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The Timing of Testation

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THE TIMING OF TESTATION

Mark Glover¹

ABSTRACT

An adult can execute her last will whenever she wants. She can do so on her eighteenth birthday, or she can wait until she is on her deathbed. She can also execute her last will at any point between these two extremes. While the timing of testation is up to the individual testator, her choice has important implications for the law. These implications have been recognized primarily in the realm of will-interpretation, as when testation occurs can affect how courts attribute meaning to a will's words. By contrast, the implications of testation's timing for the law of will-authentication have been overlooked.

Will-authentication is the process by which the law separates purported wills that testators intended to serve as evidence of their estate plans from those that decedents did not want to be given legal effect upon their deaths. This article argues that the extent to which the testator's intent will be fulfilled if a correct will-authentication decision is made should be an important consideration for policymakers when crafting the law of will-authentication. Additionally, the article argues that the timing of testation can provide policymakers evidence of the likelihood that the testator's intent will be carried out if a will is correctly authenticated. By explaining how the timing of testation should inform how the law authenticates wills, this article provides policymakers a fresh perspective through which to evaluate potential reforms of the law.

In addition to highlighting the theoretical implications of testation's timing, this article provides an empirical analysis of testation's timing, which considers an original data set of over eighteen-hundred wills that were probated in Hamilton County, Ohio, in 2014. By comparing the date of execution of these wills with the date on which the testator died, this analysis provides a glimpse of when testation in fact occurs. Ultimately, when considered alongside the theoretical implications of testation's timing, this original empirical analysis can assist policymakers in crafting the law of will-authentication.

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INTRODUCTION

Testation, or the act of executing a will,² can occur at any time during the testator's adult life.³ The timing of testation relative to the testator's death has important implications for how the law should identify and interpret the testator's intent. Some of these implications have been recognized and have influenced the development of the law.⁴ Others, however, have been overlooked, and consequently opportunities for reform have been missed. This article seeks to at least partially address this oversight by highlighting the role that testation's timing can play in shaping one aspect of the law of wills, namely the law of will-authentication.

Will-authentication is the process by which the law separates purported wills that testators intended to serve as evidence of their estate plans from those that decedents did not want to be given legal effect upon their deaths.⁵ This process has significant consequences because the law's primary objective is to carry out the decedent's intent.⁶ Thus, a method of will-authentication that poorly differentiates authentic wills and inauthentic wills undermines the law's primary objective, while a method that accurately distinguishes authentic wills from inauthentic wills furthers the law's primary objective.

Accuracy, however, is not the only factor that policymakers should consider when selecting a method of will-authentication. Instead, they should consider both the benefits and the costs of authenticating a will in which the testator's intent is

² See Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1281 n.42 (explaining that "the word 'testation' refers to a property owner's effective designation, by will, of the persons who shall receive his property upon his death"). If a decedent dies with a legally effective will, she is said to have died "testate." See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 43 (9th ed. 2013).

³ Persons who are under a specified age lack the legal capacity to execute a will. UNIF. PROBATE CODE § 2-501 (NAT'L CONFERENCE OF COMM'RS. OF UNIF. STATE LAWS 2010) ("An individual 18 or more years of age who is of sound mind may make a will."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.2(a) (AM. LAW INST. 2003); see generally Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69 (2014) (exploring the rationale of the testamentary incapacity of minors). In addition to this age requirement, a donor must also possess a requisite level of mental capacity to execute a legally effective will. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (AM. LAW INST. 2003).

⁴ See *infra* notes 125–137 and accompanying text (discussing rules of construction); *infra* notes 151–155 and accompanying text (discussing mortmain statutes); *infra* notes 158–169 and accompanying text (discussing the doctrines of undue influence, duress, and fraud).

⁵ See Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 336 (2016) (explaining that the law "differentiates wills from non-wills" and that the method that law employs to make this distinction is "not intended to delineate an arbitrary boundary between what is and is not a will", but is instead "meant to distinguish authentic wills from inauthentic wills").

⁶ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."); DUKEMINIER & SITKOFF, *supra* note 2, at 1 ("Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

expressed.⁷ On the one hand, accurate will-authentication decisions produce the benefit of fulfilling the testator's intent. On the other hand, the court's task of deciphering the testator's intent can generate costs in the form of time, money, and effort expended during the probate process.⁸ Policymakers should ensure that the benefit of their chosen method of will-authentication outweighs its costs.

In recent years, the scholarly discourse surrounding will-authentication has focused on the benefits and costs of various methods of will-authentication.⁹ Absent from the debate, however, is recognition that not all wills have the same expected benefit. Generally, the discussion assumes that the same benefit is reaped each time an accurate will-authentication decision is made. This, however, is a false assumption. To be sure, some wills substantially express the testator's intent, and therefore an accurate authenticity decision results in the testator's estate being disposed in accordance with her wishes. Other wills, by contrast, do not correctly express the testator's intent, and consequently an accurate authenticity decision does not result in the complete fulfillment of the testator's intended estate plan.

Within this context, this article makes two primary arguments. The first is that, when evaluating the overall costs and benefits of a method of will-authentication, policymakers should recognize that some wills produce a relatively large benefit and others produce a relatively small benefit. Thus, if policymakers have more confidence that a will accurately reflects the testator's intent, then they should tolerate greater decision costs during probate. Conversely, if policymakers have less confidence regarding a will's benefit, then they should tolerate fewer decision costs. Only by recognizing the differences in the expected benefit of wills can policymakers accurately evaluate the costs and benefits of a particular method of will-authentication.

This article's second primary argument is that testation's timing can help policymakers to gauge the expected benefit of wills. If testation occurs too early, then changing circumstances over the testator's life might suggest that a will does not accurately express the testator's intended estate plan at death.¹⁰ If testation occurs too late, then old age or ill health might render the testator particularly vulnerable to undue influence or other types of overreaching, which raises similar concerns that a

⁷ See Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) ("Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality."); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992) ("[W]e should ask . . . whether [a method of will-authentication] promotes the intent of the testator at an acceptable administrative cost."); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 390 (2017) ("The challenge in creating and applying a Wills Act is how to balance the competing public policy considerations of testator's intent, costs of administration, and potential for misconduct").

⁸ See Wendel, *supra* note 7, at 382 (explaining "that one of the important public policy considerations . . . is . . . the costs of administration associated with ascertaining and giving effect to testator's intent").

⁹ See, e.g., Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 63–74 (2016) (discussing the costs and benefits of the clear and convincing evidence standard); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1138–46 (2015) (discussing the costs and benefits of the harmless error rule); Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 877–82 (2012) (discussing the costs and benefits of the harmless error rule and the reformation doctrine).

¹⁰ See *infra* Section II.A.

will does not accurately express the testator's intended estate plan.¹¹ Under either scenario, testation's timing diminishes the likelihood that a will accurately reflects the testator's intent at death, and it therefore also reduces the will's expected benefit.

Through these two insights this article provides a framework for evaluating the law of will-authentication. First, because testation's timing affects the probability that wills accurately reflect intended estate plans by either raising or alleviating concerns regarding changed circumstances and testator vulnerability,¹² it can serve as a barometer of a will's expected benefit. Second, with a better sense of the expected benefit of wills, policymakers can enjoy a clearer picture of how the law should balance the costs and benefits of authenticating wills. In this way, testation's timing can assist policymakers in crafting the law of will-authentication.

This fresh perspective of the implications of testation's timing provides theoretical guidelines for analyzing the law, but this article goes beyond theoretical discourse by providing an empirical analysis of testation's timing that can aid policymakers in selecting the appropriate method of will-authentication. In particular, this empirical analysis considers an original data set of over eighteen hundred wills that were probated in Hamilton County, Ohio, in 2014.¹³ By comparing the date of execution of these wills with the date on which the testator died, this analysis provides not only a glimpse of when testation in fact occurs but also a suggestion of the confidence that policymakers should have in the extent to which wills accurately represent the testator's intent. When considered alongside previous studies of testation, this original study suggests that trends in the timing of testation change over time and consequently that the law of will-authentication should change as well.

The article proceeds in four parts. Part I explains the law and policy of will-authentication, including how the costs and benefits of the authentication process should inform the development of the law. Part II then explores how the timing of testation can provide insights regarding the expected benefit of wills, insights that ultimately can aid policymakers in evaluating potential reforms. Part III shifts the article's focus from theory to reality by providing empirical evidence of when testation actually occurs, including an analysis of an original data set of wills of recently deceased testators. Finally, Part IV applies Part III's data to the theory presented in Parts I and II to provide suggestions for reform.

I. THE AUTHENTICATION OF WILLS

A testator has broad liberty to decide how her estate should be distributed upon death.¹⁴ As the Restatement (Third) of Property (the "Restatement") explains, "[t]he organizing principle of the American law of donative transfers is freedom of disposition," and as such, "[p]roperty owners have the nearly unrestricted right to

¹¹ See *infra* Section II.B.

¹² See *infra* Part II.

¹³ See *infra* Subsection III.C.ii.

¹⁴ See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643–45 (2014).

dispose of their property as they please.”¹⁵ With freedom of disposition as the law’s organizing principle, fulfillment of the testator’s intent naturally emerges as the law’s primary objective.¹⁶

After all, if the law did not honor the testator’s intent, freedom of disposition would be illusory. The testator simply would not enjoy the liberty that the law purports to grant her. Thus, the Restatement makes clear that the law “implements [freedom of disposition through] two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor’s intention; and (2) that the donor’s intention is given effect to the maximum extent allowed by law.”¹⁷ Similarly, the Uniform Probate Code (“UPC”) stresses that one of its “underlying purposes and policies” is “to discover and make effective the intent of a decedent in distribution of his property.”¹⁸ Both the Restatement and the UPC reflect the widely-held view that the primary goal of the law of wills is to carry out the testator’s intent.¹⁹

In pursuit of this goal, the law turns to the language of the testator’s will to provide evidence of how she wanted her estate distributed.²⁰ Before the court can look to a will to determine the intent expressed therein, however, it must first decide whether the testator intended the court to consider that document as evidence of her intended estate plan.²¹ Put simply, the court must identify the testator’s will before it can interpret it. A testator might not want the court to consider a purported will

¹⁵ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003); *see also* Cantrell v. Cantrell, No. M2002-02883-COA-R3-CV, 2004 WL 3044907, at *5 (Tenn. Ct. App. Dec. 30, 2004) (“A fundamental principle of the law of wills is that a testator is entitled to dispose of the testator’s property as he or she sees fit, regardless of any perceived injustice that may result from such a choice.”); Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 284 (2017) (“Freedom of disposition is the cornerstone of the modern law of succession. Individuals enjoy nearly unfettered discretion to decide how property should be distributed upon death.” (footnote omitted)); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882 (2012) (“The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.”).

¹⁶ *See* Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) (“The primary goal of the American law of wills is the effectuation of the decedent’s testamentary intent.”); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (“One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.”).

¹⁷ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003); *see also* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 569 (2016) (“[A] fundamental principle within the law of succession [is] that intent, or more specifically testamentary intent, is the cornerstone of a will.”).

¹⁸ UNIF. PROBATE CODE § 1-102 (NAT’L CONFERENCE OF COMM’RS. OF UNIF. STATE LAWS 2010).

¹⁹ *Cf.* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 552–53 n.1 (1999) (“Most scholars agree that giving effect to testamentary intent is the primary objective of wills law.”).

²⁰ *Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) (“A will duly executed and allowed by the court must . . . be accepted as the final expression of the intent of the person executing it.”).

²¹ *See* Sitkoff, *supra* note 14, at 650–52 (distinguishing the task of authenticating a will from the task of construing it).

because she made it as a rough draft and never gave her final assent to it.²² Likewise, she might not want a purported will to serve as evidence of her intent because a wrongdoer attempted to fraudulently benefit from her estate by submitting a forgery to probate.²³ Will-authentication is the process by which the law makes this distinction between a purported will that the testator intended the court to use as evidence of her estate plan and a purported will that the testator did not intend the court to consider.²⁴

A. Law

Although the details of the law of will-authentication vary from state to state, in general, the conventional law authenticates wills by relying upon various will-execution formalities to provide evidence of authenticity.²⁵ These formalities normally require that a will be written, signed by the testator, and attested by two witnesses.²⁶ In some states, these primary formalities are accompanied by ancillary requirements, such as that the signatures must appear at the end of the document and the testator and witnesses must be in each other's presence at the time they sign the will.²⁷ If the testator complies with these formalities, the law presumes that the will is authentic, and if the testator does not comply, the law presumes the opposite.²⁸ Furthermore, under the conventional law's rule of strict compliance, the presumption of inauthenticity that results from the testator's failure to comply is conclusive.²⁹ The court is not authorized to consider other evidence that might suggest the noncompliant will is authentic.³⁰

The rationale underlying these formalities is that they provide robust evidence of a will's authenticity.³¹ The court must authenticate a will after the testator's death, and as such, the testator cannot testify regarding whether she truly intended the will

²² See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1065 (1996) (“[M]any persons are given to speak and write off the cuff, many persons commit to words tentative *drafts* of their wills and then have second thoughts when the time for inking draws near.”); John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 494–95 (1975) (explaining that “the danger exists that [the testator] may make seeming testamentary dispositions . . . without . . . finality of intention” and observing that “[n]ot every expression that ‘I want you to have the house when I’m gone’ is meant as a will”).

²³ See Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN’S L. REV. 597, 618 (2014) (recognizing the possibility of “the fraudulent admission of a will that the testator never executed”).

²⁴ See Glover, *supra* note 5, at 337.

²⁵ See DUKEMINIER & SITKOFF, *supra* note 2, at 147–48. In addition to providing evidence of authenticity, will formalities might also serve other purposes. See Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 KAN. L. REV. 139, 139 (2012) (“[F]ormal will-execution requirements bolster the overall therapeutic potential of estate planning.”).

²⁶ DUKEMINIER & SITKOFF, *supra* note 2, at 148–49.

²⁷ Glover, *supra* note 5, at 342.

²⁸ Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 625 (2016).

²⁹ DUKEMINIER & SITKOFF, *supra* note 2, at 153; Glover, *supra* note 3, at 101.

³⁰ See Langbein, *supra* note 22, at 489 (“The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.”).

³¹ *Id.* at 492 (“The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent . . .”).

to be legally effective.³² To overcome this evidentiary difficulty, the law requires that the testator comply with the prescribed will-execution formalities.³³ These requirements ensure that the court has ample evidence of the testator's intent.³⁴ After all, few testators would complete the process of writing out a will, signing it, and then locating two witnesses without intending the document to be legally effective.³⁵

Although the prescribed will-execution formalities provide evidence of authenticity, they also represent potential stumbling blocks for a testator who wants to leave behind a legally effective will but fails to comply due to ignorance or mistake.³⁶ When the law conclusively presumes that all noncompliant wills are inauthentic, there is a risk that a substantial number of truly authentic wills are denied probate because of the testator's honest mistake.³⁷ In response to this concern, critics of the conventional law have proposed the harmless error rule as an alternative to the rule of strict compliance.³⁸

The harmless error rule replaces the conventional law's conclusive presumption of inauthenticity with a rebuttable presumption.³⁹ Whereas under the rule of strict compliance the court will not consider extrinsic evidence that suggests the testator intended a noncompliant will to be legally effective,⁴⁰ under the harmless error rule the court is granted discretion to consider such evidence.⁴¹ Thus, if a purported will

³² *Id.* at 501.

³³ *See id.*

³⁴ *See id.* at 501–02.

³⁵ DUKEMINIER & SITKOFF, *supra* note 2, at 153 (“A competent person not subject to undue influence, duress, or fraud is unlikely to execute an instrument in strict compliance with all the Wills Act formalities unless the person intends the instrument to be his will.”); Kathleen R. Guzman, *Intents and Purposes*, 60 KAN. L. REV. 305, 311 n.18 (2011) (“Few people would undergo [the will-execution] ceremony without holding testamentary intent.”).

³⁶ *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 432 (2009) (“[W]ill formalities are barriers to the valid execution of a will. Put differently, absent formalities, testators would more easily exercise their testamentary power.”); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 457 (2002) (“[F]ormality rules for will execution prevent mistakes about intent and provide a means for expressing intent. At the same time, in a significant number of cases they may frustrate not only an individual testator's intent but also the principle objective of the law of wills.”).

