied the same rule to will-will and will-codicil sequences).

⁹⁶ Suppose, for example, an original will is followed by another instrument that makes an entirely new set of bequests but continues to rely on administrative terms found in the original will. Is the original will “wholly revoked,” which would yield a presumption of anti-revival under the Code if the testator were now to revoke by act the second instrument, or is the original will “partly revoked,” yielding a presumption of revival? See *Wollesen v. Carlson (In re Iburg's Estate)*, 238 P. 74, 74-76 (Cal. 1925) (raising this issue, noting conflicting authorities, and treating the second instrument as a completely new will despite its want of administrative terms replacing the previous ones); *Mason v. Danford (In re Danford's Estate)*, 238 P. 76, 77-78 (Cal. 1925) (suggesting that the issue hinges on the intent of the testator, and suggesting that if the testator intended the executor named in the initial will to serve in probate, then the second instrument would comprise a codicil); *Baily v. McElroy*, 186 N.E.2d 219, 221 (Ohio Prob. Ct. 1962) (“[W]hether you consider the First Codicil a Will or a Codicil, it had the effect of revoking the Will.”). Similarly, suppose the second instrument relies on the initial will only for the purpose of making a token bequest under the initial will. Is the original will “wholly revoked” or “partly revoked”? See *Smith v. Davison (In re Estate of Shute)*, 131 P.2d 54, 57 (Cal. Ct. App. 1942) (observing that the second instrument, here deemed a codicil despite including a residuary clause, was “not inconsistent with . . . the first insofar as nearly three-fourths of the estate is concerned”). If the codicil had been less consistent with the original will would the outcome have differed? See Gail Boreman Bird, *Revocation of a Revoking Codicil: The Renaissance of Revival in California*, 33 HASTINGS L.J. 357, 376 (1981) (noting this element of *Estate of Shute* as potentially leading to an “absurd” distinction).

⁹⁷ See *supra* note 95.

result by executing a second instrument that only altered the specific bequest. This ambiguity, too, could prompt wasteful litigation.⁹⁸

Both of these problems — marginal and functional equivalence — derive from a distinction shown by this study’s data to comprise a distinction without a difference. What is more, the drafters of the Uniform Probate Code failed even to notice the doctrinal uncertainties such a distinction would create. The accompanying comment addresses none of the ensuing issues.⁹⁹

IV. EVIDENTIARY ISSUES

A. Extrinsic Evidence

Putting aside the selection of a presumption, should it be a conclusive or a rebuttable one? Here, quantitative analysis cannot guide us. At bottom, the matter comes down to cost-efficiency, to wit, our tolerance for the added expense of trying issues of fact in revival cases, coupled with our confidence in the reliability of extrinsic evidence that might illuminate intent in those cases.

Professor Philip Mechem called it “a choice of evils,”¹⁰⁰ and the first generation of Uniform Law Commissioners divided on the matter. One faction took the view that by paring back will formalities, the Uniform Probate Code tipped the scales in favor of excluding extrinsic evidence. The Code “facilitates easy execution of a new will[,] . . . assuring that . . . real intent is carried out,” whereas “extrinsic evidence of intent permits fraud in some cases.”¹⁰¹ But another faction justified the

⁹⁸ See *Volkman v. Vinson* (*In re Estate of Schnoor*), 51 P.2d 424, 425-26 (Cal. 1935) (raising this issue and treating the second instrument as a codicil even though it included a residuary clause); *Estate of Shute*, 131 P.2d at 55-57 (similar facts and holding).

⁹⁹ See UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM’N 2019), 8 pt. 1 U.L.A. 226 (2013).

¹⁰⁰ Mechem, *supra* note 24, at 511. An early court posed the dilemma:

The effect of the rule in the [common] law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes to set up a will contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered the intention of the testator to be determined by “the uncertain testimony of slippery memory.”

Rudisill’s Ex’r v. Rodes, 70 Va. 147, 149-50 (1877). The court preferred the British statutory rule as “safer,” *id.* at 150, although it, too, operated to bar extrinsic evidence.

¹⁰¹ UNIF. PROB. CODE § 2-508 cmt. (UNIF. LAW COMM’N, Discussion Draft, Summer 1967).

admission of extrinsic evidence by pointing out that lawmakers already rely on it to demonstrate intent to revoke a will by act and to apply the doctrine of dependent relative revocation.¹⁰² A matter of “strong disagreement” among the Commissioners,¹⁰³ the second view won out, although by the time the Code was promulgated in 1969 all reference to evidentiary policy had vanished from the Code’s commentary.¹⁰⁴

If our law is to maintain a semblance of consistency, the admission of extrinsic evidence appears appropriate in revival cases.¹⁰⁵ To illustrate: Suppose a testator executes a first will, followed by a second one that disappears before the testator dies. Its disappearance creates a rebuttable presumption of revocation if the will was last known to be in the testator’s possession, or a rebuttable presumption of accidental loss if last known to be outside the testator’s possession. Either way, extrinsic evidence is admissible to show intent to revoke or accidental loss.¹⁰⁶ And if we deem extrinsic evidence of intent to revoke as credible, then surely evidence of *the effect intended by a revocation* is equally credible.¹⁰⁷ They are structurally indistinguishable and could even flow out of the same testimony — say, a reported declaration by the testator concerning

¹⁰² *Id.*

¹⁰³ *Id.* This comment reappeared in its entirety in the next draft. See UNIF. PROB. CODE § 2-508 cmt. (UNIF. LAW COMM’N, Third Working Draft, Nov. 1967).

¹⁰⁴ See UNIF. PROB. CODE § 2-509 cmt. (pre-1990 art. 2) (UNIF. LAW COMM’N 1969), 8 pt. 1 U.L.A. 537 (2013). Prior scholars had also cited the admissibility of extrinsic evidence in other situations as a justification for admitting extrinsic evidence in connection with revival, see Ferrier, *supra* note 21, at 272-73; Mechem, *supra* note 24, at 511, and presumably the Commissioners had reviewed those commentaries.

¹⁰⁵ But compare the revisers of the statutory laws of New York, who remarked that “the admission of parol evidence in any case to ascertain the intentions of the deceased, is contrary to the whole spirit and policy of the statute of wills.” Ferrier, *supra* note 21, at 272 (quoting Report of the Revisers of N.Y. Statutes of 1827-1828). A number of courts have concurred in this evaluation. See, e.g., *Bailey v. Kennedy*, 425 P.2d 304, 306-07 (Colo. 1967) (emphasizing the “danger” of judicial reliance on extrinsic evidence); *Danley v. Jefferson*, 114 N.W. 470, 472 (Mich. 1908) (“The safer and better rule is that [the testator’s] . . . intentions should be expressed in writing, formally sufficient to satisfy the statute [of wills].”). These views chimed in with those of some Uniform Law Commissioners. See *supra* note 101 and accompanying text.

¹⁰⁶ See WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 4.2, at 195-96 (5th ed. 2017).

