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2019

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Bridget J. Crawford
Elisabeth Haub School of Law at Pace University

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Recommended Citation

Bridget J. Crawford, Wills Formalities in the Twenty-First Century, 2019 Wis. L. Rev. 269,
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WILLS FORMALITIES IN THE TWENTY-FIRST CENTURY

BRIDGET J. CRAWFORD*

Individuals have executed wills the same way for centuries. But over time, traditional requirements have relaxed. This Article makes two principal claims, both of which disrupt fundamental assumptions about the purposes and functions of wills formalities. First, the traditional requirements that a will must be in writing and signed by the testator in the presence of (or acknowledged before) witnesses have never adequately served their stated purposes. For that reason, strict compliance with formalities cannot be justified by their cautionary, protective, evidentiary, and channeling functions. Reducing or eliminating most of the long-standing requirements for execution of a will is consistent with the true purpose of wills formalities—authenticating a document as the one executed by the testator with the intention of having it serve as the binding directive for the post-mortem distribution of the testator's property.

This Article's account has important implications for the way that legal scholars, lawmakers, and lawyers think about wills. The Article's second claim is that the substantive standard of the harmless error rule—that the decedent intended a particular document to be the decedent's last will and testament—should be the only threshold that must be satisfied for a court to admit the document to probate. Widespread adoption of such an intent-based rule is preferable to one that is overly formalistic. Current formalism leads both to false positives (i.e., grant of probate to a document not intended by the decedent as the decedent's will) and false negatives (i.e., denial of probate of a document clearly intended by the decedent as the decedent's will). An intent-based rule would make more likely the valid execution of wills by poor and middle-income individuals who typically cannot or do not consult attorneys. An intent-based standard also sets the stage for widespread recognition of electronic wills, if states are able to address concerns about authentication, fraud, and safekeeping of electronic documents. Technological developments could make estate planning in the twenty-first century more accessible than ever before to people of all wealth and income levels if the legal profession is prepared to embrace new ways of executing wills.

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* Bridget J. Crawford is a Professor of Law at the Elisabeth Haub School of Law at Pace University. David J. Herzig played an indispensable role in developing the ideas in this Article. For helpful comments and conversations, I thank Noa Ben-Asher, Alexander Boni-Saenz, Jill I. Gross, David J. Herzig, Adam J. Hirsch, Frances Simone Kratz, Katrina Fischer Kuh, Ray Madoff, Thomas M. McDonnell, Vanessa H. Merton, Michael M. Mushlin, Jason Parkin, Margot J. Pollans, Audrey Rogers, Michelle S. Simon, Robert H. Sitkoff, Leslie Y. Tenzer, and Lee-ford Tritt.

INTRODUCTION

Testicle gripping had solemn significance in ancient pre-Roman times.[1] When a man took an oath, the action's importance was underscored by the equally memorable act of publicly holding either his own or another man's genitals.[2] In early Bavaria, a legally completed transfer of real property required the conveyor to hit a young boy on the side of the head.[3] In England in 1677, the Statute of Frauds required certain legal agreements, particularly those relating to the transfer of land, to be in writing; signed by the transferor or by someone else in the testator's presence and at the testator's direction; and attested to and subscribed by the testator, all within the presence of "three or four credible witnesses."[4] Anecdotal evidence suggests that across cultures and time, some sort of ritual accompanies significant acts.

In the case of the important act of transferring property at death, the formal requirements of the Statute of Frauds (1677) and UK Wills Act (1837) served as the model for much state legislation in the United States.[5] Part I of this Article describes the evolution of wills formalities from strict adherence to the requirements to the ultra-forgiving harmless error rule of the Uniform Probate Code.[6] It also explores other ways—short of full embrace of the Uniform Probate Code's

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1. *See* Joshua T. Katz, Testimonia Ritus Italici*: Male Genitalia, Solemn Declarations, and a New Latin Sound Law*, 98 HARV. STUD. CLASSICAL PHILOLOGY 183 (1998). Katz demonstrates that it is no coincidence that the Latin word *testis* has the dual meaning of both "witness" and "testicle." *Id.* at 186–89, 193.

2. *Id.* at 193.

3. *See* Celia Wasserstein Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. L. 627, 627 (1983), *cited in* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992).

4. An Act for Prevention of Fraud and Perjuryes, 1677, 29 Car. 2, c.3 (Eng.).

5. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, & ESTATES 143 (10th ed. 2017); *see also infra* Section I.A.1.

6. *See infra* Section I.A.

harmless error rule—that some states have become more accepting of wills that do not strictly comply with traditional wills formalities. For example, some states embrace holographic wills and their partial revocation by physical act,[7] or the use of interested witnesses that otherwise would not be tolerated at common law.[8]

Part II evaluates these departures from strict compliance with wills formalities in light of the stated functions of those formalities. Typically scholars describe the Wills Act formalities as serving multiple purposes, e.g., an evidentiary function; a channeling function; a cautionary (or ritual) function; and a protective function.[9] Among trust and estate lawyers, professors, and students, it has been accepted almost as an article of faith for centuries that following the prescribed procedures will most likely lead to the execution of a will that reflects the testator's authentic and final desires with respect to the distribution of property. Yet given how decisively the majority of states have adopted one or more flexible rules for wills formalities, there is reason to question whether some (or any) of the formalities ever served a substantially meaningful purpose.[10] This Article suggests that the law of wills formalities might be better understood as rooted in concerns about authenticity—i.e., that a particular document is the one that the decedent intended to be her will. The formalities do not in fact provide adequate evidence that some theoretical purposes of wills formalities have been served.[11]

When viewed through the lens of American law's underlying policy commitment to the freedom of disposition,[12] it becomes clear in Part III that the law should embrace relatively simple rules for the execution of a will. The only necessary requirement should be that the document is authentic, meaning that this is the document the decedent executed, and that the decedent intended the document to function as her last will and testament. As long as the document's authenticity is uncontested, there is no reason to demand rigid adherence to wills formalities that are hundreds of years old. Up until now, the law has addressed will authentication issues through clumsy doctrines. Overt embrace of a minimal authenticity rule would be more consistent with what courts actually do to probate wills that otherwise do not meet

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7. *See infra* Section I.B.1.
8. *See infra* Section I.B.2.
9. *See infra* Part II.
10. *See infra* Part II.
11. *See infra* Part II.
12. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.").

formal requirements in jurisdictions that have not yet embraced the harmless error doctrine of the Uniform Probate Code.

Part III provides a critique of harmless error and endorsement of authenticity as the most appropriate standard for evaluating a will's validity. First, there is no evidence that traditional wills formalities have reduced litigation, and so it is appropriate to question why the formalities should be honored.[13] In other words, the requirement of a writing by the testator who acknowledges his or her signature or signs in the presence of two or more witnesses does not seem to prevent contestants from raising claims about facially defective execution of a will or an underlying problem related to the conditions under which the will was executed, such as lack of mental capacity, fraud, undue influence, or duress.[14] Given that fact, then witnesses would appear to be insufficient, although perhaps helpful, for purposes of providing evidence about the authenticity of the document or the testator's state of mind.[15] The second reason to endorse relaxed requirements for will execution is that fewer formalities will increase the likelihood that individuals can execute valid wills without lawyers. Legal services are expensive and make estate planning out of reach for people of modest or limited means. In the context of the larger access to justice movement, the ability to plan for the future, even if one has few assets to transmit at death, can be an important source of personal agency and psychological comfort.[16]

Part IV considers the future of wills formalities in light of this Article's proposal that all wills shown to be authentic should be admitted to probate. Against the backdrop of the law's anemic commitment to the policies allegedly served by requiring wills formalities in the first place, the time is ripe for reform. Any change to the law most certainly will need to account for the primacy of digital communication and recordkeeping in the twenty-first century.[17] Although not yet common practice, it is reasonably certain that electronic testamentary documents will become more widespread. If an electronic will can be authenticated as a decedent's last will and testament, there is no reason to deny probate. In developing a coherent set of rules for authenticating electronic wills, emerging technologies need to be taken into account.