³⁷ *See* Kelly, *supra* note 9, at 880 (“Currently, the concern about [false-negative outcomes] may be greater than the concern about [false-positive outcomes]. Most disputes over execution formalities . . . seem to involve technical defects . . . with little or no risk of fraud. If these cases are representative of all cases, perhaps there is a much greater chance of denying probate to a document the testator did intend to be her will . . . than probating a document the testator did not intend to be her will . . .”) (footnote omitted).

³⁸ The harmless error rule was first championed by Professor John Langbein. *See* John H. Langbein, *Excusing Harmless Error in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). Since Langbein's call for change, the harmless error rule has garnered widespread support from law reformers, as evidenced by its adoption by both the Uniform Probate Code and the Restatement (Third) of Property. *See infra*, note 43.

³⁹ Mark Glover, *In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron*, 73 WASH. & LEE L. REV. ONLINE 289, 291–92 (2016).

⁴⁰ *See supra* notes 29–30 and accompanying text.

⁴¹ *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003) (explaining that “[t]he purposive question [under the harmless error rule] is whether the evidence regarding the overall conduct of the testator establishes, in a clear and convincing manner, that the testator adopted the document as his or her will.”).

does not comply with the prescribed formalities, the court presumes that the testator did not intend it to be legally effective, but it can consider extrinsic evidence that suggests the testator's failure to comply was the result of mistake or ignorance.⁴² Although both the Restatement and the UPC favor this alternative to the conventional law,⁴³ fewer than a quarter of the states have adopted some form of the harmless error rule.⁴⁴

B. Policy

The conventional law of will-authentication and the reform movement's harmless error proposal can be evaluated from a policy perspective with the economic tool of decision theory.⁴⁵ Decision theory provides a framework for identifying the optimal decision-making process for a given determination,⁴⁶ such as whether a particular document is an authentic expression of the testator's intent.⁴⁷ To begin with, decision theory suggests that accuracy is one factor in selecting the process that courts should use to authenticate wills.⁴⁸ Because the law's ultimate goal is to carry out the testator's intent,⁴⁹ the extent to which the law correctly distinguishes authentic wills from inauthentic wills is naturally an important consideration for policymakers.⁵⁰ In the context of a binary decision, like whether a document is or is not the testator's authentic will, decision theory suggests that the accuracy of a decision-making process should be evaluated by considering two types

⁴² See Langbein, *supra* note 38, at 4–5 (arguing that, under the harmless error rule, “proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution—that the will expresses the decedent’s testamentary intent”).

⁴³ See UNIF. PROBATE CODE § 2-503 (NAT’L CONFERENCE OF COMM’RS. OF UNIF. STATE LAWS 2010); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999).

⁴⁴ See DUKEMINIER & SITKOFF, *supra* note 2, at 184.

⁴⁵ See generally C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999) (describing and applying decision theory).

⁴⁶ See *id.* at 41–42 (“Decision theory sets out a *process* for making factual determinations and decisions when information is costly and therefore imperfect. It formulates a methodology for determining when to make decisions on the basis of current information and when to gather and consider further information before making a decision.”); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 498 (2001) (“Decision theory provides a powerful framework for understanding situations in which choices among alternative actions must be based on imperfect information. It helps us understand the tradeoffs between, in effect, convicting the innocent and absolving the guilty.”); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1065 (1968) (“[T]he typical decision-theory problem involves the proper course of action to be taken by a decisionmaker who may gain or lose by taking action upon uncertain data that inconclusively support or discredit differing hypotheses about the state of the real but nonetheless unknowable world.”).

⁴⁷ For my prior scholarship that applies decision theory to the issue of will-authentication, see generally Glover, *supra* note 5 (focusing on the rate of error) and Glover, *supra* note 28 (focusing on error costs).

⁴⁸ To be more precise, decision theory focuses on minimizing expected error costs—the product of the likelihood of an erroneous decision and the cost of that erroneous decision—and makes accuracy a primary consideration in the effort to minimize expected error costs. See Glover, *supra* note 28, at 619–20.

⁴⁹ See *supra* notes 17–19 and accompanying text.

⁵⁰ See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (explaining that the law seeks to “establish[] rules under which sufficiently reliable determinations can be made regarding the content of the donor’s intention.”).

of inaccurate determinations.⁵¹ One is a false-positive outcome, and the other is a false-negative outcome.⁵²

A false-positive outcome occurs when the court decides that a purported will is authentic when in reality it is inauthentic.⁵³ Conversely, a false-negative outcome occurs when the probate court decides that a truly authentic will is inauthentic.⁵⁴ Both false-positive and false-negative outcomes result in erroneous decisions regarding a will's authenticity, and therefore both undermine the testator's intent.⁵⁵ As Professor Robert Sitkoff explains: "Both kinds of error dishonor the decedent's freedom of disposition. The former gives effect to a false expression of testamentary intent; the latter denies effect to a true expression of testamentary intent."⁵⁶ The failure to give effect to the testator's intent in the ways that Sitkoff describes represents the costs of erroneous will-authentication decisions.⁵⁷ Because the law's primary goal is to fulfill the testator's intent,⁵⁸ policymakers should strive to minimize these error costs by selecting an accurate will-authentication process.⁵⁹ The most accurate will-authentication process is the one that reduces the combined risk of allowing probate of inauthentic wills and denying probate of authentic wills.⁶⁰

Although accuracy, and therefore error cost minimization, is an important consideration for policymakers in crafting a will-authentication process, they must also consider the costs associated with making accurate will-authentication decisions.⁶¹ The court's task of determining the testator's intent, including the authenticity of a will, entails costs in the form of time, money, and effort expended by the litigants and the courts as they present and consider evidence relating to the testator's intent.⁶² Decision theory refers to these types of costs as decision costs,⁶³ and Professor Adam Samaha explains that these costs include "any burden, such as resource expenditure or opportunity costs, associated with reaching a decision,"

⁵¹ See Hylton & Salinger, *supra* note 46, at 499.

⁵² *Id.* at 499 n.116. False-positive outcomes are sometimes referred to as Type I errors, and false-negative outcomes are sometimes referred to as Type II errors. See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504 (1999).

⁵³ See DUKEMINIER & SITKOFF, *supra* note 2, at 153; Kelly, *supra* note 9, at 880; Sitkoff, *supra* note 14, at 647.

⁵⁴ See sources cited *supra* note 53.

⁵⁵ Glover, *supra* note 28, at 629–31.

⁵⁶ Sitkoff, *supra* note 14, at 647.

⁵⁷ A description of the error costs associated with both false-positive outcomes and false-negative outcomes is not as simple as Sitkoff suggests. However, he is correct that both types of false outcomes undermine the testator's intent, and that the two types of error generate roughly equivalent costs under modern conditions. See Glover, *supra* note 28, at 630–33, 646–47.

⁵⁸ See *supra* notes 17–19 and accompanying text.

⁵⁹ See generally Glover, *supra* note 5.

⁶⁰ See Glover, *supra* note 28, at 619–20.

⁶¹ See *id.* at 620–21.

⁶² See *supra* note 8 and accompanying text.

⁶³ See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) ("Decision costs' is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including the costs of supplying judges with information needed to decide the case at hand and formulate doctrines to govern future cases; the opportunity costs of litigation to litigants and judges (that is, the time spent on a case that could be spent on other cases); and the costs to lower courts of implementing and applying doctrines developed at higher levels.").

including “time, money, and emotional distress from uncertainty, conflict, worry, and the like.”⁶⁴

Decision theory suggests that policymakers should select the process for making will-authentication decisions that minimizes the sum of both error and decision costs.⁶⁵ Under this framework, if a change to the process by which courts authenticate wills would drastically increase decision costs but would only incrementally increase the process’s accuracy, and in turn only minimally reduce error costs, then policymakers should not make the change. However, if a change would dramatically increase the process’s accuracy, and in turn significantly decrease error costs, but such a change would only minimally increase decision costs, then policymakers should institute the change. In economic terms, the former reform should not be adopted because its marginal cost exceeds its marginal benefit, and the later reform should be adopted because its marginal benefit exceeds its marginal cost.⁶⁶ By focusing on the net effect of reform in this way, decision theory can aid policymakers in evaluating the ways in which courts authenticate wills.

When viewed through the lens of decision theory, the conventional law of will-authentication can be seen as minimizing the risk of false-positive outcomes because the process rarely results in the probate of an inauthentic will.⁶⁷ As explained previously, few testators would leave behind a formally compliant document without intending it to constitute a legally effective will.⁶⁸ Consequently, the court can presume that a formally compliant will is authenticated and be assured that its authenticity decision runs a low risk of producing a false-positive outcome.

Decision theory, however, directs us to consider the possibility not only of false-positive outcomes but also of false-negative outcomes.⁶⁹ When both types of error are considered, the conventional law seems to produce a significant risk of false-negative outcomes.⁷⁰ In particular, it runs the risk of invalidating authentic wills when the testator fails to strictly comply with the prescribed formalities due to mistake or ignorance of the law. Because the rule of strict compliance prohibits the court from validating a noncompliant will despite overwhelming evidence of its

⁶⁴ Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006) (emphasis omitted) (explaining further that these costs “reach[] everyone who bears these costs, whether public or private actors”); see also Beckner & Salop, *supra* note 45, at 44 (“In making these determinations, the court must be mindful of the financial, time, and management costs that it is inflicting on the parties (including third parties) and itself.”).

⁶⁵ See Beckner & Salop *supra* note 45, at 46 (“A rational decision maker will try to minimize the sum of the two types of costs. This is the second key insight of the decision theoretic approach.” (footnote omitted)); Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 879 (2011) (“[D]ecision theory’s instruction [is] to craft legal rules so as to minimize the sum of decision and error costs.”).

⁶⁶ See Wendel, *supra* note 7, at 384–85 (“An economic analysis focuses on *marginal* costs and benefits. Whether one should enter into a proposed transaction, or adopt a proposed law, depends on whether the marginal benefits of the proposed transaction or law exceed the marginal costs of the proposed transaction or law. The proposed transaction/law is efficient if the marginal benefits exceed the marginal costs.” (footnotes omitted)).

⁶⁷ Glover, *supra* note 5, at 363.

⁶⁸ See *supra* notes 31–35 and accompanying text.

⁶⁹ See *supra* notes 48–59 and accompanying text.

⁷⁰ Glover, *supra* note 5, at 363.

authenticity,⁷¹ doubts arise regarding whether the conventional law represents the most accurate method of will-authentication. Critics argue that the conventional law is overly concerned with protecting against false-positive outcomes and that it produces too many false-negative outcomes.⁷² They argue further that the risk of false-negative outcomes can be reduced without a significant increase in the risk of false-positive outcomes and that, therefore, the overall process of will-authentication can be made more accurate.⁷³

Specifically, critics of the conventional law argue that the harmless error rule allows the court to avoid the obvious false-negative outcomes produced by the rule of strict compliance.⁷⁴ It does so by granting the court the discretion to validate a noncompliant will when there is strong evidence that it is truly authentic. Although the flexibility that the harmless error rule gives courts likely reduces the risk of false-negative outcomes, it might increase the risk of false-positive outcomes. While exercising this discretion, the court might incorrectly assess the extrinsic evidence of the will's authenticity and validate a will that the testator did not intend to be legally effective.⁷⁵ If the harmless error rule's reduction of false-negative outcomes is accompanied by an increase in false-positive outcomes, then reform would not necessarily make the process more accurate. Although the possibility of an increased rate of false-positive outcomes should be considered, this concern has not emerged as a significant critique of the harmless error rule.

Recognition that the harmless error rule might lead to more accurate will-authentication decisions, however, does not necessarily lead to the conclusion that reform is needed.⁷⁶ As explained above, decision theory suggests that accuracy should not be the sole goal of will-authentication methods.⁷⁷ Instead, the benefit of accurate decisions must be considered alongside the cost of making accurate decisions.⁷⁸ The optimal method of will-authentication minimizes the total cost of the process, which includes both the error costs of making inaccurate determinations of authenticity and the decision costs associated with making determinations of authenticity.⁷⁹

⁷¹ See *supra* notes 29–30 and accompanying text.

⁷² See, e.g., Kelly, *supra* note 9, at 880 (“Currently, the concern about [false-negative outcomes] may be greater than the concern about [false-positive outcomes.] Most disputes over execution formalities . . . , at least based on reported decisions, seem to involve technical defects or obvious mistakes . . .”).

⁷³ See, e.g., Langbein, *supra* note 38, at 52 (suggesting that under the harmless error rule “the estates of those who have committed innocuous execution errors are now being distributed in accordance with their wishes,” and that “[t]he intent-serving goal of the Wills Act is achieved better without than with the rule of strict compliance.”).

⁷⁴ See, e.g., Kelly, *supra* note 9, at 889 (“The harmless error rule may decrease . . . false negatives . . . as a court is authorized to excuse an execution defect if there is clear and convincing evidence the testator intended the document or writing to be a will.”).

⁷⁵ See *id.* (“[T]he harmless error rule still entails the possibility of error costs; courts, operating with imperfect information, may not apply harmless error correctly or uniformly in every case.”).

⁷⁶ See generally Wendel, *supra* note 7 (arguing that “flexible strict compliance” is a more efficient approach than harmless error).

⁷⁷ See *supra* notes 61–64 and accompanying text.

⁷⁸ See Beckner & Salop, *supra* note 45, at 46.

⁷⁹ See *supra* notes 65–66 and accompanying text.

While the conventional law of will-authentication may not be the most accurate, it might minimize the costs of making authenticity decisions.⁸⁰ Under the conventional law, the issue of whether the testator truly intended a will to be legally effective is decided by evaluating the testator's compliance with the prescribed formalities.⁸¹ If the testator complied, the court determines that she intended that the will be legally effective, and if she did not, the court determines that she did not intend the will be legally effective. By focusing solely on formal compliance rather than on the underlying issue of intent, the conventional law provides the probate court with a relatively easy process for making authenticity decisions.⁸² The court does not have to make individualized determinations of the testator's intent based upon all available evidence,⁸³ and consequently the cost of related litigation is generally avoided.⁸⁴

But again, just because the conventional law minimizes decision costs does not mean that it is the optimal method of will-authentication. Instead of focusing solely on the minimization of decision costs, policymakers should consider whether the saved cost of making authenticity decisions outweighs the foregone benefit of making more accurate decisions. Therefore, to make a persuasive argument for reform, critics of the conventional law must establish not simply that an alternative method of will-authentication would be more accurate, but that its increased accuracy does not produce an even greater increase in decision costs.

In this regard, the main critique of the harmless error rule focuses on the possibility of increased decision costs.⁸⁵ Indeed, the primary concern is that the discretion the harmless error rule grants courts to validate noncompliant wills leads to more expensive and frequent litigation regarding the authenticity of wills.⁸⁶ With

⁸⁰ See Wendel, *supra* note 7, at 382 (“[I]t seems rather obvious that one of the important public policy considerations served by the Wills Act is to help control the costs of administration associated with ascertaining and giving effect to testator’s intent.”).

⁸¹ See *supra* notes 25–30 and accompanying text.

⁸² Langbein, *supra* note 22, at 494 (explaining that because will formalities produce uniformity, “[c]ourts are seldom left to puzzle whether the document was meant to be a will” and explaining further that “[t]he court can process [the testator’s] estate routinely, because his testament is conventionally and unmistakably express and evidenced.”); see also Hirsch, *supra* note 7, at 296 (“By calling on courts to judge a testator’s volitional state of mind, we would impose courts an evidentiary burden that raises their decision costs. By barring such evidence, we would lesson those costs.”).

⁸³ See Glover, *supra* note 23, at 629–30.

⁸⁴ See Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 804 (2014) (“In economic terms . . . we can justify the imposition of expensive formalities on parties as functioning to avoid spillover costs—internalizing the negative externality created by the state-supported construction proceedings for transfers formulated in ambiguous ways.”); David Horton, *Tomorrow’s Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 577 (2017) (“[T]he need to prevent spillover costs—not the desire to carry out the decedent’s intent—furnishes the most forceful reasons to take the Wills Act at its letter.”).

