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Revoking Wills

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REVOKING WILLS

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No issue in inheritance law has sparked as much debate as the requirements for making a valid will. For centuries, Anglo-American courts have insisted that decedents obey rigid formalities, such as signing or acknowledging their wills before two witnesses. These rituals preserve proof of the testator's wishes, reinforce the gravity of estate planning, prevent fraud and duress, and distinguish wills from other instruments. But they also have a dark side. In scores of cases, judges have cited minor errors during the execution process to invalidate documents that a decedent intended to be effective. Accordingly, generations of scholars have critiqued will-creation doctrine. Recently, these discussions have intensified, as several jurisdictions have embraced the harmless error rule, which excuses trivial departures from the execution formalities, or adopted statutes that validate electronic wills.

However, the well-canvased topic of creating a will has a little-noticed flip side. Testators do not merely need to follow formalities to make a will; rather, they also must jump through hoops to un-make a will. Since the British Parliament passed the Statute of Frauds in 1677, there have only been two ways to annul a testamentary instrument: by burning, tearing, canceling, or obliterating the document or by signing another will. In sharp contrast to the extensive commentary on executing wills, revocation doctrine has never received sustained attention.

This Article fills that vacuum. First, it reveals that the revocation formalities defeat testamentary intent far more often than is commonly believed. Indeed, testators fail to achieve their goals when they destroy a photocopy, deface the margins of their will, leave the room while a third party revokes the instrument, or express their wishes in a writing that is not a full-fledged will. Thus, even more than the execution formalities, revocation doctrine consists of tripwires and traps for the unwary. Second, the Article demonstrates that the benefits of these merciless rules are minimal. Although some serve the same evidentiary, ritual, protective, and channeling functions as the execution formalities, others further no discernable goal. Third, the Article critiques potential solutions to these problems. It explains that a handful of lawmakers and courts have moved in the right direction by relaxing the revocation formalities, extending harmless error into this sphere, and achieving justice in particular cases through the imposition of a constructive trust. Nevertheless, the Article also contends that these curative measures do not go far enough. Accordingly, the Article proposes a novel path forward: importing the revocation formalities from trust law. In sharp

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contrast to the straitjacket of wills doctrine, trust law both permits settlors to revoke their trusts by any reasonable means and to create their own private revocatory rules. Thus, extending this lenient approach into the realm of wills would minimize intent-defeating outcomes, dovetail with broader trends in the field, and bring revocation law into the twenty-first century.

INTRODUCTION

Recently, an Illinois resident named Tyler Brewer decided to revoke his will.[1] This instrument, which Brewer had signed in 1999, gave most of his assets to his brother, making only a gift of jewelry to his young daughter, Hannah.[2] But as the years passed, Brewer had grown closer to Hannah and also fathered a son, Jourdan.[3] Thus, in 2012, as death approached, Brewer decided that his will was outdated. Because he could not find the original document, he marked up a

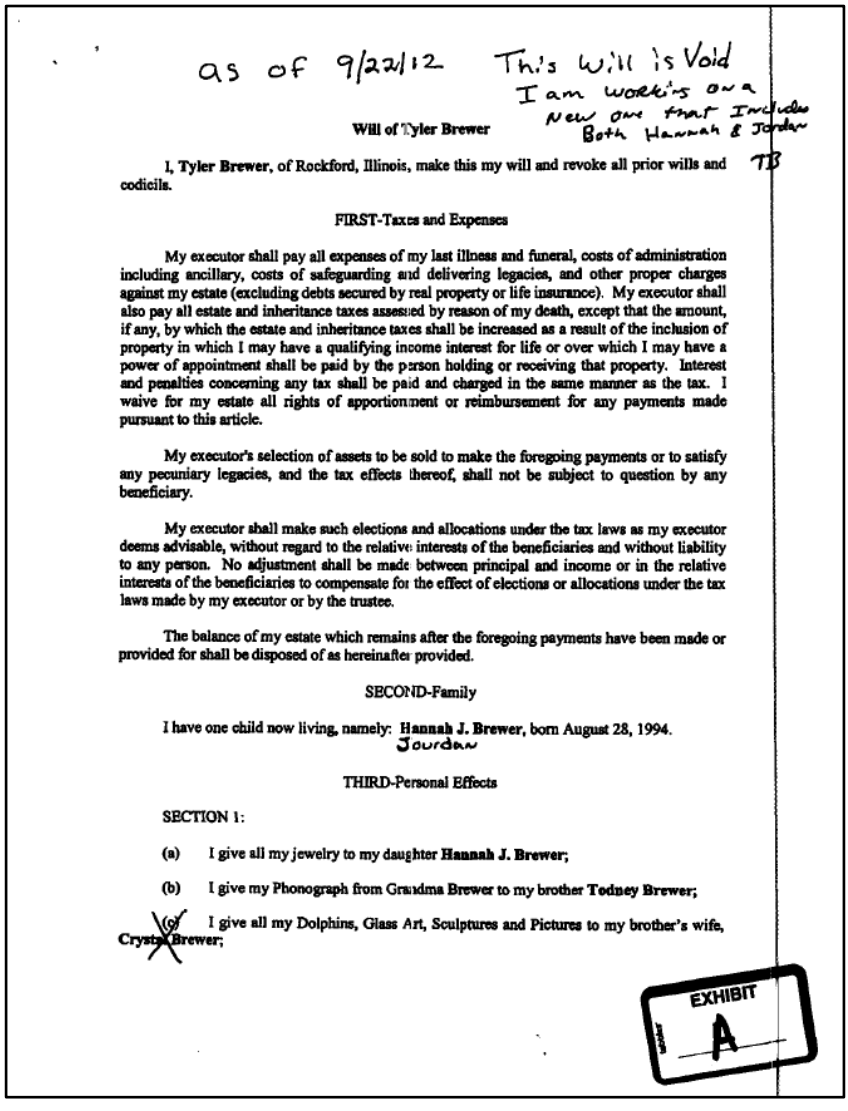
1 *See* Brewer v. Brewer (*In re* Estate of Brewer), 35 N.E.3d 149, 150 (Ill. App. Ct. 2015).

2 *See* Will of Tyler Brewer, at *1, *3–4 [hereinafter Brewer Will], Brewer v. Brewer (*In re* Estate of Brewer), No. 2013 P 387 (Ill. Cir. Ct. filed Mar. 11, 2014), *aff'd*, 35 N.E. 3d 149 (on file with author).

3 *See id.*; *Brewer*, 35 N.E.3d at 150.

copy, crossing out one provision, adding Jourdan's name to the section that identified his family, and handwriting on the first page: "[A]s of 9/22/12 [t]his will is [v]oid. I am working on a [n]ew one that [i]ncludes [b]oth Hannah and Jourdan[.] TB."[4]

FIGURE 1: WILL OF TYLER BREWER



as of 9/22/12 This Will is Void
I am working on a New one that Includes Both Hannah & Jordan
TB

Will of Tyler Brewer

I, **Tyler Brewer**, of Rockford, Illinois, make this my will and revoke all prior wills and codicils.

FIRST-Taxes and Expenses

My executor shall pay all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering legacies, and other proper charges against my estate (excluding debts secured by real property or life insurance). My executor shall also pay all estate and inheritance taxes assessed by reason of my death, except that the amount, if any, by which the estate and inheritance taxes shall be increased as a result of the inclusion of property in which I may have a qualifying income interest for life or over which I may have a power of appointment shall be paid by the person holding or receiving that property. Interest and penalties concerning any tax shall be paid and charged in the same manner as the tax. I waive for my estate all rights of apportionment or reimbursement for any payments made pursuant to this article.

My executor's selection of assets to be sold to make the foregoing payments or to satisfy any pecuniary legacies, and the tax effects thereof, shall not be subject to question by any beneficiary.

My executor shall make such elections and allocations under the tax laws as my executor deems advisable, without regard to the relative interests of the beneficiaries and without liability to any person. No adjustment shall be made between principal and income or in the relative interests of the beneficiaries to compensate for the effect of elections or allocations under the tax laws made by my executor or by the trustee.

The balance of my estate which remains after the foregoing payments have been made or provided for shall be disposed of as hereinafter provided.

SECOND-Family

I have one child now living, namely: **Hannah J. Brewer**, born August 28, 1994.
Jourdan

THIRD-Personal Effects

SECTION 1:

(a) I give all my jewelry to my daughter **Hannah J. Brewer;**

(b) I give my Phonograph from Grandma Brewer to my brother **Todney Brewer;**

(c) I give all my Dolphins, Glass Art, Sculptures and Pictures to my brother's wife, **Crystal Brewer;**

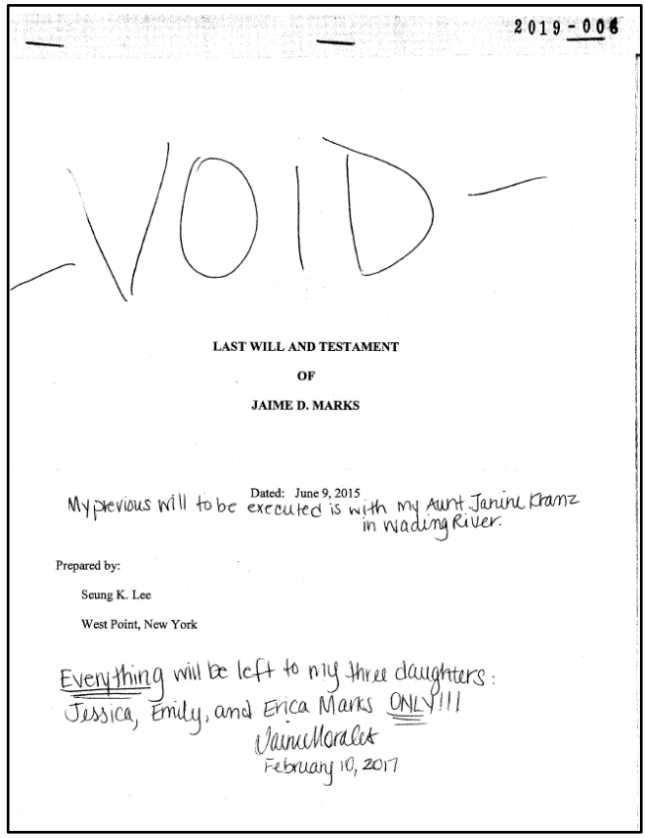
EXHIBIT A

4 Brewer Will, *supra* note 2, at *1.

* * *

In 2015, Jaime Marks, a soldier who was stationed at West Point, New York, signed a will leaving her condo and house to her husband, Marcelino Morales, Jr.[5] However, two years later, her marriage deteriorated.[6] As a result, Marks scrawled "VOID" at the top of her will's cover page and added "[e]verything will be left to my three daughters: Jessica, Emily, and Erica Marks ONLY!!!"[7] She then signed and dated below the notation.[8]

FIGURE 2: LAST WILL AND TESTAMENT OF JAIME D. MARKS



2019-006

VOID

LAST WILL AND TESTAMENT

OF

JAIME D. MARKS

Dated: June 9, 2015

My previous will to be executed is with my Aunt Janine Kranz in Wading River.

Prepared by:

Seung K. Lee

West Point, New York

Everything will be left to my three daughters: Jessica, Emily, and Erica Marks ONLY!!!

Jaime Morales

February 10, 2017

5 *See* Last Will and Testament of Jaime D. Marks at *1 [hereinafter Marks Will], *In re* Estate of Kranz-Marks, No. 2019-6, 2020 N.Y. Slip Op. 50646(U) (Sur. Ct. Mar. 10, 2020) (Westlaw) (on file with author); *In re* Estate of Kranz-Marks, No. 2019-6, 2020 N.Y. Slip Op. 50646(U), at *1 (Sur. Ct. Mar. 10, 2020) (Westlaw).

6 *See* Marks Will, *supra* note 5, at cover page (expressing Marks's wish to disinherit Morales).

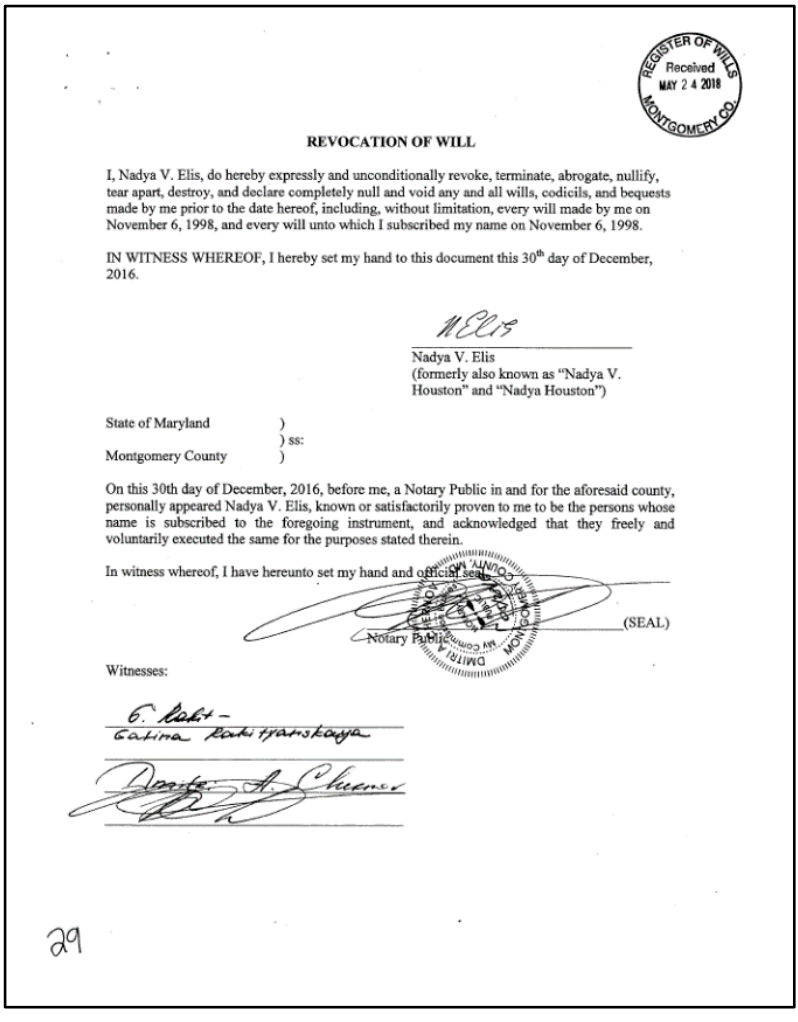
7 *Id.*

8 *Id.*

* * *

In 2016, Nadya Elis, who lived in Maryland, hired a lawyer to help her cancel all her previous wills.[9] In front of two witnesses and a notary, Elis signed a writing entitled "Revocation of Will," which stated that she wanted to "revoke, terminate, abrogate, nullify, tear apart, destroy, and declare completely null and void any and all wills, codicils, and bequests made by me."[10]

FIGURE 3: NADYA V. ELIS REVOCATION OF WILL



REGISTER OF WILLS
Received
MAY 24 2018
MONTGOMERY CO.

REVOCATION OF WILL

I, Nadya V. Elis, do hereby expressly and unconditionally revoke, terminate, abrogate, nullify, tear apart, destroy, and declare completely null and void any and all wills, codicils, and bequests made by me prior to the date hereof, including, without limitation, every will made by me on November 6, 1998, and every will unto which I subscribed my name on November 6, 1998.

IN WITNESS WHEREOF, I hereby set my hand to this document this 30th day of December, 2016.