This Article concludes with a roadmap for how the law should address some of the concerns about authentication of both traditional and electronic wills through the use of open distributed ledgers, to

13. *See infra* Part II.
14. *See infra* Part IV.
15. *See infra* Section I.A.2.
16. *See infra* Part IV.
17. *See infra* Part IV.

name just one possible innovation in electronic record-keeping. Whether the law can and will change to accommodate the changes in twenty-first century modes of communication, documentation, and data storage depends in large part on whether lawyers themselves are willing to change. As time-honored as is the traditional will execution ceremony conducted in an attorney's office, typically with a will printed on bond paper and bound ceremoniously with a ribbon (or not), that ceremony is not inherently any more reliable, justified, or correct than oath-taking accompanied by genital holding, or land conveyances effectuated by hitting children. Embracing relaxed requirements for will execution expands access to justice.

I. EVOLUTION OF WILLS FORMALITIES

Whether a will is valid or not is a matter of state law.[18] Each state has particular rules for the formalities that must be satisfied for a document to be accepted as a decedent's last will and testament.[19] Generally speaking, common throughout the United States are the requirements that the document be in writing, signed by the testator and attested by witnesses.[20] Each state may require additional formalities that must be satisfied for the document to be recognized as a valid statutory will.[21] If not so recognized, then depending on the jurisdiction, there may be three (or more) other routes for validating the document as a will. The state may permit notarized wills (a document attested in the presence of a notary, but without any witnesses) or holographic wills (an unsigned document written entirely or in large part in the testator's own hand).[22] Or the state may deploy some form

18. *See, e.g., In re Estate of Jung*, 109 P.3d 97, 99 (Ariz. Ct. App. 2005) (stating in dicta that will creation is a statutory right); 79 AM. JUR. 2D *Wills* § 48 (2013) (affirming that the ability to dispose of property and the means for doing so are matters of state law).

19. *Compare, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(4) (LexisNexis 1974) (witnesses do not have to be present together), *with* N.H. REV. STAT. ANN. § 551:2 (2018) (witnesses must be present together).

20. For a quick comparative overview of state law requirements for wills and citation to each state's applicable statutes, see NATIONAL SURVEY OF STATE LAW, WILLS (Richard A. Leiter ed., 7th ed. 2015), https://heinonline.org/HOL/NSSL?collection=nssl&law=WILLS&edition=7.

21. *See, e.g., id.*

22. *Compare* N.C. GEN. STAT. ANN § 31-3.4 (West 2012) (requiring holographic will to be written "entirely in the handwriting of the testator"), *with* S.D. CODIFIED LAWS § 29A-2-502 (2018) (recognizing a holographic will if "the signature and material portions of the document are in the testator's handwriting").

of a curative doctrine to "forgive" any failure to meet certain of the statutory formalities.[23]

A. The Traditional Formalities

1. ENGLISH AND UK PRECEDENTS

The English Statute of Frauds, enacted in 1677, required that certain agreements, especially relating to the transfer of land, were binding only if made in writing; signed by the transferor or by someone else in the testator's presence and at the testator's direction; and attested to and subscribed by the testator, all within the presence of "three or four credible witnesses."[24] Different (and less rigorous) rules applied to dispositions of personal property at that time.[25] Only the 1837 enactment of the UK Wills Act brought harmony to the requirements for the disposition of real and personal property by will.[26] Under the Wills Act, a valid will could dispose of both real and personal property if it was in writing, signed at the end (or "subscribed") by the testator or someone else at the testator's direction and in the testator's presence, and attested and signed in the testator's presence by two or more witnesses who were present together.[27]

Historically the requirements of the Wills Act were strictly construed in most jurisdictions. Consider, for example, the infamous case of Charles Groffman who, together with his wife, was socializing at home with two other couples.[28] Mr. Groffman decided that particular evening was a convenient time to have witnessed his last will and testament, so he invited his friends and guests Julius Leigh and David

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23. *See, e.g.*, MONT. CODE. ANN. § 72-2-523 (West 2017) (holding document not complying with statutory formalities validly executed "if the proponent of the document or writing establishes by clear and convincing evidence" that the decedent intended the writing to constitute the decedent's will). One cannot necessarily count on a curative doctrine, however. *Compare In re Will of Ranney*, 589 A.2d 1339, 1339-40 (N.J. 1991) (probating will where testator mistakenly signed a stand-alone affidavit but not the page of a will containing language indicating that the testator intends to execute simultaneously the will and a self-proving affidavit), *with In re Will of Ferree*, 848 A.2d 81 (N.J. Super. Ct. Ch. Div. 2003), *aff'd*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (per curiam) (denying probate of a signed and notarized will that lacked witnesses). New Jersey has subsequently adopted the more flexible harmless error statute. N.J. REV. STAT. § 3B:3-3 (West 2018).

24. An Act for Prevention of Fraud and Perjuryes, 1677, 29 Car. 2, c.3 (Eng.).

25. Wills Act 1540, 32 Hen. 8, c. 1 (requiring that a transfer of land be made by a "writing," with no requirement of signature by the testator or witnesses, and permitting transfer of personal property by oral or written will).

26. Wills Act 1837, 7 Will. 4 & 1 Vict., c. 26 § 9.

27. *Id.*

28. *In re Groffman* [1969] 1, W.L.R. 733 (P), 1069 WL 26902.

Block to serve as witnesses to the will he had already signed and had in his jacket pocket.[29] Mr. Groffman and Mr. Block left the lounge and went together to the dining room, where Mr. Block signed the will as a witness.[30] Mr. Leigh, however, continued to enjoy the company in the lounge for a few more minutes and joined Mr. Groffman in the dining room only after Mr. Block had returned to the lounge.[31] Mr. Groffman acknowledged his signature to Mr. Leigh; Mr. Leigh signed as a witness.[32] After Mr. Groffman died and his will was presented for probate, the issue was whether the formalities of the Wills Act of 1837 were satisfied, given the fact that Mr. Block and Mr. Leigh were not together in the dining room at the same time and had not seen each other sign the will as witnesses. Although the deciding judge declared that he was "satisfied that the document does represent the testamentary intentions of the deceased," he went on to say that judicial duty required a finding that "there was no acknowledgment or signature by the testator in the presence of two or more witnesses present at the same time," and thus the will could not be probated.[33] Strict adherence to the wills formalities prevented recognition of a document that Mr. Groffman undoubtedly intended to be his will.