⁸⁵ See Horton, *supra* note 84, at 574 (“[C]oncern about the burden on the judicial system has also surfaced during the debate over the harmless error rule. Scholars have voiced concern that replacing strict compliance with harmless error may increase litigation rates by providing new ammunition to disappointed heirs.”); Kelly, *supra* note 9, at 881 (“Regarding decision costs, one concern with harmless error . . . is that [it] might increase litigation costs . . .”).

⁸⁶ Hirsch, *supra* note 84, at 829 (“The harmless error power might tend to encourage carelessness and broad litigation . . .”); Kelly, *supra* note 9, at 889 (“The harmless error rule could increase decision costs,

the discretion to validate noncompliant wills, the authentication process is more difficult. The court is not tasked with simply evaluating formal compliance in all cases, but in some cases it is tasked with evaluating the more complex issue of intent.⁸⁷ When addressing this more complex issue, the court and the litigants in a particular case might have to devote more time and effort in presenting and evaluating the evidence regarding the underlying issue of intent.⁸⁸

Moreover, the number of cases in which a will's authenticity can be judged simply by formal compliance could decrease.⁸⁹ Because a noncompliant will is no longer necessarily invalid, testators may have less incentive to strictly comply with execution formalities. The number of compliant wills might consequently decrease, and the number of noncompliant wills might increase. The harmless error rule could therefore produce greater decision costs not only by allowing authenticity to be decided through a more cumbersome process, but also by reducing the number of wills that can be authenticated through the easier process of evaluating formal compliance.

Proponents of reform counter these arguments regarding the harmless error rule's potential to increase decision costs in two primary ways. The first is that the conventional law's rule of strict compliance does not necessarily provide courts a simple, straightforward process for authenticating wills. Proponents of reform argue that instead of litigation regarding the true issue of intent, the conventional law produces litigation regarding formal compliance.⁹⁰ By turning the court's attention squarely to intent, the harmless error rule does not necessarily substitute a straightforward authentication process with a contentious process; it simply replaces one type of litigation with another.⁹¹ As such, proponents of reform argue that any given case will not be more difficult to decide under either the harmless error or strict compliance rule.

either because the rule might result in more litigation or because any litigation that does occur might involve factual or legal questions that are more difficult to determine.”).

⁸⁷ See Horton, *supra* note 84, at 574 (“Once the crystalline statutory elements have been replaced with a muddy standard, however, all manner of malformed instruments may come out of the woodwork.”).

⁸⁸ See John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP., TRUST & EST. L.J. 73, 80 (2008) (arguing that under the harmless error rule the “intractable problem remains of determining the intention of a person now dead, particularly in light of often conflicting evidence offered by persons with an interest in the outcome.”).

⁸⁹ See Kelly, *supra* note 9, at 878.

⁹⁰ See Langbein, *supra* note 22, at 525 (“Many of the formalities have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance.”); Langbein, *supra* note 38, at 28 (“[T]he rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict.”); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 572 (1990) (“Courts . . . often decide like cases dissimilarly because some courts will strain to avoid the unduly harsh rules for formal validity. Thus, even where the case or statutory law seems to be clear, disappointed beneficiaries will still litigate to try to win their devises.”).

⁹¹ See Langbein, *supra* note 22, at 526 (“The choice is not between litigation and no litigation. In cases of defective compliance the important choice is between litigation resolved purposefully and honestly under the [harmless error rule], or irrationally and sometimes dishonestly under the rule of literal compliance.”); Lindgren, *supra* note 7, at 1016 (arguing that under the harmless error rule “[l]itigation about formalities will lessen; litigation about testamentary intent will increase.”).

The second argument that proponents of reform make is that, by granting courts discretion to authenticate noncompliant wills, the harmless error rule does not necessarily reduce the testator's incentive to strictly comply with the prescribed formalities.⁹² The total number of cases in which a will's authenticity can be determined solely by the testator's formal compliance may not decrease.⁹³ The incentive to formally comply would remain intact because the testator would still reap a substantial benefit by complying. A testator likely does not want to place her estate in litigation and face the risk that the court will invalidate her will. As such, even if the court has discretion to excuse harmless errors, the testator would still have strong incentive to comply in order to avoid placing the court in the position to exercise that discretion.⁹⁴

Thus, the extent to which the harmless error rule increases decision costs, and in turn whether it generates an overall net benefit, is an ongoing debate, and as the preceding discussion illustrates, decision theory is a useful tool for analyzing these issues. At its core, decision theory suggests that policymakers should maximize the overall benefit produced by the will-authentication process. When evaluating various methods of will-authentication and the overall benefit that they produce, policymakers should consider how accurately a particular method authenticates wills.⁹⁵ Moreover, it directs policymakers to also consider the decision costs that the method of will-authentication produces.⁹⁶ After weighing the costs and benefits of potential will-authentication methods, policymakers should select the option that produces the overall net benefit.⁹⁷

While decision theory nicely frames the discussion regarding the appropriate method of will-authentication, policymakers should not lose sight of the law's ultimate goal. The primary objective of the law of wills is not simply to correctly distinguish authentic wills from inauthentic wills. Instead, the law's goal is to distribute the testator's property according to her wishes.⁹⁸ Making accurate and efficient decisions regarding a will's authenticity is the first step in the pursuit of this goal, but the entire process of fulfilling the testator's intent must be considered when prescribing the method used to make the initial authenticity decision. In this regard, one must consider that after the court authenticates a will, the court must interpret it.⁹⁹ Generally, the court attributes the plain meaning to the will's words,¹⁰⁰ and the

⁹² See Sherwin, *supra* note 36, at 469 (“A testator sufficiently informed to know of the will statutes has powerful reasons to follow them, whether or not courts have authority to accept defective wills.”).

⁹³ See Langbein, *supra* note 38, at 51–52 (suggesting that the harmless error rule “has [not] inspired testators to become sloppy about executing their wills” and consequently “the reform has left unaffected the estates of testators who have complied fully with the Wills Act formalities”).

⁹⁴ *Id.* at 52 (explaining that “people do not set out to embroil their estates in litigation”).

⁹⁵ See *supra* notes 48–60 and accompanying text.

⁹⁶ See *supra* notes 61–64 and accompanying text.

⁹⁷ See *supra* notes 65–66 and accompanying text.

⁹⁸ See *supra* notes 17–19 and accompanying text.

⁹⁹ See Sitkoff, *supra* note 14, at 650.

¹⁰⁰ DUKEMINIER & SITKOFF, *supra* note 2, at 328 (explaining that under the plain meaning rule, “the plain meaning of the words of a will cannot be disturbed by evidence that the testator intended another meaning.”).

testator's estate is then distributed as expressed by the will's terms.¹⁰¹ If the will does not accurately express the testator's actual intent, then the law's ultimate goal will not be achieved, even if the court makes a correct determination regarding the will's authenticity.

With this in mind, this article's first primary argument is that, when crafting the method by which courts authenticate wills, policymakers should consider not only the error costs associated with incorrect will-authentication decisions and the decision costs of the process, but also the expected benefit of probating the testator's will. Put differently, policymakers should consider the extent to which the testator's intent will be fulfilled if a correct determination of authenticity is made. On the one hand, if the testator's will accurately expresses her actual intent, then the benefit of honoring the testator's intent will be realized by authenticating her will. On the other hand, if the testator's expressed intent, as found in her will, does not significantly match her actual intent, then little benefit will be reaped by making a correct decision regarding the will's authenticity.

The consideration of a will's expected benefit bears directly on the decisions costs policymakers should tolerate in a will-authentication process. If a will's expected benefit is high because it accurately reflects the testator's actual intent, then policymakers should tolerate greater decision costs. More time, effort, and money should be expended so that this higher benefit is realized. By contrast, if a will's expected benefit is low because the intent expressed therein likely does not reflect the testator's actual intent, then policymakers should not tolerate significant decision costs. In such a situation, a correct decision regarding the will's authenticity will not lead to the fulfillment of the testator's intent regarding the ultimate disposition of her property.

In sum, to obtain a complete picture of the costs and benefits of a will-authentication process, policymakers must consider the expected benefit of wills. Only by doing so can they fully assess whether the conventional law or the reform movement's harmless error proposal produces a greater net benefit. The role that a will's expected benefit should play in selecting a method of will-authentication, however, has been absent from the debate; consequently, a complete evaluation of the optimal method of will-authentication has not occurred.

II. THE EXPECTED BENEFIT OF WILLS

The recognition that the expected benefit of wills should inform how the law authenticates them raises the question of how policymakers can gauge the expected benefit of wills. A will's expected benefit is a product of the likelihood that the will's terms match the testator's actual intent.¹⁰² If the testator's intent as expressed in her will substantially aligns with her actual intent at death, then the will has a high expected benefit. Conversely, if the testator's expressed intent only minimally matches her actual intent, then the expected benefit is relatively low.

¹⁰¹ Sitkoff, *supra* note 14, at 650 ("The testator's estate must be distributed in accordance with the terms of the will.")

¹⁰² See *supra* notes 98–101 and accompanying text.

Of course, the difficulty with deciphering the testator's intent at probate stems from the court's inability to obtain evidence of her intent through direct testimony.¹⁰³ Thus, the court cannot simply ask the testator whether her will accurately expresses her actual intent any more than it can ask her whether her will is authentic. To address this evidentiary problem, the article's second primary argument is that the timing of testation can provide evidence of the likelihood that a will accurately conveys the testator's intended estate plan.

Consider a hypothetical testator who executes a will during the prime of her life and then dies from a sudden illness two years later. This testator's will likely reflects her intent at the moment of her death. Put differently, if immediately before her death, the testator were asked how she would prefer her estate to be distributed, her response would probably have closely matched how her will provided for the disposition of her property. This likely similarity between the estate plan that this hypothetical testator would have described immediately before death and the one expressed in the will that she executed two years prior flows from two considerations.

First, the will likely reflects the testator's intent at the time she executed it. Because the testator executed her will while she was free from the infirmities of old age and ill health, she was not an attractive target for overreaching by wrongdoers attempting to improperly influence her estate plan.¹⁰⁴ As such, her will likely reflects her intent rather than the intent of someone else. Second, the testator's intent likely did not significantly change in the intervening period between will-execution and death.¹⁰⁵ Because only two years separated the creation of the will and its effectiveness, little opportunity existed for circumstances to arise in the testator's life that would cause her intended estate plan to change.¹⁰⁶ Thus, the timing of this testator's act of executing a will suggests that the will accurately describes her intended estate plan at death.

If, however, this hypothetical testator had executed her will earlier, for instance twenty years prior to her sudden demise,¹⁰⁷ there would be greater opportunity for changing circumstances to render her will stale, and the likelihood that her will reflects her intended estate plan would be diminished. Conversely, if she had executed her will later, perhaps in the hospital, hours before death,¹⁰⁸ she would have been more susceptible to overreaching, which would likewise diminish the likelihood that the will accurately reflects her actual intent at death. Of course, for

¹⁰³ See Hirsch, *supra* note 7, at 287 ("The mind of a testator teems with data, but data that is difficult to access, and assess, without risk of inaccuracy or misrepresentation. Death compounds those risks."); Sitkoff, *supra* note 14, at 647 ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been called a 'worst evidence' rule of procedure. The witness who is best able to [provide evidence of intent] is dead by the time the court considers such issues." (footnote omitted)).

¹⁰⁴ See *infra* Section II.B.

¹⁰⁵ See *infra* Section II.A.

¹⁰⁶ See *infra* Section II.A.

¹⁰⁷ See, e.g., *Friedman v. Hannan*, 987 A.2d 60, 63 & n.3 (Md. 2010) (involving a testator who executed a will on April 18, 1986 and died on September 10, 2006).

¹⁰⁸ See, e.g., *Daley v. Boroughs*, 835 S.W.2d 858, 860–61 (Ark. 1992) (involving a testator who died seven hours after amending his will while in the hospital).

any individual testator, circumstances can change dramatically on the day after a will is executed and overreaching can occur well before death. However, on average, across all testators, the timing of testation relative to the testator's death affects the likelihood that a will accurately memorializes the testator's intended estate plan.

A. Early Testation

When testation occurs early in life, questions arise regarding whether a will represents the testator's intent at death. These questions arise because a long period of time can separate the execution of a will and the testator's death. A testator can draft and execute a will at any point in her adult life,¹⁰⁹ and the document that she produces will reflect her intent at that moment.¹¹⁰ Indeed, the testator crafts her estate plan based upon her known circumstances, including the relationships that she enjoys with friends and family and the property that she owns at that point in her life.¹¹¹

A will takes effect, however, not at the time the testator executes it, but at the time that the testator dies.¹¹² The time between will-execution and death might be minimal, but it need not be so. To the contrary, a testator can execute a will and survive for decades afterward,¹¹³ and in the intervening years, much can happen that can change the testator's intent regarding the disposition of her estate.¹¹⁴ The testator's relationships with potential beneficiaries can change over time. Likewise, the nature of the testator's property can change as she disposes and acquires property during the ordinary course of her life.¹¹⁵

When circumstances surrounding the testator's relationships and property change during the period between the execution of a will and the testator's death, uncertainty

¹⁰⁹ See sources cited *supra* note 3.

¹¹⁰ This, of course, assumes no scrivener's errors.

¹¹¹ Although a testator might be able foresee the possibility of some changes occurring after the execution of her will, she will not be able to foresee and account for all possible changes. See Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 *FORDHAM L. REV.* 1125, 1158–60 (2013).

¹¹² See John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference With Inheritance*, 65 *STAN. L. REV.* 335, 342 (2013) (“The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable legal right until the donor's death. Until then, a prospective beneficiary has a mere ‘expectancy’ that is subject to defeasance at the donor's whim.”).

¹¹³ See Hirsch, *supra* note 84, at 824 (“A transferor may preconceive a planned transfer—or an inevitable one—and seek to formalize it long before the transferor intends it to become possessory. Nowadays, of course, that is the standard practice for making a will. The transferor executes the will at an early or middle age, anticipating by years or even decades the time when the transfer eventually, but ineluctably, comes to fruition.”).

¹¹⁴ See Sitkoff, *supra* note 14, at 652 (“Another difficulty in construing wills stems from the gap in time that intervenes between the making of a will and the testator's death. During this gap, which may span years or even decades, circumstances can change in a way that renders the will stale or obsolete.”).

¹¹⁵ See Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 *GONZ. L. REV.* 105, 105 (1993) (“Because there is always some interval of time between the execution of a will and the date when the will becomes effective at the testator's death, some bequests mentioned in the will may have been sold, lost, damaged or destroyed. Since such property is no longer in the testator's estate, it is clear that the devisee cannot receive the exact property. However, it is less clear whether the devisee should be entitled to receive a substitute gift or its value.” (footnote omitted)).

arises regarding whether a will accurately reflects the testator's intent.¹¹⁶ Professor Adam Hirsch explains this uncertainty: "Wills drafted in the prime of life implicate . . . the risk of being overtaken by events. If a hiatus separates the time when a will is executed from the time when it matures . . . changes in the testator's life[] may render it less well adapted to his or her subsequent circumstances."¹¹⁷ One of the implications of testation's timing is that the risk that Hirsch identifies is not the same for all wills. Instead, as testation occurs earlier and earlier, this risk increases simply because there is greater opportunity for intervening events to occur.

These intervening events can take on a variety of forms and can vary in the degree to which they raise uncertainty regarding whether a will accurately expresses the testator's intent at death. Under some scenarios, changed circumstances render the testator's estate plan impossible to carry out.¹¹⁸ Consider, for example, the death of a beneficiary. A testator can execute a will that names specific beneficiaries whom are to receive gifts upon her death, but, because a significant period of time can separate the execution of a will and the testator's death, beneficiaries can predecease the testator.¹¹⁹ Deceased beneficiaries cannot be recipients of gifts,¹²⁰ and consequently the testator's estate plan, as expressed in her will, cannot be achieved.¹²¹ Of course, the testator can avoid this uncertainty by specifically describing how she would like property distributed if a beneficiary dies before her will becomes effective.¹²² Nevertheless, not all testators provide for such contingencies; in such situations, uncertainty arises regarding whom the testator intended to benefit from the gift that would have gone to predeceased beneficiaries.