¹⁰⁷ See *Ford’s Estate*, 13 Pa. D. & C. 87, 98, 100 (Orphans’ Ct. 1929), *rev’d sub nom. In re Ford’s Estate*, 151 A. 789 (Pa. 1930) (Stearne, J., dissenting) (making this observation, and hence characterizing the exclusion of extrinsic evidence of intent with regard to revival as “inharmonious” and “anomalous”).

what he or she had done with the second will and what he or she had sought to accomplish thereby.¹⁰⁸

A conclusive presumption of revival or anti-revival appears even more problematic when compared to the doctrine of dependent relative revocation. Suppose a testator executes a first will, followed by a second will, and then in the presence of witnesses revokes the second will by act. Suppose the testator informs the witnesses that, by this act, the testator intends to revive the first will. In a jurisdiction that applies a rebuttable presumption of anti-revival, the first will would be revived, assuming the court found the witness' testimony credible enough to overcome the presumption. By contrast, in a jurisdiction that applies a conclusive presumption of anti-revival, the first will would not be revived. Nonetheless, even in such a state, the court could apply dependent relative revocation to undo the revocation of the second will, if it comes closer to the terms of the preferred, first will than the intestacy statute — the theory being that the revocation of the second will was contingent on revival of the first will.¹⁰⁹

A court invokes dependent relative revocation only if it is satisfied by the trustworthiness of the available evidence of intent. Unless evidence of the estate plan the testator preferred is credible, the court cannot compare the desired estate plan with intestacy (on one hand) and with the second will (on the other hand) in order to decide whether undoing the revocation of the second will would better effectuate testamentary intent. And if a court deems extrinsic evidence trustworthy, then we do better still by applying *that same body of evidence* not to undo the revocation of the second will but to revive the first will, exactly as the testator intended. The court refuses to do so in a dependent relative revocation case only because the operative revival statute bars the court from electing that option.

Doctrines admitting extrinsic evidence to prove or disprove revocation by act and to invoke dependent relative revocation both rest on the assumption that extrinsic evidence of intent in revocation scenarios is potentially reliable and ought to be admissible. In fact, dependent relative revocation arose as a judicial contraption serving to

¹⁰⁸ See, e.g., *Sec. Pac. Nat'l Bank v. Bockin (In re Estate of Hering)*, 166 Cal. Rptr. 298, 299 (Ct. App. 1980); *Tibbetts v. Garrett (In re Tibbetts' Estate)*, 189 N.W. 401, 401 (Minn. 1922).

¹⁰⁹ See, e.g., *Ruedisili v. Henkey (In re Estate of Alburn)*, 118 N.W.2d 919, 920-23 (Wis. 1963). The doctrine relies on a legal fiction, namely that the testator made a *conditional* revocation, when in truth the testator was mistaken about the effect of the revocation. See *In re Dougan's Estate*, 53 P.2d 511, 524 (Or. 1936) ("In an endeavor to give effect to the deceased's intent, the doctrine construes his mistaken belief into a conditional revocation.").

circumvent statutory rules perceived by courts to exclude extrinsic evidence unnecessarily.¹¹⁰ The coexistence of these doctrines with conclusive presumptions of revival or anti-revival, persisting in some states, represents a structural inconsistency in our law too glaring to ignore.

B. Circumstantial Evidence

Assuming, then, that lawmakers allow courts to assess intent to revive on a case-by-case basis, what sorts of evidence should they deem relevant? Obviously, statements by testators comprise the best evidence of their intent or assumptions concerning revival. Such statements have often figured in the case law, although some courts have excluded oral declarations that were non-contemporaneous with the act of revocation.¹¹¹ Here, we may observe that most courts today apply a liberal version of the hearsay rule in probate proceedings, allowing into evidence declarations that are admissible under the state-of-mind exception regardless of whether they are contemporaneous.¹¹² The state-of-mind exception pertains to cases where a court seeks evidence of a testator's subjective intent to revive (or not to revive) a will.

Whenever they are made, not all statements are alike. Some appear in writing,¹¹³ whereas others comprise oral declarations related by

¹¹⁰ For a further discussion, see Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 554-58 (2000).

¹¹¹ Under the Uniform Probate Code, a testator's "contemporary or subsequent declarations" of intent are admissible in revival cases, but not prior declarations. The accompanying comment fails to explain this limitation, which might reflect a concern that testators could change their minds. See UNIF. PROB. CODE § 2-509(a)-(b) & cmt. (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 226 (2013); cf. *Pickens v. Davis*, 134 Mass. 252, 257-58 (1883) (deeming admissible declarations "whether prior, contemporaneous or subsequent," but adding that any non-contemporaneous declaration "is to be received with caution"); *Flintham v. Bradford*, 10 Pa. 82, 85-86, 92 (1848) (excluding evidence of subsequent declarations by the testator, on the theory that "[t]o allow declarations of intention entertained at a subsequent time, or subsequent circumstances, to be evidence of the testator's intention at the time of the cancellation, would be no less than to give them the effect of a parol revocation"); *Manning's Estate*, 46 Pa. Super. 607, 611 (1911) (observing that "[t]he statement was made so soon after the destruction of the will . . . that the declaration may be reasonably related to the act of destruction").

¹¹² See FED. R. EVID. 803(3); see also 1 MCCORMICK ON EVIDENCE § 65, at 432-37 (Kenneth S. Broun et al. eds., 7th ed. 2013) [hereinafter MCCORMICK] (addressing the admissibility of declarations under dead man statutes).

¹¹³ See, e.g., *In re Estate of O'Donovan*, 6 N.Y.S.2d 456, 457 (Sur. Ct. 1938).

witnesses.¹¹⁴ Some take place in ritualistic settings,¹¹⁵ whereas others occur casually.¹¹⁶ Some address directly the testator's intent to revive,¹¹⁷ whereas others refer indirectly to testamentary provisions a testator claims to have made for — or just the benevolence a testator feels toward — a beneficiary.¹¹⁸ Courts must rate each statement in light of both its credibility and its persuasiveness to clarify the outcome a testator sought to achieve.

In the absence of persuasive statements, courts might look to other facts as suggestive of intent. The case law brings to light a number of variables a court could assess as significant.

Plainly relevant is whether a testator sought legal counsel before revoking the second of two wills. Courts can assume that an informed testator acted in the shadow of the law, rather than in the shadow of his or her logical preconceptions — at least when the attorney gave the testator accurate advice.¹¹⁹

Another pertinent consideration is the testator's treatment of the original will. Whether or not the testator retained the original will among his or her important papers bears on whether the testator deemed it effective following the revocation of a subsequent will.¹²⁰ This type of evidence has also served to prove (or disprove) the performative

¹¹⁴ See, e.g., *Danley v. Jefferson*, 114 N.W. 470, 470 (Mich. 1908).

¹¹⁵ See, e.g., *Blackett v. Ziegler*, 133 N.W. 901, 902 (Iowa 1911) (remarking declaration of intent to revive made in the presence of an attorney and witnesses); *Tibbetts v. Garrett (In re Tibbetts' Estate)*, 189 N.W. 401, 401 (Minn. 1922) (remarking declaration of intent to revive "in the presence of two disinterested witnesses whom [the testator] called in to witness" her revocation of the second will).

¹¹⁶ See, e.g., *In re Hall's Estate*, 131 N.Y.S.2d 639, 642-43 (Sur. Ct. 1951) (remarking declaration made in "casual conversation with an employee").

¹¹⁷ See, e.g., *Tibbetts*, 189 N.W. at 401.