In the United States, the UK Statute of Frauds (1677)[34] and the Wills Act (1837)[35] served as the basis for most state legislation,[36] with some jurisdictions adding further formal requirements.[37] Although a few states continue to require rigid adherence to the presence or subscription requirements, most states have loosened in some way the requirements of wills formalities.[38]

2. Departures From Wills Formalities

In 1975, Professor John Langbein of Yale Law School published *Substantial Compliance with the Wills Act*, an article that became the

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29. *Id.* at 735.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 736.
34. An Act for Prevention of Fraud and Perjuryes, 1677, 29 Car. 2, c.3 (Eng.).
35. Wills Act 1837, 7 Will. 4 & 1 Vict., c. 26 § 9.
36. *See, e.g.*, Gerry W. Beyer, *The Will Execution Ceremony: History, Significance and Strategies,* 29 S. Tex. L. Rev. 413, 418–19 (describing Statute of Frauds and Wills Act as basis for U.S. law).
37. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 3-2.1(a)(3) (McKinney 2006) (requiring "publication" of a will by the testator).
38. *See infra* Section I.A.2.

foundational scholarship on wills formalities.[39] More than forty-five years after its publication, that article continues to be excerpted in twenty-first century law school casebooks.[40] Langbein wrote that "the insistent formalism of the law of wills is mistaken and needless."[41] Langbein proposed departing from wills formalities under a substantial compliance doctrine where failure to meet any of the statutory requirements would trigger a two-pronged inquiry into whether the document expressed the decedent's intent and whether its form "sufficiently approximate[d] Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act."[42] Citing prior work by Fuller,[43] Friedman,[44] Gulliver,[45] and Tilson,[46] Langbein listed and described what by then had become accepted as the traditional functions of wills formalities: the "cautionary" (or ritual) function;[47] the protective function;[48] the evidentiary function;[49] and the channeling function.[50] To the extent that a court was satisfied that these purposes were served, Langbein argued, a technically non-compliant will should be admitted to probate.[51] In Langbein's view, the minimum requirements for a valid will were a writing and the testator's

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39. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("The law of wills is notorious for its harsh and relentless formalism.").

40. *See, e.g.*, SITKOFF & DUKEMINER *supra* note 5, at 145–46.

41. Langbein, *supra* note 39, at 489 (observing that upon finding of formal defect in compliance with formalities, "Anglo-American courts have been unanimous in concluding that the attempted will fails").

42. *Id.*

43. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

44. *See* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340.

45. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1951); *see also infra* note 137 and accompanying text.

46. *See id.*

47. Langbein, *supra* note 39, at 495 ("One purpose of many of the forms is to impress the testator with the seriousness of the testament . . . ."). Fuller also used the phrase "cautionary function." Fuller *supra* note 43, at 800. Friedman does not use the phrase "cautionary function," but describes formalities as impressing upon the testator "the solemnity of his acts." Friedman, *supra* note 44, at 367. Gulliver and Tilson use the term "ritual" function to refer to the same concept. *See* Gulliver & Tilson, *supra* note 45, at 4.

48. Langbein, *supra* note 39, at 496.

49. *Id.* at 492 ("The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent and of the terms of the will.").

50. *Id.* at 494 (stating that if formalities are followed, "[c]ourts are seldom left to puzzle whether the document was meant to be a will").

51. *Id.* at 515–16.

signature.[52] Otherwise, he saw no reason to invalidate a will for what were essentially minor errors in execution.[53] To take one easy example, under Langbein's proposed doctrine, Mr. Groffman's will would be valid.

Langbein's tremendously practical and useful doctrine essentially functions as an interpretory preference. In place of a conclusive presumption of invalidity in cases of imperfect compliance with wills formalities, in Langbein's view, the law should have a rebuttable presumption of invalidity that can be overcome with evidence of intent of the testator and satisfaction of the purposes of the Wills Act.[54] Langbein argued, in essence, for the possibility "of harmless error in the execution of wills," something otherwise not recognized by the courts,[55] yet his views became known under the banner of "substantial compliance," in keeping with the article's title.[56]

In the same year that Langbein's article appeared, the state of South Australia adopted an even more progressive approach to defectively-executed wills.[57] Instead of requiring the will proponent to show that the purposes of formalities were satisfied when strict formalities were not, South Australia opened the door for a defectively executed will to be probated as long as the proponent could show merely that the decedent intended the document to be his will.[58] Over six years after passage of that South Australia statute, the Australian state of Queensland enacted a law that was closer to Langbein's original substantial compliance vision than the South Australia law had been. The Queensland law provided that a will could be probated if it "substantially complied" with wills formalities.[59]

In 1987, Langbein published his study of how the implementation of the (looser, harmless error) South Australia rule compared with the implementation of the (stricter, substantial compliance) Queensland rule.[60] He concluded that the South Australia rule was more forgiving,

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52. *Id.* at 498.

53. *See id.* at 489, 515–16.

54. *Id.* at 513.

55. *Id.* at 489.

56. *See* Langbein, *supra* note 39, and accompanying text.

57. *See S. Austl. Wills Act Amendment Act (No. 2) 1975* (SA) s 9, *amending Wills Act of 1936, 1938* (SA) s 12(2).

58. *Id.*

59. *See Succession Act of 1981* (Qld.) s 9(a).

60. Twelve years after the publication of his *Substantial Compliance* article, Professor Langbein published the results of his study of the application of the substantial compliance in the Australian states of Queensland and South Australia. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1–2, 52–53 (1987) [hereinafter Langbein, *Excusing Harmless Errors*]. Langbein notes that the approach he articulated in the 1975 *Substantial Compliance* article, *supra* note 39, had

as courts were quick to excuse failure to meet most signature or attestation requirements.[61] Langbein suggested approvingly that the only "indispensable" formality under the South Australia approach appeared to be a *writing*.[62] Langbein seemed persuaded by the wisdom of the South Australian approach, thus embracing an evolution from the substantial compliance test he first articulated in 1975 to the looser harmless error test for validating otherwise defectively executed wills.

Like Langbein, Professor James Lindgren believes that the only wills formalities that are indispensable are that the will must be in writing and must be signed by the testator.[63] He would abolish entirely the attestation requirement (i.e., the necessity for two or more competent individuals to sign as witnesses or to acknowledge the will and circumstances surrounding its execution).[64] Lindgren argues that such a change would modernize wills formalities and bring them in line with those that apply to nonprobate transfers.[65] Given the rising importance of non-probate transfers in estate planning,[66] according to Lindgren there is no reason for one set of execution rules to apply to testamentary transfers and a different set of rules to apply to non-probate transfers that are probate substitutes.[67]

Lindgren and others have suggested that substantive doctrines of fraud, undue influence, and capacity are better suited than formalities for separating "good" wills from "bad" ones.[68] Lindgren in particular has advocated for the elimination of the attestation requirement, based on the erosion of the requirement of disinterested witnesses, as well as

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little impact in the United States. *See* Langbein, *Excusing Harmless Errors*, *supra*, at 8-10.

61. Langbein, *Excusing Harmless Errors*, *supra* note 60, at 16–18, 22–24, 52.

62. *Id.* at 52 (explaining that under South Australia statute, courts excused non-compliance with formalities because "[o]f the three main formalities—writing, signature, and attestation—writing turns out to be indispensable").

63. James Lindgren, *Abolishing the Attestation Requirement*, 68 N.C. L. REV. 541, 542 (1990) [hereinafter Lindgren, *Abolishing Attestation*].