In addition to the death of a beneficiary prior to the death of the testator, changes that affect the testator's property can also lead to the impossibility of the testator's estate plan.¹²³ Consider a situation in which the testator executes a will that purports

¹¹⁶ See DUKEMINIER & SITKOFF, *supra* note 2, at 351 (explaining that "[c]ven if a will is unambiguous" changed circumstances can suggest that "the testator's actual intent is not evident").

¹¹⁷ Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 611 (2009); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 5, intro. note (AM. LAW INST. 1999) ("There will always be some interval between the execution of a will and the testator's death. The interval is sometimes long, sometimes short. Older wills, sometimes called 'stale' wills, are just as valid as 'fresher' ones, but have the potential to do mischief if they are out of date.").

¹¹⁸ See Hirsch, *supra* note 117, at 624–25 ("[W]here the change is of a nature as to make the original estate plan impossible to implement, some sort of intervention has to occur. Courts can do many things, but they cannot do the impossible. Here they have no choice but to deviate from the strict letter of a document's text.").

¹¹⁹ See DUKEMINIER & SITKOFF, *supra* note 2, at 351.

¹²⁰ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.2 cmt. a (AM. LAW INST. 1999) ("A donative transfer cannot be made to a deceased person. Because probate transfers take place at the decedent's death, they cannot be made to an individual who fails to survive the decedent.").

¹²¹ See Hirsch, *supra* note 117, at 625 ("Impossibility in the context of wills arises . . . where named beneficiaries . . . are no longer alive and hence are unavailable to accept bequests.").

¹²² See REST. (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. g (AM. LAW INST. 1999) (explaining that "[a]n alternative devise indicates [the testator's] intent" regarding who should take a predeceased beneficiary's gift and that the alternative devisee will take the predeceased beneficiary's gift if she "survives the testator and is otherwise entitled to take (i.e., is not prevented from taking because of an unsatisfied condition)").

¹²³ See Hirsch, *supra* note 117, at 625 ("Impossibility in the context of wills arises . . . where property testators bequeathed no longer remains within their inventory of possessions . . .").

to give a specific piece of property to a specified beneficiary and then subsequently sells the property that is the subject of the beneficiary's gift. The testator's expressed intent is impossible to fulfill because she cannot give property that she no longer owns.¹²⁴ As such, uncertainty arises regarding what the testator intended the beneficiary to receive—perhaps nothing; perhaps a different piece of property; or perhaps the cash value of the original gift.

To address the impossibility of a testator's estate plan that occurs when a beneficiary predeceases the testator or when the testator no longer owns property that she purports to give in her will, the law applies rules of construction that are designed to fulfill the testator's probable intent.¹²⁵ To be sure, these rules of construction fulfill the actual intent of some, if not most, people.¹²⁶ They will not, however, fulfill the intent of all testators. The very fact that the law must resort to rules of construction to address the issue of an impossible estate plan highlights the ambiguity of the testator's intent and the resulting uncertainty regarding whether the testator's intent is accurately expressed in her will.¹²⁷

Although the uncertainty is perhaps most obvious in the case of an impossible estate plan, changed circumstances need not render a testator's estate plan impossible to raise doubts about whether a will accurately reflects the testator's true intent.¹²⁸ Consider, for example, the situation in which the testator divorces after executing a will that leaves a substantial gift to her former spouse.¹²⁹ Consider also situations in which the testator marries or has children after executing a will that leaves nothing to these potential beneficiaries.¹³⁰ Under each scenario, uncertainty exists regarding

¹²⁴ See *id.* (explaining that property testators dispose during life "is no longer theirs to give away" in their wills at death).

¹²⁵ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 351 (explaining that "the rules that apply if a named beneficiary predeceases the testator" and "the rules that deal with changes in the testator's property" both address the stale will problem, and that "[i]n both circumstances, if the testator's intent is not evident, the court will apply rules of construction that are meant to implement the probable intent of the typical testator"). In the context of a predeceasing beneficiary, the rules of lapse, as altered by antilapse statutes, attempt to fulfill the testator's probable intent. See *id.* at 357. In the case of the testator not owning property that she purports to give through her will, the rules of ademption apply. See *id.* at 373-74.

¹²⁶ To have a sense of how well these rules fulfill the probable intent of the testator, empirical evidence would have to be collected; however, that endeavor has largely been ignored. See Hirsch, *supra* note 117, at 656 ("[I]n every situation where theory warrants intervention to effectuate probable intent, we need data to guide our course. Some data are available today, but we must have more. Without data to inform our law, we are flying blind and cannot tell how far off target our hunches and conjectures are carrying us.").

¹²⁷ See *Horton v. Ferris*, 179 N.E.2d 680, 682 (Ill. 1962) ("The intention manifested in a will is determined in two ways: (1) by ascertaining the actual meaning from the words used, to which rules of construction give way, and (2) by finding the presumed intention from the application of rules of construction governing all cases in which the meaning is obscured, doubtful or uncertain.").

¹²⁸ See Hirsch, *supra* note 117, at 632 (explaining that "lawmakers have ventured out into the field of speculation, amending an estate plan in discrete situations that vary from state to state" and that "[t]hree triggering events predominate: where the execution of a will is followed by divorce, by marriage, or by childbirth.").

¹²⁹ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 239; see, e.g., *Coffed v. Waley*, 387 N.E.2d 1209, 1210 (N.Y. 1979).

¹³⁰ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 563, 566-67; see, e.g., *Gray v. Gray*, 947 So. 2d 1045, 1046 (Ala. 2006) (involving a child born after the execution of a will); *In re Estate of Prestie*, 138 P.3d 520, 521-22 (Nev. 2006) (involving a marriage that occurred after the execution of a will).

whether the will accurately reflects the testator's intent at death. As one California Court of Appeals explains, "[U]pon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, [testators] would most likely intend to provide for their new family members, and/or revoke prior provisions for their ex-spouses."¹³¹ The uncertainty in these scenarios stems from the conflict between the unambiguous language of the testator's will, which suggests that the testator possessed one intent, and the testator's circumstances at death, which suggest that she held a contrary intent.

Divorces, marriages, and births that occur during the intervening gap between will-execution and death raise so much doubt regarding whether a will accurately reflects the testator's intent that the law presumes a will's unambiguous language no longer expresses the testator's intended estate plan. Because a typical testator would want to provide for a surviving spouse¹³² or child,¹³³ and conversely, because a typical testator would not want to benefit an ex-spouse,¹³⁴ the law intervenes in these situations and alters the estate plan expressed in the testator's will. Specifically, the law presumes that the testator actually intended to give a portion of her estate to her surviving spouse or children, despite that her will provides no benefit to these beneficiaries.¹³⁵ Similarly, the law presumptively revokes a gift to the testator's ex-spouse in a will that was executed prior to her divorce.¹³⁶ The rationale underlying

¹³¹ *Coughlin v. Board of Admin., Pub. Emp. Ret. Sys.*, 199 Cal. Rptr. 286, 287 (Cal. Ct. App. 1984).

¹³² UNIF. PROBATE CODE § 2-301 cmt. (NAT'L CONFERENCE OF COMM'RS. OF UNIF. STATE LAWS 2010) ("This section reflects the view that the intestate share of the spouse . . . is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.").

¹³³ See Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted From Wills*, 50 REAL PROP. TR. & EST. L.J. 175, 182–83 (2015) (explaining that the law "assum[es] that [testators] would regret not having acted more expeditiously to modify their estate plans" in reaction to "the subsequent appearance of a child").

¹³⁴ See *In re Estate of Rodriquez*, 160 P.3d 679, 686 (Ariz. Ct. App. 2007) ("[R]evocation by divorce statutes rest on the belief that, after a divorce, neither spouse will usually wish to leave any part of his or her estate to the other.").

¹³⁵ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 563 (explaining that the law contains "rules that . . . protect the surviving spouse and children from unintentional disinheritance by a stale will"). For surviving spouses, this protection involves "giv[ing] a surviving spouse who is omitted from a premarital will an intestate share, otherwise leaving the premarital will intact." *Id.* Similarly, the protection for surviving children involves a presumptive gift, but the precise amount can vary depending upon the circumstances. UNIF. PROB. CODE § 2-302. The presumption of gifts to a spouse who married the testator after the execution of a will, and to a child who was born after the execution of a will, is rebuttable. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 9.6 cmt. i (AM. LAW INST. 2003) ("Omitted-child statutes protect the testator's children . . . from *unintentional* disinheritance. Consequently, such statutes yield to a contrary intent."); *DUKEMINIER & SITKOFF*, *supra* note 2, at 563 ("The statutes contain default rules that can be overcome by evidence that the testator deliberately omitted the surviving spouse").

¹³⁶ *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 4.1(b) (AM. LAW INST. 1999) ("The dissolution of the testator's marriage is a change in circumstance that presumptively revokes any provision in the testator's will in favor of his or her former spouse."); see also UNIF. PROB. CODE § 2-804(b). The presumption of revocation of a gift to an ex-spouse is rebuttable. *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 4.1(b) cmt. o (AM. LAW INST. 1999) ("The Revised UPC provides that the presumption is rebutted if it is provided otherwise in the express terms of the will, a court order, or a contract relating to the division of the marital estate made between the testator and the former spouse before or after the marriage, divorce, or annulment.").

both of these presumptions is that the occurrence of marriage, childbirth, or divorce provides better evidence of the testator's true intent than the language of a will executed prior to the event.¹³⁷

Marriages, divorces, births, and deaths are all examples of changed circumstances that can occur between the execution of a will and the testator's death that create uncertainty regarding whether a will accurately reflects the testator's intent. As described above, the law intervenes in these situations with rules of construction that alter the testator's estate plan to align with her probable intent. These changes, such as revoking a gift to an ex-spouse or giving a gift to a child born after the execution of a will, are intended to increase the likelihood that the probate of a will fulfills the testator's intent. However, because these rules of construction likely do not fulfill the intent of all testators, they do not eliminate the uncertainty regarding whether a will's probate will carry out the testator's intent.

Marriages, divorces, births, and deaths are also the most easily identifiable changes in the testator's life, as they are accompanied by formal evidence of the change, such as a marriage license, divorce decree, birth certificate, or death certificate. Furthermore, the uncertainty that these changes produce regarding the testator's intent is obvious, as they render the testator's expressed intent either impossible to fulfill or contrary to the probable intent of most people. Changed circumstances, however, can be more difficult to recognize and can create less obvious uncertainty regarding whether a will accurately expresses the testator's intent.

Hirsch, for example, identifies a number of what he characterizes as "triggering events" that can raise uncertainty regarding the testator's intent.¹³⁸ These include identifiable changes to the nature of the testator's relationships with potential beneficiaries, such as an engagement to be married, a permanent separation from a spouse, and the termination of a beneficiary's employment by the testator.¹³⁹ Hirsch also suggests that dramatic changes in the value of the testator's property from the time of will-execution to the time of the testator's death could raise uncertainty regarding the testator's intent.¹⁴⁰ Like the previously discussed changed circumstances, these potential triggering events are fairly easy to identify, and they raise questions regarding whether the testator's will accurately reflects her intent at death. The law, however, does not view the changes as creating enough uncertainty to alter the testator's expressed estate plan.¹⁴¹

¹³⁷ See Hirsch, *supra* note 117, at 632 ("[L]awmakers simply reckon that these dramatic changes of circumstance will likely precipitate a shift of testamentary intent.")

¹³⁸ Hirsch, *supra* note 117, at 643.

¹³⁹ *Id.* at 643 n. 149. Hirsch identifies other potential triggering events as well, such as "[a] beneficiary . . . harm[ing] the testator sufficiently to damage their relationship" and "a beneficiary's conviction of a crime of moral turpitude." *Id.*

¹⁴⁰ *Id.* Hirsch notes, however, that "[c]ourts have rejected claim of implied revocation on the ground of substantial changes in the value of a testator's property." *Id.*

¹⁴¹ See, e.g., *Atcn v. Tobias*, 220 P. 196, 202 (Kan. 1923) ("Here there was an elevenfold increase in the personal estate in seven years between making of the will and the death of the testator. But, because of such unusual increase, the testator must necessarily have thought of the consequence to [the beneficiaries], who according to this will would possess this handsome fortune, and also of the consequences to [individuals omitted from the testator's will], who would possess none of it unless he

Finally, some changes that occur over the testator's life can be so subtle that they are not easily identifiable and, when taken individually, raise little uncertainty regarding the testator's intent. For instance, the testator's affection for potential beneficiaries undoubtedly waxes and wanes over time.¹⁴² Given the fluid nature of interpersonal relationships, it is difficult for the law to track the changes in the testator's affinity for potential beneficiaries, let alone the degree to which the testator's intended estate plan changes based upon these fluctuations. Similarly, the relative need of potential beneficiaries might change in the time between will-execution and death. Again, these changes are difficult for policymakers and courts to identify,¹⁴³ and they might not significantly affect the testator's intent. In isolation, these incremental changes do not raise as much uncertainty as other changed circumstances, such as marriages and divorces. But as the testator's relationships with numerous potential beneficiaries change over time, these incremental changes can render the testator's will increasingly obsolete.

In sum, the timing of testation is evidence of the degree to which a testator's will becomes stale due to changed circumstances in the time between will-execution and the testator's death. Some changes, such as marriage and divorce, raise so much uncertainty regarding whether a will accurately reflects the testator's intent at death that the law intervenes and alters the testator's expressed estate plan to conform with her probable intent. The law's intervention in these circumstances does not eliminate the uncertainty regarding whether the intent that is expressed in a will accurately reflects the testator's actual intent at death, but it is designed to minimize this risk. Other changes, in isolation, do not raise enough uncertainty to warrant the application of rules of construction to change the testator's expressed estate plan. Nevertheless, this does not mean that the uncertainty that these more subtle changes produce is not significant in the aggregate. To the contrary, as the length of time between will-execution and death increases, the opportunity for changing circumstances to accumulate over the course of the testator's life increases.¹⁴⁴ In turn,

bestirred himself to alter the testamentary disposition already made of his personalty. But the testator was content to let it stand as made, and the court may not meddle with it.”); see also Hirsch, *supra* note 117, at 643 & n.149.

¹⁴² See *In re Estate of Kottke*, 6 P.3d 243, 248 (Alaska 2000) (recognizing that a testator's “[r]elationships change over time, with relationships that were important at one time, sometimes fading”).

¹⁴³ See Kelly, *supra* note 111, at 1136–37 (“[C]ompared to legislatures or courts, donors may possess better information about the circumstances of family members and other donees. . . . Typically, courts have neither the time nor the institutional capacity to investigate the circumstances of each decedent to determine the optimal distribution.”).

¹⁴⁴ One important caveat regarding the implications of early testation is worth noting. Specifically, early testation does not raise significant concerns for pour-over wills. In a pour-over will, the testator gives the bulk of her estate to the trustee of a trust, which the testator establishes. See *DUKEMINIER & SITKOFF*, *supra* note 2, at 463–64. The main dispositive provisions of the testator's estate plan are located in the trust document and not in the will. See Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 686 (2018). As such, the testator can execute a pour-over will long before death and continuously update her estate plan by amending her trust rather than executing a new will. Early testation therefore does not necessarily have the same implications for a pour-over will as it does for a will that is the testator's primary estate planning document.

the likelihood that a will accurately represents the testator's intended estate plan at death decreases, and consequently the will's expected benefit decreases as well.

B. Late Testation

Just as the degree to which a will accurately evidences the testator's intent decreases if testation occurs too early, the same likelihood decreases if testation occurs too late. Instead of this concern arising from the possibility of changed circumstances during the period that intervenes the testator's execution of a will and her death, it results from the testator's increased vulnerability. As Professor Peter Wendel observes: "Time of death transfers, particularly those executed by elderly testators, intuitively present an increased risk of fraud, duress, and/or undue influence."¹⁴⁵ As explained in greater detail below, fraud, duress, and undue influence all involve a wrongdoer undermining the testator's freedom of disposition, so that the estate plan described in a will reflects the wrongdoer's intent rather than the testator's intent.¹⁴⁶

Wendel's intuition that wills executed late in life pose a greater risk of being tainted by overreaching than those executed earlier flows from the recognition that testators who are near death may be suffering from mental infirmities and physical weaknesses that render them less able to defend themselves from overreaching.¹⁴⁷ A testator who executes a will in the prime of life is likely to be fairly well-equipped to detect and defuse a wrongdoer's attempt to subvert her intended estate plan.¹⁴⁸ By contrast, the plights of old age or ill health can render the testator less able to defend herself from attempts of wrongdoing.¹⁴⁹ This increased vulnerability of a testator who executes a will later in life makes her a more attractive target for potential wrongdoers.¹⁵⁰ Consequently, when a testator executes a will too late, the likelihood that the will accurately reflects the testator's actual intent decreases because the testator is susceptible to an increased risk of overreaching.