¹¹⁸ See, e.g., *Hall's Estate*, 131 N.Y.S.2d at 642-43 (observing that "deceased stated that he had a will under which he left his estate to his wife"); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Allan (In re Allan's Estate)*, 59 P.2d 425, 428 (Cal. Ct. App. 1936) (remarking similar declaration); *Ford's Estate*, 13 Pa. D. & C. 87, 89 (Orphans' Ct. 1929), *rev'd sub nom. In re Ford's Estate*, 151 A. 789 (Pa. 1930) (noting testator's instruction to his secretary upon the revocation of his second will to "tell Leighton [the testator's son] he is all I've got").

¹¹⁹ See, e.g., *Garrett v. Powers (Estate of Dallas Pierce Garrett)*, No. D038435, 2002 WL 1288765, at *7-8 (Cal. Ct. App. June 12, 2002); *Ewell v. Rucker*, 187 S.W.2d 644, 648 (Tenn. Ct. App. 1945).

¹²⁰ This item of evidence has figured in countless cases. Compare, e.g., *Whitehill v. Halbing*, 118 A. 454, 458 (Conn. 1922) (noting the former will preserved among valuable papers), with *In re Moore's Will*, 65 A. 447, 448-49 (N.J. Prerog. Ct. 1907) ("[The will] was not retained [among testator's] . . . important papers. . . . [H]e had practically thrown the paper away . . .").

nature of holographic and conditional wills, by analogy.¹²¹ Nonetheless, a court should not treat evidence of retention of the original will as dispositive. A testator might preserve a will he or she considers invalid for any number of reasons — for instance, as a reference point for future will drafting.¹²²

The timing of events also appears relevant. When the original will predated its successor by a long while, the likelihood that the testator took its existence into account when revoking a subsequent will diminishes. Testators are more likely to intend to revive wills of recent vintage than dated ones.¹²³

In the same vein, if a subsequent will has only existed for a brief time, testators might imagine it a tentative document, without immutable consequences. In one case, a testator executed a will but, upon reflection, revoked it later on the same day, informing a party that “he would keep the old will,” after all.¹²⁴ Also in several cases, testators have revoked a subsequent will soon after the discovery of an original will they had believed lost. Where the reappearance of an original will prompts the testator to revoke a subsequent one, courts can infer an intent to revive the original.¹²⁵

¹²¹ See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 75, at 362, § 83, at 418 (1953). For a recent discussion, see Kevin Bennardo & Mark Glover, *The Location of Holographic Wills*, 97 N.C. L. REV. 1625, 1631-36 (2019).

¹²² See *Estate of Olmsted*, 54 P. 745, 747 (Cal. 1898) (“[Testator] appears to have been using [the old document] as the foundation and framework for another testament.”); *In re Burt’s Estate*, 44 A.2d 670, 677 (Pa. 1945) (“It is clear that testator preserved the mass of writings [including a former will] merely as memoranda and guides to his future contemplated [will] . . .”).

¹²³ See *In re Will of Wylie*, 162 A.D. 574, 576 (N.Y. App. Div. 1914) (addressing a twenty-three-year gap between wills); *Pully v. Crooks*, 179 N.E. 364, 365-66 (Ohio Ct. App. 1931) (addressing an eighteen year gap); *Burt’s Estate*, 44 A.2d at 677 (addressing a thirty-three year gap); *In re Estate of Ziegler*, 6 Pa. D. & C.5th 475, 477 (Pa. Com. Pl. Dec. 31, 2008) (addressing a twenty-four-year gap). Some courts have wondered whether a testator might even have “forgotten” such a previous will. *Blackett v. Ziegler*, 133 N.W. 901, 905 (Iowa 1911); *Manning’s Estate*, 46 Pa. Super. 607, 611 (1911); see also *In re Ford’s Estate*, 151 A. 789, 793 (Pa. 1930) (suggesting that a testator might have forgotten a previous will because he had had made “many wills”).

¹²⁴ *Bullard v. Stickney (In re Stickney’s Will)*, 52 N.Y.S. 929, 930 (App. Div. 1898); see also *In re Hall’s Estate*, 131 N.Y.S.2d 639, 640 (Sur. Ct. 1951) (concerning a testator who revoked a subsequent will one day after executing it); *In re Andrews’ Will*, 88 N.Y.S.2d 32, 38 (Sur. Ct. 1949) (noting that the testator “might have destroyed the [subsequent] will almost immediately after its execution”).

¹²⁵ See *Appeal of Fitzpatrick*, 89 A. 92, 94 (Conn. 1913); *Thompson v. Boysen (In re Estate of Boysen)*, 309 N.W.2d 45, 46-47 (Minn. 1981); see also *Marsh v. Marsh*, 48 N.C. 77, 78 (1855) (concerning testator who affirmatively expressed a desire to revive his original, lost will following its reappearance).

Courts can also draw inferences from the timely or anachronistic character of a will. Where original wills predated marriage, or divorce, or birth of a child, or death of a beneficiary, they are less likely to reflect testamentary intent. All else being equal, courts should assume a testator would prefer not to revive an obsolescent estate plan.¹²⁶

Possibly also significant is the formality of the wills at issue. Typically, holographic wills are informal documents, sometimes even embedded within letters.¹²⁷ If a testator began with a holographic will, superseded it with an executed will, and then revoked by act the executed will, it seems less likely that the testator would intend to revive the holograph. By the same token, if a testator began with an executed will, superseded it with a holograph, and then revoked by act the holograph, it appears more likely that the testator would intend to revive the executed will. Thus far, courts have declined to acknowledge this distinction, however.¹²⁸

Two other factors merit notice for their insignificance. Evidence sometimes shows that a testator revoked a subsequent will while making plans to execute still another, newer, will, and several courts have read this fact as implying an intent not to revive the original will.¹²⁹ To be sure, this evidence suggests dissatisfaction with the terms of the original will — but it also implies dissatisfaction with intestacy.¹³⁰ A testator's intention to make a new will sheds no light his or her preferred estate plan in the interim.

Some courts have also regarded the presence of an express revocation clause in a subsequent will as indicating an intent never to revive the

¹²⁶ See *In re Moore's Will*, 65 A. 447, 449 (N.J. Prerog. Ct. 1907); *In re Forbes' Will*, 24 N.Y.S. 841, 845 (Sur. Ct. 1893); *Flintham v. Bradford*, 10 Pa. 82, 84-85 (1848). An early draft of the Uniform Probate Code had sought to incorporate this variable into the rule. Under this draft, the revocation of a subsequent will conclusively revived the original will, but only if, inter alia, "the testator was, both at the time of the execution of the earlier will and at the time of the revocation of the later will, (i) unmarried, or (ii) married to the same person." UNIF. PROB. CODE § 248(a)(3) (UNIF. LAW COMM'N, Reporters' Draft No. 1, Aug. 1966).

¹²⁷ See, e.g., *Estate of Blake v. Benza*, 587 P.2d 271, 272 (Ariz. Ct. App. 1978); *Nevada v. Palm (In re Estate of Melton)*, 272 P.3d 668, 671-72, 674 (Nev. 2012).

¹²⁸ See *In re Brackenridge's Estate*, 245 S.W. 786, 790-91, 794 (Tex. Civ. App. 1922) (applying anti-revival where an executed will was followed by a holographic will and downplaying the distinction between them).