64. *Id.* at 541–43 ("Abolishing the attestation requirement for formal wills would bring their formalities more in line with the formalities required for other ways of passing property at death . . . .").

65. *Id.* at 543.

66. *Id.* at 542 (describing the "rise of nonprobate transfers" as one that destabilizes the claim of the importance of wills formalities).

67. *Id.* at 566–67 (explaining methods for correcting mistakes in documents effectuating non-probate transfers of property).

68. *Id.* at 555–56 ("[O]ther substantive doctrines are designed to protect the testator—not only the laws against fraud, duress, and undue influence, but also the law of capacity. . . . These substantive doctrines are much better suited for separating coerced wills from uncoerced wills.").

the rise of holographic wills.[69] Pointing to the thousands of reported cases in which an intended will failed because of an innocuous defect in witnessing,[70] Lindgren noted that the presence of witnesses does not guarantee that the will is untainted by fraud or undue influence.[71] He would apply lower standards of proof to witnessed wills, without automatically invalidating a will that lacks witnesses.[72] If Lindgren's proposal were adopted and attestation were not required, then there would be little need for either the substantial compliance doctrine or the harmless error rule.

B. Informal Becomes Normal

The Uniform Probate Code, adopted in whole or in part by at least eighteen states,[73] is far less stringent than the Wills Act when it comes to the execution of wills. Under UPC § 2-502(a), a will must be in writing;[74] it must signed by the testator or in the testator's name by someone else in the testator's conscious presence and at the testator's direction;[75] and the document must either be acknowledged by the testator before a notary public[76] or signed by at least two individuals "each of whom signed within a reasonable time after the individuals witnessed either the signing of the will . . . or the testator's acknowledgement of that signature or acknowledgment of the will," without any requirement that the witnesses be present together while the

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69. *See* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1028 (1992) (arguing against the need for any witnesses); *see also infra* Sections I.B.1 & I.C.

70. Lindgren, *Abolishing Attestation, supra* note 63, at 542 n.15 (citing over 2000 appellate cases listed in the treatise, W. BOWE & D. PARKER, 2 PAGE ON WILLS §§ 19.73-19.149 (3d ed. 1960)).

71. *Id.* at 573 ("Wills lacking attestation are not usually tainted by fraud or undue influence. And wills with attestation are not necessarily freely made.").

72. *Id.* at 572 (stating preference for "easier proof in court for attested wills"). Adam Hirsch's analysis of comparative scholarship on wills formalities is especially helpful in considering this topic. *See* Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 800–12 (2014).

73. *Probate Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8 [https://perma.cc/UN5S-X77G] (displaying map and table tracking states that have enacted the Uniform Probate Code).

74. UNIF. PROBATE CODE § 2-502(a)(1) (UNIF. LAW COMM'N amended 2010) (requiring will to be in writing).

75. § 2-502(a)(2) (requiring testator to sign or permitting another person to sign in the testator's name if done so in the testator's conscious presence and at testator's direction).

76. § 2-502(a)(3)(B) (permitting notary public to take testator's acknowledgment, without requirement of additional witnesses).

testator signs or acknowledges the will.[77] By following these rules, replete with all attendant formalities, a testator produces what is typically called a "statutory will."[78] Yet statutory wills are not the only kind of valid will under the Uniform Probate Code or specific state law. The Uniform Probate Code and states that have adopted it take a broad approach and recognize many types of documents as valid wills. The Uniform Probate Code and adopting states forgive or even overlook failure to comply with the rigorous (or relaxed) requirements for valid will execution.

1. HOLOGRAPHIC WILLS

The Uniform Probate Code specifically recognizes as a valid will a document that does not meet the formalities specified under UPC § 2-502(a), as long as the signature and "material portions" of the document are in the testator's handwriting.[79] Typically unwitnessed, such a document commonly is called a "holographic" will. Even states that have not adopted the Uniform Probate Code in whole or in part may permit holographic wills under particular circumstances. In New York (a non-UPC state), for example, holographic wills must be written *entirely* in a decedent's own hand[80] and are valid only when made by certain individuals in particular situations (e.g., a member of the armed forces of the United States while in actual military or naval service during a war or other armed conflict, a person who serves with or accompanies an armed force engaged in actual military or naval service during a war or other armed conflict, or mariners at sea),[81] and

77. § 2-502(a)(3)(A) (permitting will to be signed by at least two witnesses).

78. *See, e.g.*, GENERAL PRACTICE SECTION, AM. BAR ASS'N, ALL-STATES WILLS AND ESTATE PLANNING GUIDE 1-1, 1-4 to 1-5 (1993 ed.) (describing four types of wills as statutory, holographic, nuncupative and military).

79. § 2-502(b) ("A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting."). Jurisdictions have considered in many different factual scenarios what constitutes the "material portions" of a purported will. *See, e.g.*, *In re Estate of Krueger*, 529 N.W.2d 151, 153 (N.D. 1995) (defining material portions as "relevant," "consequential," or "having a certain or probable bearing . . . on the effect of an instrument"); *In re Estate of Muder*, 765 P.2d 997, 1000 (Ariz. 1988) (permitting probate of a fill-in-the-blank form will as having "material portions" in the decedent's own handwriting where decedent completes blanks with the names of his intended beneficiaries).

80. N.Y. EST. POWERS & TRUSTS LAW § 3-2.2(a)(2) (McKinney 2006) ("A will is holographic when it is written entirely in the handwriting of the testator, and is not executed and attested in accordance with the formalities prescribed by 3-2.1.").

81. § 3-2.2(b) (delineating three groups of people who may validly execute a nuncupative or holographic will).

only for a limited time period.[82] Pennsylvania, in contrast, makes no distinction between holographic wills and wills executed in accordance with greater formalities (such as witnesses).[83] Under Pennsylvania law, the only requirements are that a will must be in writing and signed by the testator.[84] In Pennsylvania, it is legally insignificant whether some, all, or none of the will is written in the testator's own hand; it may be entirely typed, entirely handwritten, or any combination of both.[85]

2. OTHER NON-TRADITIONAL WILLS

Somewhat surprisingly, the Uniform Probate Code does not recognize nuncupative, or oral, wills.[86] Nor does the UPC relax execution requirements for wills of active duty military personnel.[87] It does, however, permit wills to be notarized in lieu of having two witnesses; this adds certain flexibility to the otherwise formal requirements for wills.[88] The failure of the UPC to recognize nuncupative wills or loosened requirements for military wills is not a significant obstacle to creating a valid will, given its otherwise capacious and forgiving approach to any failure to comply with the strict statutory requirements.[89]

C. Tolerable Conflicts

An "interested witness" is someone who stands to benefit under a will, most typically as a named recipient of some or all of the testator's property.[90] In some jurisdictions a person also is deemed to be an interested witnesses if nominated as executor or as trustee under the will.[91] Traditionally, if one of a will's necessary witnesses were

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82. § 3-2.2(c) (a nuncupative or holographic will becomes invalid within certain time after occurrence of particular events).

83. PA. CONS. STAT. § 2502 (form and execution of a will).

84. *Id.* (stating "[e]very will shall be in writing and shall be signed by the testator at the end thereof," subject to further rules regarding text following the signature or testators unable to sign their own names to the will).