N Elis

Nadya V. Elis
(formerly also known as "Nadya V. Houston" and "Nadya Houston")

State of Maryland)
) ss:
Montgomery County)

On this 30th day of December, 2016, before me, a Notary Public in and for the aforesaid county, personally appeared Nadya V. Elis, known or satisfactorily proven to me to be the persons whose name is subscribed to the foregoing instrument, and acknowledged that they freely and voluntarily executed the same for the purposes stated therein.

In witness whereof, I have hereunto set my hand and official seal.

Notary Public (SEAL)

Witnesses:

G. Kakit-
Galina Kakityanskaya

29

9 Kiknadze v. Elis, No. 1166, 2020 WL 4937994, at *1–2 (Md. Ct. Spec. App. Aug. 24, 2020).

10 *Id.* at *1–2.

* * *

These cases highlight an important but neglected problem in inheritance law. For decades, no issue in the field has provoked as much controversy as the steps necessary to create a valid will. In Anglo-American legal systems, executing a will takes place in the shadow of the Wills Act: a nineteenth-century statute that requires wills to be written, signed by the testator, and attested by two witnesses who were present at the same time when they saw the testator sign or ratify the document.[11] In addition, about half of U.S. jurisdictions recognize holographic wills, which do not need witnesses but must be in the testator's handwriting and signed by her.[12] Traditionally, courts demanded strict compliance with these rules, voiding would-be wills for trivial errors, such as a misplaced signature,[13] witnesses who were not in the same physical space when the testator acknowledged the document,[14] or a stray typed word in a purported holograph.[15]

These doctrines, which I will call the "execution formalities," have captured the attention of generations of scholars. For instance, in separate articles published in 1941, Ashbel Gulliver and Catherine Tilson (writing together), and Lon Fuller (working alone) contended that each element of the Wills Act furthers a key goal.[16] By insisting upon a signed and witnessed writing, the statute preserves proof of the testator's wishes (the "evidentiary function"), reinforces the gravity of the process (the "ritual function"), discourages fraud and forgery (the "protective function"), and distinguishes wills from other legal instruments (the "channeling function").[17] As later writers then elaborated, these external badges of authenticity minimize the "worst evidence problem": the fact that inheritance law hinges on the wishes of a decedent, who cannot "clarify his declarations, which may have

11 *See* Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26 (Eng., Wales & Ir.).

12 *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2503 (2021); CAL. PROB. CODE § 6111(a) (West 2021); N.C. GEN. STAT. § 31-3.4 (2021); TEX. EST. CODE ANN. § 256.154 (West 2021); VA. CODE ANN. § 64.2-403 (2021); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1116 n.139 (2015) (collecting statutes).

13 *See, e.g.*, *In re* Schiele's Estate, 51 So. 2d 287, 290 (Fla. 1951).

14 *See, e.g.*, *In re* Groffman [1969] 1 WLR 733 (P) at 739 (Eng.).

15 *See, e.g.*, *In re* Thorn's Estate, 192 P. 19, 22 (Cal. 1920).

16 *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–9 (1941); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

17 *See* Gulliver & Tilson, *supra* note 16, at 5–13 (discussing the evidentiary, ritual, and protective functions); Fuller, *supra* note 16, at 800–03 (referring to the evidentiary, cautionary, and channeling functions). Although Gulliver and Tilson focused on the Wills Act, Fuller largely concentrated on the contract doctrine of consideration. *See* Gulliver & Tilson, *supra* note 16, at 5–13; Fuller, *supra* note 16, at 799–804.

been made years, even decades past."[18] In addition, because millions of people die every year, bright-line rules "enable probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria, thereby permitting probate to proceed in the vast majority of cases as a routine, bureaucratic process."[19]

But near the end of the twentieth century, a new cohort of academics offered a more skeptical account of traditional will-execution doctrine. Some of these critics argued that the Wills Act and holograph statutes had not kept pace with the times.[20] As they observed, in a movement called the "nonprobate revolution," owners were transmitting wealth through devices that are exempt from the execution formalities, such as *inter vivos* revocable trusts.[21] Compared to these user-friendly mechanisms—which do not need to be witnessed and can even be consummated orally—the steps necessary to create a will seemed excessive.[22] Similarly, a chorus of critics asserted that the practice of ignoring the testator's desires and refusing to enforce attempted wills for trivial mistakes was "inequitable,"[23] "needless,"[24] and an "anachronism."[25] Thus, "'[d]own with formalism' [became] the rallying cry of probate reform."[26]

This debate has intensified as the law has evolved. Over the past three decades, calls to reform the execution formalities have gained traction. The 1990 revisions to the Uniform Probate Code (UPC), the Restatement (Third) of Property: Wills and Other Donative Transfers, and twelve American jurisdictions have adopted a novel rule called harmless error, which allows judges to enforce a writing that does not satisfy the execution formalities if the decedent clearly meant it to be her will.[27] In addition, since 2017, nine states have sought to bring will

18 John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344 (2013) (quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975)).

19 Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994).

20 *See, e.g.*, James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 557 (1990).

21 *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108, 1113 (1984) (describing how contract-like mechanisms were replacing wills as the primary estate planning tool).

22 *See, e.g.*, Wehking v. Wehking, 516 P.2d 1018, 1020 (Kan. 1973) ("the validity of a trust in personalty established by parol has long been recognized").

23 Lindgren, *supra* note 20, at 542.

24 Langbein, *supra* note 18, at 489.

25 *Id.* at 496.

26 Mann, *supra* note 19, at 1033.

27 *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999); CAL. PROB. CODE § 6110(c)(2) (West 2021); COLO. REV. STAT. § 15-11-503 (2021); HAW. REV. STAT. § 560:2-

making into the digital age by passing statutes that authorize electronic wills.[28] These developments have inspired a vibrant new literature about the future of estate planning.[29]

But despite the attention lavished on the *creation* of wills, the *revocation* of wills has flown underneath the radar. Since the British Parliament passed the Statute of Frauds in 1677, there have only been two ways to annul a testamentary instrument.[30] First, a testator can perform a "revocatory act" by burning, canceling, tearing, or obliterating the will with the intent to revoke it.[31] Second, a person can rescind a will by executing a writing that satisfies the rules that govern the making of a will.[32] This avenue—"revocation by will"—rests on the premise that because wills are formal documents, only an equally formal writing should be able to defeat them.[33] Surprisingly, even though these "revocation formalities" are the mirror image of the much-discussed execution formalities, academics have generally ignored them.[34]

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503 (2021); MICH. COMP. LAWS § 700.2503 (2021); MONT. CODE ANN. § 72-2-523 (2021); N.J. STAT. ANN. § 3B:3-3 (West 2021); OHIO REV. CODE ANN. § 2107.24 (West 2021); S.D. CODIFIED LAWS § 29A-2-503 (2021); UTAH CODE ANN. § 75-2-503 (West 2021); VA. CODE ANN. § 64.2-404 (2021); *cf.* MINN. STAT. § 524.2-503 (2021) (enacting harmless error as part of a temporary COVID-19 relief measure).

28 Five of these laws follow unique approaches to electronic will formalities. *See* ARIZ. REV. STAT. ANN. § 14-2518 (2021); FLA. STAT. § 732.522 (2021); IND. CODE § 29-1-21-4 (2021); MD. CODE ANN., EST. & TRUSTS § 4-102 (West 2021); NEV. REV. STAT. § 133.085 (2019). Four have passed the Uniform Law Commission's proposed Electronic Wills Act. *See* UNIF. ELEC. WILLS ACT (UNIF. L. COMM'N 2019) [hereinafter UEWA]; COLO. REV. STAT. § 15-11-1301 (2021); N.D. CENT. CODE § 30.1-37 (2021); UTAH CODE ANN. § 75-2-1405 (West 2021); WASH. REV. CODE §§ 11.12.400–11.12.491 (2021).

29 *See, e.g.*, Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547 (2019); Bridget J. Crawford, *Blockchain Wills*, 95 IND. L.J. 735 (2020); Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269; Adam J. Hirsch, *Technology Adrift: In Search of A Role for Electronic Wills*, 61 B.C. L. REV. 827 (2020); David Horton, *Wills Without Signatures*, 99 B.U. L. REV. 1623, 1635 (2019); David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027 (2018); John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion*, 38 ADEL. L. REV. 1 (2017); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337 (2017); Gökalp Y. Gürer, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision*, 49 U.C. DAVIS L. REV. 1955 (2016); Paige Hall, Note, *Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent*, 20 NEV. L.J. 339 (2019).

30 *See* Statute of Frauds 1677, 29 Car. 2 c. 3 (Eng.).

31 *See id.* § 6.

32 *See id.*

33 *See* Allen v. Huff, 9 Tenn. (1 Yer.) 404, 411 (1830).

34 One exception is Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411 (2009). Glover argues that the relative ease with which a testator can revoke a will by act "promotes

This Article reassesses the law of will revocation. It has four goals. First, the Article reveals that the revocation formalities do more damage to testamentary intent than is commonly believed. The problem is not just that courts demand literal compliance with the revocation formalities. It is that judges have embellished these commands with an additional layer of technicalities. For example, each of the testators mentioned above failed to revoke their wills. Although Tyler Brewer handwrote "[t]his will is void" on a Xerox of the document, an Illinois appellate court held that "a revocatory act performed on a[] photocopy is legally ineffective."[35] Likewise, a New York Surrogate Court concluded that Jaime Marks's notation in the margins of her original will did not "physically obliterate it" and therefore "[wa]s insufficient to operate as a revocation [by act]."[36] Furthermore, Brewer's and Marks's handwritten, signed—but unwitnessed—expressions of intent were not proper revocations by "will," because neither of their states recognizes holographic wills.[37] Finally, and even more perversely, Nadya Elis's lawyer-drafted, signed, witnessed, and notarized writing was nothing more than words on a page.[38] It was not a revocation by "act" because it was printed on a separate piece of paper, rather than a "'cancel[ation]' . . . performed on the will."[39] Moreover, it was not a revocation by "will" since Maryland is one of several jurisdictions that only allow testators to revoke wills through writings that *also* dispose of some of their assets.[40]

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probate's family-protection policy by channeling a decedent's estate into intestacy." *Id.* at 413 (footnote omitted) (citing JESSE DUKEMINIER, STANLEY M. JOHANSON, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS & ESTATES (7th ed. 2005)). Conversely, this Article focuses more on the *difficulty* of revoking a will: situations in which a testator almost certainly intended to annul an instrument but failed to do so. Likewise, another piece on revocation, Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035 (1992), claims "that relatively few cases presenting revocation . . . problems arise in the system." *Id.* at 1036. Although I agree that there is probably less litigation over revocation than the creation of wills, the issue does generate a fair number of disputes. *See infra* Parts II–III.

35 Brewer v. Brewer (*In re* Estate of Brewer), 35 N.E.3d 149, 153 (Ill. App. Ct. 2015).

36 *In re* Estate of Kranz-Marks, No. 2019-6, 2020 N.Y. Slip Op. 50646(U), at *2 (Sur. Ct. Mar. 10, 2020) (Westlaw).

37 *See Brewer*, 35 N.E.3d at 152–53 (declining to even consider whether Brewer revoked his will by making a second will); *Kranz-Marks*, 2020 N.Y. Slip Op. 50646(U), at *2 (explaining that Marks's handwritten passage failed to be a will because it "was not executed with the formalities required by statute").

38 *See* Kiknadze v. Elis, No. 1166, 2020 WL 4937994, at *5 (Md. Ct. Spec. App. Aug. 24, 2020).

39 *Id.* (quoting MD. CODE ANN., EST. & TRUSTS § 4-105(b)(2) (West 2020) (previously MD. CODE ANN., EST. & TRUSTS § 4-105(2) (West 2019))).

40 *See id.*

These cases are not unique; indeed, revocation law often generates absurd results.

Second, the Article questions the value of these unforgiving revocation rules. Upon close inspection, these principles lack the virtues of the execution formalities. As noted, scholars agree that the Wills Act serves evidentiary, ritual, protective, and channeling functions.[41] Conversely, revocation doctrine is riddled with nuances that are hard to justify. For example, even if mandating that testators deface an original will deters forgery, this logic does not apply to cases like Tyler Brewer's, where the testator's penmanship demonstrates that the revocation is authentic. Even worse, ignoring language written in the margins (as with Jaime Marks's will) or requiring revocations by "will" to contain bequests (the downfall of Nadya Elis's attempted revocation) serve no discernable policy objective. Thus, the hallmark revocation doctrine is not merely formalism—it is *empty* formalism.

Third, the Article explains why electronic wills are going to exacerbate these problems. These cutting-edge testamentary instruments are sending policymakers back to the drawing board because several established methods of revoking paper wills, such as burning and tearing them, do not apply to intangible writings. Not surprisingly, then, the jurisdictions that have adopted e-will statutes have taken divergent approaches to revocation.[42]

Fourth, the Article evaluates potential cures for the pathologies of revocation. It explains that a slim minority of courts and policymakers have taken a step in the right direction by liberalizing revocation law. For example, some judges have imposed a constructive trust on the estate for the benefit of the individuals who would have inherited if the revocation had been effective.[43] Likewise, the UPC loosens the rules for revoking by act and extends harmless error to some failed revocations.[44] The Article endorses these remedial measures, which, unfortunately, have not been widely adopted. But the Article also demonstrates that they contain gaping holes. Thus, the Article proposes a novel solution: aligning will revocation law with the rules that govern the revocation of a trust. The Article explains why this change would reduce unfair outcomes, avoid difficult questions about revoking electronic wills, and modernize the centuries-old will revocation formalities.

A few words can clarify the scope of this Article. The revocation of wills is a sprawling issue that intersects with several other complex doctrines. However, the Article focuses on the oft-litigated issue of

41 *See supra* text accompanying notes 16–17.

42 *See infra* subsection II.B.4.

43 *See infra* Section IV.A.

44 *See infra* Section IV.B.

how testators can voluntarily cancel wills in their entirety. As a result, it excludes related topics, such as implied revocations triggered by divorce,[45] partial revocations by act,[46] and the revival of revoked wills.[47]

The Article contains four Parts. Part I sets the stage by describing the debate over the execution formalities. It shows that although the caselaw interpreting the Wills Act and holograph statutes is infamous for its wooden rules and harsh results, this legacy of formalism has started to wane. Part II then pivots to will revocation. It reveals that the rules that govern this subject are confusing and counterintuitive. Part III contends that the costs of these revocation formalities dwarf the benefits. Indeed, some revocation requirements further vital policies, but others are baffling. Finally, Part IV analyzes existing attempts to reform revocation law and ultimately suggests that lawmakers borrow revocation rules from the field of trusts.

I. MAKING WILLS

To frame the issue of will revocation, it can be helpful to start with an overview of will execution. This Part explains that the steps required to create a testamentary instrument have sparked decades of controversy. It then reveals that the rigidity of traditional will-creation law is slowly relaxing its grip.

A. Formalism's Rise

The law of will execution has long been synonymous with "harsh and relentless formalism."[48] This section explains why.

Historically, three British statutes have dominated the will-making process. First, in 1540, Parliament passed the Statute of Wills.[49] At common law, land—the wellspring of economic power—could not be

45 In general, "[t]he 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." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1(b) (AM. L. INST. 1999); *see also* Naomi R. Cahn, *Revisiting Revocation upon Divorce?*, 103 IOWA L. REV. 1879, 1881 (2018) (criticizing this rule).

46 A partial revocation by act occurs when the testator tries to cancel a specific part of the will rather than the entire instrument. *See* Note, *Partial Revocation of Wills by Acts Done to the Instrument*, 23 HARV. L. REV. 558, 559 (1910). States disagree about the permissibility of this practice. *See, e.g.*, *In re* Estate of Menchel, No. 263251, 2006 N.Y. Slip Op. 50930(U), at *2 (Sur. Ct. May 18, 2006) (Westlaw).