¹²⁹ See *Manning's Estate*, 46 Pa. Super. 607, 611 (1911); *McClure v. McClure*, 6 S.W. 44, 46-47 (Tenn. 1887).

¹³⁰ See *Bohanon v. Walcot*, 2 Miss. 336, 340 (1836) (concerning a testator who declared an intent to make a new will, adding that if it "should not be completed, he desired the [former] will of 1829 to go into effect").

original will,¹³¹ although other courts have rejected this conclusion.¹³² Plainly, the second view is correct: Express revocation clauses appear in wills as boilerplate. They fail to reflect advertent drafting decisions by testators.¹³³ And even if the facts of a case suggested otherwise, such a clause would reflect intent at the time when the testator executed the subsequent will, not when the testator revoked that will. We can identify any number of cases in which testators have made clear their intent to revive an original will when revoking by act a subsequent will, despite its inclusion of an express revocation clause.¹³⁴

At the end of the day, we can specify no definitive catalog of relevant factors in revival cases. The inquiry should remain broad-based, and in some cases conflicting evidence may emerge.¹³⁵ The exercise of weighing that evidence points, in turn, to another problem, arising at

¹³¹ “Most of the laity apparently believe that the express revocation clause revokes the first will at once A clause of revocation in a will is a useless thing unless it has the immediate effect intended.” *In re Ford’s Estate*, 151 A. 789, 794 (Pa. 1930); *see also* Heise v. Earle (*In re Davis’ Estate*), 35 A.2d 880, 887 (N.J. 1944) (asserting that this rule accords with “the normal experiences of life”); *Scott v. Fink*, 7 N.W. 799, 802 (Mich. 1881) (asserting that this rule is “most consonant . . . with popular understanding”); *James v. Marvin*, 3 Conn. 576, 578 (1821) (holding a will superseded by one containing an express revocation clause as not revivable, “because an express revocation is a positive act of a party, independent of the will which may happen to contain it”).

¹³² *See Whitehill v. Halbing*, 118 A. 454, 457 (Conn. 1922); *In re Estate of Block*, 190 A. 315, 318 (N.J. Orphans’ Ct. 1937); *Bates v. Hacking*, 68 A. 622, 626-29 (R.I. 1908); *Timberlake v. State-Planters Bank of Commerce & Tr.* 115 S.E.2d 39, 44 (Va. 1960).

¹³³ *See In re Henesey’s Estate*, 149 N.Y.S.2d 68, 70 (Sur. Ct. 1956) (“[I]t was [the attorney-scrivener’s] custom to have a revocation clause in wills which he prepared [W]henever he prepared a will it contained a revocation clause.”); *see also* Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 668 (2018) (finding, in an empirical study, that “recycled language is endemic in wills”). *But cf. James*, 3 Conn. at 578 (quoted *supra* note 131).

¹³⁴ *See, e.g., Danley v. Jefferson*, 114 N.W. 470, 470, 472 (Mich. 1908); *Tibbetts v. Garrett (In re Tibbetts Estate)*, 189 N.W. 401, 401 (Minn. 1922); *In re Kuntz’s Will*, 148 N.Y.S. 382, 383 (App. Div. 1914); *Bullard v. Stickney (In re Stickney’s Will)*, 52 N.Y.S. 929, 930 (App. Div. 1898).

¹³⁵ For an early observation of the need to consider “all the circumstances of the case,” *see Pickens v. Davis*, 134 Mass. 252, 253 (1883). For a modern recognition, *see* UNIF. PROB. CODE § 2-509 cmt. (UNIF. LAW COMM’N 2019), 8 pt. 1 U.L.A. 226 (2013). For examples of conflicting evidence, *see Garrett v. Powers (Estate of Dallas Pierce Garrett)*, No. D038435, 2002 WL 1288765, at *14-15, 19 (Cal. Ct. App. June 12, 2002); *In re Estate of Farley*, 24 N.W.2d 453, 459 (Iowa 1946). In some revival cases, courts have divided over the implications of the evidence. *See, e.g., Ford’s Estate*, 13 Pa. D. & C. 87, 96-97 (Orphans’ Ct. 1929), *rev’d sub nom. In re Ford’s Estate*, 151 A. 789 (Pa. 1930).

the intersection between circumstantial evidence and empirical evidence. To that problem we now turn.

V. SUPERMAJORITARIAN DEFAULTS

A striking aspect of the data presented earlier in this study is their lopsidedness. The doctrinal implications flowing from the data are clear. Yet, they suggest another issue that default rule theory has overlooked heretofore: namely, whether the proportion, as well as the distribution, of parties' intentions or assumptions are relevant to the formulation of a default rule. The distribution of intentions reveals the majoritarian default. But when a disproportionate fraction of parties converges on the same intention, a majoritarian default swells into what we might call a "supermajoritarian" default. Should supermajoritarian defaults function differently from (mere) majoritarian defaults?

In one dimension, we can distinguish supermajoritarian defaults as especially efficient. Not just diminishing individual transaction or error costs, supermajoritarian defaults operate collectively to slash those costs, given the inordinate number of parties who benefit from the rule. This property suggests a process value. To the extent they can identify supermajoritarian defaults, lawmakers should deem their codification a priority.

In another dimension, the discovery of supermajoritarian intentions speaks to the optimal "altering rule" applicable to a default — to wit, the rule governing actors' means of overriding that default.¹³⁶ The case for admitting extrinsic evidence to supersede a default becomes marginally weaker once a supermajority intends the default. In that instance, the likelihood that the evidence will prove superfluous, adding to the cost of decision-making without changing the outcome, grows larger, given the higher probability that the actor intended the default.

The lumping of preferences also bears on the standard of proof that lawmakers ought to apply to extrinsic evidence, if admissible. Decision-makers can take both background probabilities of intent and extrinsic evidence of intent into account when assessing the likelihood that an individual actor sought a given outcome. Courts have long observed the relevance of each element in this compound. As one early court put it,

¹³⁶ For a theoretical discussion of altering rules, coining the phrase, see Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *YALE L.J.* 2032 *passim* (2012).

a testator's "intention [to revive a will was] evidenced by a series of facts, independent of the general probabilities of the case."¹³⁷

Of course, if we had direct testimony of an individual party's intent, the background probability of what most people intend under like conditions would not matter. Our only other concern would then become the risk of perjury, which is unrelated to background probabilities. For this reason, the identification of a supermajoritarian intention appears irrelevant to the application of contract defaults, at least when the parties are available to testify. But in the inheritance realm direct evidence of intent is never available; these cases are tried in probate, when "the lips of the main 'witness' (the testator) are sealed."¹³⁸

Courts can combine the two elements mathematically by undertaking a Bayesian analysis of updated probabilities.¹³⁹ In this regard, identification of an intention shared by only a slender majority has a smaller probabilistic impact than one shared by a supermajority, a point we can illustrate conceptually.