85. *See id.*

86. *See* UNIF. PROBATE CODE § 2-502(a)(1) (UNIF. LAW COMM'N amended 2010) (recognizing as valid wills only those documents executed in accordance with requisite formalities unless instrument is holographic will or valid in jurisdiction where executed).

87. *Cf., e.g., supra* notes 81–82 and accompanying text.

88. *See* § 2-502(b) (will may either be witnessed by two individuals or be notarized).

89. *See infra* Section I.B.1.

90. *See Witness – Interested Witness*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A witness who has a direct and private interest in the matter at issue.").

91. *Id.*

"interested," then a court would invalidate the entire will, on the grounds that it had not been properly witnessed.[92] A "purging statute" enacted in the United Kingdom in 1752 mitigated these harsh results,[93] and similar purging statutes were adopted in many U.S. states.[94] Currently most states have some variation of them.[95] The impact of such a purging statute is to treat as valid any will with an interested witness, but to require that witness to forfeit some or all of the transfers to him or her.[96]

The Uniform Probate Code permits an interested witness to sign a will and does not require any forfeiture by the interested witness of a portion of a bequest or devise.[97] The comment to UPC § 2-505 indicates that as of 1990 (when the comment was written), the National Conference of Commissioners on Uniform State Laws believed that the presence or absence of witnesses historically had little or no impact on deterrence of fraud or undue influence.[98] For that reason, the UPC allowed interested witness and instead treated a substantial testamentary transfer to an interested witness as a suspicious circumstance that might give rise to an undue influence claim, but not a bar to inheritance.[99]

The UPC's more casual approach to interested witnesses is not unexpected, because the primary authors of the revisions to Part 2 of the 1990 UPC were Professor Langbein and Professor Lawrence

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92. *See, e.g.*, Gulliver & Tilson, *supra* note 45, at 11-12 (describing common law rule on interested witnesses to a will). Later that rule was softened by permitting probate of a will with an interested witness, as long as there were a sufficient number of disinterested witnesses. *See, e.g.*, Katheleen R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543, 566 (2014) (describing supernumerary rule).

93. 25 Geo. 2, c. 6 § I (1752).

94. JEFFREY A. SCHOENBLUM, 2018 MULTISTATE GUIDE TO ESTATE PLANNING tbl. 1 (providing citations to each state's law concerning interested witnesses, among other topics).

95. *Id.*

96. States vary widely on their approach to interested witnesses; the interested witness may forfeit all, none or some of the devised or bequeathed property. *Compare, e.g.*, ALA. CODE § 43-8-134(b) (2018) (interested witness may receive under will) *with* CONN. GEN. STAT. ANN. § 45a-258 (2018) (providing that all devises to interested witness are void unless witness is an heir or supernumerary), *with* ARK. CODE ANN. § 28-25-102(b) (2018) (non-supernumerary interested witness forfeits any transfers that, in aggregate, exceed the value of that interested witness's intestate share, had the decedent died intestate).

97. UNIF. PROBATE CODE § 2-505, cmt. (UNIF. LAW COMM'N amended 1990) (witness's status as "interested" does not impact validity of will or disposition).

98. *Id.* ("The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.").

99. *Id.* (naming substantial devise to interested witness as a "suspicious circumstance").

Waggoner.[100] Recall that Langbein had advocated for relaxed wills formalities in his 1975 *Substantial Compliance* article.[101] He also served on the Joint Editorial Board for the Uniform Probate Code.[102] Waggoner served as that project's Director of Research; he was well known for advocating for reformation of wills doctrines.[103] As one fellow law reformer contemporaneously described Langbein's and Waggoner's important roles in the 1990 UPC, "[t]heir law review articles and other writings have demonstrated the need for this constant review and revision. There is no doubt that the most recent draft of article II [of the UPC] clearly reveals their pervasive influence and draftsmanship."[104]

D. Harmless Errors

The provision of the UPC with the greatest impact on wills formalities is the harmless error rule of UPC § 2-503.[105] This rule operates to excuse any defect in execution as long as the document's proponent can provide by "clear and convincing evidence" that the decedent intended the document to operate as a will, a partial or complete revocation, or an alteration or revival of a previously revoked will.[106] Although the official comments make clear that "the larger the departure from [the statutory formalities], the harder it will be to satisfy the court that the instrument reflects the testator's intent,"[107] mistakes that appear to be forgiven frequently include lack of witnesses or other

100. *See* Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 898 (1992) (referring to Langbein's appointment to the Joint Editorial Board for the Uniform Probate Code).

101. Langbein, *Substantial Compliance*, *supra* note 39.

102. Averill, *supra* note 100, at 897–98.

103. *Id.* at 898 (mentioning Waggoner's role as Director of Research of the Joint Editorial Board for the Uniform Probate Code). Together, Langbein and Waggoner had advocated for open recognition of reformation of wills, in departure from the strict no-reformation common law tradition. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

104. Averill, *supra* note 100.

105. UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N amended 2010).

106. *Id.* (stating that non-conforming will may be probated if: "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will").

107. § 2-503 cmt. (emphasizing section's intent-serving aims).

problems with attestation.[108] The stated rationale for this lenience is that attestation "makes a more modest contribution to the purposes of the formalities."[109] By this comment, the Restatement drafters appear to admit that witnesses play a comparatively lesser role in serving the purposes of wills formalities: the cautionary, ritual, protective, and channeling functions.[110] To understand the harmless error doctrine, then, it is imperative to ask the next question: witnesses to a will make a "more modest contribution"[111] to wills formalities *in comparison to what other persons or factors*?

Apart from witnesses that meet specific performance and presence tests, consider the two other fundamental requirements for statutory wills. The testator must sign the document and the document must be in writing.[112] If the harmless error rule of UPC § 2-503 excuses the absences of witnesses or other errors in attestation, query whether the failure of a testator to sign a document could be considered a "harmless error." The answer appears to be yes. In a relatively recent New Jersey case, a client prepared for her attorney notes about how she wanted her estate to be distributed.[113] The attorney then prepared a draft in accordance with the client's notes, but the provisions of the draft did not precisely mirror the notes.[114] The attorney may have been seeking to translate the client's wishes into clearer or more flexible dispositive language that the attorney planned to discuss with the client.[115] Unfortunately, the client died without having reviewed or signed the draft will.[116] Some of the decedent's relatives sought to have probated either the client's notes or the unsigned draft.[117]

Working with a harmless error-type statute, the trial court and the appellate court denied probate of the client's notes as a holographic will[118] and also denied probate of the unexecuted draft will.[119] The New

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108. *See, e.g., In re Estate of Hall*, 51 P.3d 1134, 1135–36 (Mont. 2002) (joint will may be probated without necessary number of witnesses because attorney had advised clients that his notarization was sufficient).

109. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003).

110. *See supra* Section I.A.2.

111. *See* § 3.3 cmt. b.

112. *See supra* note 20 and *infra* note 141 and accompanying text.

113. *In re Estate of Macool*, 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1262–63.

118. *Id.* at 1264 (denying probate of the client's handwritten notes on the basis that they were unsigned).

119. *Id.* at 1263–65 (distinguishing between evidence that decedent intended to change her will from evidence that she intended a draft document to serve as her will).