47 Revival comes into play when the testator makes Will 1, then revokes Will 1 by making Will 2, and then revokes Will 2. *See* UNIF. PROB. CODE § 2-509 (UNIF. L. COMM'N 2019). The question in revival cases is whether the testator intended to reinstitute Will 1 by revoking Will 2. *See id.*

48 Langbein, *supra* note 18, at 489.

49 *See* Statute of Wills 1540, 32 Hen. 8 c. 1 (Eng.).

devised,[50] and testators often disposed of personal property on their deathbeds through oral "nuncupative" wills.[51] The Statute of Wills changed these traditions by making real estate transmissible by testamentary instrument so long as the owner memorialized her wishes in writing.[52]

Second, in 1677, lawmakers added a layer of formality by enacting the Statute of Frauds.[53] A year earlier, the Great Fire had swept through London, destroying property records and making "the effect and even existence of wills . . . sources of dispute."[54] Thus, section 5 of the new law declared that wills transmitting land "shall be in [writing] and signed by the [testator] . . . and shall be attested and subscribed in the presence of the [testator] by three or [four] credible [w]itnesses."[55] These formalities distinguished wills from contracts and gifts, which can sometimes be made orally and never need to be attested by witnesses.[56]

Third, in 1837, the Wills Act extended the rigorous execution formalities to bequests of both real and personal property.[57] In addition, the Wills Act reduced the number of required witnesses to two but specified that these people must be "present at the same [t]ime" when the testator either signed the document or acknowledged her signature.[58] Both the Statute of Frauds and the Wills Act eventually migrated to former British colonies, such as Australia and the United States.[59]

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50 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *430; 1 HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS pt. 1 §§ 12, 14, pt. 4 § 26 (7th ed., Dublin, Elizabeth Lynch 1793) (1590).

51 *See* 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 539 (3d ed. 1923).

52 *See* Statute of Wills 1540 § 1.

53 Statute of Frauds 1677, 29 Car. 2 c. 3 (Eng.).

54 Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 364–66 (1983).

55 Statute of Frauds 1677 § 5.

56 For example, the Statute of Frauds only covered specific kinds of agreements, such as those that could not be fully performed within a year of their making. *See* Statute of Frauds 1677 § 4. In addition, the law required these deals to be in writing and signed by the party to be charged, but did not insist upon witness attestation. *See id.*

57 *See* Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26 (Eng., Wales & Ir.)).

58 *See id.* § 9.

59 *See, e.g.*, Waller v. Waller, 42 Va. (1 Gratt.) 454, 475 (1845) (noting that Virginia had recently adopted the Wills Act); LAW REFORM COMM. OF S. AUSTL., TWENTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA TO THE ATTORNEY-GENERAL: RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS 10–12 (1974) (analyzing the execution formalities in South Australia).

In addition, about half of American states adopted holographic will statutes.[60] Holographs, which have deep roots in civil law countries, are exempt from the Wills Act's attestation requirement but must be handwritten and signed by the testator.[61] The rationale for this deviation from the Wills Act is that because each person's penmanship is distinctive, a decedent's handwriting "assume[s] the role witnesses normally serve[.]"[62]

In the middle of the twentieth century, scholars who specialized in private law became intrigued by the execution formalities. In 1941, Ashbel Gulliver and Catherine Tilson (in one article) and Lon Fuller (in another) critiqued the statute's elements.[63] Gulliver and Tilson began by noting that probate litigation takes place in an unusual posture: because the testator will be dead, the court must discern her intent through the haze of testimony from interested parties and documents that may be very old.[64] Accordingly, Gulliver and Tilson argued that the Wills Act's writing and signature requirements serve an "evidentiary" function: they ensure that a decedent's wishes are "cast in reliable and permanent form."[65]

In addition, Gulliver, Tilson, and Fuller observed that the execution formalities reinforce the gravity of estate planning. Wills are "ambulatory" and can be revoked at any time.[66] In turn, this power to erase and revise creates a risk that testators will make rash decisions. Thus, the three authors observed that the elaborate rites of the Wills Act "act[] as a check against inconsiderate action."[67] Gulliver and

60 *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2503 (2021); CAL. PROB. CODE § 6111(a) (West 2021); N.C. GEN. STAT. § 31-3.4 (2021); TEX. EST. CODE ANN. § 256.154 (West 2021); VA. CODE ANN. § 64.2-403(B) (2021); Horton, *supra* note 12, at 1116 n.139 (collecting statutes).

61 *See* Reginald Parker, *History of the Holograph Testament in the Civil Law*, 3 JURIST 1, 4–5, 5–10, 28–31 (1943) (describing the evolution of holographs). States disagree about how much of the instrument needs to be handwritten. *See* UNIF. PROB. CODE § 2-502(b) & cmt. (UNIF. L. COMM'N 2019) ("[A] holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 cmt. a (AM. L. INST. 1999) (describing this jurisdictional split).

62 Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 33 (2008); *see* Adams' Ex'x v. Beaumont, 10 S.W.2d 1106, 1108 (Ky. 1928) (reasoning that every person "acquires a style of writing, a certain mannerism in the formation of letters and words, absolutely peculiar to himself, and which, almost without exception, renders his handwriting easily distinguishable from that of others").

63 *See* Gulliver & Tilson, *supra* note 16; Fuller, *supra* note 16.

64 *See* Gulliver & Tilson, *supra* note 16, at 6.

65 *Id.*

66 Alex M. Johnson, Jr., *Is It Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 393 & n.4 (2016); *see* Cozzort v. Cunningham, 130 S.E.2d 171, 173 (Ga. Ct. App. 1963).

67 Fuller, *supra* note 16, at 800; Gulliver & Tilson, *supra* note 16, at 5.

Tilson dubbed this the "ritual function," while Fuller called it the "cautionary function."[68]

Next, Gulliver and Tilson theorized that attestation by witnesses once played a "protective" function by shielding testators from fraud and undue influence.[69] However, they argued that this goal was no longer relevant because although "wills were [once] usually executed on the death bed," they were now "probably executed by most testators in the prime of life and in the presence of attorneys."[70]

Finally, Fuller mentioned what he called the "channeling function."[71] As he put it, the Wills Act elements "furnish[] a simple and external test of enforceability" by standardizing the appearance of testamentary instruments.[72] Indeed, when a judge sees a signed and witnessed writing, she can be confident that it is a will.[73]

But even though the execution formalities were socially valuable, they also had a dark side. Courts adopted "[a] strict interpretation of the Wills Act,"[74] citing minor deviations from its commands to nullify documents that decedents "doubtless[ly] intended to be [their] last will."[75] People failed to create a will every time they forgot to sign the instrument[76] or authenticated it in the wrong place,[77] or when a witness could not see the decedent put pen to paper,[78] or when the witnesses were not "present at the same time" when the testator gave her approval to the document.[79] Judges also used an iron-handed approach when assessing purported holographs. If someone typewrote, printed, or stamped a single word, she violated the axiom that "a holographic will not entirely written by the testator cannot be probated."[80]

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68 *See* Gulliver & Tilson, *supra* note 16, at 5; Fuller, *supra* note 16, at 800, 814.

69 *See* Gulliver & Tilson, *supra* note 16, at 9–13.

70 *Id.* at 10.

71 Fuller, *supra* note 16, at 801–03.

72 *Id.* at 801.

73 *See id.*

74 Armenti v. Ryan, 186 A. 517, 517 (N.J. Dep't of Lab., Workmen's Comp. Bureau 1936).

75 *In re* Sage, 107 A. 445, 445 (N.J. 1919).

76 *See, e.g.*, *In re* Hoyt, 303 So. 2d 189 (La. Ct. App. 1974); *In re* Estate of Glace, 196 A.2d 297, 300 (Pa. 1964).

77 *See, e.g.*, *In re* Schiele's Estate, 51 So. 2d 287, 290 (Fla. 1951).

78 *See In re* Mackay's Will, 18 N.E. 433, 434 (N.Y. 1888); Krause v. Dodge (*In re* Krause's Estate), 117 P.2d 1, 2 (Cal. 1941).

79 *In re* Groffman [1969] 1 WLR 733 (P) at 739 (Eng.).

80 Maris v. Adams, 166 S.W. 475, 478 (Tex. Civ. App. 1914), *modified*, 213 S.W. 622 (Tex. Comm'n App. 1919); *cf. In re* Estate of Dobson, 708 P.2d 422, 424 (Wyo. 1985) (refusing to enforce an attempted holograph that the decedent had handwritten which also contained a third party's notations because it was not "*entirely* in the handwriting of the

In these ways, the fact that a decedent wanted a "document to be his or her will has always been secondary to whether or not the document complied with the statutory formalities."[81] But as I discuss next, this legacy has started to evolve.

B. Formalism's Decline

Recently, the execution formalities have become embattled. As this section explains, states have started to experiment with fresh approaches to will creation.

In the late twentieth century, scholars became disenchanted with orthodox will-creation doctrine. This shift stemmed, in part, from a sea change in legal practice. In 1965, Norman F. Dacey's *How to Avoid Probate!* became a surprise best-seller and christened the "nonprobate revolution": a movement in which people went to great lengths to avoid leaving property that was subject to court supervision after death.[82] Pay-on-death accounts and revocable trusts became the core of many estate plans.[83] Although these devices are "will substitutes"—they allow owners to pass wealth after death—they do not need to comply with the Wills Act or holograph statutes.[84] Instead, these mechanisms are often governed by private formalities established by financial firms that manage a decedent's assets, such as banks or trust companies.[85] In turn, these institutions generally insist that nonprobate transfers be written and signed, but not attested.[86] Thus,

testator" (citing WYO. STAT. ANN. § 2-55 (1957) (current version at WYO. STAT. ANN. § 2-6-113 (West 2021)))).

81 Mann, *supra* note 19, at 1035.

82 Langbein, *supra* note 21, at 1108 (coining the phrase "nonprobate revolution"); *see* NORMAN F. DACEY, HOW TO AVOID PROBATE! (HarperCollins 5th ed. 1993) (1965); Edwin McDowell, *Book Notes*, N.Y. TIMES (Mar. 7, 1990), http://www.nytimes.com/1990/03/07/arts/book-notes-459190.html [https://perma.cc/D8RW-BG6E] (describing the wild success of Dacey's book).

83 Langbein, *supra* note 21, at 1109.

84 *Id.* ("In truth, will substitutes are simply 'nonprobate wills'—'wills' that need not comply with the Wills Act."). To be clear, some courts did strike down purported trusts on the grounds that they were "testamentary" and thus needed to obey the Wills Act. *See, e.g.*, Betker v. Nalley, 140 F.2d 171, 173 (D.C. Cir. 1944). But those cases were soon overruled. *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600, 605 (Ill. 1955) (refusing to find that "intended trusts [were] invalid as attempted testamentary dispositions").

85 *See* Lindgren, *supra* note 20, at 556 (explaining that "financial intermediaries have developed these will substitutes as free-market competitors to the state-run probate system").

86 *See id.* at 557.

critics like James Lindgren urged lawmakers to mirror this practice by deleting the witnessing mandate from the Wills Act.[87]

Similarly, in a forceful critique, John Langbein challenged the judicial norm of requiring strict compliance with the Wills Act.[88] Langbein began by noting that there is nothing unusual about subjecting the enforceability of a legal instrument to formal requirements.[89] After all, the fields of contracts and property also demand that certain transfers be reduced to a signed writing or supported by consideration.[90] But Langbein observed that these rules differed in one critical way from wills law. Courts had carved out exceptions—for instance, part performance and promissory estoppel—which recognized that "when the purposes of the formal requirements are proved to have been served, literal compliance with the formalities themselves is no longer necessary."[91] Conversely, wills doctrine alone insisted "that any defect in compl[iance] . . . automatically and inevitably voids the will."[92] For these reasons, Langbein contended that judges should interpret the Wills Act purposively, rather than textually, and ask whether the goals of the formalities had been satisfied.[93]

But the most influential development began in an unlikely place. In 1975, the South Australian Parliament adopted a novel statute that allowed probate judges to forgive "technical failure[s] to comply with the Wills Act" if they were "satisfied that [a] document does in fact represent the last will and testament of the testator."[94] Shortly thereafter, Langbein abandoned his substantial compliance proposal and endorsed the South Australia regime, which he called the "harmless error rule."[95] The 1990 revisions to the Uniform Probate Code (UPC) and the *Restatement (Second) of Property: Donative Transfers*

87 *See id.* ("The main purpose of the attestation requirement is to protect the testator against fraud, duress, and undue influence. Yet we know from experience with will substitutes that witnessing isn't necessary to prevent these harms.").

88 *See* Langbein, *supra* note 18, at 489.

89 *See id.* at 498–99.

90 *See id.* at 498–99; *see also* Langbein, *supra* note 21, at 1133.

91 Langbein, *supra* note 18, at 499.

92 *Id.* at 498.

93 *Id.* at 516–26.

94 LAW REFORM COMM. OF S. AUSTL., TWENTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA TO THE ATTORNEY-GENERAL: RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS 10–11 (1974) (describing what became *Wills Act Amendment Act (No. 2) 1975* (S. Austl.) s 9 (Austl.), amending *Wills Act 1936* (S. Austl.) s 12).

95 *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 51 (1987).

echoed Langbein's call.[96] Since then, twelve U.S. jurisdictions have given courts the discretion to validate writings that violate the execution formalities if there is compelling proof that the decedent intended to make a will:

> Although a document or writing added upon a document was not executed in compliance with [the Wills Act], the document or writing is treated as if it had been executed in compliance with that [Act] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will . . . .[97]

Thus, the harmless error rule has become the "most significant change in what constitutes a will since enactment of the Statute of Frauds."[98]

Finally, an equally momentous transformation is now underway: the rise of electronic wills. Since 2017, Arizona,[99] Florida,[100] Indiana,[101] and Nevada[102] have adopted statutes that authorize wills in digital formats.[103] These laws are the fruits of lobbying by legal services

96 *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 1990); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS app. I items 3–4 (AM. LAW INST., Tentative Draft No. 13, 1990) (expanding on 1989's Tentative Draft No. 12).

97 UNIF. PROB. CODE § 2-503; *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999) ("A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."). Hawaii, Michigan, Montana, New Jersey, Oregon, South Dakota, and Utah have adopted UPC section 2-503 verbatim. *See* HAW. REV. STAT. § 560:2-503 (2021); MICH. COMP. LAWS § 700.2503 (2021); MONT. CODE ANN. § 72-2-523 (2021); N.J. STAT. ANN. § 3B:3-3 (West 2021); OR. REV. STAT § 112.238 (2019); S.D. CODIFIED LAWS § 29A-2-503 (2021); UTAH CODE ANN. § 75-2-503 (West 2021). In 2020, Minnesota followed suit temporarily to facilitate will-making during the coronavirus pandemic. *See* MINN. STAT. § 524.2-503 (2021) ("This section applies to documents and writings executed on or after March 13, 2020, but before February 15, 2021."). Finally, California, Colorado, Ohio, and Virginia have embraced "partial" harmless error statutes that can only excuse failure to comply with some elements of the Wills Act (usually attestation). *See* CAL. PROB. CODE § 6110(c)(2) (West 2021); COLO. REV. STAT. § 15-11-503 (2021); OHIO REV. CODE ANN. § 2107.24 (West 2021); VA. CODE ANN. § 64.2-404 (2021).