Note first that courts resolve inheritance cases ordinarily by a preponderance of the evidence. In probabilistic terms, this standard requires decision-makers to hold for a party when the chance that his or her claim is meritorious exceeds (if only by a little) the chance that it is spurious.¹⁴⁰ This standard ensures that decision makers weigh the evidence most accurately. If data show that statistically only a slender majority of testators intends outcome *A* over outcome *B*, then the

¹³⁷ *Usticke v. Bawden*, (1824) 162 Eng. Rep. 238, 242; 2 *Addams* 116, 127; cf. *Appeal of Fitzpatrick*, 89 A. 92, 94 (Conn. 1913) (dismissing as irrelevant the drafting attorney's testimony that "more often than not" he included express revocation clauses in wills he drafted because "the desires or the indifference of a majority of his clients . . . furnishes no logical basis for an inference [concerning what the testator] desired").

¹³⁸ *In re Lee's Estate*, 80 F. Supp. 293, 294 (D.D.C. 1948). Even if an auditor testified about a declaration made by the testator concerning his or her intent, such a declaration would not comprise direct evidence; the auditor could misremember, or could have misheard, the declaration, or the testator could even have dissembled to the auditor. "Persons often make false or misleading statements when talking about their own wills for the very purpose of concealing the truth . . . or to mystify curious or expectant relatives." *Loy v. Loy*, 246 S.W.2d 578, 579 (Ky. 1952); see also *Pickens*, 134 Mass. at 257 (making a similar observation in connection with revival). Still, declarations should hold greater probabilistic value than circumstantial evidence.

¹³⁹ See generally D.V. LINDLEY, INTRODUCTION TO PROBABILITY AND STATISTICS 19-48 (Cambridge Univ. Press 1965) (providing an overview of Bayes's theorem).

¹⁴⁰ See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 23.4, at 845 (Aspen Publishers 9th ed. 2014); 2 MCCORMICK, *supra* note 112, § 339, at 661. Some courts have rejected a probabilistic conception of the preponderance standard, however. See *id.* § 339, at 661-62 (citing to cases).

“prior” probability (in Bayesian terminology) that a testator intended outcome *A* is barely above $\frac{1}{2}$. The finding of only a modicum of contrary evidence in the individual case would then suffice to tip the probability to outcome *B* after we take evidence into account (the “posterior” probability). In other words, evidence in the individual case serves primarily to resolve the suit. Only in the absence of evidence, or where the evidence is so balanced as to stand on a knife’s edge, should a court impose the majoritarian default.

But suppose instead data reveal that a supermajority of testators intends outcome *A*. In that event, the prior probability that the testator intended outcome *A* is higher, and therefore we require a commensurately more convincing body of evidence in the individual case to tip the posterior probability to outcome *B*. In other words, statistical evidence now holds greater significance relative to other evidence in determining where the overall preponderance of the evidence lies.

How much greater? Consider again our data, which indicate a prior probability of around $\frac{3}{4}$ that testators assume a rule of revival. How strong must evidence suggesting that a particular testator assumed, and therefore intended, a rule of anti-revival be in order to tip the preponderance of the evidence in favor of anti-revival? As shown in the Appendix, Bayes’s theorem reveals that the posterior probability that a testator assumed a rule of anti-revival is $\geq \frac{1}{2}$ only if evidence of anti-revival, considered on its own, has a likelihood ratio of $\geq \frac{3}{4}$. And, as also shown in the Appendix, we can generalize this conclusion: For any given prior probability that testators intend a given result, the strength of the evidence necessary to prove an intention of the contrary result must be at least as great in order to generate a posterior probability of $\geq \frac{1}{2}$ in favor of that result.¹⁴¹

Consider a concrete example. Suppose evidence reveals that a testator executed a first will, later executed a second will, and still later revoked by act the second will without informing anyone what she intended to accomplish thereby. Additional evidence shows that, although the testator never destroyed the first will, she failed to keep it among her important papers. If decision makers concluded that this circumstance in and of itself created a $\frac{2}{3}$ chance that the testator intended not to revive her will, then, all else being equal, decision makers should so conclude and hold for the heirs. But, as shown in the Appendix, if we take into

¹⁴¹ Professor Louis Kaplow gleaned the fundamental insight: “[Bayes’s theorem] tells us that, to meet the preponderance rule, we require stronger evidence . . . to offset the initial deficit and bring the posterior odds above 50-50.” Louis Kaplow, *Likelihood Ratio Tests and Legal Decision Rules*, 16 AM. L. & ECON. REV. 1, 14 (2014).

account the prior probability that three out of four testators assume they are reviving their first will when they revoke by act a second will, then we are left with a posterior probability of $\frac{3}{5}$ that the testator intended anti-revival under these circumstances. Therefore, despite circumstantial evidence to the contrary, decision makers should conclude that, more likely than not, the testator intended to revive her first will and find for the proponents of that will.

Lawmakers could take supermajoritarian intentions into account in several ways. One option is simply for courts to admit survey results into evidence, thereby allowing juries to consider prior probabilities along with other evidence. Nowadays, courts regularly hear survey evidence, either directly or via expert testimony, so long as they judge it trustworthy and relevant.¹⁴² That includes data from electronic surveys (as conducted in the instant study), a polling methodology that courts are accepting as sound.¹⁴³

Alternatively, lawmakers could assimilate prior probabilities into the rule itself. If evidence presented in the case must suggest a $\frac{3}{4}$ chance that a testator assumed or intended anti-revival in order to generate a posterior probability of at least $\frac{1}{2}$ that he or she so intended, then lawmakers could require clear-and-convincing evidence of that intent. Judges typically interpret this standard as calling for a likelihood of at least $\frac{3}{4}$ (instead of $\geq \frac{1}{2}$) in favor of an outcome.¹⁴⁴ In effect, this formula would reproduce the preponderance standard, adjusted to take into account the statistical likelihood that a testator assumed or intended revival.

This analysis suggests a novel approach to standards of proof within the realm of default rules. Conventional evidence theory posits that we raise the standard of proof where the social cost of a false positive differs from the cost of a false negative. Thus, we require proof of guilt beyond a reasonable doubt in criminal cases because, even though this standard decreases the accuracy of determinations at trial, lawmakers assess the social cost of a false conviction to exceed the cost of a false acquittal.¹⁴⁵

¹⁴² See 1 MCCORMICK, *supra* note 112, § 208, at 1247-57; Kevin H. Smith, *External Validity: Representativeness and Projectability in the Probative Value of Sample Surveys*, 39 WAYNE L. REV. 1433, 1442-53 (1993).

¹⁴³ See, e.g., *United States v. 400 Acres of Land*, No. 2:15-cv-01743-MMD-NJK, 2017 WL 4797517, at *5-9 (D. Nev. Oct. 24, 2017).

¹⁴⁴ See Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 779 & n.77 (2012) (citing to surveys of judges).

¹⁴⁵ See POSNER, *supra* note 140, § 23.4, at 845; 2 MCCORMICK, *supra* note 112, § 341, at 669. For a judicial articulation, see *In re Winship*, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring). For recent discussions, see generally Ronald J. Allen & Alex Stein, *Evidence, Probability, and Burden of Proof*, 55 ARIZ. L. REV. 557 (2013); Michelle

In inheritance cases — and in civil cases generally — the cost of a false verdict one way or the other remains equal, whence lawmakers' reliance on the preponderance standard. Yet, in the presence of a supermajoritarian intention, a clear-and-convincing evidence requirement becomes the functional equivalent of a preponderance standard for default rules, at least in inheritance cases, where no direct testimony about intent is available.