Jersey Superior Court recognized that it was the first appellate court in that state to interpret the harmless error statute.[120] The court self-consciously referred to its decision as "plow[ing] this virgin soil guided by our jurisprudential experience and mindful that, in addition to discerning the intent of the Legislature, a court's duty in probate matters is to ascertain and give effect to the probable intention of the testator."[121] The Superior Court affirmed the trial court's denial of probate on the grounds that it was not clear that the decedent intended *this particular* draft document to serve as her will because she never had the opportunity to review it and assent to it.[122]

Surprisingly, though, for a court conscious about plowing "virgin soil,"[123] the Superior Court opinion went on to say in dicta that "we are satisfied that a writing offered [not as a holographic will, but an otherwise non-conforming statutory will] need not be signed by the testator in order to be admitted to probate."[124] Thus there is at least one state, New Jersey, that appears to suggest that even the testator's own signature is not an essential component of a will. The New Jersey Superior Court does not provide any rationale, however. One possible interpretation is that the testator's own signature is not absolutely necessary for serving the purposes of wills formalities—the cautionary, ritual, protective, or channeling functions.[125]

The commentary to the Restatement calls the lack of signature on a will "the hardest [of defects] to excuse."[126] Although such a defect is "serious," it is not "insuperable."[127] The commentary cites as an example of a case in which lack of signature might be most easily excused the situation in which a wife mistakenly signs the husband's will and the husband mistakenly signs the wife's will.[128] Implied in such a scenario is that each testator had read and approved the intended wills (presumably "mirrors" of each other), but then signed the wrong document.

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120. *Id.* at 1263.

121. *Id.* at 1263–64 (internal citations and quotations omitted).

122. *Id.* at 1264–65 (interpreting the harmless error statute to require the proponent to prove "by clear and convincing evidence [] that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes").

123. *Id.* at 1263.

124. *Id.* at 1266.

125. *See supra* Section I.A.2.

126. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003).

127. *Id.*

128. *Id.* ("A particularly attractive case for excusing the lack of the testator's signature is a crossed will case, in which, by mistake, a wife signs her husband's will and the husband signs his wife's will.").

II. FORMALITIES AS ANTI-LITIGATION DEVICES

This Part II explores in greater detail the origins and variations in formal wills requirements and then turns to consider the rationales for having any traditional requirements for wills formalities.[129] The multiple statutory exceptions to strict compliance with wills formalities suggest that the commonly accepted and often-cited policy reasons for requiring wills formalities may not be compelling enough to demand continued adherence to traditional methods for executing a valid will.[130] If that is true, then different and more lenient rules would facilitate the validation of a greater number of authentic wills.[131]

In *Consideration and Form*, an article published in the Columbia Law Review in 1941, Professor Lon Fuller attempted to parse the difference between form and substance in legal doctrine, specifically in the context of transfers with and without consideration (i.e., contracts and gifts).[132] Citing legal giants including British legal positivist John Austin,[133] American legal realist Karl Llewellyn,[134] and British legal positivist (and advocate of utilitarianism) Jeremy Bentham,[135] Fuller

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129. *See infra* Part II.

130. *See infra* Part III.

131. Such rules might include recognition of electronic wills. *See, e.g.*, NEV. REV. STAT. ANN. § 133.085 (West 2017) (permitting electronic wills). *But see generally* Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 890–86 (2007) (describing multiple obstacles to the widespread adoption of electronic wills); Michael Millonig, *Electronic Wills: Evolving Convenience or Lurking Trouble*, 45 EST. PLAN. 27, 29 (2018) (cautioning that "[c]areful consideration should be given before changing the traditional method [of signing a will] to an electronic format. Unless there has been some dramatic change in society or the law justifying deletion of this exception, there is no reason to bring the signing of a will into electronic commerce").

132. *See* Fuller, *supra* note 43.

133. *See id.* at 800 n.4 (quoting John Austin, *Fragments—On Contracts*, *in* 2 LECTURES ON JURISPRUDENCE 939–44 (4th ed., London, John Murray 1879) for proposition that legal formalities provide "evidence of the existence and purport of the contract, in case of controversy").

134. *Id.* (citing Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931) on functions of legal formalities). Llewellyn's view of contract formalities was that "[f]ormal acts of the known type then signify openly definitive intent to change the existing situation—and to be relied on." Llewellyn *supra*, at 711.

135. Fuller, *supra* note 43, at 800 n.4 (citing Jeremy Bentham, *The Rationale of Judicial Evidence*, *in* 6 THE WORKS OF JEREMY BENTHAM 64–86, 508–85 (John Bowring ed., 1843)). Bentham's view was that evidence could be divided into three categories—real, oral, and written—and that written evidence operates

> to establish the genuineness of the document . . . to make it appear, to the satisfaction of the judge, that the document exhibited as containing the discourse expressed by a certain person on a certain occasion, does really contain the discourse of that same person; and (where the occasion is

identified three principal functions of legal formalities: an *evidentiary* function (preserving a written record), a *cautionary* function (causing the transactor to take the transaction seriously), and a *channeling* function (forcing the transactor to take actions in a format that would be interpretable easily by a deciding judge, because the form of the transaction resembled similar transactions of that nature).[136]

In 1941, Ashbel Gulliver, the Dean of Yale Law School, together with Yale Law School instructor Catherine Tilson, extended Fuller's work by applying to wills Fuller's analysis of the function of contract and gift formalities.[137] In their article *Classification of Gratuitous Transfers*, Gulliver and Tilson evaluated the formalities that courts treated as important in determining whether a particular transfer would be recognized as a valid testamentary transfer.[138] Where Fuller saw three functions—*evidentiary*, *cautionary*, and *channeling*—in contractual formalities, Gulliver and Tilson reconsidered and rearticulated the distinct purposes served by strict application of wills formalities. First, Gulliver and Tilson explained, requiring the testator (or some other person on the testator's behalf and at the testator's direction) to sign the will served a *ritual* function (a different name for Fuller's *cautionary* function), insofar as a transfer effectuated by multiple attendant formalities likely correlated with deliberation and intentionality on the part of the testator.[139]

Second, as Fuller found with contractual formalities, Gulliver and Tilson understood wills formalities to serve an *evidentiary* function.[140] A will's written nature, the presence of disinterested witnesses, and the testator's affixing her signature, especially at the end of the will, all served to preserve the physical proof of the testator's motivations and

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material) that this discourse did really issue from him on that same occasion.

Bentham, *supra*, at 120.

136. Fuller, *supra* note 43, at 799–801 (describing evidentiary, cautionary and channeling functions of formalities governing the execution of contracts).

137. *See, e.g.*, Gulliver & Tilson, *supra* note 45, at 3–5 (explaining that "the court needs to be convinced that the statements of the transferor were intended to effectuate a transfer," that the presented proof of this intent is reliable, and that safeguards protected the transferor from "undue influence or other forms of imposition"). For more information on these authors' collaboration, see, Adam J. Hirsch, *Gulliver and Tilson, 'The Classification of Gratuitous Transfers' - A Belated Review*, 35 U. QUEENSLAND L.J. 127 (2016).

138. Gulliver & Tilson, *supra* note 45, at 3–5.

139. *Id.* at 4 ("[T]he general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion.").