98 Mann, *supra* note 19, at 1035.

99 *See* ARIZ. REV. STAT. ANN. § 14-2518 (2021).

100 *See* FLA. STAT. § 732.522 (2021).

101 *See* IND. CODE § 29-1-21-4 (2021).

102 *See* NEV. REV. STAT. § 133.085 (2019). In 2001, Nevada became the first state to authorize electronic wills. *See id.*; David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 568 (2017). But "the software necessary to meet the requirements of the statute ha[d] not yet been developed," so it was almost never used. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 887 (2007).

103 In addition, courts have sometimes upheld electronic wills. *See In re* Estate of Horton, 925 N.W.2d 207, 209 (Mich. Ct. App. 2018) (per curiam) (using the harmless error rule to enforce a will written on cell phone); *In re* Estate of Castro, No. 2013ES00140, 2013 WL 12411558 (Ohio Ct. Com. Pl. June 19, 2013) (enforcing a will written with stylus and

providers such as LegalZoom and Willing.com.[104] Their goal is to create a market for supervising will execution over the internet and then serving as "qualified custodians" who store the document for an extra fee.[105] As a result, these "industry-drafted" statutes generally make it easier to probate an e-will that has been lodged with a custodian.[106] Conversely, in 2019, the Uniform Law Commission promulgated a rival Uniform Electronic Wills Act (UEWA).[107] This proposed law tries not to favor any "particular business model" and thus does not mention qualified custodians.[108] As of the summer of 2021, Colorado, North Dakota, Utah, and Washington have adopted the UEWA.[109] Thus, it may only be a matter of time before testators routinely articulate their wishes in emails, text messages, and word processing files.

* * *

To summarize, there has been a long and lively debate about will creation. Although the execution formalities were once notorious for thwarting a decedent's intent, they have gradually become more flexible. Nevertheless, as the next Part elucidates, the related topic of will revocation has slipped through the cracks.

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saved on tablet computer). As these cases reveal, in some states, a digital document may qualify as a "writing" that is "signed" even without an electronic will statute. *See* Horton, *supra* note 102, at 568–69.

104 *See* Hirsch, *supra* note 29, at 859 (discussing the lobbying efforts that have produced some e-will statutes).

105 *See Developments in the Law: More Data, More Problems*, 131 HARV. L. REV. 1790, 1806 n.87 (2018).

106 Memorandum from Suzanne Brown Walsh, Chair, Unif. L. Comm'n, Turney P. Berry, Vice Chair, Unif. L. Comm'n & Susan N. Gary, Reporter, Unif. L. Comm'n, to Unif. L. Comm'n 3 (June 8, 2018), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=442fc3a6-ba53-f1db-fce6-c52d81340e0c&forceDialog=0 [https://perma.cc/5R93-LN82] (describing these laws as "industry-drafted"). Three of the statutes encourage the use of qualified custodians by making wills stored with such a person or entity "self-proving," which means that a court can admit them to probate without the need for the submission of evidence. *See* ARIZ. REV. STAT. ANN. § 14-2519(2) (2021); FLA. STAT. §§ 732.503, 732.523 (2021); NEV. REV. STAT. § 133.086 (2019).

107 *See* UEWA, *supra* note 28.

108 *Id.* at 2. Instead, the UEWA permits testators to make e-wills self-proving by including an affidavit sworn "before an officer authorized to administer oaths under law of the state in which execution occurs." *Id.* at 16.

109 *See supra* note 28.

II. REVOKING WILLS

Unlike the Wills Act and holograph statutes, the rules for revoking wills have lurked in relative obscurity. This Part gives them the attention they deserve.

A. Early Law

The common law did not impose rigid mandates on the revocation of wills.[110] Instead, the inquiry was fact-sensitive and holistic. Judges asked whether there was "clear evidence of a positive declaration of the intent to revoke."[111] Testators could satisfy this standard through oral statements or unsigned and unattested writings.[112] Even after Parliament began to solemnize the law of will execution by passing the Statute of Wills in 1540, a testamentary instrument that "must have been in writing . . . [could] have been revoked by parol."[113]

But in 1676, the King's Bench decided *Cole v. Mordaunt*—a case that would transform the law of revocation.[114] The testator had executed a written will making a large gift to charity.[115] His wife, who was much younger, then alleged that he had orally revoked this instrument on his deathbed and made a nuncupative will leaving his entire estate to her.[116] Nine people claimed to have witnessed this exchange.[117] Eventually, however, this testimony was exposed as perjury.[118] When the truth emerged, one of the judges, Lord Nottingham,

110 *See* WILLIAM HERBERT PAGE, A CONCISE TREATISE ON THE LAW OF WILLS 273 (1901) (observing that "the form of the revoc[ation] . . . was immaterial"). This was a looser standard than Roman law, which insisted that testators revoke wills that were less than ten years old by performing "some act" that demonstrated their intent to revoke. WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 610–11 (1938).

111 Floyd v. Floyd, 34 S.C.L. (3 Strob.) 44, 55 (S.C. Ct. App. 1848).

112 *See, e.g.*, Brook v. Warde (1572) 73 Eng. Rep. 702, 702–03; 3 Dyer 310 b, 310 b (enforcing an oral revocation).

113 *Ex parte* Ilchester (1803) 32 Eng. Rep. 142, 145; 7 Ves. Jun. 348, 356; JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 321, at 266 (2d ed. 1926) (noting that even after Parliament began to formalize the law of will execution, "courts held parol revocations sufficient").

114 There is no record of the opinion in *Cole*. Instead, we know about the trial and its aftermath from other sources. *See* Mathews v. Warner (1798) 31 Eng. Rep. 96, 107; 4 Ves. Jun. 187, 211; Prince v. Hazleton, 20 Johns. 502, 512 (N.Y. 1822); ROOD, *supra* note 113, § 218, at 171 n.5.

115 *See Mathews*, 31 Eng. Rep. at 107.

116 *See id.*

117 *See id.*

118 *See id.*

declared: "I hope to see one day a law, that no written will should be revoked but by writing."[119]

As luck would have it, Lord Nottingham was uniquely situated to push the law in that direction. At the time he was presiding over *Cole*, he was also drafting the Statute of Frauds.[120] In 1677, a year after Lord Nottingham's remarks, Parliament passed this legislation and formalized the revocation of wills that devised land.[121] Specifically, the Statute of Frauds established two paths for nullifying such a will. First, testators could revoke by act by either "burning[,] cancelling [sic][,] teareing [sic][,] or obliterating the [will]" or having someone else do so in the testator's presence.[122] This aspect of the statute codified existing norms: although the common law did not require it, testators often took one of these destructive steps to dispel any doubt about their intent.[123] Second, Parliament mandated that a writing that revoked a will needed to meet the formalities for *being* a will. As one court eloquently put it, "[t]he evidence of revocation . . . must be of dignity equal to the instrument revoked."[124] I will borrow this phrase and call the idea that it takes a will to revoke a will the "equal dignity principle."

In the early nineteenth century, American states adopted the Statute of Frauds, and revocation cases took a strange turn.[125] Courts faced a steady stream of lawsuits contending that a third party had prevented the testator from destroying her will.[126] The typical claim was that the testator had orally declared her intent to revoke, thrown the document onto a fire, and not noticed when someone who

119 *Id.*

120 *See* Ash v. Abdy (1678) 36 Eng. Rep. 1014, 1014; 3 Swans. 664 app., 664 app. (acknowledging Lord Nottingham's role in drafting the Statute of Frauds); George P. Costigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 335 (1913) (same).

121 Statute of Frauds 1677, 29 Car. 2 c. 3, § 6 (Eng.).

122 *Id.*

123 *See* LAWRENCE W. WAGGONER, RICHARD V. WELLMAN, GREGORY S. ALEXANDER & MARY LOUISE FELLOWS, FAMILY PROPERTY LAW 253 (1991) ("many people choose this method of revoking their wills").

124 Allen v. Jeter, 74 Tenn. 672, 674 (1881).

125 Some U.S. jurisdictions enacted the Statute of Frauds piecemeal, initially embracing its provisions that governed the execution of wills but not those that applied to revocation. *See, e.g.*, Belden v. Carter, 4 Day 66, 68 (Conn. 1809); Clark's Ex'rs v. Eborn, 6 N.C. (2 Mur.) 234, 235 (1813).

126 *See In re* Silva's Estate, 145 P. 1015, 1016–17 (Cal. 1915); Runkle v. Gates, 11 Ind. 95, 99 (1858); Gains v. Gains, 9 Ky. (2 A.K. Marsh.) 190, 191 (1820); Graham v. Birch, 49 N.W. 697, 697–98 (Minn. 1891); Mundy v. Mundy, 15 N.J. Eq. 290, 291 (Prerog. Ct. 1858); Hise v. Fincher, 32 N.C. (10 Ired.) 139, 140 (1849); Kent v. Mahaffey, 10 Ohio St. 204, 211 (1859); Clingan v. Mitcheltree, 31 Pa. 25, 26 (1856); Boyd v. Cook, 30 Va. (3 Leigh) 32, 55 (1831); *cf.* Doe v. Harris (1838) 112 Eng. Rep. 737, 740; 8 Ad. & E. 1, 2.

benefitted from the instrument whisked it to safety.[127] Judges were understandably skeptical. These allegations seemed to be manufactured to justify the physical integrity of a document that the testator supposedly meant to destroy. In addition, like *Cole*, they usually relied entirely on the testimony of an interested party or one of their allies.[128] And here the new revocation formalities revealed their value. Although courts once had to wade through a trial, the law now allowed them to slam the courthouse door. In opinion after opinion, they held that these fantastic events, even if true, did not satisfy the test for revocation.[129] As the Supreme Court of Indiana declared in 1858, "a testator's intent to revoke [does] not, of itself, render his will inoperative."[130]

But on the opposite side of the ledger, the Statute of Frauds sometimes forced judges to ignore compelling evidence that a decedent truly *had* intended to revoke. For instance, people occasionally sent letters asking their attorneys to destroy a will that they had left in the law office for safekeeping.[131] Under the equal dignity rule, this correspondence was not a revocation by writing because it was not attested.[132] And even if the lawyer complied with the request,

127 *See Doe*, 122 Eng. Rep. at 740 (testator "threw the will upon the fire" only to have one of the beneficiaries "rescue[] it without his knowledge"); *Graham*, 49 N.W. at 697–98 (testator placed a will in an envelope in an unlit stove only to have the wrongdoer remove the document from the envelope); *cf. In re Silva's Estate*, 145 P. at 1016–17 (testator's wife "destroy[ed] an envelope" and lied by telling the testator "that the will was [e]nclosed therein"); *Runkle*, 11 Ind. at 99 (testator's son had falsely declared that he had burnt the will); *Gains*, 9 Ky. at 191 (will was "snatched from [the testator's] hand by the defendant in error, and forcibly retained by him"); *Mundy*, 15 N.J. Eq. at 291 (testator's wife convinced him she had burnt will); *Clingan*, 31 Pa. at 26 (same); *Hise*, 32 N.C. at 141 (testator's son threw blank piece of paper on fire); *Kent*, 10 Ohio St. at 211 (same); *Boyd*, 30 Va. at 47, 50 (blind testator asked for his will to be destroyed).

128 *See, e.g.*, *Hise*, 32 N.C. at 139–40 (case rested on a single witness's testimony); *Mundy*, 15 N.J. Eq. at 291 (same); *Runkle*, 11 Ind. at 97 (allegations were supported by three witnesses); *Clingan*, 31 Pa. at 37 (noting that "the channel of proof is through persons pecuniarily interested in [the dispute]").

129 *See In re Silva's Estate*, 145 P. at 1017 ("The mere intent, unperformed, to destroy or burn the will is not sufficient."); *accord Gains*, 9 Ky. at 191; *Graham*, 49 N.W. at 698; *Mundy*, 15 N.J. Eq. at 292; *Hise*, 32 N.C. at 141; *Kent*, 10 Ohio St. at 218; *Boyd*, 30 Va. at 55.

130 *Runkle*, 11 Ind. at 99. Paradoxically, a few courts held that the testator had failed to revoke but also employed a constructive trust to give the assets to the people who would have inherited in the absence of the will. *See, e.g.*, Brazil v. Silva, 185 P. 174, 176 (Cal. 1919), *disapproved of on other grounds by* Ludwicki v. Guerin, 367 P.2d 415, 419 (Cal. 1961). *But see Kent*, 10 Ohio St. at 220–22 (rejecting this position as an improper end-run around the revocation formalities); Reiter v. Carroll, 198 S.W.2d 163, 166–68 (Ark. 1946) (collecting cases).

131 *See* Harris v. McDonald, 108 S.E. 448, 453 (Ga. 1921); *In re* McGill's Will, 128 N.E. 194, 194 (N.Y. 1920); *c.f.* Tynan v. Paschal, 27 Tex. 286, 289 (1863).

132 *See Harris*, 108 S.E. at 453 (holding that the testator's letter failed to revoke her will because it was not "executed with the same formality" as a will) (quoting GA. CIV. CODE

mutilating the will accomplished nothing, because a destructive act must be performed in the testator's presence.[133] Likewise, testators often scrawled phrases such as "obsolete,"[134] "void,"[135] or "I revoke"[136] in the margins or on the backs of their wills. These bare notations were not revocations by writing because they flunked the equal dignity test: they were "never attested or subscribed by any witness, much less by two witnesses."[137] Also, most courts held that these words were not revocations by act because they were "not written in such a way as to have the effect of obliterating or canceling or destroying any words of the will itself."[138] Thus, the revocation formalities erected a tightrope that not all testators could cross.

B. Modern Law

Revocation law shifted again in the nineteenth century, when the Wills Act replaced the Statute of Frauds as the field's centerpiece. The Wills Act applied its revocation rules across the board to all wills—not just to those that devised land.[139] It also changed the list of permissible revocatory acts by dropping "cancelling" and "obliterating" and adding "otherwise destroying."[140] Only some American states followed suit.[141] Finally, as time passed, courts added their own layer of

§ 3918 (current version at GA. CODE ANN. § 53-4-43 (2021))). In addition, testators did not intend the letter *itself* to operate as a revocation; rather, they simply meant to arm their lawyers with the "power to destroy." *Tynan*, 27 Tex. at 295; *McGill's Will*, 128 N.E. at 196 (rejecting the argument that the testator "intended that the act of signing the paper [to be] . . . a complete revocation of her will").

133 *See Tynan*, 27 Tex. at 295 (opining that if the lawyer had "acted upon the instruction contained in the letter, and destroyed the will, . . . it would not operate as a destruction"). For a modern decision involving a testator who called her lawyer and asked him to discard her will, see *Harrison v. Bird*, 621 So. 2d 972, 973 (Ala. 1993) (observing that "Ms. Speer's will was not lawfully revoked when it was destroyed by her attorney at her direction and with her consent, but not in her presence").

134 Lewis v. Lewis, 2 Watts & Serg. 455, 455–56 (Pa. 1841).

135 Howard v. Hunter, 41 S.E. 638, 638 (Ga. 1902); *In re* Shelton's Will, 55 S.E. 705, 706 (N.C. 1906).

136 *In re* Akers' Will, 77 N.Y.S. 643, 644 (N.Y. App. Div. 1902), *aff'd*, 66 N.E. 1103 (N.Y. 1903); *In re* Ladd, 18 N.W. 734, 735 (Wis. 1884).

137 *Ladd*, 18 N.W. at 735; *see also Lewis*, 2 Watts & Serg. at 457.