We can extend this analysis further, and in opposing directions. On one hand, the flip-side of a supermajoritarian default is a “plurality” default, where preferences among an array of alternatives are so scattered that none commands even a majority.¹⁴⁶ Here, lawmakers have the least to gain from a default rule in terms of cost efficiency, and its enactment becomes a lower priority. By the same token, plurality defaults present the strongest case for admitting extrinsic evidence, given the greater likelihood that individual intentions will deviate from the default.

On the other hand, if an even larger concatenation of parties intends an outcome — a “hyper-majoritarian” intention, so to say — then enacting a default rule reflecting that intention becomes an even more urgent priority. At the same time, the case for admitting extrinsic evidence in connection with a hyper-majoritarian intention appears progressively weaker, given the dwindling likelihood that costly fact finding will alter the outcome. And here, even a clear-and-convincing-evidence requirement might fail to adjust the standard of proof for extrinsic evidence adequately. Now a beyond-a-reasonable-doubt standard could better serve to maintain accuracy, applied at this juncture in civil cases.¹⁴⁷ Finally, if evidence suggests that *virtually all parties* intend an outcome — making it a universal intention — then we reach the extreme point in all dimensions: Lawmakers have the greatest incentive to enact the default rule and can reasonably create a conclusive presumption in its favor. If a contrary intention is practically unimaginable, then lawmakers can ignore the possibility of its occurrence in the interest of judicial economy.¹⁴⁸ Such a rule of

M. Burtis et al., *Error Costs, Legal Standards of Proof and Statistical Significance*, 25 SUP. CT. ECON. REV. 1 (2017); Kaplow, *supra* note 144; Gustavo Ribeiro, *The Case for Varying Standards of Proof*, 56 SAN DIEGO L. REV. 161 (2019).

¹⁴⁶ For a further discussion, see Hirsch, *Default Rules*, *supra* note 69, at 1040.

¹⁴⁷ Judges' and juries' assessments of the beyond-a-reasonable-doubt standard average around ninety percent certainty. See Kaplow, *supra* note 144, at 779 n.78 (citing to surveys). As shown in the Appendix, this standard would suit data finding a ninety percent rate of consensus among testators or other parties.

¹⁴⁸ Lawmakers might also bar extrinsic evidence for non-probabilistic reasons, viz., under conditions where extrinsic evidence is too unreliable to improve the accuracy of

evidence would not transform a default rule into a mandatory rule, since parties remain free to override the rule by explicit drafting; the rule would function only to bar extrinsic evidence. And because parties will take care to draft around default rules if they have any inkling of their own idiosyncrasy, we have little to fear from black swans.¹⁴⁹

Lawmakers have occasionally applied the clear-and-convincing-evidence standard and even the beyond-a-reasonable-doubt-standard in gratuitous-transfers cases,¹⁵⁰ including cases concerning default rules,¹⁵¹ and even within rules of revival in a few states.¹⁵² Default rules barring extrinsic evidence entirely are also common, and rules of revival in many states take this form.¹⁵³ Nonetheless, lawmakers have

trial judgments, to facilitate planning, or simply to reduce the cost of trial judgments irrespective of the probability that intent will deviate from the default. Default rules in inheritance law typically exclude extrinsic evidence for one or more of these reasons. For further discussions, see Hirsch, *Default Rules*, *supra* note 69, at 1065-67; Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1478 (2013); Hirsch, *Text and Time*, *supra* note 77, at 626-30; *see also supra* notes 100-104 and accompanying text.

¹⁴⁹ Under a conclusive presumption regime, the formalizing rule for executing a new will becomes the altering rule for the default.

¹⁵⁰ *See, e.g.*, UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 215 (2013) (requiring clear and convincing evidence to prove harmless error in the execution of a will); *id.* § 2-805, 8 pt. 1 U.L.A. 335 (2013) (requiring clear-and-convincing evidence to prove mistake in the execution of, or inducement for, a will); *St. Louis Union Tr. Co. v. Busch*, 145 S.W.2d 426, 430 (Mo. 1940) (requiring evidence beyond a reasonable doubt to prove an inter vivos gift following the donor's death); *see also* 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2498, at 424-33 (James H. Chadbourne ed., 1981) (collecting cases employing both standards concerning, *inter alia*, proof of undue influence, will contracts, and the contents of lost wills).

¹⁵¹ *See* UNIF. PROB. CODE § 2-507(c)-(d) (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 222 (2013) (requiring clear-and-convincing evidence to override the presumption that a subsequent executed writing that includes a residuary clause comprises a will, rather than a codicil, and that a subsequent executed writing that lacks a residuary clause constitutes a codicil, rather than a will); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. d (AM. LAW INST. 1999) (same).

¹⁵² *See* N.J. STAT. ANN. § 3B:3-15(b)-(c) (2020) (requiring clear and convincing evidence of revival for will-will sequences and clear and convincing evidence of anti-revival for will-codicil sequences); S.C. CODE ANN. § 62-2-508(a)-(b) (2020) (same); *Flintham v. Bradford*, 10 Pa. 82, 92 (1848) (allowing parties to overcome a presumption of revival under limited circumstances, but only "if it was clearly proved"). Two preliminary drafts of the Uniform Probate Code, later discarded, required proof by clear-and-convincing evidence to overcome the presumption of anti-revival (rather than the reverse, as proposed herein). The accompanying draft comment offered no explanation for the requirement. *See* UNIF. PROB. CODE § 2-508 & cmt. (UNIF. LAW COMM'N, Discussion Draft, Summer 1967); UNIF. PROB. CODE § 2-508 cmt. (UNIF. LAW COMM'N, Third Working Draft, Nov. 1967).

¹⁵³ *See supra* notes 28, 31 and accompanying text. Likewise, for example, the rules of intestacy operate universally to bar evidence of contrary intent unless formalized

articulated no rationale for the systemic imposition of standards of proof in civil cases thus far, and those standards remain a neglected aspect of altering-rule jurisprudence.¹⁵⁴ By intuition, though, several courts have recognized the general principle that applies here:

[T]here is an inverse relationship between the likelihood that the Type of claim, as opposed to the particular claim, which burden-bearer is alleging is true and the degree of persuasiveness which will be demanded. Thus, if it is unlikely that a type of allegation can be supported, clear and convincing evidence will be required to meet the burden of persuasion. Conversely, if it is likely that a type of allegation can be supported or if the risk cannot be estimated, a preponderance of evidence will meet the burden of persuasion.¹⁵⁵

Bayesian analysis could lend itself to inheritance law beyond the realm of default rules. For instance, prior probabilities bear on the strength of genetic evidence of parentage, offered to establish a child's right to inherit from an alleged father's estate.¹⁵⁶ Still, Bayesian analysis appears peculiarly applicable to default rules. Exactly because default

under a will. See UNIF. PROB. CODE § 2-101(a) (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 98 (2013). The decision to bar extrinsic evidence in such instances has centered on concerns unrelated to probabilities of intent. See *supra* note 148.