¹⁴⁵ Wendel, *supra* note 7, at 388–89. Hirsch labels transfers that occur close to death, "cleventh-hour transfers." Hirsch, *supra* note 84, at 844–45.

¹⁴⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (AM. LAW INST. 2003).

¹⁴⁷ See *In re Metz' Estate*, 100 N.W.2d 393, 398 (S.D. 1960) ("Obviously, an aged and infirm person with impaired mental faculties would be more susceptible to influence than a mentally alert younger person in good health."); Hirsch, *supra* note 84, at 846–49.

¹⁴⁸ See Hirsch, *supra* note 84, at 810 ("Those in good health with a strong will are, we might say . . . 'naturally protected.'").

¹⁴⁹ See Hirsch, *supra* note 7, at 352 ("Turning to the literature on lesser forms of persuasion, one finds that empirical evidence largely accords with judicial intuitions. Courts assume that the sick and the aged are most susceptible to influence.") (footnote omitted); James H. Pietsch & Margaret Hall, "Elder Law" and Conflicts of Interest in the United States and Canada, 117 PENN ST. L. REV. 1191, 1196–97 (2013) ("[I]t is indisputable that some people . . . take advantage of individuals who may not retain the ability to protect themselves due to diminished mental or physical capacity and who may be more vulnerable due to their reliance on others for their care.").

¹⁵⁰ See *McKee v. McKee's Ex'r*, 160 S.W. 261, 264 (Ky. App. 1913) ("Many persons wait until their last days—even hours—to make wills; they are frequently then weak and debilitated. At such times they are usually surrounded by persons who are interested in the disposition of their property. Under such conditions opportunity for fraud or deception is frequently presented, and the incentive for its perpetration is great.").

The law's concern regarding the susceptibility of those nearing death and, in turn, the increased risk that wrongdoers will replace the testator's intended estate plan with their own is particularly evident in what are known as mortmain statutes. Although they have now fallen out of favor,¹⁵¹ mortmain statutes once limited the extent to which religious organizations and other charities could benefit from a will.¹⁵² These statutes originated from the fear that those close to death may be particularly susceptible to influence or pressure, especially from religious groups.¹⁵³ As Professor Ray Madoff explains, "Mortmain statutes were ostensibly enacted to address the concern that as people get closer to death, they may be inclined to direct their estates to a religious or charitable organization to ensure their eternal salvation."¹⁵⁴ Based on this rationale, some states specifically limited the application of mortmain statutes to wills executed relatively late in life, such as those executed six to twelve months before death.¹⁵⁵ In this way, mortmain statutes recognized that late testation implicates an increased vulnerability of the testator and, as such, an increased risk of overreaching by those attempting to undermine the testator's intent.

While testators nearing death may be particularly susceptible to influence from those with religious authority or charitable auspices, the law is concerned with protecting the vulnerable from any form of overreaching. As such, the modern law of wills relies on a variety of doctrines to protect testators from all forms of wrongdoing, regardless of the precise source of the overreaching.¹⁵⁶ These include the doctrines of undue influence, duress, and fraud, and each is designed to reduce

¹⁵¹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.7 cmt. c (AM. LAW INST. 2003) ("All the American mortmain statutes have been repealed, some after having been held unconstitutional.")

¹⁵² DUKEMINIER & SITKOFF, *supra* note 2, at 751; see also Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 408–11 (1992).

¹⁵³ DUKEMINIER & SITKOFF, *supra* note 2, at 751 ("These statutes originated in the medieval fear of overreaching by priests taking the last confession and will."); Elizabeth R. Carter, *Tipping the Scales in Favor of Charitable Bequests: A Critique*, 34 PACE L. REV. 983, 1013 (2014) ("The more common concern . . . was protecting testators and their families from overreaching by religious groups.")

¹⁵⁴ Ray D. Madoff, *What Leona Helmsley Can Teach Us About the Charitable Deduction*, 85 CHI.-KENT L. REV. 957, 959 (2010); see also *In re Estate of French*, 365 A.2d 621, 622 (D.C. 1976) ("The purpose of the statute is to preclude 'deathbed' gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations.")

¹⁵⁵ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.7 cmt. b (AM. LAW INST. 2003) ("Mortmain statutes in this country took either of two forms. One form invalidated charitable devises in a will executed with a specified time before the testator's death. The other form prohibited charitable devises that exceeded a specified portion of the testator's estate."); Kristine S. Knaplund, *Charity for the "Death Tax": The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 727 (2009) ("Some states required the will to be executed more than 30 days before death in order to give effect to a bequest or devise to charity, thereby protecting the testator from any undue influence on his or her deathbed; others went so far as to require its execution at least twelve months before death.") (footnotes omitted).

¹⁵⁶ See DUKEMINIER & SITKOFF, *supra* note 2, at 751 (explaining that "states once had statutes permitting spouses and children to set aside deathbed wills making gifts to charity" but that "[t]oday claims of overreaching by a charity, religious or otherwise, are litigated under the ordinary contest grounds of undue influence, duress, or fraud").

the risk that a wrongdoer will disrupt the distribution of the testator's estate in accordance with her intent.¹⁵⁷

The doctrine of undue influence, for example, invalidates testamentary gifts that were the product of suggestion or pressure that overcame the testator's free will.¹⁵⁸ If the testator could not freely exercise freedom of disposition because of another's influence, her will, or at least portions of it, expresses the intent of the influencer rather than her own.¹⁵⁹ The difficulty with this doctrine is distinguishing persuasion that overcomes the testator's free will from innocuous influence that leaves the testator's free will intact.¹⁶⁰ Because no clear demarcation between these two types of influence exists, the law relies on various types of circumstantial evidence to guide courts in identifying undue influence.¹⁶¹ Unsurprisingly, the court will consider the testator's vulnerability to overreaching.¹⁶²

The Restatement explains that courts should consider "the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence."¹⁶³ As explained above, the risk that the testator is suffering from the vulnerabilities that the Restatement identifies as evidence of potential undue influence increases as the testator approaches death. Thus, similar to some mortmain statutes that expressly recognized that testation's timing relative to death has implications for the potential of overreaching, the modern undue influence doctrine also recognizes that testation's timing is a relevant consideration, albeit implicitly through reference to the testator's vulnerability.

Like the doctrine of undue influence, the doctrines of duress and fraud are designed to protect the testator from overreaching; however, they are distinct in that they protect the testator from different types of wrongdoing.¹⁶⁴ Duress, for instance, invalidates a will or specific gifts therein that were the product of coercion.¹⁶⁵ Whereas undue influence involves mere persuasion that overcomes the testator's free will, duress involves outright threats of physical or other types of

¹⁵⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (AM. LAW INST. 2003).

¹⁵⁸ *Id.* at § 8.3(b) ("A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.")

¹⁵⁹ See *In re Estate of Hoover*, 615 N.E.2d 736, 741 (Ill. 1993) (explaining that undue influence involves "the substitution of one's will over that of the testator's original intent").

¹⁶⁰ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 283 ("Drawing a line between indelicate but permissible persuasion versus influence that is undue can be frustratingly difficult.")

¹⁶¹ See *id.* ("[B]ecause direct evidence of undue influence is rare, a contestant must typically rely on circumstantial evidence.")

¹⁶² RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (AM. LAW INST. 2003).

¹⁶³ *Id.* at cmt. h. Courts also recognize that the testator's vulnerability is circumstantial evidence that should be considered. See, e.g., *Bowman v. Bowman*, 55 S.E.2d 298, 307 (Ga. 1949) ("[A]cts, conduct, and circumstances may constitute undue influence when exercised on a person of failing mind, poor health, and other mental and bodily enfeeblements which would not be such undue influence as to void a will executed by a person of sound mind, good health, and intelligence.")

¹⁶⁴ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. e, i, & j (AM. LAW INST. 2003).

¹⁶⁵ See *DUKEMINIER & SITKOFF*, *supra* note 2, at 313 ("When undue influence crosses the line into coercion, it becomes *duress*.")

harm.¹⁶⁶ The doctrine of fraud, by contrast, is designed to protect the testator from misrepresentations by the wrongdoer,¹⁶⁷ rather than improper influence or coercion. Despite these differences, wills that are the product of undue influence, duress, or fraud, all include gifts that the testator would not have made had she exercised freedom of disposition under her own free will.¹⁶⁸ Furthermore, as the testator gets closer to death, her susceptibility to all of these forms of overreaching increases.¹⁶⁹

Thus, as evidenced by both historical and contemporary components of the law of wills, late testation, like early testation, raises concerns regarding whether a will accurately reflects the testator's intended estate plan. Two points regarding late testation, which distinguish it from early testation, are worth noting. First, late testation does not necessarily implicate an increased risk of vulnerability for all testators. Many testators will die from old age or a protracted illness, and they likely will experience increased susceptibility to overreaching due to decreased physical and mental faculties. Some testators, by contrast, will die swiftly and unexpectedly, and will not experience this increased vulnerability. Nonetheless, on the whole, the risk of vulnerability to overreaching and consequently the risk that a will does not accurately reflect the testator's intent increases as testation occurs closer to death.

The second point worth noting is that the risk of vulnerability likely increases little until the testator gets very close to death at which point the risk may increase exponentially. As Hirsch explains: "At the eleventh hour . . . the risk of fraud rises by an order of magnitude; given the [testator's] infirmity" and "[b]y the same token, when meeting with a dying [testator] in private, an ostensible donee can exercise undue influence or duress without restraint."¹⁷⁰ This rapid increase in risk of testator vulnerability in situations involving late testation stands in contrast to the slower and more regular increase in risk of testamentary obsolescence that occurs when testation occurs too early. As time marches on after the execution of a will, the opportunity for the testator's circumstances to change increases steadily. Yet, despite this difference in the rate at which risk increases as testation moves closer and farther from death, both early testation and late testation implicate increased uncertainty regarding whether a will accurately expresses the testator's intent at death.

¹⁶⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. i (AM. LAW INST. 2003) ("A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made. An act is wrongful if it is criminal or one that the wrongdoer had no right to do.")

¹⁶⁷ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(d) (AM. LAW INST. 2003) ("A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.")

¹⁶⁸ See *id.* (explaining that undue influence, duress, and fraud each results in the testator making "a donative transfer that [she] would not otherwise have made").

¹⁶⁹ See Hirsch, *supra* note 84, at 846–47; Wendel, *supra* note 7, at 389–90.

¹⁷⁰ Hirsch, *supra* note 84, at 846–47. Hirsch initially recognizes this increased risk in the context of inter vivos gifts made near death, but he acknowledges the same concerns arise in the context of testamentary gifts. See *id.* at 849 ("Both occur under the same conditions and . . . both raise the same concerns."). Wendel recognizes the same point when he refers to "[t]ime of death transfers." See Wendel, *supra* note 7, at 388–89.

In short, the time at which testation occurs relative to the testator's death can provide insight into a will's expected benefit. When testation occurs too early, a will's expected benefit is diminished because of the increased risk that changing circumstances have rendered the will obsolete.¹⁷¹ Likewise, when testation occurs too late, a will's expected benefit is reduced because of the testator's increased vulnerability to various forms of overreaching.¹⁷² By considering these implications of testation's timing, policymakers can obtain a better sense of a will's expected benefit. Moreover, because policymakers should consider the expected benefit of wills while crafting the law, the timing of testation can also provide policymaker a better sense of the decisions costs that should be tolerated in the process of will-authentication.¹⁷³

III. THE AGE OF WILLS

As Parts I and II argue, the timing of testation should play a role in the development of the law of will-authentication. To make informed decisions regarding potential reforms, however, policymakers need an understanding of when testation actually occurs. In this regard, some scholars have made general conclusions regarding testation's timing. For instance, Professor James Lindgren explains: "Centuries ago many, if not most, wills were executed on the deathbed. . . . Yet today deathbed wills are rare."¹⁷⁴ Similarly, in an earlier example, Professor Ashbel Gulliver and Catherine Tilson suggested: "While there is little direct evidence, it is a reasonable assumption that, in the period prior to the [enactment of the] Statute of Frauds, wills were usually executed on the death bed. . . . Under modern conditions, however, wills are probably executed by most testators in the prime of life"¹⁷⁵

While these descriptions offer a general understanding of testation's timing, they do not provide policymakers the information they need. Lindgren's observations are largely based on anecdotal evidence,¹⁷⁶ and Gulliver and Tilson admit that their observations are mere assumptions.¹⁷⁷ Policymakers should rely on more than mere anecdote or best guesses when crafting the law. Fortunately, empirical evidence of when testation actually occurs is available. By surveying the probate archives from various time periods, legal scholars have compiled data regarding testation's timing that can be used to help shape the law. This data includes evidence of both historical testation occurring in the period spanning the sixteenth and twentieth centuries and contemporary testation occurring in the twenty-first.

¹⁷¹ See *supra* Section II.A.

¹⁷² See *supra* Section II.B.

¹⁷³ See *supra* Section I.B.

¹⁷⁴ Lindgren, *supra* note 90, at 554; see also Hirsch, *supra* note 84, at 848 ("In the Middle Ages, testators typically made their wills as part of the last confession. Today, testators rarely wait until the eleventh hour to execute their wills" (footnote omitted)); Hirsch, *supra* note 117, at 610-11 ("Prior to the nineteenth century, Americans and Britons typically put off executing their wills until death was near. . . . Since the twentieth century, deathbed wills have grown comparatively rare.").

¹⁷⁵ Gulliver & Tilson, *supra* note 16, at 10.

¹⁷⁶ See Lindgren, *supra* note 90, at 554-56.

¹⁷⁷ Gulliver & Tilson, *supra* note 16, at 10.

A. Sixteenth and Seventeenth Centuries

As Lindgren’s observations, as well as Gulliver and Tilson’s, suggest, the general consensus is that the conventional law of will-authentication developed during a time in which testators frequently waited to the very end of life to execute their wills.¹⁷⁸ Historian W. K. Jordan echoes this consensus: “The wills of [sixteenth and seventeenth century England], were made in full contemplation of death, and they were ordinarily drawn in the immediate presence of death. They were literally last wills and testaments.”¹⁷⁹ Unlike others, however, Jordan supports this observation with empirical evidence.

Specifically, in 1959, Jordan published a survey of sixteenth and seventeen-century probate records of Canterbury, England, and in this survey he reports data regarding the age of the wills in his sample.¹⁸⁰ Jordan does not provide detailed information regarding the percentage of wills that were executed at various time intervals before the testator’s death, but instead, he simply reports the median age of the wills in his sample, along with the age of the youngest and oldest wills.¹⁸¹ Moreover, he provides these three data points for three time periods: (1.) 1504 to 1517; (2.) 1558 to 1564, and; (3.) 1617 to 1637.¹⁸² The results of Jordan’s study are displayed in Figure 1 below.

Figure 1

CANTERBURY, ENGLAND

TIMING	1504-1517	1558-1564	1617-1637
Latest	6 Days	6 Days	3 Days
Median	59 Days	81 Days	121 Days
Earliest	2 Years, 2 Months, 11 Days	3 Years, 14 Days	7 Years, 6 Months, 1 Day

Jordan’s data supports his conclusion that testators once generally executed their wills very close to death. Over half of the wills in Jordan’s sample from 1504 to 1517 were executed within two months of the testator’s death, and over half the wills from

¹⁷⁸ Professor John Langbein provides an explanation for this prevalence of late testation: “In the seventeenth century when the first Wills Act was written, most wealth was in the form of realty, and passed either by intestacy or conveyance. Will making could thus be left to the end . . .” Langbein, *supra* note 22, at 496–97.