138 *Howard*, 41 S.E. at 638; *see Shelton's Will*, 55 S.E. at 706 ("The words written on the blank margin of this will do not touch any part of the will proper."); *In re* Miller's Estate, 100 N.Y.S. 344, 346 (Sur. Ct. 1906) ("Not a word of this will was erased, crossed out, marked over, or in any manner obliterated . . . ."); *Ladd*, 18 N.W. at 739 (explaining that words of cancellation must appear "upon the face of the instrument itself, and not upon some remote corner of the same sheet").

139 *See* Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 20 (Eng., Wales & Ir.).

140 *Compare id. with* Statute of Frauds 1677, 29 Car. 2 c. 3 § 6. (Eng.)

141 *See infra* text accompanying note 148.

revocation formalities. Thus, as this section explains, contemporary revocation doctrine has become exceedingly complex.

1. Revoking by Act

Although states uniformly permit testators to revoke by act, they differ on what kind of conduct suffices. Most have merged the Statute of Frauds and the Wills Act by authorizing burning, canceling, tearing, obliterating, and destroying.[142] But there are many subtle variations. Some jurisdictions omit particular acts[143] and others add "defacing,"[144] "cutting,"[145] or "mutilat[ing]."[146]

Furthermore, three sub-rules have become increasingly important in this niche. First, courts distinguish between revocatory acts performed on original wills and those inflicted on mere copies. Because it can be useful to have more than one version of an instrument, lawyers once created "duplicate originals": multiple wills with ink

142 *See, e.g.*, ALA. CODE § 43-8-136(b) (2021); ALASKA STAT. § 13.12.507(a)(2) (2021); ARK. CODE ANN. § 28-25-109(a)(2) (2021); CAL. PROB. CODE § 6120(b) (West 2021); COLO. REV. STAT. § 15-11-507(1)(b) (2021); HAW. REV. STAT. § 560:2-507(a)(2) (2021); IDAHO CODE § 15-2-507(b) (2021); KAN. STAT. ANN. § 59-611 (2021); MASS. GEN. LAWS ch. 190B, § 2-507(a)(2) (2021); ME. STAT. tit. 18-C, § 2-506(1)(B) (2021); MICH. COMP. LAWS § 700.2507(1)(b) (2021); MINN. STAT. § 524.2-507(a)(2) (2021); MO. REV. STAT. § 474.400 (2021); MONT. CODE ANN. § 72-2-527(1)(b) (2021); NEV. REV. STAT. § 133.120(1)(a) (2019); N.H. REV. STAT. ANN. § 551:13(I) (2021); N.J. STAT. ANN. § 3B:3-13(b) (West 2021); N.M. STAT. ANN. § 45-2-507(A)(3) (2021); N.C. GEN. STAT. § 31-5.1(2) (2021); N.D. CENT. CODE § 30.1-08-07(1)(b) (2021); OKLA. STAT. tit. 84, § 101(2) (2021); OR. REV. STAT. § 112.285(2) (2019); 20 PA. CONS. STAT. § 2505(3) (2021); S.C. CODE ANN. § 62-2-506(a)(2) (2021); S.D. CODIFIED LAWS § 29A-2-507(a)(2) (2021); TENN. CODE ANN. § 32-1-201(3) (2021); UTAH CODE ANN. § 75-2-507(1)(b) (West 2021); VA. CODE ANN. § 64.2-410(A) (2021); VT. STAT. ANN. tit. 14, § 11(a)(B)(2) (2021); WASH. REV. CODE. § 11.12.040(1)(b) (2021); WIS. STAT. § 853.11(1m) (2021); WYO. STAT. ANN. § 2-6-117(a)(ii) (2021).

143 Because "destroying" did not appear in the Statute of Frauds, it is also absent from several revocation statutes. *See* ARIZ. REV. STAT. ANN. § 14-2507(A)(2) (2021); CONN. GEN. STAT. § 45a-257 (2021); D.C. CODE § 18-109(a)(2) (2021); 755 ILL. COMP. STAT. 5/4-7 (2021); MD. CODE ANN., EST. & TRUSTS § 4-105(b)(2) (West 2021); *cf.* OHIO REV. CODE ANN. § 2107.33(A) (West 2021) (omitting "burning"); DEL. CODE ANN. tit. 12, § 208 (2021) (only permitting "canceling"); TEX. EST. CODE ANN. § 253.002 (West 2021) ("destroying or canceling"); MISS. CODE. ANN. § 91-5-3 (2021) ("destroying, canceling, or obliterating"); 33 R.I. GEN. LAWS § 33-5-10 (2021) ("burning, tearing, or otherwise destroying"); IOWA CODE § 633.284 (2021) (allowing wills to be "canceled or destroyed" but adding that a cancellation "must be witnessed in the same manner as the making of a new will").

144 FLA. STAT. § 732.506 (2021).

145 KY. REV. STAT. ANN. § 394.080(3) (West 2021); W. VA. CODE § 41-1-7 (2021).

146 N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(2)(A) (McKinney 2021) ("other mutilation"); IND. CODE § 29-1-5-6 (2021) ("destroy[ing] or mutilat[ing]" the will).

signatures.[147] In the nineteenth century, courts held that duplicate originals are "performative," meaning that revoking one is sufficient even if other duplicate originals remain.[148] But as office technology evolved, attorneys began to rely on conformed copies (typewritten transcriptions of legal instruments) and carbon copies (impressions of a document made on a kind of tissue paper).[149] Eventually, the Xerox machine made it even easier to reproduce testamentary instruments.[150] The prevalence of these duplicate *non*-original wills raised a novel question: were copies performative, too?

In 1945, the Wisconsin Supreme Court held that only originals can be revoked in *In re Wehr's Will*.[151] William Wehr signed a will that gave his assets to his siblings, left the original with his lawyer, and kept a conformed copy.[152] William then married Alberta.[153] Under the law at the time, Alberta was not entitled to a share of William's estate as an accidentally omitted spouse, and the will effectively disinherited her.[154]

147 *See, e.g.*, Gushwa v. Hunt (*In re* Estate of Gushwa), 168 P.3d 147, 152 (N.M. Ct. App. 2007), *aff'd in part, rev'd in part*, 197 P.3d 1, 5–7 (N.M. 2008) (differentiating between duplicate originals and copies).

148 *See, e.g.*, Crossman v. Crossman, 95 N.Y. 145, 150 (1884) ("As each contains the will of the testator, a revocation of either is a revocation of his will, and thus revokes both."). The law generally remains unchanged today. *See, e.g.*, *In re* Estate of Fowler v. Perry, 681 N.E.2d 739, 742 (Ind. Ct. App. 1997) ("A duplicate will does not survive revocation of the original."); CAL. PROB. CODE § 6121 (West 2021) ("A will executed in duplicate . . . is revoked if one of the duplicates is burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it . . . ."); IDAHO CODE § 15-2-507(c) (2021) ("The revocation of a will executed in duplicate may be accomplished by revoking one (1) of the duplicates."). *But cf.* Estate of Koester v. First Mid-Ill. Bank & Tr., 975 N.E.2d 1115, 1125 (Ill. App. Ct. 2012) ("[I]f a testator has possession of both duplicate original wills and burns only one of them, the surviving duplicate original will has not been revoked" (emphasis omitted)).

149 *See, e.g.*, *In re* Karcher's Estate, 16 N.Y.S.2d 577, 578 (Sur. Ct. 1939) (involving the execution of an original will and a conformed copy); *Conformed Copy*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a "conformed copy" as "[a]n exact copy of a document bearing written explanations of things that were not or could not be copied, such as a note on the document indicating that it was signed by a person whose signature appears on the original"); Julia Lawlor, *Carbon Paper Still Messy, Still in Use*, N.Y. TIMES (Nov. 12, 1998), https://www.nytimes.com/1998/11/12/technology/carbon-paper-still-messy-still-in-use.html [https://perma.cc/6PAQ-TRNA] (discussing the rise and fall of carbon paper).

150 *See* Kate O'Connell, *Happy Birthday, Copy Machine! Happy Birthday, Copy Machine!*, NPR (Oct. 23, 2013), https://www.npr.org/2013/10/23/239241106/happy-birthday-copy-machine-happy-birthday-copy-machine [https://perma.cc/7LQY-D3AC] (describing the emergence of the commercial photocopier).

151 Wehr v. Wehr (*In re* Wehr's Will), 18 N.W.2d 709 (Wis. 1945).

152 *See id.* at 710, 715.

153 *See id.* at 710.

154 *See id.* at 714–15. Today, a spouse who marries a testator after the execution of the will is generally entitled to a share of the estate. *See, e.g.*, UNIF. PROB. CODE § 2-301(a) (UNIF. L. COMM'N 2019).

Nevertheless, after William passed away, the conformed copy of the will was found in his desk with its signature torn out.[155] Alberta argued that because William did not possess the original, his destruction of the copy should serve as a revocation.[156] The court disagreed, refusing to allow what it called "a symbolic revocation," and reasoning that treating copies as performative would open the door to fraud.[157] Since *Wehr*, courts have uniformly held that "a revocatory act performed on a mere []copy is legally ineffective."[158] I will call this the "copy rule."

Second, revocation statutes continue to restrict revocations by third parties. Most states mandate that other people perform a revocatory act "in the testator's presence and by the testator's direction."[159]

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155 *See Wehr*, 18 N.W.2d at 715.

156 *See id.*

157 *See id.* ("There is no proof that the desk was locked or that the papers were not open to numerous other persons."). The court also cited the text of the revocation statute, which requires testators to deface a "will," rather than a copy. *Id.* (quoting WIS. STAT. § 238.14 (1943) (current version at WIS. STAT. § 853.11(1m) (2021)).

158 Gushwa v. Hunt (*In re* Estate of Gushwa), 197 P.3d 1, 6 (N.M. 2008); *In re* D'Agostino's Will, 75 A.2d 913, 915 (N.J. Super. Ct. App. Div. 1950) (citing *Wehr* to hold that a revocation failed when the destroyed writing was "a conformed or unexecuted copy rather than a duplicate"); Brewer v. Brewer (*In re* Estate of Brewer), 35 N.E.3d 149, 153 (Ill. App. Ct. 2015) ("[A] revocatory act performed on any photocopy is legally ineffective."*); In re* Krieger, 595 N.Y.S.2d 272, 272 (N.Y. App. Div. 1993) ("[A] will cannot be revoked by the physical destruction of an unexecuted conformed copy . . . ."); *In re* Estate of Charitou, 595 N.Y.S.2d 308, 311 (Sur. Ct. 1993) ("Objectants [sic] have not cited, nor has the court found, a single decision in which the court permitted revocation by physical act to take place other than upon the testamentary instrument itself."); Gassmann v. Stanton (*In re* Estate of Stanton), 472 N.W.2d 741, 747 (N.D. 1991) ("[T]he destruction of an unexecuted or conformed copy is ineffectual as an act of revocation regardless of the testator's intent."); *cf. In re* Estate of Tolin, 622 So. 2d 988, 990–91 (Fla. 1993) (holding that "the testator's destruction of a copy of a codicil is not an effective revocation of the codicil" but fixing the testator's mistake using the equitable remedy of constructive trust); Lauermann v. Superior Ct., 26 Cal. Rptr. 3d 258, 262 (Cal. Ct. App. 2005) (holding that the phrase "duplicate original" does not include a photocopy (quoting CAL. PROB. CODE § 6124 (West 1991) (current version at CAL. PROB. CODE § 6124 (West 2021)))).

159 ARK. CODE ANN. § 28-25-109(a)(2) (2021); CAL. PROB. CODE § 6120(b)(2) (West 2021); COLO. REV. STAT. § 15-11-507(1)(b) (2021) (requiring "conscious" presence); CONN. GEN. STAT. § 45a-257 (2021) (skipping "and"); DEL. CODE ANN. tit. 12, § 208 (2021) (requiring "express" direction); D.C. CODE § 18-109(a)(2) (2021) (using pronouns for the testator and requiring "express direction and consent"); FLA. STAT. § 732.506 (2021) ("by" replaced with "at"); 755 ILL. COMP. STAT. 5/4-7(a)(2) (2021) (using pronouns for the testator and requiring "direction and consent"); KAN. STAT. ANN. § 59-611 (2021) (skipping "and" and using pronouns); KY. REV. STAT. ANN. § 394.080(3) (West 2021) (using pronouns); MD. CODE ANN., EST. & TRUSTS § 4-105(b)(2) (West 2020) (requiring "express direction and consent"); MISS. CODE ANN. § 91-5-3 (2021) (saying "in his or her presence, or by subsequent will, codicil, or declaration, in writing, made and executed"); MO. REV. STAT. § 474.400 (2021) (using pronouns and requiring "consent and direction"); NEV. REV. STAT. § 133.120(1)(a) (2019) (using "in the presence and at the direction of the testator"); N.H. REV. STAT. ANN. § 551:13(I) (2021) (switching the phrases' order and using "consent"

A handful of legislatures have imposed additional elements, such as requiring that third party revocations be authorized by the testator in writing[160] or overseen by two witnesses.[161] At the opposite pole, about a dozen jurisdictions have slightly softened this rule by permitting the revocatory act to occur in the testator's "conscious presence,"[162] which can be anywhere within the testator's zone of sight or hearing.[163]

Third, when a will was last in the testator's possession but cannot be found after her death, courts assume that she revoked it.[164] The

instead of "direction"); N.C. GEN. STAT. § 31-5.1(2) (2021); OKLA. STAT. tit. 84, § 101(2) (2021) (using pronouns); 33 R.I. GEN. LAWS § 33-5-10 (2021) (using pronouns); S.C. CODE ANN. § 62-2-506(a)(2) (2021); TENN. CODE ANN. § 32-1-201(3) (2021); TEX. EST. CODE ANN. § 253.002 (West 2021) (using "causing it to be destroyed or canceled in the testator's presence"); VA. CODE ANN. § 64.2-410(A) (2021) (using pronouns and switching the phrases' order); VT. STAT. ANN. tit. 14, § 11(a)(1)(B) (2021) (requiring "conscious presence"); W. VA. CODE § 41-1-7 (2021) (using pronouns); WYO. STAT. ANN. § 2-6-117(a)(ii) (2021) (using pronouns); *cf.* IOWA CODE § 633.284 (2021) (not permitting revocation by third parties under any circumstances); LA. CIV. CODE ANN. art. 1607(1) (2021) (not imposing a presence requirement).

160 *See* OHIO REV. CODE ANN. § 2107.33(A)(3) (West 2021).

161 *See* ALA. CODE § 43-8-136(b) (2021) ("If the physical act is by someone other than the testator, consent and direction of the testator must be proved by at least two witnesses."); OR. REV. STAT. § 112.285(2) (2019) (same effect); 20 PA. CONS. STAT. § 2505(3) (2021) (same effect); WASH. REV. CODE § 11.12.040(1)(b) (2021) (same effect); N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(2)(A)(ii) (McKinney 2021) (same and also requiring that neither of the witnesses "shall be the person who performed the act of revocation").

162 COLO. REV. STAT. § 15-11-507(b) (2021); HAW. REV. STAT. § 560:2-507(a)(2) (2021); MASS. GEN. LAWS ch. 190B, § 2-507(a)(2) (2021); ME. STAT. tit. 18-C, § 2-506(1)(B) (2021); MICH. COMP. LAWS § 700.2507(1)(b) (2021); MINN. STAT. § 524.2-507(a)(2) (2021); MONT. CODE ANN. § 72-2-527(1)(b) (2021); N.J. STAT. ANN. § 3B:3-13(b) (West 2021); N.M. STAT. ANN. § 45-2-507(A)(3) (2021); N.D. CENT. CODE § 30.1-08-07(1)(b) (2021); S.D. CODIFIED LAWS § 29A-2-507(a)(2) (2021); UTAH CODE ANN. § 75-2-507(1)(b) (West 2021); WIS. STAT. § 853.11(1m) (2021).