¹⁵⁴ See Ayres, *supra* note 136, *passim* (skipping over standards of proof as an element of altering rules). Up to now, discussions of standards of proof in the inheritance realm have been either truistic or hopelessly vague. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2003) ("The standard of proof serves various functions. It alerts potential plaintiffs to the strength of evidence required in order to prevail, instructs the trier of fact regarding the level of confidence needed to find for the plaintiff, and allocates the risk of an erroneous factual determination."); UNIF. PROB. CODE § 2-503 cmt. (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 215 (2013) (asserting that a clear-and-convincing evidence requirement reflects "the seriousness of the issue" that the rule addresses).

¹⁵⁵ *General Motors Corp. v. Toyota Motor Co.*, 467 F. Supp. 1142, 1173 (S.D. Ohio 1979); see also *Ziegler v. Hustisford Farmers Mut. Ins. Co.*, 298 N.W. 610, 612 (Wis. 1941) ("To fasten upon a man the act of willfully and maliciously setting fire to his own building should certainly require more evidence than to establish the fact of payment of a note . . . because the improbability or presumption to be overcome in the one case is much stronger than it is in the other.") (internal quotation marks omitted) (quoting 2 BURR W. JONES, COMMENTARIES ON THE LAW OF EVIDENCE § 563, at 1036 (2d ed. 1926)). Professor McCormick, who identified *General Motors Corp.* and *Ziegler*, remains skeptical: "Such a rationale, if carried very far logically, would make it virtually impossible to prove a difficult claim." 2 MCCORMICK, *supra* note 112, § 340, at 668 n.25.

¹⁵⁶ See Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions*, *Surprising Answers*, 76 JUDICATURE 222, 225-27 (1993). At least one state imposes a clear and convincing evidence requirement for paternity determinations in probate. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C) (2020).

rules depend on probabilities of intent, we can pinpoint the likelihood of preferences or assumptions by recourse to experimental surveys. Whereas lawmakers may infer or estimate other probabilities, substantiating them is bound to pose greater challenges.¹⁵⁷

The question remains whether lawmakers would better serve the cause of trial accuracy by tinkering with standards of proof or by retaining the traditional preponderance standard and admitting survey data into evidence in each case. Plainly, the worst option is to admit the data without expert testimony. As a number of cognitive studies have shown, persons untrained in statistics poorly understand the significance of Bayes's theorem and tend to mistake the impact of prior probabilities by an order of magnitude sufficient to alter the outcomes of cases.¹⁵⁸ Experts would need to explain to juries the probabilistic implications of the data. And the cost of employing experts, duplicated in case after case, would lessen the efficiency of trial process.

At the same time, the alternative of imposing a higher standard of proof as a proxy for survey evidence holds a number of drawbacks. The standard lacks clarity.¹⁵⁹ Still, this characteristic is not fatal, for the persuasiveness of evidence of a given testator's intentions also defies quantification. As a result, exactitude in specifying the prior probability of an intention holds limited value for calculating its posterior

¹⁵⁷ See Ira Mark Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1149-52 (1979) (noting difficulties of determining prior probabilities of parentage).

¹⁵⁸ See, e.g., David M. Eddy, *Probabilistic Reasoning in Clinical Medicine: Problems and Opportunities*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 249, 252-54 (Daniel Kahneman et al. eds, Cambridge University Press 1982) (citing to additional studies); Gaëlle Villejoubert & David R. Mandel, *The Inverse Fallacy: An Account of Deviations from Bayes's Theorem and the Additivity Principle*, 30 MEMORY & COGNITION 171 *passim* (2002) (same). Subjects applying Bayes's theorem tend to give insufficient consideration to prior probabilities (a phenomenon dubbed "base-rate neglect"). For surveys of the experimental literature, see SANJIT DHAMI, *THE FOUNDATIONS OF BEHAVIORAL ECONOMIC ANALYSIS* 1375-83 (2016); Daniel J. Benjamin, *Errors in Probabilistic Reasoning and Judgment Biases*, in 2 HANDBOOK OF BEHAVIORAL ECONOMICS – FOUNDATIONS AND APPLICATIONS 69, 136-43 (B. Douglas Bernheim et al. eds. 2019). Subjects applying Bayes's theorem appear also to compress probabilities toward a mental default of 50:50 under conditions of cognitive uncertainty. See Benjamin Enke & Thomas Graeber, *Cognitive Uncertainty* 32-33 (Nat'l Bureau of Econ. Research, Working Paper No. 26518, 2019), <https://www.nber.org/papers/w26518.pdf> [<https://perma.cc/Q2UQ-3FTB>].

¹⁵⁹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2003) ("Although this higher standard of proof defies quantification, it is generally agreed that it requires an assertion to be established by a high degree of probability, though not to an absolute or moral certainty or beyond a reasonable doubt.").

probability. Approximation remains an inevitable feature of these assessments.

Juries' ignorance about the purpose served by a higher standard of proof poses more serious difficulties. By performing thought experiments, members of a jury might make crude assumptions about the likelihood that a testator intended to revive a will, apart from the evidence presented, even before applying a standard of proof. Assuming those assumptions already influenced juries' assessments of the evidence, then proceeding to impose a higher standard of proof would give undue weight to the prior probability of revival.¹⁶⁰ In order to ensure that the standard operates properly, courts would have to explain its purpose within jury instructions — a process that civil statutes rarely regulate.¹⁶¹

Finally, we may observe that by imposing higher standards of proof here and there, but not everywhere, lawmakers would complicate inheritance law, even as they are striving to simplify it.¹⁶² To be sure, whether survey evidence is introduced at trial or absorbed into the rule, legal decision making will grow marginally more complex. But by keeping rules themselves as simple as possible, we at least make them (again, marginally) more comprehensible at the front end.¹⁶³ Following this logic, we may counsel lawmakers to require higher standards of proof only when they can identify compelling justifications for doing so.

Were lawmakers ultimately to follow this route, a clear-and-convincing-evidence standard would suit the statistical data on testators' assumptions regarding the problem of revival both for will-will and will-codicil sequences. As we have seen, we require evidence with a sensitivity of around $\frac{3}{4}$ to maximize accuracy in either case.¹⁶⁴ This level of sensitivity accords roughly with most judges' interpretation

¹⁶⁰ Any such tendency might, however, be tempered by the phenomenon of base-rate neglect. *See supra* note 158.

¹⁶¹ *See* MOORE'S FEDERAL PRACTICE: CIVIL § 51.20 (Thomas D. Rowe, Jr. ed., 3d ed. 2019). There are exceptions, however. *See* John D. Perovich, *Construction of Statutes or Rules Making Mandatory the Use of Pattern or Uniform Approved Jury Instructions*, 49 A.L.R.3d 128 (1973).

¹⁶² UNIF. PROB. CODE § 1-102(b)(1) (UNIF. LAW COMM'N 2019), 8 pt. 1 U.L.A. 35 (2013) ("The underlying purposes and policies of this [code] are: (1) to simplify and clarify the law concerning the affairs of decedents . . ."). This aim is centuries old. *See* FOURTH REPORT, *supra* note 36, at 4 (urging that the laws of wills "should be so simple and uniform, that they may be generally understood").

¹⁶³ For an overview of the costs and benefits of legal complexity, see RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 21-36 (Harvard Univ. Press 1995).

¹⁶⁴ *See supra* Part III.

of the clear-and-convincing-evidence standard.¹⁶⁵ Neither a beyond-a-reasonable doubt standard nor a conclusive presumption coincides with the data presented in the instant study.