¹⁷⁹ W. K. JORDAN, *PHILANTHROPY IN ENGLAND 1480–1660* 16 (1959).

¹⁸⁰ *See id.* at 17 n. 1.

¹⁸¹ *See id.*

¹⁸² *See id.*

1558 to 1564 were executed within three months before death.¹⁸³ Similarly, for the years 1617 to 1637, the median age of the wills in Jordan's sample was roughly four months.¹⁸⁴ While the median age of these wills supports Jordan's general conclusion, the age of the oldest wills bolsters it as well. Indeed, the data suggests testators rarely, if ever, executed wills long before their deaths, as the oldest age in each of his three sample intervals was roughly two years, three years, and seven and a half years.¹⁸⁵ Jordan's survey of sixteenth and seventeenth-century probate records from Canterbury, England therefore suggests that the general consensus regarding extremely late testation is correct.¹⁸⁶

B. Nineteenth and Twentieth Centuries

In addition to Jordan's study of sixteenth and seventeenth-century wills, several scholars have conducted studies of testation that took place in the nineteenth and twentieth centuries.¹⁸⁷ These studies give an historical perspective of testation's timing in the period between the development of the conventional law and today. They also provide context in which to interpret data regarding the timing of contemporary testation.

i. Essex County, NJ – 1850, 1875, 1900

In 1964, Professor Lawrence Friedman published a study of 150 wills probated in Essex County, New Jersey, an area that includes the City of Newark.¹⁸⁸ Friedman's initial data set consisted of thirty wills from probate proceedings commenced in 1850, sixty wills from probate proceeding commenced in 1875, and sixty wills from probate proceeding commenced in 1900,¹⁸⁹ and for these individual years Friedman sought to calculate each will's age.¹⁹⁰ Because some of these wills

¹⁸³ In addition to information regarding the median age of wills in his samples, Jordan also provides the average age. He reports that the average age of wills in the 1504 to 1517 sample was 106 days, and that the average age in the 1558 to 1564 sample was 158 days. *Id.*

¹⁸⁴ *Id.* Jordan reports that the average age for this sample was 273 days. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ In addition to Canterbury, Jordan also surveyed wills from York, and he reports that these additional wills reveal similar information regarding the timing of testation. *Id.* ("Less extensive samplings made of wills proved at York for these same years yielded substantially similar results.")

¹⁸⁷ This article focuses on four studies: MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, *THE FAMILY AND INHERITANCE* 66–68 (1970); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964), and; Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3 (2008).

¹⁸⁸ Friedman, *supra* note 187, at 34.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 37–38. For 1875 and 1900, it appears that Friedman compared the date of execution as found on the will with the date of death as found in the probate records. A different calculation was used for 1850. As Friedman explains: "Date of death is not given for 1850 wills; the figures for 1850 refer to the lapse of time between execution and probate, a somewhat longer period. This adds some slight distortion to the figures." *Id.* at 37 n.11. Furthermore, Friedman explains that "[w]here there are codicils, the date of the codicil is used instead of the date of the will." *Id.* at 38 n.14.

were undated, Friedman excluded those wills from his analysis of testation's timing,¹⁹¹ and consequently his final data set included twenty-eight wills from 1850, fifty-eight wills from 1875, and fifty-seven wills from 1900.¹⁹² The results of Friedman's study are summarized in Figure 2 below.¹⁹³

Figure 2
ESSEX COUNTY, NJ – 1850, 1875, 1900

TIMING	NUMBER			PERCENTAGE		
	1850	1875	1900	1850	1875	1900
1 Month or Less	7	16	11	25%	27.6%	19.3%
1 Month To 1 Year	9	21	18	32.1%	36.2%	31.6%
1 to 5 Years	8	13	18	28.6%	22.4%	31.6%
More than 5 Years	4	8	10	14.3%	13.8%	17.5%

Similar to Jordan's study,¹⁹⁴ the most important takeaway from Friedman's results is that a significant portion of wills were executed relatively late in life. Indeed, Friedman begins by stating that "[n]ineteenth century wills were frequently executed shortly before death."¹⁹⁵ In particular, he reports that over a quarter of wills from both 1850 and 1875 were executed within a month of death and that slightly under a fifth of the 1900 wills were executed during this timeframe.¹⁹⁶ When the window is expanded to include all wills executed within one year of death, the prevalence of late testation is even more striking, with 57.1% of 1850 wills, 63.8% of 1875 wills, and 50.9% of 1900 wills executed in the last year of life.¹⁹⁷ Moreover, although he does not provide concrete data of extreme examples of late testation, Friedman indicates that "in some cases the wills were executed one or two days before death" and that "some of the wills must have been executed literally on the testator's deathbed."¹⁹⁸

¹⁹¹ *Id.* at 38 n. 14. ("A few wills have been omitted from the table because the will was undated.")

¹⁹² These number were calculated by adding the number of wills founded in the four columns of Friedman's table for each of 1850, 1875, and 1900. *See id.* at 38 tbl.II.

¹⁹³ This table was compiled from the data contained in Friedman's Table II with the percentages calculated by dividing the total number of wills for each year (as explained in the preceding footnote) by the number of wills falling with in each column.

¹⁹⁴ *See supra* Section III.A.

¹⁹⁵ Friedman, *supra* note 187, at 37.

¹⁹⁶ *See id.* at 38.

¹⁹⁷ These percentages were calculated by adding the number of wills in the first two columns of Friedman's Table II and dividing that number by the total number of wills in the data set for each year.

¹⁹⁸ *Id.* at 38.

This prevalence of late testation stands in stark contrast to the relatively low rates of early testation that Friedman uncovered. Only 14.3% of 1850 wills, 13.8% of 1875 wills, and 17.5% of 1900 wills were executed five or more years before death.¹⁹⁹ Friedman does not break down his data of late testation into more discrete intervals,²⁰⁰ which might suggest that the instances of testation occurring significantly later than five years before death were extremely rare or even non-existent. In sum, Friedman's study reveals that testators in nineteenth century New Jersey frequently executed their last wills late in life and rarely executed their last wills early in life.

ii. Los Angeles County, CA - 1893

In 2008, Professor Kristine Knaplund published a study of the 1893 probate archives of Los Angeles County, California,²⁰¹ which included the wills of 108 decedents.²⁰² Knaplund does not describe precisely how she makes her calculations,²⁰³ but she does report, at various intervals, the time at which these wills were executed. Like Friedman,²⁰⁴ she prefaces the discussion of her findings by pointing out the prevalence of late testation, and although Knaplund begins by noting that "[t]he majority of wills . . . were executed within a year of death,"²⁰⁵ this observation does not adequately highlight the predominance of late testation that is borne out in the details of the data that is summarized in Figure 3 below.²⁰⁶

Figure 3

LOS ANGELES COUNTY, CA – 1893

TIMING	NUMBER	PERCENTAGE
3 Days or Less	12	11.1%
4 to 30 Days	20	18.5%
1 to 3 Months	14	13%
3 to 12 Months	17	15.7%
More than 1 Year	45	41.7%

¹⁹⁹ See *supra* Figure 2.

²⁰⁰ See Friedman, *supra* note 187, at 38 tbl.II.

²⁰¹ Knaplund, *supra* note 187, at 5–6.

²⁰² *Id.* at 6 (reporting the full sample of probate records consisted of 246 probate files, including "138 intestate decedents and 108 testate decedents").

²⁰³ The percentages that Knaplund reports were derived by using the entire 108 sample as the denominator. See *id.* at 19 ("Thirty percent of the wills (32 of 108) were executed within thirty days of death."). However, elsewhere Knaplund reports that the date of execution for at least one will in her sample was unknown. *Id.* at 25 n.166 ("The will was not in the file so the date is unknown . . ."). One can assume that Knaplund uses the date of a codicil rather than the date of the original will because she reports that in one instance the will was not dated but the codicil was dated. See *id.* at 29 n.180.

²⁰⁴ See Friedman, *supra* note 187, at 37.

²⁰⁵ Knaplund, *supra* note 187, at 18.

²⁰⁶ The individual numbers and percentages for each interval were derived from the cumulative data that Knaplund provides. See *id.* at 18–19.

While Friedman only notes the occurrence of extremely late testation in passing,²⁰⁷ Knaplund provides remarkable data regarding deathbed wills. She reports that over one-tenth of the wills in her sample were executed within three days of the testator's death.²⁰⁸ Beyond cases of extremely late testation, Knaplund's study reveals that 29.6% of wills were executed within one month of death, 42.6% were executed within three months of death, and 58.3% were executed within one year of death.²⁰⁹

With respect to early testation, Knaplund does not provide detailed information other than that 41.7% of wills were executed more than one year before death.²¹⁰ Like Friedman's failure to provide data regarding testation occurring more than five years before death,²¹¹ Knaplund's failure to provide any information regarding testation occurring more than one year before death might suggest that instances of extremely early testation were rare. Given this limitation of Knaplund's data, it is difficult to reach a conclusion regarding early testation in late nineteenth century Los Angeles, but it is clear that late testation was prevalent.

iii. Cook County, IL – 1953, 1957

While Friedman and Knaplund analyzed nineteenth-century wills, Professor Allison Dunham published a study of mid-twentieth century probate records in 1963.²¹² Specifically, Dunham's study focused on the probate records of Cook County, Illinois, which includes the Chicago metropolitan area, from the years 1953 and 1957.²¹³ Dunham combined the wills from these two years to create a sample of 119 wills,²¹⁴ and he reported the time at which testation occurred relative to the testator's death.²¹⁵ Dunham's specific findings are summarized in Figure 4 below.²¹⁶

²⁰⁷ See Friedman, *supra* note 187, at 38.

²⁰⁸ Knaplund, *supra* note 187, at 18.

²⁰⁹ See *id.* at 19.

²¹⁰ See *id.*

²¹¹ See *supra* note 200 and accompanying text.

²¹² Dunham, *supra* note 187, at 241.

²¹³ *Id.* at 241–42.

²¹⁴ Dunham does not clearly identify the total number of wills in his sample. At the beginning of his study he notes that he sampled ninety-seven probate proceedings from 1953 and seventy-three from 1957. *Id.* at 241. The number of those 170 proceedings that involved wills is evident in a table in which Dunham reports that fifty-one men and sixty-eight women in his sample died with wills. See *id.* at 249. Dunham's lack of clarity in this regard has caused confusion in past summaries of his findings. In particular, Professors Marvin Sussman, Judith Cates, and David Smith erroneously suggest that Dunham's study consisted of ninety-eight wills from 1953. See SUSSMAN, CATES & SMITH, *supra* note 187, at 66 (suggesting further that Dunham's study only included wills from 1953).

²¹⁵ Dunham does not explain precisely how he calculated the timing of testation but did make clear that he used the date of the last codicil. See Dunham, *supra* note 187, at 279 (reporting that "in only 2 cases in each of the years were codicils the reason for the freshness of the will").

²¹⁶ The data in Figure 4 approximately mirrors the data in Dunham's Table 15. See *id.* The differentiation, however, between wills that were executed six months or fewer before death and wills that were executed six months to one years before death was derived from Dunham's statement that "almost three-fourths of the wills less than one year old were executed within six months of death." *Id.*

Figure 4
COOK COUNTY, IL – 1953, 1957

TIMING	NUMBER	PERCENTAGE
6 Months or Less	32	26.9%
6 Months to 1 Year	11	9.2%
1 to 3 Years	20	16.8%
3 to 5 Years	19	16%
5 to 10 Years	25	21%
More than 10 Years	12	10.1%

Like Friedman and Knaplund, Dunham suggests that the primary observation to be gleaned from his study is “the freshness of the wills” in his sample.²¹⁷ In other words, the wills in Dunham’s study were executed relatively late in the testator’s life, albeit not as frequently as the wills in either Friedman’s or Knaplund’s studies.²¹⁸ Specifically, Dunham reports that approximately 26.9% of wills were executed within six months of death and 36.1% were executed within the last year of the testator’s life.²¹⁹ Unlike Friedman and Knaplund, Dunham provides no information, empirical or anecdotal, regarding extremely late testation, including deathbed wills.

In addition to his reporting regarding late testation, Dunham provides some data regarding early testation. In particular, Dunham reports that approximately 30.3% of wills were executed five or more years before the testator’s death and that approximately 10.1% of wills were executed more than ten years before death.²²⁰ Therefore, when compared to Friedman’s and Knaplund’s studies, Dunham’s study suggest a change in the timing of testation, with late testation slightly less prevalent and early testation slightly more prevalent in the mid-twentieth century than in the late nineteenth century.

iv. Cuyahoga County, OH – 1964, 1965

In 1970, Professors Marvin Sussman, Judith Cates, and David Smith published a study of probate records from Cuyahoga County, Ohio, which includes the City of Cleveland and its surrounding metropolitan area.²²¹ Sussman, Cates, and Smith surveyed 453 wills from probate proceedings commenced in a period spanning 1964 and 1965, and they reported the time that elapsed between the execution of these

²¹⁷ *Id.*

²¹⁸ See *supra* Subsections III.B.i., III.B.ii.

²¹⁹ See Dunham, *supra* note 187, at 279 (giving general information that is calculated in percentages in Figure 4 of this article); see also *supra* Figure 4.

²²⁰ See *id.*; *supra* Figure 4.

²²¹ SUSSMAN, CATES & SMITH, *supra* note 187, at 36.

wills and the testators' deaths.²²² The authors' findings are summarized in Figure 5 below.²²³

Figure 5
CUYAHOGA COUNTY, OH – 1964, 1965

TIMING	NUMBER	PERCENTAGE
3 Months or Less	18	4%
3 to 6 Months	21	4.6%
6 Months to 1 Year	27	6%
1 to 3 Years	75	16.6%
3 to 5 Years	67	14.8%
5 to 10 Years	116	25.6%
More than 10 Years	129	28.5%

In contrast to Friedman's, Knaplund's, and Dunham's observations regarding the prevalence of late testation in their samples, Sussman, Cates, and Smith summarize their findings by stating, "The testators in the decedent sample were *early* declarers of property distribution."²²⁴ The authors report that only 4% of wills were executed within three months of the testator's death, 8.6% were executed within six months of death, and 14.6% were executed within one year of death.²²⁵ Moreover, given the small percentage of wills that were executed within three months of death, the authors note that instances of extremely late testation in the form of deathbed wills were probably rare.²²⁶

Conversely, the authors report that a substantial percentage of the wills from their sample were executed relatively early in the testator's life. Specifically, 54.1% of wills were executed more than five years before the testator's death, and 28.5% were executed more than ten years before death.²²⁷ This data, when coupled with data from the previous three studies discussed in this section, suggests a trend away from late testation and toward earlier testation from the nineteenth century into the mid-twentieth century. This potential trend is evident in Figure 6 below.²²⁸

²²² *Id.* at 62–66.

²²³ Figure 5 substantially mirrors the author's Table 4-3. *See id.* at 66. However, the differentiation of wills executed within three months, six months, and one year of death was derived from the authors' statement that "39 wills (9 per cent) were made within six months of death; 18 (4 per cent) of the probated wills were made within three months of death." *Id.* at 66 n.13.

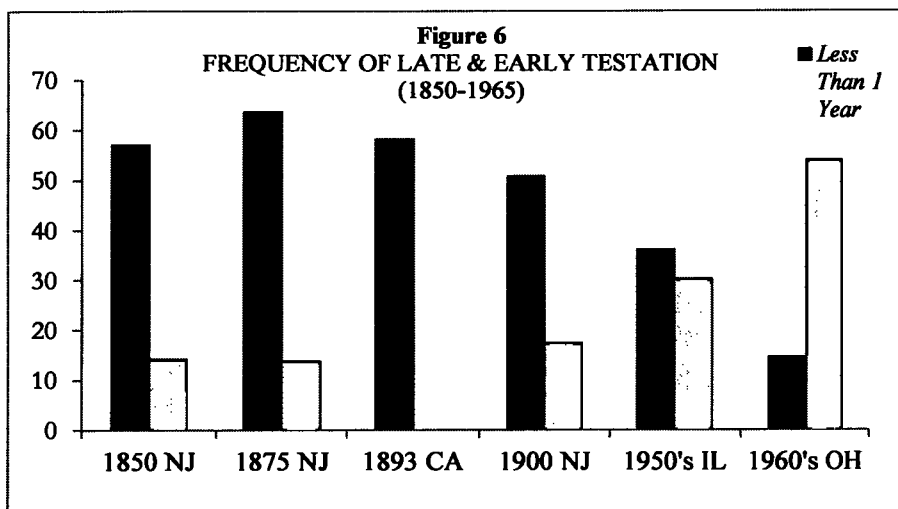
²²⁴ SUSSMAN, CATES & SMITH, *supra* note 187, at 66 (emphasis added).