163 *See, e.g.*, Lehman v. Tracy (*In re* Tracy's Estate), 182 P.2d 336, 336–37 (Cal. Dist. Ct. App. 1947) (holding that testator revoked will by asking third parties to act in an adjoining room that was within earshot); Whitacre v. Crowe, 972 N.E.2d 659, 664 (Ohio Ct. App. 2012) (defining "conscious presence," OHIO REV. CODE ANN. § 2107.03 (West 2010), to encompass conduct that occurs "in the testator's range of vision or that the testator [can] hear and understand").

164 *See, e.g.*, Frakes v. Thieme (*In re* Estate of Frakes), 146 N.E.3d 801, 810–11 (Ill. App. Ct. 2020) ("[I]t has long been established, where a last will and testament, after its execution, is retained in the exclusive control of the decedent and upon his or her death cannot be found, a presumption arises that the decedent destroyed the will . . . ."); Golini v. Bolton (*In re* Estate of Arant), 482 S.E.2d 784, 788 (S.C. Ct. App. 1997) ("If the testator was known to have her last will in her possession or had ready access to it, and it cannot be found on her death, it is presumed, rebuttably, that she destroyed it and thereby revoked it."); *cf.* Kitta v. Geringer (*In re* Estate of Mecello), 633 N.W.2d 892, 902 (Neb. 2001) (declining to apply the presumption when "a person other than [the testator] who would benefit from the revocation of the 1996 will had access to the box which [the testator] had stated contained her will").

logic behind this so-called "presumption of *animo revocandi*"[165] is that a testamentary instrument that disappears was more likely destroyed than misplaced:

> Persons in general keep their wills in places of safety, or, as we here technically express it, "among their papers of moment and concern." . . . [I]f the instrument be not found in the repositories of the testator, where he had placed it, the common sense of the matter, prima facie, is that he himself destroyed it, meaning to revoke it.[166]

However, the proponent of a will can demonstrate otherwise through "statements [by] the decedent [that she] did not intend to revoke the will, and evidence of other individual[s'] access to the will prior to death."[167] If the presumption is rebutted, a court can admit a copy of the will to probate as proof of the terms of the original.[168]

2. Revoking by Writing

There are two basic approaches to written revocations. First, many states boast "broad" revocation statutes. These laws allow testators to rescind a testamentary instrument by creating either "a subsequent will" or a "writing" that is technically not a will but is "executed with the same formalities required for the execution of wills."[169] Second, a

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165 *See, e.g.*, Nordahl v. Jensen (*In re* Estate of Blikre), 934 N.W.2d 867, 872 (N.D. 2019).

166 *In re* Estate of Hartman, 563 P.2d 569, 571 (Mont. 1977) (quoting Colvin v. Fraser (1829) 162 Eng. Rep. 856, 877; 2 Hagg. Ecc. 266, 326); *see also* Feder v. Nation of Israel, 830 S.W.2d 449, 452 (Mo. Ct. App. 1992) ("A will is universally recognized as a sacred document. When the testator desires to dispose of his assets according to his will, a certain degree of care and caution in its preservation, is required.").

167 *Frakes*, 146 N.E.3d at 811. Some states hold that evidence must be "clear, satisfactory and convincing" to rebut the presumption. *In re* Davis' Will, 11 A.2d 233, 236 (N.J. 1940); *accord* Easley v. Ferguson (*In re* Estate of Cannon), 733 So. 2d 245, 248 (Miss. 1999); Briscoe v. Schneider (*In re* Estate of Penne), 775 P.2d 925, 927 (Or. Ct. App. 1989). In other jurisdictions, the standard is a mere preponderance. *See, e.g.*, *In re* Estate of Glover, 744 S.W.2d 939, 940 (Tex. 1988).

168 *See, e.g.*, *In re* Estate of Richard, 556 A.2d 1091, 1092 (Me. 1989) (affirming a probate court ruling that had "allowed the copy in place of the original 'to carry out the will (wishes and desires) of the deceased'"); W.W. THORNTON, A MONOGRAPH ON THE LAW OF LOST WILLS § 58 (Chicago, Callaghan & Co. 1890) (discussing the practice of judges validating "a draft[] or a duplicate" when the presumption is rebutted).

169 FLA. STAT. § 732.505(2) (2021); *see also* DEL. CODE ANN. tit. 12, § 208 (2021); D.C. CODE § 18-109(a)(1) (2021); GA. CODE ANN. § 53-4-42(b) (2021); 755 ILL. COMP. STAT. ANN. 5/4-7 (2021); IND. CODE § 29-1-5-6 (2021); KAN. STAT. ANN. § 59-611 (2021); KY. REV. STAT. ANN. § 394.080(1)–(2) (West 2021); LA. CIV. CODE ANN. art. 1607(2) (2021); MISS. CODE. ANN. § 91-5-3 (2021); N.Y. EST. POWERS & TRUSTS LAW § 3-4.1(a)(1)(B) (McKinney 2021); N.C. GEN. STAT. § 31-5.1(1) (2021); OHIO REV. CODE ANN. § 2107.33(4)–(5) (West 2021); OKLA. STAT. tit. 84, § 101(1) (2021); 20 PA. CONS. STAT. § 2505 (2021); 33 R.I. GEN.

handful of jurisdictions have "narrow" revocation legislation. They limit written revocations to full-fledged "will[s] which revoke[] the prior will."[170]

The difference between these regimes rears its head when a testator attempts to execute what I call an "anti-will": a writing that satisfies the execution formalities but merely tries to override a previous will. Anti-wills differ from conventional wills in two ways. First, according to some definitions, a will must bequeath the testator's property.[171] But anti-wills do not convey assets to anyone.[172] Second, wills only kick in after the testator dies, but anti-wills purport to take effect upon execution.[173]

It would be hard to exaggerate the confusion that anti-wills have engendered. Recall that broad statutes allow revocations by a "subsequent will" and a "*writing*" executed with the formalities of a will.[174] Thus, these laws permit revocation by a document that does not meet the technical definition of a "will."[175] Indeed, courts in jurisdictions with broad statutes have enforced revocations by writings "incapable of operating as a will,"[176] such as a "blank form of a will with some of the spaces filled in,"[177] a questionnaire used to prepare for a meeting with an estate planner,[178] and a contract between divorcing

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LAWS § 33-5-10 (2021); TENN. CODE ANN. § 32-1-201(1)–(2) (2021); TEX. EST. CODE ANN. § 253.002 (West 2021); VA. CODE ANN. § 64.2-410(B) (2021); W. VA. CODE § 41-1-7 (2021).

170 ALA. CODE § 43-8-136(a) (2021); *see also* ALASKA STAT. § 13.12.507(a)(1) (2021); ARIZ. REV. STAT. ANN. § 14-2507 (2021); ARK. CODE ANN. § 28-25-109 (2021); CONN. GEN. STAT. § 45a-257 (2021); HAW. REV. STAT. § 560:2-507 (2021); IDAHO CODE § 15-2-507 (2021); IOWA CODE ANN. § 633.284 (2021); MD. CODE ANN., EST. & TRUSTS § 4-105 (West 2021); MASS. GEN. LAWS ch. 190B, § 2-507 (2021); ME. STAT. tit. 18-C, § 2-506 (2021); MICH. COMP. LAWS § 700.2507 (2021); MINN. STAT. § 524.2-507 (2021); MONT. CODE ANN. § 72-2-527 (2021); N.J. STAT. ANN. § 3B:3-13 (West 2021); NEV. REV. STAT. § 133.120 (2019); N.D. CENT. CODE § 30.1-08-07 (2021); OR. REV. STAT. § 112.285 (2019); S.C. CODE ANN. § 62-2-506 (2021); S.D. CODIFIED LAWS § 29A-2-507 (2021); UTAH CODE ANN. § 75-2-507 (West 2021); VT. STAT. ANN. tit. 14, § 11 (2021); WASH. REV. CODE § 11.12.040 (2021); WIS. STAT. § 853.11 (2021); WYO. STAT. ANN. § 2-6-117 (2021).

171 *See, e.g.*, Holmden v. Craig, 31 Ohio Cir. Dec. 461, 467 (1909) ("[A] will always disposes of property."), *aff'd*, 94 N.E. 1108 (Ohio 1910) (per curiam); *In re* Sherman's Estate, 3 Pa. D. & C.2d 677, 680 (Pa. Orphans' Ct. 1955) (holding that a document was not a will where "[t]here is no disposition of property anywhere in the paper").

172 *See, e.g.*, Kiknadze v. Elis, No. 1166, 2020 WL 4937994, at *5 (Md. Ct. Spec. App. Aug. 24, 2020).

173 *See, e.g.*, Brown v. Brown, 21 So. 3d 1, 6 (Ala. Civ. App. 2009).

174 *See supra* text accompanying note 169 (emphasis added).

175 These non-wills are sometimes called "nontestamentary writings." *See* 79 AM. JUR. 2D *Wills* § 468, Westlaw (database updated Aug. 2021).

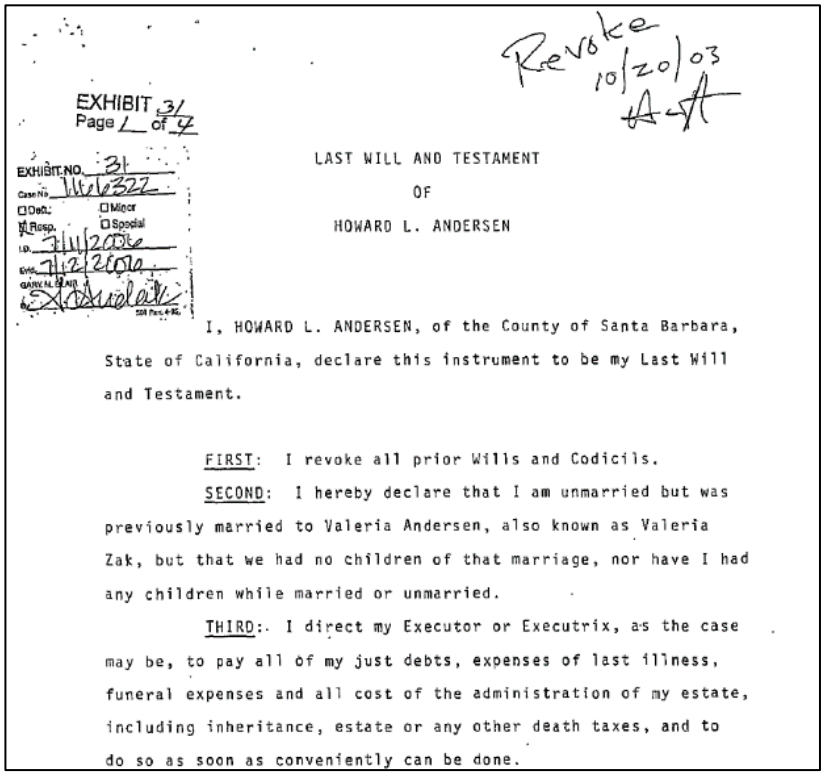
176 *In re* Estate of Stege, 293 N.Y.S. 856, 866 (Sur. Ct. 1937).

177 *Id.* at 860.

178 *In re* Estate of Diana, No. 98 CA 104, 1999 WL 436732, at *1 (Ohio Ct. App. June 21, 1999).

spouses.[179] In fact, in holographic states, testators can revoke by handwriting simple notations such as "cancelled,"[180] "revoke[d],"[181] or "null and void"[182] on their will and signing or initialing below.

FIGURE 4: LAST WILL AND TESTAMENT OF HOWARD L. ANDERSEN[183]



Revoke
10/20/03

EXHIBIT 31
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EXHIBIT NO. 31
Case No. 1116322
☐ Def. ☐ Minor
☒ Resp. ☐ Special
I.D. 7/11/2006
Rptr. 7/12/2006
GARY M. HUNT

LAST WILL AND TESTAMENT
OF
HOWARD L. ANDERSEN

I, HOWARD L. ANDERSEN, of the County of Santa Barbara, State of California, declare this instrument to be my Last Will and Testament.

FIRST: I revoke all prior Wills and Codicils.

SECOND: I hereby declare that I am unmarried but was previously married to Valeria Andersen, also known as Valeria Zak, but that we had no children of that marriage, nor have I had any children while married or unmarried.

THIRD:. I direct my Executor or Executrix, as the case may be, to pay all of my just debts, expenses of last illness, funeral expenses and all cost of the administration of my estate, including inheritance, estate or any other death taxes, and to do so as soon as conveniently can be done.

Conversely, courts in states with narrow revocation statutes are divided about the permissibility of anti-wills. Although these laws require a "will" to revoke a will, some courts have opined that the legislature did not use this word "in its technical sense," but rather merely meant "a writing executed with the solemnity of a will."[184]

179 Dunsworth v. Dunsworth, 81 P.2d 9, 15 (Kan. 1938).

180 McCarthy v. Bank of Cal. (*In re* Estate of Langan), 668 P.2d 481, 482 (Or. Ct. App. 1983).

181 Rogers v. Andersen (*In re* Estate of Andersen), No. B194657, 2008 WL 116430, at *1 (Cal. Ct. App. Jan. 14, 2008).

182 *In re* Kehr's Estate, 95 A.2d 647, 648 (Pa. 1953).

183 Appellant's Opening Brief at Exhibit 31 p. 1, *In re Estate of Andersen*, 2008 WL 116430 (No. B194657), 2007 WL 2273771 at *63.

184 *In re* Peirce's Estate, 115 P. 835, 837 (Wash. 1911); *see also In re* Heazle's Estate, 240 P.2d 821, 822–23 (Idaho 1952) (rejecting the argument that a document that "makes no

However, other judges read the revocation statute literally and disallow anti-wills.[185] For instance, in *Brown v. Brown*, R.B. Brown executed a will in 1957.[186] In 2006, Brown signed a writing that declared his intent to "revoke all last wills and testaments heretofore made by me; it being my intention and desire to die without a will."[187] An Alabama appellate court held that Brown's attempt to make an anti-will did not comply with the state's narrow revocation statute because it was not a "will":

> By its terms, the revocation document was intended to take effect immediately, not upon the death of the decedent. Moreover, the revocation document did not determine the disposition of the decedent's property after his death. Because the revocation document is not a "subsequent will," we conclude that that document did not meet the statutory requirements to revoke the 1957 will.[188]

Thus, Brown's purported anti-will accomplished nothing.[189]

3. Revoking by Cancellation

The revocatory method of "cancellation" has also proven to be problematic. Attempted cancellations can take two forms. First, the testator might draw lines through the language of the will. Cases involving this method are relatively simple: they hinge on "whether the evidence sustains the conclusion that the cancellation was done by the testator with the intent and purpose of revoking . . . the will."[190] But

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disposition of property and appoints no representative and is uncertain and indefinite . . . fails as a will and therefore also fails as a revocation").