CONCLUSION

Long a bone of contention among the states, the rules of revival need revising. Empirical evidence suggests that a large majority of persons infer that revocation of a subsequent will would resurrect its predecessor. As a consequence, rules creating a presumption of anti-revival, including the one found in the Uniform Probate Code, are freighted with misunderstanding. More often than not, they function to confound the expectations of uncounseled testators.¹⁶⁶

Whichever presumption lawmakers prefer, it ought to remain a rebuttable presumption, if only to maintain harmony with adjoining rules of revocation. Therefore, the ideal rule appears to be a rebuttable presumption of revival. Ironically, despite the plethora of alternative rules found among the jurisdictions today, not a single state currently adopts this formula.¹⁶⁷ But it is not without precedent: The earliest American courts to face the issue, in eighteenth-century Pennsylvania, and later in Maryland, created a rebuttable presumption of revival.¹⁶⁸ “It may be that the legal philosophy of the rule is not founded upon exact and scientific legal reasoning,” one Pennsylvanian judge observed, “yet the rule is practical and sound.”¹⁶⁹ Back then, courts had no empirical data to go on — perforce, lawmaking remained an inexact science. Today, we can justify this very rule as founded upon data, exactly and scientifically.¹⁷⁰

Finally, because a supermajority of persons presuppose that revocation of a will revives its predecessor, as the data presented in this study reveal, lawmakers could go further and make the presumption of

¹⁶⁵ See *supra* note 144 and accompanying text.

¹⁶⁶ Even if the presumption of anti-revival is rebuttable, as under the Uniform Probate Code, insufficient evidence may exist following the testator's death from which to determine his or her intentions regarding the issue of revival, rendering the presumption decisive. In many cases, courts have noted the absence of such evidence. See, e.g., *Parker v. Mobley*, 577 S.W.2d 583, 586 (Ark. 1979).

¹⁶⁷ See *supra* notes 27–33 and accompanying text.

¹⁶⁸ See *Lawson v. Morrison*, 2 U.S. 286, 290 (1792); *Rabe v. McAllister*, 8 A.2d 922, 926 (Md. 1939); *Colvin v. Warford*, 20 Md. 357, 393 (1863); *Boudinot v. Bradford*, 2 Dall. 266, 268 (Pa. 1796).

¹⁶⁹ *Ford's Estate*, 13 Pa. D. & C. 87, 100 (Orphans' Ct. 1929), *rev'd sub nom. In re Ford's Estate*, 151 A. 789 (Pa. 1930) (Stearne, J., dissenting).

¹⁷⁰ See *supra* Part III.

revival a strong presumption, rebuttable only by clear-and-convincing evidence.¹⁷¹ This standard of proof functions to take the likelihood of intent to revive into account when assessing the evidence available in any given case.

This last aspect of the instant study could hold significance beyond the revival problem. Scholars doing empirical research in the inheritance field — so well represented in this Symposium — have bent their efforts to reveal the typical testator's preferences under varying circumstances. Those revelations help lawmakers to craft majoritarian defaults. Scholars might next turn their attention to the *scale* of like-mindedness among testators. Although not key to substance, this metric matters when lawmakers establish the altering rules for majoritarian defaults. Altering rules, too, merit scrutiny, as we extend quantitative analysis to the nicer details of inheritance law.

APPENDIX

We here model the posterior probability of a testator's intention or assumption concerning revival by applying Bayes's theorem. Let:

$P(nr | E)$ = posterior probability of anti-revival (i.e., the probability generated by the survey evidence adjusted for extrinsic evidence in any given case).

$P(E | nr)$ = probability that the extrinsic evidence correctly identifies anti-revival (i.e., the true-positive rate).

$P(E | r)$ = probability that the extrinsic evidence incorrectly identifies anti-revival (i.e., the false-positive rate). Assuming extrinsic evidence is equally sensitive (or insensitive) for detecting true and false positives, then $P(E | r) = 1 - P(E | nr)$.

$P(nr)$ = prior probability of anti-revival revealed by the survey evidence, which equals $\frac{1}{4}$ given our data.

$P(r)$ = prior probability of revival revealed by the survey evidence, which equals $\frac{3}{4}$ given our data.

Then according to Bayes's theorem:

¹⁷¹ One court in Pennsylvania that created a presumption of revival allowed a finding of contrary intent only "if it was clearly proved." *Flintham v. Bradford*, 10 Pa. 82, 92 (1848). Still, the court announcing this rule limited the admissibility of extrinsic evidence to cases where the testator lacked possession of the initial will and thus could not revoke it by act, *see id.*, hence distinguishing the court's rule from the one advocated here.

$$P(\text{nr} | E) = \frac{P(E | \text{nr}) P(\text{nr})}{P(E | \text{nr}) P(\text{nr}) + P(E | r) P(r)}$$

For what $P(E | \text{nr})$ does $P(\text{nr} | E) = 1/2$ (simulating the preponderance standard)?

In light of the data presented in Part III, where:

$$1/2 = \frac{1/4 P(E | \text{nr})}{1/4 P(E | \text{nr}) + 3/4 - 3/4 P(E | \text{nr})}$$

Which reduces to:

$$1/2 = \frac{P(E | \text{nr})}{3 - 2 P(E | \text{nr})}$$

Therefore:

$$P(E | \text{nr}) = 3/4$$

So, for example, if a jury estimates the probability that a testator intended anti-revival as $2/3$, based on circumstantial evidence of intent, then the posterior probability that the testator intended anti-revival is equal to:

$$\frac{(2/3)(3/4)}{(2/3)(3/4) + (1 - 2/3)(3/4)} = 2/5$$

Under a preponderance standard, the jury should find in favor of the party seeking revival, despite circumstantial evidence to the contrary.

We can generalize these results for any $P(\text{nr})$ and its corresponding $P(r)$:

$$1/2 = \frac{P(E | \text{nr}) P(\text{nr})}{P(E | \text{nr}) P(\text{nr}) + (1 - P(E | \text{nr}))(1 - P(\text{nr}))}$$

Which we can express as:

$$1 = \frac{2 P(E | \text{nr}) P(\text{nr})}{2 P(E | \text{nr}) P(\text{nr}) + 1 - P(E | \text{nr}) - P(\text{nr})}$$

Therefore:

$$P(E | \text{nr}) = 1 - P(\text{nr})$$

Accordingly, and in summary, if we wish to incorporate prior probabilities into the standard of proof applicable to a default rule and data suggest that little more than half the population of parties intends or assumes the result presumed by the rule, then a preponderance of extrinsic evidence should suffice to override the default rule favoring that result. If data suggest that approximately $3/4$ of the population of parties intends or assumes the result, then only clear-and-convincing

evidence should serve to override the default rule favoring that result.¹⁷² If data suggest that approximately %io of the population of parties intends or assumes the result, then only evidence beyond a reasonable doubt should serve to override the default rule favoring that result.¹⁷³ Finally, if data suggest that virtually the entire population of parties intends or assumes the result, then a conclusive presumption, barring extrinsic evidence, should operate in favor that result.¹⁷⁴

¹⁷² See *supra* note 144 and accompanying text.

¹⁷³ See *supra* note 147 and accompanying text.

¹⁷⁴ See *supra* note 148 and accompanying text.