140. Gulliver and Tilson noted, however, that, "this purpose is not accomplished in every case, since all of the attesting witnesses may become unavailable to testify because of death or some other reason, and their unavailability will not defeat probate of a will." *Id.* at 8.

increase the likelihood that some person would be available after the transferor's death who could testify as to the testator's clear testamentary intent and actions.[141] Presumably the rationale was that an eyewitness would be able to testify that the document had not been tampered with, and that the testator undertook certain acts with testamentary intent. Potential problems might arise if one or more of the witnesses were not available (or alive) to testify when the will eventually was probated.[142]

The third function of wills formalities as articulated by courts, according to Gulliver and Tilson, was the *protective* function; they did not consider this especially justified or well-served by the presence of witnesses.[143] The competency of witnesses could be questioned, their presence may or may not have served as deterrents to malfeasance by others, and there was no reason to think that testamentary transfers needed more "protection" from bad actors than inter vivos transfers.[144] Yet witnesses were required for wills, but not for lifetime gifts, they noted.[145]

Gulliver and Tilson went on to argue that some jurisdictions' recognition of holographic wills as valid suggested that the main "work" of wills formalities was to provide evidence of what the decedent intended.[146] If Gulliver and Tilson were correct, then perhaps the only truly significant formality was that the testator's wishes be committed to writing.[147] And only for testators in the most extreme circumstances—those on their deathbeds as well as active military personnel—were those requirements relaxed.[148]

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141. *Id.* at 8. Nevertheless, the court placed significant value on eyewitness testimony in probate cases, and so the presence of witnesses increased the likelihood that someone would be available to testify as to the actions taken. *Id.*

142. *Id.* at 6 ("[T]he testator will inevitably be dead and therefore unable to testify when the issue is tried. Secondly, an extended lapse of time, during which the recollection of witnesses may fade considerably, may occur between a statement of testamentary intent and the probate proceedings.").

143. *Id.* at 9 ("Some of the requirements of the statutes of wills have the objective, according to judicial interpretation, of protecting the testator against imposition at the time of execution. This is difficult to justify under modern conditions.").

144. *Id.* (explaining that makers of wills are "likely to be among the more capable and dominant members of our society").

145. *Id.*

146. *Id.* at 13 ("The exemption of holographic wills from the usual statutory requirements seems almost exclusively justifiable in terms of the evidentiary function.").

147. Gulliver and Tilson treat the restricted availability of nuncupative testamentary transfers as indicating the prime importance that courts place on the evidentiary function served by formal wills. *Id.* at 14–15.

148. *Id.*

In 1966, legal historian Lawrence Friedman explored the interplay between social values and the law of succession in *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, published in the *Wisconsin Law Review*.[149] He brought particular focus to the way in which the general principle of freedom of testation exists in tension with the laws governing wills, insofar as "[t]he wills statute admits of no exception, and none will be engrafted on the law by the courts."[150] In other words, in Friedman's analysis, wills formalities served to restrict testamentary freedom.[151] Far from being content with an historical explanation for the legal system's rigid adherence to wills formalities, Friedman inferred that the absence of a "swift tide running against formality" necessarily meant that wills formalities served some social utility or value.[152] Notwithstanding the growth of middle-class estate planning in the nineteenth century, Friedman inferred that wills formalities persisted because lawyers understood them and insisted upon them.[153] Friedman did not critique wills formalities as inappropriate constraints on testamentary freedom.[154]

Without citing or referring to the work of Fuller,[155] Austin,[156] Llewellyn,[157] Bentham,[158] Gulliver,[159] or Tilson,[160] Friedman labeled wills formalities as having ritual, evidentiary, protective, and channeling functions, without naming them as such, as well as providing an incentive to engage lawyers for a procedurally facile post-

149. Friedman, *supra* note 44, at 340 (making overarching claim that "every major field of law is concerned in some way or other with reproducing social values in succeeding generations," and then exploring this proposition in the specific context of the law of gratuitous transfers).

150. *Id.* at 365 (explaining that formalism operates as a type of restriction on absolute freedom of testation).

151. *Id.* (describing the conflict between testamentary freedom and wills formalities in three distinct areas: formalities for due execution, limited discretion of a court to limit statutory rights to succession such as the elective share right, and the probate (legal) process that must be followed after death in order for transfers to be treated as valid, for example).

152. *Id.* at 366 ("[W]e should resist seductive use of history as a substitute for an explanation. . . . We must therefore look for forces within the social system that maintain formality in being.").

153. *Id.* at 367 ("Formalism survived when the lawyers of the day were capable of understanding and perpetuating it.").

154. *Id.* ("[T]he formalism which survived was functional. The formalities of executing a will are useful ones.").

155. *Supra* note 132; *see also supra* note 136 and accompanying text.

156. *See supra* note 133 and accompanying text.

157. *See supra* note 134 and accompanying text.

158. *See supra* note 135 and accompanying text.

159. *See supra* note 137 and accompanying text.

160. *See supra* note 137 and accompanying text.

mortem disposition of assets.[161] The larger social value served by these formalities was a legal system that is "smooth, uniform, and efficient," a goal that Friedman and most other scholars would find worthy indeed,[162] but one that certainly supported the legal profession as well.

III. FORGIVENESS AS THE BEST FRAGRANCE FOR WILLS[163]

In many states, the law governing wills formalities has moved gradually from the strict compliance required by the Wills Act[164] to forgiving errors in execution, as long as the will meets the cautionary, ritual, evidentiary, and channeling purposes of wills formalities.[165] The Uniform Probate Code permits even greater variation from traditional wills formalities, allowing for holographic wills not entirely in the decedent's own handwriting,[166] notarized wills,[167] and wills with interested witnesses who are not required to forfeit any part of a testamentary transfer to them.[168] Indeed, the Uniform Probate Code has relaxed the formalities required for will execution so much that it appears that the absence of witnesses, the testator's signature or even a writing might be excused, as long as there is clear and convincing evidence that the decedent intended a particular memorialization to constitute the testator's will.[169]

Given that the Uniform Probate Code and state statutes modeled after it have all but eviscerated the traditional wills formalities, there is good reason to doubt that the primary motivation for those formalities were fully (or even adequately) described as having cautionary, ritual, evidentiary, and channeling functions.[170] To be sure, the legal system has an interest in ensuring that testators take the process of will execution seriously, are protected from the influence of potential malfeasors, provide clear evidence of their intent to make a final transfer, and execute documents that courts can readily identify as last

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161. Friedman, *supra* note 44, at 367–68 (judging formalities as useful because they "impress the testator with the solemnity of his acts; they ensure a standard written document, duly filed in court, recording the orderly disposition of goods and rights; they eliminate most of the danger of forgery and fraud; they encourage the use of middlemen (lawyers) who can help plan a rational, trouble-free disposition of assets. . . . It may be all the more important that the documents be standardized in form.").

162. *Id.* at 368.

163. The phrase "forgiveness is the fragrance that the violet sheds on the heel that has crushed it," has been attributed to Mark Twain, but may have other origins.

164. *See supra* Sections I.A.1–2.

165. *See supra* Section I.B.

166. *See supra* Section I.B.1.

167. *See supra* Section I.B.2.

168. *See supra* Section I.C.

169. *See supra* Section I.D.

170. *See supra* Section I.B.

wills and testaments. Yet the fact that many wills formalities are relaxed (or abandoned) suggests the value of an economic analysis—i.e., whether the benefits associated with any given formalities are worth the costs associated with complying with them. In other words, what wills formalities truly seek to do is to balance the possibility of false positives (i.e., the mistaken determination that a particular document or memorial is a decedent's will) against the possibility of false negatives (i.e., denying probate to a document or writing that clearly was intended by the decedent as a final expression of wishes for the post-mortem distribution of the decedent's property).