185 *See, e.g.*, Kiknadze v. Elis, No. 1166, 2020 WL 4937994, at *5 (Md. Ct. Spec. App. Aug. 24, 2020) (refusing to enforce attempted anti-will). Two recent cases in this camp come from New Mexico. *See, e.g.*, Gushwa v. Hunt (*In re* Estate of Gushwa), 197 P.3d 1, 3 (N.M. 2008) ("[O]ur Probate Code, unlike that of other states, does not allow for revocation of a will by any 'other writing.'" (citing N.M. STAT. ANN. § 45-2-507(A)(1) (1993) (current version at N.M. STAT. ANN. § 45-2-507(A)(1) (2021)))); Sanchez v. Martinez (*In re* Estate of Martinez), 985 P.2d 1230, 1232 (N.M. Ct. App. 1999) (reasoning that the revocation statute "contains no provision that permits a testator to revoke a will by execution of a nontestamentary document"). When they were decided, the state's revocation statute "require[d] revocation by a subsequent will" and did not allow revocation "by 'any other writing.'" *Gushwa*, 197 P.3d at 4. However, the legislature later amended the law to authorize revocation "by executing another subsequent document" that complies with the execution formalities. 2011 N.M. Laws ch. 124 § 23; N.M. STAT. ANN. § 45-2-507(A)(2) (2021). Thus, these opinions are no longer good law.

186 21 So. 3d 1, 2 (Ala. Civ. App. 2009).

187 *Id.* The opinion does not say whether the writing was attested. However, the fact that the court treated it as an anti-will suggests that it met the execution formalities.

188 *Id.* at 6.

189 *See id.*

190 Train v. Sherer (*In re* Martens' Estate), 74 P.2d 238, 239 (Cal. 1937).

second, a testator might write words of cancellation, such as "void," on the will. This technique has spawned "much . . . litigation."[191]

Unfortunately, words of cancellation straddle the boundary between revocation by act and revocation by writing. On the one hand, words of cancellation might be an attempt to annul an instrument by defacing it—a slightly more elaborate version of crossing out its text. Seen this way, scrawling something like "I revoke" should, in fact, revoke the will, just like tearing it, burning it, or drawing a large "X" would. But on the other hand, it is equally possible to conceptualize words of cancellation as an attempt to make an anti-will. To be valid under the equal dignity principle, words of cancellation would thus need to satisfy the execution formalities.

Most jurisdictions distinguish between these options by examining whether the words of cancellation touch the language of the will. If the writing intersects with the instrument's text, courts deem it to be a revocation by the act of cancellation. As the Georgia Supreme Court explained in 1902, "if any material part of the will is obliterated or marked, or words indicating an intention to revoke written across the same, . . . the instrument will be said to have been revoked."[192] Alternatively, when words of cancellation occupy a blank part of the will, judges treat them as an attempt to revoke by anti-will.[193] In turn, this move is usually fatal to the testator's intent because words of cancellation are rarely signed by witnesses.[194]

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191 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. g (AM. L. INST. 1999).

192 Howard v. Hunter, 41 S.E. 638, 638 (Ga. 1902); *see also* Note, *Wills—Revocation by Cancellation*, 31 YALE L.J. 892, 893 (1922) ("[A] writing upon the back or margin of a will has been held not to be a revocation within the contemplation of the statute, upon the theory that no material part of the will has been cancelled.").

193 *See, e.g.*, Dowling v. Gilliland, 122 N.E. 70, 72 (Ill. 1919) ("It could not be said that a will is canceled in the slighest [sic] degree by reason of marks or scratches made upon blank places on the will."); Yont v. Eads, 57 N.E.2d 531, 532 (Mass. 1944) ("[T]he prevailing view requires some defacement of the words of the will."); *In re* Danielly's Estate, 81 A.2d 519, 520 (N.J. Camden County Ct. 1951) ("The great weight of authority is to the effect that the mere writing upon a will which does not in any wise physically obliterate or cancel the same is insufficient to work a revocation of the will even though the writing may express an intention to revoke."); *In re* Akers' Will, 77 N.Y.S. 643, 646 (N.Y. App. Div. 1902), *aff'd*, 66 N.E. 1103 (N.Y. 1903) ("There can be no such thing as a cancellation of an instrument, either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated."); Lewis v. Lewis, 2 Watts & Serg. 455, 457 (Pa. 1841) ("It cannot be pretended that writing the word 'obsolete' [in the margins] can be considered as a burning, cancelling, obliterating or destroying the will."); Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934) ("[R]evocation of a will by cancellation . . . contemplates marks or lines across the written parts of the instrument, or a physical defacement, or some mutilation of the writing itself, with the intent to revoke.").

194 *See, e.g.*, Taft v. Zack, 830 So. 2d 881, 882–83 (Fla. Dist. Ct. App. 2002) (determining that testator did not revoke will when she lined out the name of her husband and wrote the

4. Revoking Electronic Wills

As noted, digital wills are likely to become a major force in estate planning.[195] However, as this section explains, prescribing revocation formalities for e-wills has proven to be challenging.

Defining how a testator can revoke an e-will by act is a mind-bending problem. Some of the conduct listed in the revocation statutes, such a burning and tearing the document, does not apply to digital files. This issue is so thorny that the authors of the UEWA seriously "considered not permitting revocation by physical act" and only relented because "many people would assume that they could revoke their wills by deleting them."[196] Ultimately, the UEWA chose to blandly announce that digital wills can be voided by "a physical act," if the testator's intent to revoke can be established by a preponderance of the evidence.[197] The comments to the model law elaborate that revocatory conduct "could include deleting a file with the click of a mouse or smashing a flash drive with a hammer."[198]

In a testament to the difficulty of regulating revocation of e-wills by act, each industry-drafted statute offers its own take on the issue. Arizona weaves digital wills into its general revocation statute by stating that the testator or another person in the testator's presence and by the testator's direction may perform a "'revocatory act on the will,' [which] includes burning, tearing, canceling, obliterating, *rendering*

word "void" and her initials next to the makings); *Yont*, 57 N.E.2d at 532 ("Failing as a cancellation, the writing had no revocatory effect because it was not 'signed, attested and subscribed in the same manner as a will' as required by the statute."); *Akers' Will*, 77 N.Y.S. at 647 ("Where a will is sought to be revoked solely by writing, it must conform in that respect to the requirement of the statute; and, failing in that, it does not revoke the will, even though there may be a clear intention so to do."); *Lewis*, 2 Watts & Serg. at 458 ("[T]his was not a revocation for want of a signing by the testator."); *Thompson*, 175 S.E. at 750 ("The attempted revocation is ineffectual, because testatrix intended to revoke her will by subsequent writings not executed as required by statute . . . ."); *In re* Ladd, 18 N.W. 734, 734–35 (Wis. 1884) (refusing to enforce attempted revocation when wrote "I revoke this will" on blank page and added her signature because the words were "never attested or subscribed by any witness, much less by two witnesses").

195 *See supra* text accompanying notes 99–109.

196 Memorandum from Suzanne Brown Walsh, Chair, Unif. L. Comm'n, Turney P. Berry, Vice Chair, Unif. L. Comm'n, & Susan N. Gary, Reporter, Unif. L. Comm'n, to Unif. L. Comm'n 2 (May 30, 2019) (available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=134c0ae2-a0ae-2752-1497-f47d8c1d9d75&forceDialog=0 [https://perma.cc/Q3JN-LBKK]).

197 UEWA, *supra* note 28, § 7(b)(2); N.D. CENT. CODE § 30.1-37-05(2)(b) (2021); UTAH CODE ANN. § 75-2-1407(2)(b) (West 2021); WASH. REV. CODE §§ 11.12.400–11.12.491 (2021); *cf.* COLO. REV. STAT. § 15-12-1507(2)(b) (2020) (requiring clear and convincing evidence for revocations by act) (repealed 2021).

198 UEWA, *supra* note 28, § 7 cmt. (Physical Act Revocation).

unreadable or destroying the will."[199] Florida sets a high bar for proving revocation, declaring that an e-will "is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by deleting, canceling, rendering unreadable, or obliterating [the will] . . . as proved by clear and convincing evidence."[200] Indiana provides that a testator who is not storing an e-will with a custodian can revoke "by permanently deleting each copy of the electronic record associated with the electronic will in the testator's possession or control or by rendering the electronic record for the associated electronic will unreadable and nonretrievable."[201] Finally, Nevada specifies that "[a]n electronic will may only be revoked by: . . . [c]ancelling [sic], rendering unreadable or obliterating the will with the intention of revoking it, by . . . [t]he testator or a person in the presence and at the direction of the testator."[202] Thus, although these laws share the common thread of authorizing revocation by making files "unreadable," they also diverge on topics like whether to recognize revocation by cancellation and the appropriate standard of proof.

Digital will legislation is more uniform on the subject of revocation by writing. Each statute preserves the equal dignity principle by decreeing that a testator can only invalidate an electronic will "[b]y executing a subsequent will."[203] Yet some laws also import the equal dignity principle into a new context. Recall that industry-drafted laws encourage testators to store their wills with qualified custodians.[204] Thus, testators who use these services cannot revoke their digital wills themselves. In turn, this raises questions about the degree of formality that should be required when a client communicates her desire to revoke to a custodian. On the one hand, it seems perverse to insist that a testator execute a solemn document just to set the wheels of revocation in motion. But on the other hand, traditional law has never let third parties revoke a will outside of the testator's presence,[205] and permitting custodians to honor informal expressions of intent might open the door to fraud. Thus, in Arizona and Nevada, a custodian is only bound by a directive to revoke that is

199 ARIZ. REV. STAT. ANN. § 14-2507(A)(2) (2021) (emphasis added). Conversely, Maryland's e-will statute does not mention revocation at all. *See* H.B. 1261, 2021 Leg., Reg. Sess. (Md. 2021).

200 FLA. STAT. § 732.506 (2021).

201 IND. CODE § 29-1-21-8(c) (2021).

202 NEV. REV. STAT. § 133.120(2) (2019).

203 ARIZ. REV. STAT. ANN. § 14-2507(A)(1) (2021); *see also* FLA. STAT. § 732.505(2) (2021); IND. CODE § 29-1-21-8(b) (2021); NEV. REV. STAT. § 133.120(2)(a) (2019); UTAH CODE ANN. § 75-2-1407(2)(a) (West 2021); UEWA, *supra* note 28, at § 7(b)(1).

204 *See supra* text accompanying notes 105–106.

205 *See supra* text accompanying notes 159–163.

embodied "in a writing executed with the same formalities required for the execution of an electronic will."[206]

* * *

From the copy rule to electronic will statutes, the American legal system makes it surprisingly difficult to revoke a will. This next Part argues that this hidden pocket of formalism is problematic.

III. CRITIQUING THE REVOCATION FORMALITIES

Although scholars have catalogued the advantages and drawbacks of the Wills Act and holograph laws,[207] the revocation formalities have largely escaped notice. This Part takes up the gauntlet. It reveals that some revocation requirements serve important goals, but many do not. Even worse, these bright line rules routinely thwart a testator's intent.

A. The Copy Rule

Arguably, the copy rule advances each of the four functions of formalities.[208] First, it plays an evidentiary role. As noted, reproductions of wills are pervasive.[209] Indeed, "[a] testator may make several photocopies of his or her will, perhaps to send to relatives or other beneficiaries, or to retain for the purpose of drafting possible changes."[210] Thus, as a New York probate judge reasoned, treating these copies as potentially revocable would sow confusion about the testator's intent:

> [I]n cases where the executed original, but not all of the photocopies, can be found after decedent's death, it might be

206 ARIZ. REV. STAT. ANN. § 14-2522(C) (2021); *see also* NEV. REV. STAT. § 133.330(2)(e) (2019). Conversely, Indiana merely requires testators to inform these entities "in writing." IND. CODE § 29-1-21-8(e) (2021).

207 *See supra* text accompanying notes 16–26.

208 Judges have also grounded the copy rule in the text of revocation statutes. These laws usually authorize revocation by "burning, tearing, canceling, obliterating, or destroying *the will*." UNIF. PROB. CODE § 2-507 (UNIF. L. COMM'N 2019) (emphasis added). In turn, the italicized words demonstrate that "the document destroyed must be the original." *In re* Estate of Tolin, 622 So. 2d 988, 990 (Fla. 1993); *see also* Gushwa v. Hunt (*In re* Estate of Gushwa), 197 P.3d 1, 6 (N.M. 2008) ("[O]ur Probate Code mandates that a revocatory act be performed 'on the will.'") (quoting N.M. STAT. ANN. § 45-2-507(A)(2) (1993) (current version at N.M. STAT. ANN. § 45-2-507(A)(3) (2021)); Wehr v. Wehr (*In re* Wehr's Will), 18 N.W.2d 709, 715 (Wis. 1945) ("There is no room in the language of [the revocation statute] for construction broad enough to include a copy of the will."); *see also supra* text accompanying note 158. Because my goal is to persuade lawmakers to amend their revocation legislation, I will not dwell on this issue.

209 *See supra* text accompanying notes 147–50.

210 Lauermann v. Superior Ct., 26 Cal. Rptr. 3d 258, 261–62 (Cal. Ct. App. 2005).

> contended that one or more of the photocopies had been destroyed by decedent with the intention to revoke the will. Of course, in all of these cases, the party whose testamentary intentions are at stake and whose acts are in question is the maker of the will whose lips have been sealed for eternity.[211]

Second, the copy rule seems consistent with the ritual function. A photocopy is usually a pale substitute for the thick paper and "wet" signatures of the real thing.[212] Accordingly, there is a plausible argument that deeming copies to be performative would not "impress upon the mind of the testator the solemnity of the occasion."[213] Third, the copy rule can be justified on protective grounds. Because people usually keep their original will in a safe place, it is easier for wrongdoers to obtain a copy. By making these stray documents irrelevant, the copy rule limits the risk of fraud.[214] Fourth, the copy rule has a channeling dimension. It conserves judicial resources by making revocation cases pivot on the clear-cut issue of the physical appearance of a single document.[215]

But these benefits come at a hefty price. Under the copy rule, it does not matter how emphatically the testator defaced the document, how potent the evidence is of her intent, or even whether she was simply following her lawyer's instructions. One decedent took his counsel's advice and "wrote 'Revoked' on each page of th[e] copy."[216] Another crossed out the copy's text, wrote that "[t]he Will . . . is void,"

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211 *In re* Estate of Charitou, 595 N.Y.S.2d 308, 311 (Sur. Ct. 1993); *see also Gushwa*, 197 P.3d at 6 ("Photocopies can be readily produced and the existence of multiple copies of a will can engender confusion, especially when the issue is whether the will has been validly revoked.").

212 *See Lauermann*, 26 Cal. Rptr. 3d at 262 ("[N]ot only are photocopies ubiquitous, but the simplicity of their creation stands in stark contrast to the considerable formalities surrounding the execution of a will.").

213 *Charitou*, 595 N.Y.S.2d at 310 (quoting Coffed v. Waley (*In re* Estate of Coffed), 387 N.E.2d 1209, 1211 (N.Y. 1979)).

214 For instance, as an Oklahoma appellate court observed, originals are tamper-resistant in a way that copies are not:

> [A]n individual, using common office computers, scanners, and software, could create an unauthorized will, scan and reproduce an authentic signature from another document, and merge the authentic signature and the bogus document. After making a photocopy of the bogus document, the final result would be indistinguishable from a photocopy of an authentic document. . . . [T]he statutory requirement of an original signature on reproduced documents would serve as a safeguard against such an acts [sic].

Goodwin v. Goodwin (*In re* Estate of Goodwin), 18 P.3d 373, 376 n.3 (Okla. Civ. App. 2000).

215 *See In re* Estate of Sullivan, 868 N.W.2d 750, 753 (Minn. Ct. App. 2015) (reasoning that the copy rule helps "avoid substantial litigation based on potentially fraudulent changes on photocopies").