²²⁵ *See id.* at 66 & n.13; *supra* Figure 5.

²²⁶ *See* SUSSMAN, CATES & SMITH, *supra* note 187, at 66 n.13 ("Possible deathbed wills were infrequent . . ."). Suggesting the presence of deathbed wills in this sample, Knaplund states that 4% of the wills in Sussman, Cates, and Smith's study were executed within 3 *days* of death. *See* Knaplund, *supra* note 187, at 18 n.122. However, the authors clearly state that 4% were executed within three *months* of death. *See* SUSSMAN ET AL., *supra* note 187, at 66 n.13.

²²⁷ *See* SUSSMAN, CATES & SMITH, *supra* note 187, at 66.

²²⁸ This Figure was derived from the data discussed in Sections III.B.i., III.B.ii, III.B.iii., and III.B.iv. One detail regarding this Figure is worth noting. Specifically, Knaplund did not provide specific data regarding testation occurring more than five years before death. *See* Knaplund, *supra* note 187, at 18–19.



As Figure 6 illustrates, over half of the wills in the studies focusing on nineteenth-century testation were executed within one year of the testator's death. This figure dipped to slightly over one-third of wills in Dunham's study of 1950s wills and then dropped again to under 15% of the wills in Sussman, Coats, and Smith's study of 1960s wills. While the data suggests a dramatic decrease in the rate of testation occurring less than one year before death, it also suggests a corresponding increase in the rate of testation occurring more than five years before death. Friedman reports that, in each of his three nineteenth century samples, less than one-fifth of wills were executed more than five years before death. By Dunham's 1950's study, this fraction had increased to almost one-third, and by Sussman, Coats, and Smith's study of 1960s wills, the fraction of wills executed more than five years before death had increased to over one-half.

Overall, the studies focusing on historical testation suggest that late testation persisted well into the twentieth century and that, at some point in the middle of that century, testators began executing wills earlier in life more often. Some of these authors recognized this trend from their own data. For instance, Friedman hinted at this trend when he states that "[o]n the basis of [his] evidence, it seems likely that the number of wills made 'in contemplation of death' has been declining in the United States,"²²⁹ and Knaplund summarizes this shift nicely when she notes her study's role in revealing "[t]he trend toward executing a will and then living longer."²³⁰

As such, the Figure does not include a bar representing the percentage of testation occurring within this window for the study labeled "1893 CA."

²²⁹ Friedman, *supra* note 187, at 37.

²³⁰ Knaplund, *supra* note 187, at 19.

C. Twenty-First Century

Data regarding historical testation provides context for thinking about how the law of wills has developed over time, but, of course, such data has little relevance to how the law should be crafted today. Instead, policymakers should consult data regarding the timing of contemporary testation. Two primary studies exist that shed light on the timing of testation in the twenty-first century, one of which is an original study conducted in contemplation of this article.²³¹

i. Alameda County, CA - 2007

Professor David Horton conducted the first study of contemporary testation when he surveyed the probate records of Alameda County, California, which comprises most of the East region of the San Francisco Bay area, including the city of Oakland.²³² This study focuses on decedents who died in 2007 and encompasses a total of 324 wills.²³³ Horton's findings regarding the timing of testation are summarized in Figure 7 below.²³⁴

Figure 7

ALAMEDA COUNTY, CA – 2007

TIMING	NUMBER	PERCENTAGE
1 Day or Less	3	0.9%
7 Days to 1 Day	6	1.9%
1 Month to 1 Week	14	4.3%
1000 Days or Less	108	33.3%
More than 1000 Days	216	66.7%

While the authors of the studies that analyzed nineteenth-century testation highlighted the prevalence of late testation when summarizing their findings,²³⁵

²³¹ The previous study of contemporary testation was conducted by Horton. *See generally* Horton *supra* note 9 (discussing the costs and benefits of contemporary will construction doctrines, such as the harmless error rule). The original study is presented in Section III.C.ii. In a recent article, Horton along with Professor Reid Kress Weisbord, reported data regarding the timing of testation from a study of wills probated in Sussex County, New Jersey in 2015. *See* Weisbord & Horton, *supra* note 144, at 689. However, the information provided in Weisbord and Horton's study is not as extensive as that which is presented in the two studies that are the focus of this article.

²³² Horton, *supra* note 9, at 1121.

²³³ *Id.* Horton excluded all pour over wills (67 in total) from the sample that he analyzed. *Id.*

²³⁴ Horton does not break his data down into the specific intervals found in Figure 7, but the numbers and percentages in the first three rows of Figure 7 can be calculated from the information that Horton provides. *See id.* 1129–30. However, Horton does not provide the precise number of wills that were executed before and after 1000 days. Instead, he simply reports: "Two-thirds of the individuals in my study died more than a thousand days after signing their wills." *Id.* at 1129. Two-thirds of the total 324 wills is exactly 216 wills. Thus, Figure 7 reports that 216 wills were executed more than three years before death and that 108 wills were executed less than three years before death.

²³⁵ *See supra* notes 195 & 205 and accompanying text.

Horton notes the prevalence of early testation when he explains that his data “indicates . . . that most testators engage in estate planning long before they pass away.”²³⁶ In particular, Horton reports that, although he found a few deathbed wills in his sample,²³⁷ only 7.1% were executed within one month of the testator’s death.²³⁸ When the window is expanded beyond extremely late testation, Horton reports that roughly 33.3% of wills were executed within a thousand days of death.²³⁹

As these numbers reveal, the vast majority of wills in Horton’s sample were executed more than a thousand days before the testator’s death, as over two-thirds were executed in this timeframe.²⁴⁰ Suggesting the prevalence of even earlier testation, Horton reports that “the average gap between will execution and death was a decade, and the median was seven years.”²⁴¹ He also indicates that his sample contained some cases of extremely early testation, including one will that was executed over fifty years before the testator’s death.²⁴² In sum, the prevalence of extremely late testation that was found in previous studies of nineteenth century testation has clearly been replaced in Horton’s study by a prevalence of early testation.

ii. Hamilton County, OH - 2014

While Horton’s study sheds light on the timing of contemporary testation, Horton himself acknowledges that his data does not fully illuminate the realities of probate. He explains that “statistics from a single county are a pinprick of light in the vast darkness of probate” and that “[o]ther parts of . . . the country may be experiencing different trends.”²⁴³ Consequently, additional data is needed to supplement Horton’s data so that a more complete picture of testation’s timing might come into focus.

Therefore, to cast an additional ray of light on the darkness of probate generally and the timing of testation specifically, this article reports the results of a second original study of contemporary testation. This study surveys the probate records of Hamilton County, Ohio, which includes Cincinnati and the surrounding metropolitan area.²⁴⁴ The study analyzes an original data set of 1,824 wills that were submitted to Hamilton County’s probate court in 2014. This data set was compiled by reviewing every probate matter that was opened in Hamilton County in 2014 through an

²³⁶ Horton, *supra* note 9, at 1129. Hirsch points out that a “trickle of cases” in which “procrastinators rush to [execute wills] only after they fall seriously ill . . . continues to appear in the law reports.” Hirsch, *supra* note 84, at 848–49.

²³⁷ See Horton, *supra* note 9, at 1130 (reporting that “nine [testators] perished the same week and three [testators] passed on the same day” that they executed their wills).

²³⁸ See *id.*

²³⁹ See *id.* at 1129.

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² *Id.* at 1129 n.212 (reporting that “[f]or some, the gap was significantly longer, such as Tecna Kools, whose brisk 1954 will preceded her demise by more than a half-century”).

²⁴³ *Id.*

²⁴⁴ See *Hamilton County/About*, HAMILTON COUNTY GOV’T, <https://www.hamiltoncountyohio.gov/about> [<https://perma.cc/3AZ9-6ZXX>].

on-line database maintained by the county's probate court.²⁴⁵ This review produced 2,012 cases in which a will was submitted. From those roughly two thousand matters, certain categories of cases were eliminated, the vast majority of which were cases in which the testator died before 2013.²⁴⁶ Since the goal of this study is to provide a better understanding of contemporary testation, only the wills of testators who died in 2013 or 2014 were analyzed.²⁴⁷

Once the more than eighteen-hundred wills in this sample were identified, the time at which each will was executed relative to the testator's death was calculated using the date of death found in the online probate entry and the date of execution as it appears on the copy of the will. If a testator executed a codicil to her original will, the date of the last codicil was used to calculate the timing of testation. The findings of this study are summarized in Figure 8 below.

Figure 8
HAMILTON COUNTY, OH – 2014

TIMING	NUMBER	PERCENTAGE
1 Day or Less	2	0.1%
7 Days to 1 Day	21	1.2%
1 Month to 1 Week	39	2.1%
1000 Days or Less	480	26.3%
More than 1000 Days	1344	73.7%

As this table illustrates, while they are rare, deathbed wills and other instances of extremely late testation exist within the Hamilton County sample, with 3.4% of wills being executed within the last month of the testator's life, 1.2% being executed within the last week of life, and two out of the total 1,824 wills being executed within one day of death. When a larger timeframe of late testation is considered, the study reveals that 26.3% of wills in Hamilton County were executed within a thousand days of the testator's death. Thus, like Horton's study, the sampling of Hamilton County's probate records reveals the prevalence of early testation, with 73.7% of wills executed more than a thousand days before the testator's death. Moreover, the average number of years intervening execution and death was approximately nine years, and the median number of intervening years was roughly seven and a half.

A comparison with Horton's study reveals general similarities between the timing of testation in Alameda County, California in 2007 and Hamilton County, Ohio in 2014. As Figure 9 shows below, most testators in both studies executed their

²⁴⁵ See *Court Record Search*, HAMILTON COUNTY PROB. CT., <https://www.probatect.org/court-records> [<https://perma.cc/YFJ3-JAP8>].

²⁴⁶ Other types of cases that were discarded include those in which the date of death was not provided in the online probate record, those in which the date of will-execution was not clear from the will, and cases in which the testator was domiciled outside of the state of Ohio at the time of death. It is also noteworthy that pour over wills were included in this sample. Horton, by contrast, excluded pour over wills. Horton, *supra* note 8, at 1121.

²⁴⁷ For instance, four testators died in the 1990's, and as such, their wills would provide little insight into testation as it occurs today.

wills more than three years before death, with 66.7% of testators in Alameda County and 73.7% in Hamilton County doing so. Likewise, a relatively small number in both studies executed their wills within the last month of life. Specifically, 7.0% of wills in Horton's study and 3.4% of wills in the Hamilton County study were less than a month old. When placed within the context of Horton's study, the Hamilton County data fits squarely within the modern trend away from extremely late testation and towards earlier testation.

Figure 9
COMPARISON OF CA & OH

TIMING	CALIFORNIA - 2007	OHIO - 2014
1 Day or Less	0.9%	0.1%
7 Days to 1 Day	1.9%	1.2%
1 Month to 1 Week	4.3%	2.1%
1,000 Day or Less	33.3%	26.3%
More than 1,000 Days	66.7%	73.7%

Although the results from Alameda County, California and Hamilton County, Ohio are similar, potentially important differences exist. In particular, the Hamilton County results suggest that the rate of extremely late testation may continue to decrease and that a corresponding increase in the rate of early testation may be occurring. For instance, the rate of testators executing wills within the last month of life in the Hamilton County study is roughly half of the rate found in Horton's study. Likewise, the rate of wills executed more than a thousand days before death increased from 66.7% in Horton's study to 73.7% in the Hamilton County study. Therefore, a comparison of the two studies of contemporary testation not only confirms the trend away from late testation but also suggests that the rate of early testation may continue to increase.²⁴⁸

Moving beyond the thousand-day timeframe, the study of Hamilton County reveals that extremely early testation is not uncommon. As summarized in Figure 10 below, a significant number of testators executed their wills extremely early in life with 277 or 15.2% executing their wills over two decades before death and 102 or

²⁴⁸ One difference in the composition of the respective samples examined in California and Ohio could at least partially explain the increased rates of early testation. Specifically, the California sample excludes pour over wills and the Ohio sample includes pour over wills. See *supra* notes 233 & 246. The inclusion of pour over wills in the Ohio sample could produce higher rates of early testation because the primary dispositive provisions of the testator's estate plan are found in the testator's revocable trust rather than her will. See DUKEMINIER & SITKOFF, *supra* note 2, at 463. Thus, testators of pour over wills can update their estate plans by amending their trusts rather than their wills, and consequently wills that pour over into a trust might be some of the oldest in the Ohio sample. Unfortunately, specific data regarding the timing of execution of pour over wills was not collected as part of the Ohio study. The potential consequences of including pour over wills in this study's sample highlights the need for researchers to thoroughly consider whether to include or exclude pour over wills when conducting empirical studies of probate records. See generally Mark Glover, *Boilerplate in Pour-Over Wills*, 104 Iowa L. Rev. Online 138 (2018), <https://ilr.law.uiowa.edu/online/volume-103/boilerplate-in-pour-over-wills/>.

5.6% executing their wills over three decades before death. At the extreme end of the spectrum, twenty-five wills, or 1.4%, were more than four decades old at the time they became effective, with the earliest instance of testation occurring over fifty-five years before the testator's death.

Figure 10
HAMILTON COUNTY, OH – 2014

TIMING	NUMBER	PERCENTAGE
0 to 5 Years	718	39.4%
5 to 10 Years	384	21.1%
10 to 15 Years	268	14.7%
15 to 20 Years	177	9.7%
20 to 25 Years	106	5.8%
25 to 30 Years	69	3.8%
30 to 35 Years	52	2.9%
35 to 40 Years	25	1.4%
40 to 45 Years	15	0.8%
45 to 50 Years	7	0.4%
50 to 55 Years	2	0.1%
55 to 60 Years	1	0.06%

In sum, while consideration of testation's timing has theoretical implications for how the law of wills should be crafted,²⁴⁹ policymakers need an understanding of when testation actually occurs to adequately evaluate the possibility of reform. In this regard, a review of the various studies of historical testation reveals that extremely late testation was once prevalent,²⁵⁰ but beginning in the mid-twentieth century, testators began to execute their wills earlier in life. This shift in testation's timing is confirmed by studies of contemporary testation, including Horton's study of Alameda County, California and this article's original study of Hamilton County, Ohio; indeed, a comparison of the two studies suggests that the rate of early testation may continue to grow.²⁵¹

IV. THE REFORM OF THE LAW OF WILLS

As explained previously, the conventional method of will-authentication likely minimizes decision costs at the expense of fewer accurate decisions.²⁵² Conversely, the reform movement's proposal of harmless error is likely to more accurately distinguish authentic wills from inauthentic wills, but this increased accuracy might result in increased decision costs.²⁵³ This article argues that

²⁴⁹ See *supra* Parts I, II.

²⁵⁰ See *supra* Section III.A and Subsections III.B.i, III.B.ii.

²⁵¹ See *supra* Figure 9.

²⁵² See *supra* notes 67–73, 80–84 and accompanying text.

²⁵³ See *supra* notes 74–75, 85–89 and accompanying text.

policymakers must consider both the expected benefit of wills to determine which method of will-authentication is optimal and that the timing of testation can provide them evidence of a will's expected benefit.²⁵⁴

The data presented in Part III suggests that the timing of testation, and therefore the expected benefit of wills, has changed over time. The vast majority of testators no longer wait until the last minute to execute their wills as they did in the past.²⁵⁵ Instead, testation increasingly occurs long before the testator's death.²⁵⁶ With this trend away from late testation and toward earlier testation clearly identified, the task of determining how the law of will-authentication should be crafted in light of this trend remains. This section therefore concludes the article by exploring whether reform will better align the law of will-authentication with the realities of contemporary testation.