On the whole, the strict requirements of the Wills Act and statutes modeled after it[171] reflect a preoccupation with—or priority given—to preventing false positives. The underlying reasoning is that unless the testator truly intended a particular document to be a will, a testator would be unlikely to go through the trouble of writing one (or directing the preparation of one), signing the document at the end (or having someone else sign it at the testator's direction and in the testator's presence) with two or more witnesses who attest and sign in the presence of the testator and each other.[172] Yet the cost of rigid adherence to these wills formalities are false (and clearly unjust) negatives—the denial of probate to an instrument, such as the will in *Groffman*,[173] where the court has no doubt that the decedent intended the document to be his will.[174]

Overall, the relaxing of the requirements for a statutory will under UPC § 2-502(a) to the bare minimums of a writing, signature and witnesses[175] would have the effect of reducing the number of false negatives without increasing the number of false positives. In that sense, this provision of the UPC is a salutary reform that merits serious consideration by states that have not yet adopted it. By parity of reasoning, generous application of the harmless error rule[176] accomplishes the same result of minimizing false negatives. It is not clear, though, that law reform needs to stop there.

The standard for authenticity should be simple: Was this the document signed by decedent and intended to be his or her will? In phrasing, the test is similar to the harmless error rule but emphasizes authenticity. Authenticity, more than whether particular psychological or physical requirements are met, seems to be the more appropriate goal of will formalities.

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171. *See supra* Sections I.A.1–2.
172. *See supra* note 26 (describing requirements under Wills Act).
173. *See supra* notes 28–33 and accompanying text.
174. *See supra* notes 28–33 and accompanying text.
175. *See supra* Section I.B.
176. *See supra* Section I.D.

IV. THE FUTURE OF WILLS FORMALITIES

The law is moving and likely will continue to move in the direction of recognizing wills that are "written" in electronic form only.[177] In 2017, the Uniform Law Commission took the unusual step of establishing a drafting committee for an Electronic Wills Act without first engaging in the typical study phase that precedes any drafting project.[178] This suggests that law reformers perceive an urgent need to bring the practice of wills into the twenty-first century, and to square historic requirements for the execution of wills with the realities of life in the twenty-first century.[179] In order to plan for the future, the traditional purposes of wills formalities demand critical investigation. By letting go of conventional platitudes about the cautionary, ritual, protective, and channeling function of wills, it may be possible to articulate a more nuanced understanding of the substantive goals served by wills formalities. With that knowledge, one can then begin to consider how twenty-first century technology might be employed to revolutionize will execution, without jeopardizing any of the security that is fundamental for a functional legal system of succession.

One technology with particular promise for safeguarding and verifying documents such as wills is a distributed ledger that allows transactions to be recorded and validated electronically.[180] The details of how this technology might apply to testamentary instruments merits more rigorous inquiry, but the basic concept is this: as long as there is

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177. *See, e.g.*, *In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. Com. Pl. Prob. Div. June 19, 2013) (permitting probate of will of electronic will signed by stylus on Samsung Galaxy tablet computer); *see also Nichol v. Nichol* [2017] QSC 200 (Supreme Court in Queensland, Australia allowing probate on an unsent text message as decedent's last will and testament); and *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003) (permitting probate of a will where testator affixed a computer-generated, cursive style signature at the end of the document in the presence of two witnesses, and witnesses then signed their names to the will). *But see Litevich v. Probate Court*, 2013 WL 2945055 (Conn. Super. Ct. May 17, 2013) (unpublished opinion) (denying probate of will prepared via paid online drafting service Legalzoom and unsigned by testator with no evidence that any witnesses present at any relevant time).

178. *See* Memorandum from Suzy Walsh, Turney Berry & Susan Gary to Electronic Wills Drafting Committee (Oct. 2, 2017); NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DRAFT FOR DISCUSSION: ELECTRONIC WILLS ACT (2018); Fla. Electronic Wills Act, Fla. H.B. 277, 119th Sess. (2017).

179. *See also* Fla. Electronic Wills Act, Fla. H.B. 277, 119th Sess. (2017) and Real Property, Probate and Trust Law Section of The Florida Bar, White Paper on Proposed Enactment of the Florida Electronic Wills Act 7, https://www.flprobatelitigation.com/wp-content/uploads/sites/206/2017/05/RPPTL-Electronic-Wills-Act-White-Paper-Final.pdf [https://perma.cc/8CNU-5XN2] (noting absence of study phase for project and warning that a "change to the law as substantial as this demands a careful and well-studied approach").

180. *See* Bridget J. Crawford, *Blockchain Wills*, IND. L.J. (forthcoming 2019), https://ssrn.com/abstract=3346493.

clear and convincing proof that a particular document was the document signed—whether electronically or not—by the testator and intended to be the testator's will—that document should be given legal effect.[181]

In the short term, the possibility of electronic wills and technology-based verification systems draw attention away from the fundamental proposal of this Article: wills should be simpler to execute. Eventually, though, as technology develops and becomes more widespread, looser legal standards combined with technological advances may allow execution of a valid will to be as simple as sending an email. Contemplating such a future forces an honest discussion of the ways that traditional wills formalities have not in fact functioned as generations of scholars have claimed. That is, even when presented with a document in writing that has been signed by the testator and attested by witnesses,[182] wills nevertheless have been vulnerable to attack on the grounds of fraud,[183] undue influence,[184] duress,[185] or lack of mental capacity.[186] The fact that compliance with wills formalities does not preclude these challenges suggests that the formalities are doing something other than what they claim. The real work of formalities appears to be authentication and nothing more.[187]

CONCLUSION

How and why a society facilitates the transfer of wealth reveals a tremendous amount about that society's values. If the overarching principle of the law of succession in the United States is the freedom of disposition, as the Restatement (Third) of Property states,[188] then the lawyers, as primary architects and custodians of the legal system, must strive for laws that facilitate, rather than impede, a testator's desires for the distribution of his property. By requiring simply a showing that a document is the decedent's authentic will for it to be probated, more people would be able to execute valid estate planning documents. And if lawyers can incorporate twenty-first century technologies into their practices to allow electronic wills, that eventually may make execution of a will as simple as sending an email or completing an online form.

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181. *Id.*

182. *See supra* note 20 and accompanying text.

183. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(d) (AM. LAW INST. 2003) (defining fraud).

184. § 8.3(b) (defining undue influence).

185. § 8.3(c) (defining duress).

186. *See, e.g.*, § 8.1(b) (stating standard for mental capacity); 95 C.J.S. *Wills* § 7 (2018) (defining testamentary capacity generally).

187. *See supra* Part III.

188. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (AM. LAW INST. 2003).

Current wills formalities do not serve their stated purposes, but emerging technologies hold the potential to address the concerns that undergird the stated cautionary, protective, evidentiary, and channeling functions of wills formalities.[189] Just as important oaths are no longer taken while gripping genitalia and real property transfers do not require boxing the ears of children,[190] there is nothing immutable about the historic or present-day wills formalities. Any change that makes estate planning more available to a greater number of people should be embraced and welcomed.

189. *See* Crawford, *supra* note 180.

190. *See supra* notes 1-3 and accompanying text.