A. Static Law and Decreased Rates of Late Testation

Under both the conventional law and the harmless error rule, the method of will-authentication is consistent for all wills. Put differently, the law of will-authentication under both approaches is static. Under the conventional law, all wills are subject to the same presumptions based upon whether they are formally compliant. If a will complies with the prescribed formalities, the court presumes it to be authentic, and if a will does not comply, it is subject to a conclusive presumption of inauthenticity.²⁵⁷ Likewise, under the harmless error rule, all wills are subject to the same presumptions regarding authenticity, based upon whether the testator complied with the prescribed formalities. If a will complies with the prescribed formalities, the court presumes that it is authentic; if a will does not comply, it is subject to a rebuttable presumption of inauthenticity.²⁵⁸

Under these static approaches to will-authentication, the average expected benefit of a will must be considered by policymakers when evaluating the costs and benefits of a given will-authentication process. On the one hand, if the average expected benefit of wills is low, then policymakers should not tolerate significant decision costs because expending such costs will not produce substantial benefit. On the other hand, if the average expected benefit of wills is high, then policymakers should tolerate greater decision costs so that the greater benefit is realized. In this way, the average expected benefit of wills can inform how to craft a static will-authentication method.

Consider, for example, the conventional law. If policymakers during the time of its development were concerned that the benefit of accuracy was not significant, then a goal of minimizing decision costs may have been warranted. Within this context of historical testation, the timing of testation suggests that a low average expected benefit of wills might, in fact, have played a role in the development of a will-authentication process that minimizes decision costs. As explained previously,

²⁵⁴ See *supra* Parts I, II.

²⁵⁵ See *supra* Section III.C.

²⁵⁶ See *supra* Section III.C.

²⁵⁷ See *supra* notes 25–30 and accompanying text.

²⁵⁸ See *supra* notes 39–44 and accompanying text.

a high frequency of late testation existed centuries ago during the conventional law's development,²⁵⁹ and this prevalence of late testation produced a low average expected benefit of wills.

In particular, extremely late testation raised the concern that the testator was acutely susceptible to overreaching at the time she executed her will.²⁶⁰ This increased vulnerability, in turn, increased the risk that the testator's will did not express her own intent but instead expressed the intent of someone else. Put differently, the testator's increased susceptibility decreased the likelihood that the will accurately reflected her intended estate plan, and as such, the expected benefit of making an accurate authenticity decision regarding the will was diminished. When faced with these consequences of the time's prevalence of late testation, early policymakers may have determined that they should not tolerate significant decision costs during the will-authentication process, and therefore the conventional law may have developed in response to these concerns in a way that favored efficiency over accuracy.

Although a low average expected benefit of wills might generally explain the development of the conventional law, and specifically the law's focus on minimizing decision costs, it does not necessarily explain the conventional law's continuation into modern day. If the average expected benefit of wills has increased since the development of the conventional law, then greater decision costs should be tolerated so that the greater expected benefit is realized. To decide whether the average expected benefit of wills has increased, policymakers must consult the data regarding the timing of contemporary testation.

In this regard, the studies of contemporary testation reveal that testation's timing has shifted away from the extremely late testation that was prevalent in earlier times.²⁶¹ In the Alameda County study, only 7.1% of testators executed their wills within the last month of life, and a mere 3.4% of Hamilton County testators executed their wills within this timeframe.²⁶² Because testators no longer wait until their last days to execute wills, today's policymakers should not worry about the implications of late testation that might have shaped the conventional law. Indeed, the move away from extremely late testation suggests that the average expected benefit of wills has increased since the time of the conventional law's development, and therefore policymakers should not be as concerned with minimizing decision costs because the benefit of accurate will-authentication decisions likely has increased.

The trend away from extremely late testation therefore bolsters the reform movement's argument in favor of the harmless error rule. Although reform could increase costs associated with making will-authentication decisions,²⁶³ the harmless error rule is likely more accurate at distinguishing authentic from inauthentic wills than the conventional law.²⁶⁴ Moreover, under contemporary conditions in which testators no longer execute their wills extremely late in life, accuracy is more

²⁵⁹ See *supra* Section III.A.

²⁶⁰ See *supra* Section II.B.

²⁶¹ See *supra* notes 250–251 and accompanying text.

²⁶² See *supra* Figure 9.

²⁶³ See *supra* notes 80–94 and accompanying text.

²⁶⁴ See *supra* notes 76–77 and accompanying text.

beneficial because wills likely have a higher average expected benefit. Consequently, even if decision costs increase under the harmless error rule, the timing of testation suggests that this increase should be tolerated.

B. Dynamic Law and Increased Rates of Early Testation

Although the studies of contemporary testation suggest that concerns regarding extremely late testation have waned, they also suggest an emergence of new concerns regarding extremely early testation. If testators execute wills so early in life that changing circumstances cause their wills to diverge significantly from their intent at death, then the trend away from late testation might not result in an increase in the average expected benefit of wills.²⁶⁵ Certainly, the move away from extremely late testation by some testators suggests an increase in the average expected benefit of wills. However, the move by others toward extremely early testation suggests that the net change in the average expected benefit of wills might be minimal or even negative. Put simply, a prevalence of extremely late testation reduces the average expected benefit of wills, but so does a prevalence of extremely early testation.

The data from Alameda and Hamilton Counties illuminates this concern regarding a potential decline in the average expected benefit of wills. As explained previously, both studies produced low rates of extremely late testation, with 7.1% of Alameda County testators executing their wills within the last month of life and 3.4% of Hamilton County testators doing so. Both studies also reveal increasingly high rates of early testation. Horton found that two-thirds of the wills in the Alameda County study were executed more than 1,000 days before the testator's death,²⁶⁶ and this article's study of Hamilton County found that 73.7% of wills were executed within this timeframe.²⁶⁷

Moreover, the Hamilton County study, which reports that substantial percentages of wills were executed ten, fifteen, and twenty years before death,²⁶⁸ raises even greater concerns for policymakers. In particular, 39.6% of Hamilton County wills were executed more than ten years before death; 24.9% were executed more than fifteen years before death; and 15.1% were executed more than twenty years before death.²⁶⁹ These rates of early testation are troubling because the likelihood that a will's terms match the testator's intent decreases as testation moves farther and farther away from the testator's death. Simply put, the more time there is for circumstances to change, the more likely a will becomes obsolete.

Based upon this data, it is difficult to precisely calculate the average expected benefit of contemporary wills because it is unclear at what point early testation raises significant concerns regarding changed circumstances. Perhaps the 1,000-day mark

²⁶⁵ See *supra* Section II.A.

²⁶⁶ See Horton, *supra* note 9, at 1129.

²⁶⁷ See *supra* Subsection III.C.ii.

²⁶⁸ See *supra* Figure 10.

²⁶⁹ These percentages are derived from the information found in Figure 10. In particular, Figure 10 reveals that, of the 1,824 total wills in the sample, 722 were executed more than ten years before death, 454 were executed more than fifteen years before death, and 277 were executed more than twenty years before death.

that is used in both the Alameda County and Hamilton County studies is the most significant cutoff point. However, a two-year timeframe or a five-year timeframe might provide the most meaningful insights into the average expected benefit of wills. Alternatively, perhaps policymakers should only be concerned with the ten, fifteen, or twenty-year timeframes that are reported in the Hamilton County study. Regardless of which timeframe is used, it is clear that reliable data regarding the timing of testation provides a glimpse into when testation actually occurs, but the task of calculating the average expected benefit of wills from such data is far from straightforward.

If this concern regarding the difficulty of formulating a clear understanding of the average expected benefit of wills in light of the increased rates of early testation causes policymakers to reject a broad harmless error rule, the timing of testation can still provide useful insights regarding how the law should be constructed.²⁷⁰ Specifically, as an alternative to a harmless error rule that applies to all wills, policymakers should consider a harmless error rule that applies only to a subset of wills. In other words, instead of continuing a static method of will-authentication that applies the same standards to all wills, policymakers should consider a dynamic method of will-authentication that applies different standards to different wills.²⁷¹

While the data regarding contemporary testation might not be capable of providing a clear picture of the average expected benefit of all wills, policymakers can use the timing of testation to select a subset of wills that has the greatest average expected benefit. For example, policymakers should be confident that wills executed within the timeframe spanning one month to 1,000 days before the testator's death have a greater average expected benefit than that of all wills. Within this window, the problems associated with testator vulnerability are largely absent,²⁷² and the concerns regarding stale wills are diminished because relatively little opportunity exists for the testator's circumstances to change.²⁷³ Policymakers should therefore view this timing as falling within a sweet spot where testation is neither too early nor too late.

Because wills that fall within this timing sweet spot have a relatively high average expected benefit, policymakers should be more confident that the application of the harmless error rule to these wills will produce an overall net benefit. Although decision costs might increase as the court considers extrinsic evidence of a will's authenticity,²⁷⁴ these costs likely will be outweighed by the benefit of accurate

²⁷⁰ To be clear, the average expected benefit of will is not the sole variable to consider when evaluating a method of will-authentication. Consequently, even if the average expected benefit of wills is increasing, reform might be warranted.

²⁷¹ Whereas this article suggests that a different standard of compliance with the prescribed formalities could apply to wills depending upon the time at which they were executed, Hirsch has suggested that different formalities should be required depending upon the situation in which the testator executes her will. See Hirsch, *supra* note 84, at 863 ("This article proposes a new framework for formalizing rules, founded not on the category of transfer but rather on the setting within which the transfer takes place. Transfers that a party carries out on the spot, or delays with a long fuse, or makes on death's door, call for different formalizing rules, irrespective of the substantive category into which the transfers fall.")

²⁷² See *supra* Section II.B.

²⁷³ See *supra* Section II.A.

²⁷⁴ See *supra* notes 85–89 and accompanying text.

authenticity decisions regarding wills that possess a high average expected benefit. The data from both Alameda County, California and Hamilton County, Ohio reveal that a significant percentage of wills fall within this timeframe, and therefore that the harmless error rule could be applied in a substantial number of cases. In particular, 26.2% of Alameda County testators executed their wills between one month and 1,000 days before death, and 22.9% of Hamilton County testators executed their wills within this timeframe.²⁷⁵

Therefore, if policymakers were to adopt a dynamic approach to harmless error that applied only to wills executed within one month and 1,000 days before death, a court could consider extrinsic evidence of authenticity for roughly a quarter of wills. For the remaining three-quarters, the conventional law's rule of strict compliance would remain. Through this type of dynamic will-authentication process, policymakers might be more comfortable diverging from the conventional law's insistence on strict compliance for all wills because they would have greater confidence that reform will actually increase the benefit reaped by the will-authentication process than they might have with reform that applies the harmless error rule to all wills.

The adoption of a dynamic will-authentication process will not end the debate regarding harmless error. Undoubtedly, some, if not many, proponents will argue that the application of the harmless error rule to all wills will maximize the benefit reaped by the will-authentication process. Others likely will argue that even if harmless error should not be applied to all wills, the timing window in which wills must fall to be eligible for harmless error should be expanded. Alternatively, critics of reform might argue that the subset of wills that are eligible for harmless error should be narrowed. Regardless of whether the debate regarding the appropriate method of will-authentication continues, however, the recognition of a dynamic approach highlights two key points. First, policymakers have reform options, other than a broad harmless error rule, that will increase the net benefit of probating wills. Second, the timing of testation can inform policymakers as to which option they should chose.

CONCLUSION

The timing of testation has implications regarding the likelihood that a will accurately reflects the testator's intent. If testation occurs early in the testator's life, then changing circumstances might suggest that her will does not accurately reflect her intent at death.²⁷⁶ If testation occurs late in life, then the testator's will might not reflect her intended estate plan because old age or ill health have increased her vulnerability to attempts of overreaching.²⁷⁷ Under both scenarios, testation's timing provides insight into the extent to which the testator's intent will be fulfilled through the distribution of the her estate in accordance with her will.

²⁷⁵ These percentages are derived from the data contained in Figure 9.

²⁷⁶ See *supra* Section II.A.

²⁷⁷ See *supra* Section II.B.

Put differently, the timing of testation provides evidence of the expected benefit that the law will realize by probating a will. The expected benefit of wills, in turn, can inform how the law of will-authentication should be crafted. When selecting a method of will-authentication, policymakers should consider both the accuracy and the efficiency of the process. On the one hand, the law's primary goal is to fulfill the testator's intent,²⁷⁸ so policymakers should strive for a method of will-authentication that accurately determines a will's authenticity. On the other hand, making accurate authenticity decisions produces costs, as litigants and the court expend time, money, and effort considering evidence of the testator's intent.²⁷⁹ After considering both the benefit of making accurate will-authentication decisions and the costs of making those decisions, policymakers should choose the method of will-authentication that produces the greatest net benefit.

When making this decision, policymakers have two primary options from which to choose: the conventional law's rule of strict compliance and the reform movement's harmless error rule. The conventional law's rule of strict compliance directs the court to rely solely on formal evidence of the testator's intent.²⁸⁰ Under this approach, a will is deemed authentic if the testator complied with the prescribed formalities, and it is deemed inauthentic if she did not.²⁸¹ This streamlined process of authenticating wills attempts to minimize decision costs by making the court's task relatively simple and by removing all noncompliant wills from the court's purview.²⁸² This process, however, might not produce the most accurate decisions because the court will invalidate a noncompliant will even if there is overwhelming evidence that it is authentic.²⁸³

By contrast, the reform movement's harmless error rule does not rely solely on formal evidence of a will's authenticity. Like the conventional law, the harmless error rule imposes a presumption of inauthenticity upon noncompliant wills, but unlike the conventional law, this presumption is rebuttable.²⁸⁴ When a testator fails to comply with the prescribed formalities the court presumes the will is inauthentic, but it can consider extrinsic evidence that suggests the will is, in fact, authentic. By transforming the presumption of inauthenticity from a conclusive presumption to a rebuttable one, the reform movement seeks to increase the accuracy of the will-authentication process.²⁸⁵ Critics argue, however, that the harmless error rule could increase the cost and frequency of litigation regarding a will's authenticity.²⁸⁶ This argument suggests that even if the harmless error rule increases the accuracy of the process, it might not result in a net benefit because the costs associated with making authenticity decisions could increase.

²⁷⁸ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003); DUKEMINIER & SITKOFF, *supra* note 2, at 1.

²⁷⁹ See *supra* notes 85–94 and accompanying text.

²⁸⁰ See *supra* notes 25–30 and accompanying text.

²⁸¹ See Glover, *supra* note 28, at 625.

²⁸² See *supra* notes 80–84 and accompanying text.

²⁸³ See *supra* notes 69–75 and accompanying text.

²⁸⁴ See *supra* notes 39–42 and accompanying text.

²⁸⁵ See *supra* notes 74–75 and accompanying text.

²⁸⁶ See *supra* notes 85–89 and accompanying text.

To determine which method of will-authentication is optimal, policymakers need to consider the expected benefit of wills. More specifically, policymakers need an understanding of the likelihood that the testator's intended estate plan will be fulfilled if an accurate authenticity decision is made.²⁸⁷ Consideration of the theoretical implications of testation's timing is the first step in obtaining an understanding of the expected benefit of wills, but policymakers must also consult data regarding when testation occurs.²⁸⁸ Only then will they have a meaningful assessment of the expected benefit of wills.

When data regarding contemporary testation is considered alongside data relating to historical testation, a trend away from extremely late testation and toward earlier testation emerges.²⁸⁹ This trend suggests that wills more likely reflect the testator's actual intent than they did at the time the conventional law developed.²⁹⁰ Because the timing of testation suggests that today's wills likely have a greater average expected benefit, policymakers should tolerate greater decision costs during the authenticity process so that the law realizes the greater benefit of accurate decisions.²⁹¹ Ultimately, the timing of contemporary testation suggests that the conventional law's method of will authentication should be reformed to strike a different balance between the twin concerns of accuracy and efficiency.

²⁸⁷ See *supra* Part II.

²⁸⁸ See *supra* Part III.

²⁸⁹ See *supra* Figure 6; Section III.C.

²⁹⁰ See *supra* notes 259–260 and accompanying text.

²⁹¹ See *supra* Part IV.