216 *Gushwa*, 197 P.3d at 2.

and added both her initials and a signature.[217] And yet another went to even greater lengths after scheduling a meeting with her estate planner:

> Prior to the appointment, decedent had written the word "Void" at the top of the first page of the photocopy. During the meeting with counsel, decedent wrote the word "Cancelled" across the first page of the photocopy under which notation she wrote the date and her initials. Decedent then cut her signature out of the second page of the photocopy. The latter two acts were performed in the presence of decedent's niece, her husband, and two attorneys.[218]

None of these attempted revocations survived the copy rule.[219]

B. Presence

"Presence" has long been one of the most divisive elements of the Wills Act. In most states, the testator must sign or acknowledge her will before two witnesses who are present at the same time.[220] Commentators have criticized this formality's potential for generating cases in which one witness looked away at the key moment or left "the room to powder her nose before the other has completed signing."[221] Yet there are plausible evidentiary, ritual, and protective justifications for this aspect of the statute. As the California Supreme Court reasoned, by making the testator's acknowledgement of the will "quasi public" and "solemn," there is "less likelihood [of] fraud . . . and more likelihood of an accurate memory."[222]

Conversely, the rationale for the rule that a third party must revoke a will in the testator's presence is less well-articulated. Some courts have gestured towards the idea that it plays the same evidentiary

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217 *Sullivan*, 868 N.W.2d at 751 (first alteration in original).

218 *Charitou*, 595 N.Y.S.2d at 309; *cf.* Gassman v. Stanton (*In re* Estate of Stanton), 472 N.W.2d 741, 746–47 (N.D. 1991) (featuring a testator who crumpled a certified copy of the will that a third party presented to him and then threw it away).

219 *See Gushwa*, 197 P.3d at 6–7; *Sullivan*, 868 N.W.2d at 753; *Charitou*, 595 N.Y.S.2d at 311–12. Admittedly, *Gushwa* remanded the matter for the trial court to consider whether to impose a constructive trust on the assets for the benefit of the people who would inherit had the will been revoked. *See Gushwa*, 197 P.3d at 7. I discuss this remedy below in Section IV.A.

220 *See supra* text accompanying note 59.

221 John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 9 (2012).

222 *In re* Emart's Estate, 165 P. 707, 708 (Cal. 1917); COMM'RS APPOINTED TO INQUIRE INTO THE L. OF ENG. RESPECTING REAL PROP., COPY OF THE FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY, 1833, HC, at 18 (remarking that "if the transaction must be witnessed by both witnesses at one time, they must then agree in the same story, and perjury will be more easily detected by cross-examination").

role as the Wills Act's presence formality.[223] But that is not persuasive. In the execution context, simultaneous presence helps sear the event into the witness' minds, "thus enabling them to testify with greater assurance that the will was intended to be operative."[224] But insisting that a third party revoke near the testator does not generate proof of anything. Indeed, by the time of any trial, the testator will be deceased and thus unable to testify.

Another view is that presence deters unintentional or counterfeit revocations.[225] For instance, in *Estate of Haugk*, the Wisconsin Supreme Court refused to enforce a revocation that happened outside of the testator's presence.[226] Marie Haugk, who was married to Horst Haugk, hired a lawyer to update her will.[227] Shortly after Marie met with the estate planner, but before she had signed the new will, she asked Horst to go to the incinerator in the basement of their building and burn her old will.[228] Because Marie's heart condition prevented her from walking up or down stairs, she remained behind in their apartment.[229] The court opined that deeming the will to be void would open the door to mistakes and wrongdoing:

> The requirement that a will must be destroyed in the "testator's presence" must be strictly construed. This strict construction is necessary so as to prevent the inadvertent or more importantly the fraudulent destruction of a will contrary to the testator's intentions. Each element recited in the revocation statute must be established by adequate evidence as this court will not adopt a position that will promote either intestacy or the fraudulent destruction of an individual's last will and testament.[230]

But this logic also rings hollow. Demanding that a third party revoke in the testator's presence is not necessary to prevent the "inadvertent or . . . fraudulent destruction of a will."[231] Revocation law patrols this border through a different formality: the requirement that

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223 *See, e.g.*, Reiter v. Carroll, 198 S.W.2d 163, 165 (Ark. 1946) (reasoning that the revocation formalities are designed to bar false oral testimony); Campbell v. Griefen (*In re* Mitchell's Estate), 27 N.E.2d 606, 609 (Ill. App. Ct. 1940) (implying that the revocation formalities serve the same purposes as the execution formalities); *In re* McGill's Will, 128 N.E. 194, 196 (N.Y. 1920) (same).

224 Gulliver & Tilson, *supra* note 16, at 8–9.

225 *See Mitchell's Estate*, 27 N.E.2d at 609 ("All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will . . . .") (quoting Walker v. Walker, 174 N.E. 541, 543 (Ill. 1930)).

226 *See* Lutheran Child.'s Friend Soc'y v. Haugk (*In re* Estate of Haugk), 280 N.W.2d 684, 690–91 (Wis. 1979).

227 *Id.* at 685–86.

228 *Id.* at 686.

229 *Id.*

230 *Id.* at 690.

231 *Id.*

a third party revoke "at the testator's direction."[232] If a clumsy person drops a will into the sea or a wrongdoer annihilates the document in secret, there has been no revocation. The reason for this sensible outcome is simple: the testator never "direct[ed]" the individual to revoke. It does not matter whether these acts take place inches from the testator or miles away.

The best explanation for the presence doctrine in the revocation setting is ritual. As the Kentucky Supreme Court put it, the rule "induce[s] care and deliberation."[233] Indeed, forcing testators to personally experience the destruction of the will might jolt them into pondering the consequences of their choice. And it is possible that they might be moved to reconsider their intent to revoke upon seeing the lit blowtorch or the scissors hovering over the page.

Nevertheless, this meager virtue pales to the vices of the presence requirement. Just as with the Wills Act and witnesses, testators and parties to whom they have delegated the task of revocation are often in the wrong place at the wrong time.[234] Surprisingly, many of these cases involve people who ask their lawyers to revoke.[235] Consider *Estate of Boote*.[236] Joseph Boote executed a codicil to his will that included his

232 *Id.* at 687; *see also, e.g.*, Stainback v. West (*In re* Arbuckle's Estate), 220 P.2d 950, 953 (Cal. Dist. Ct. App. 1950) (determining that a will was not revoked when the testator' lawyer destroyed it "in the absence of decedent, without her direction and without her knowledge or consent").

233 Miller v. Harrell, 194 S.W. 782, 785 (Ky. 1917).

234 *See, e.g.*, *In re* Estate of Bancker, 232 So. 2d 431, 431 (Fla. Dist. Ct. App. 1970) (refusing to find revocation when decedent's family "went into another room, removed the will from a wall safe and destroyed it by tearing it into pieces and flushing them down a toilet"); Gross v. Gross (*In re* Estate of Gross), 144 So. 2d 861, 861 (Fla. Dist. Ct. App. 1962) (holding that no revocation occurred when "[t]he original of the will was destroyed in Birmingham, Alabama, by a person acting at the direction of the testator who was then in Miami, Florida"); *Miller*, 194 S.W. at 785 (concluding that a third party's destruction of the will outside of the presence of the testator was ineffective even though the testator later ratified the decision); *In re* Hughes' Will, 114 N.Y.S. 929, 929 (Sur. Ct. 1908) (finding that will remained valid when third parties mutilated the will outside of the testator's presence); Dower v. Seeds, 28 W. Va. 113, 138 (1886) (deciding that there was no revocation when the will "was not burned in the room, where [the testator] was or had been, but in a different room, in which no one was").

235 *See In re* Estate of O'Donnell, 803 S.W.2d 530, 532 (Ark. 1991) (lawyer ripped the will "into two pieces pursuant to the decedent's directions which came over the telephone"), *overruled on other grounds by* Edmundson v. Estate of Fountain, 189 S.W.3d 427 (Ark. 2004); Campbell v. Griefen (*In re* Mitchell's Estate), 27 N.E.2d 606, 607 (Ill. App. Ct. 1940) (featuring a lawyer who threw away the testator's will after receiving a letter from her asking him to destroy it); *In re* Estate of Kraus, 385 N.Y.S.2d 933, 934 (Sur. Ct. 1976) (same); *cf.* Harrison v. Bird, 621 So. 2d 972, 973 (Ala. 1993) (lawyer failed to revoke when he tore will in his office not in the presence of the testator, but because he mailed the pieces to her and they could not be found at her death, they were presumed revoked).

236 *In re* Estate of Boote, 198 S.W.3d 699 (Tenn. Ct. App. 2005).

new wife in addition to his kids.[237] His family learned about his choice and began to squabble.[238] As a result, Joseph visited his counsel and asked him to destroy the codicil.[239] The attorney explained that he would need to retrieve the document from his office safe, but Joseph, who was pressed for time, responded "[j]ust tear the damn thing up" and left.[240] Later, the lawyer ran the codicil through a paper shredder.[241] A Tennessee appellate court held that the codicil remained valid.[242] As the judges explained, the instrument had been "destroyed 'by the testator's direction' but not 'in the testator's presence.'"[243]

C. Equal Dignity

At first blush, the equal dignity principle seems to make sense. If a testator must step inside the prophylactic bubble of the formalities to make a will, then she should need to do the same to un-make a will. This stance ensures that revocations boast all the virtues of the Wills Act, from preserving the testator's intent in writing to creating witnesses who can testify about the document should a dispute arise.[244] Even in holograph jurisdictions, insisting that the revocation be in the decedent's handwriting provides valuable proof of authenticity. Therefore, imposing the same norms on execution and revocation gives the law a tidy symmetry.

But on closer inspection, the equal dignity principle glosses over meaningful divergences between execution and revocation. For starters, the legal system needs to be especially sensitive to administrative costs when formulating execution rules. After all, millions of wills pass through probate courts each year.[245] Arguably, this tips the scales toward requiring strict compliance with the execution formalities.[246]

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237 *See id.* at 704.

238 *Id.* at 704–05.

239 *Id.* at 705.

240 *Id.*

241 *Id.* at 706.

242 *See id.* at 723–24.

243 *Id.* at 723 (quoting TENN. CODE ANN. § 32-1-201(3) (2001) (current version at TENN. CODE ANN. § 32-1-201(3) (2021))).

244 *See, e.g.*, *In re* McGill's Will, 128 N.E. 194, 196 (N.Y. 1920) (opining that "[t]he reason that exists for requiring that a will to be effective must be executed with certain formalities exists to an equal extent for requiring that an instrument revoking a will to be effective must be executed with like formalities").

245 *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)).

246 *See* Peter Wendel, *Testamentary Transfers and the Intent Versus Formalities Debate: The Case for a "Charitable" Common Ground*, 69 U. KAN. L. REV. 249, 270 (2020) (noting that this concern has surfaced in the debate over harmless error).

This bright line approach allows probate judges "to identify documents as wills solely on the basis of readily ascertainable formal criteria, thereby permitting probate to proceed in the vast majority of cases as a routine, bureaucratic process."[247] However, this concern is not as pressing in the revocation context. Although every testator makes a will, not every testator revokes a will. Thus, because revocation issues arise less frequently, lawmakers could adopt a fact-sensitive test for revoking by "will" without overburdening probate courts.

Moreover, one of the most frequently cited reasons for insisting that testators strictly satisfy the Wills Act and holograph statutes—discouraging wrongdoing—applies with less force to revocations. Courts routinely justify their traditional zero-tolerance policy for execution errors on the grounds that it "prevent[s] fraudulent or unauthorized alterations or additions to the will."[248] But sham instruments are a legitimate concern, in part, because they can benefit *anyone*. Since American law gives property owners broad testamentary freedom, there is no limit to the class of people who have the incentive to forge a will.[249] Revocations are starkly different. The only people who stand to profit from the annulment of a will are either the decedent's heirs (if she has no other will) or the beneficiaries of a prior instrument. For this reason, deterring bogus revocations may not be as important as deterring the creation of bogus wills.

D. Anti-Wills

Refusing to enforce anti-wills is absurd. Consider a New Mexico appellate decision called *Estate of Martinez*.[250] Jose Martinez executed a valid will that gave his land to two of his children.[251] Eleven years later, he signed and had notarized a document entitled "Revo[c]ation of Last Will and Testament," which explained that he wanted to "revok[e] a previous WILL which was executed approximately [t]welve[] years ago [and] . . . named my daughter . . . as Personal

247 Mann, *supra* note 19, at 1036.

248 *In re* Brown's Estate, 32 A.2d 22, 23 (Pa. 1943); *see also In re* Estate of Posey, 214 A.2d 713, 720 (N.J. Union County Ct. 1965), *aff'd*, 223 A.2d 38 (N.J. Super. Ct. App. Div. 1966) ("The basic purpose of the Wills Act is to provide safeguards 'rigorously thrown about the testamentary act in order to forestall frauds by the living upon the dead.'") (quoting *In re* Taylor's Estate, 100 A.2d 346 (N.J. Super. Ct. App. Div. 1953)).

249 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) (stating that courts lack the "general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property").

250 Sanchez v. Martinez (*In re* Estate of Martinez), 985 P.2d 1230 (N.M. Ct. App. 1999).

251 *See id.* at 1231.

Representative."[252] The court held that the document was invalid because it was not a "will": it did not transmit property to anyone, and it "would have taken effect immediately, not after the death of the decedent."[253]

Notably, this approach does not serve *any* of the purposes of the execution formalities. If Jose Martinez had added a clause to his "Revo[c]ation of Last Will and Testament" giving $1 to his cousin, the document would have blossomed into a valid "will" that revokes a previous will.[254] But this additional clause would not have made evidence of his intent to revoke clearer. It would not have increased the probability that he was acting thoughtfully and voluntarily. And it would not have made it easier for a probate court to administer his estate. In fact, the equal dignity principle already ensures that anti-wills fall into the green zone of reliability established by the Wills Act and holograph statutes. Thus, demanding that a revocatory writing take the additional step of conveying assets after death is arbitrary.[255]

E. Words of Cancellation

Judicial hostility to enforcing words of cancellation comes from two sources. The first is the language of revocation statutes. As noted, the Statute of Frauds permitted revocation by "cancelling," but the Wills Act then omitted "cancelling" and added the catch-all "otherwise destroying."[256] Some American lawmakers amended their revocation legislation to match.[257] As a result, courts in these states interpreted this change to mean that revocation by "cancellations" needed to be

252 *Id.*

253 *Id.* at 1232. The writing also failed the equal dignity principle because it was only attested by one witness (the notary). *See id.* at 1233. Oddly, the court only mentions this much more obvious reason not to enforce the revocation at the end of the opinion, in passing. *See id.*

254 Of course, he would have also needed to obtain an additional witness' signature. I am ignoring that nuance because it does not factor into the court's analysis.

255 As noted, courts that require anti-wills to distribute the testator's assets rely heavily on the text of their states' narrow revocation statutes, which do not expressly permit a "writing" that is not a "will" to operate as a revocation. *See supra* text accompanying note 171–75. But these judges fail to acknowledge that judges in other states with narrow revocation statutes "have held that an instrument to be effective as a revocation need not be effective as a will." *In re* Heazle's Estate, 240 P.2d 821, 823 (Idaho 1952) (collecting cases).

256 *See supra* text accompanying notes 140–41.

257 *See, e.g.*, Estate of Eglee, 383 A.2d 586, 588–89 (R.I. 1978) ("When the Legislature amended the revocation statute in 1896, it deleted the words 'cancelling' and 'obliterating' and inserted the phrase 'otherwise destroying.'") (quoting R.I. GEN. LAWS 1896, ch. 203, § 17 (current version at 33 R.I. GEN. LAWS § 33-5-10 (2021))); John B. Rees, Jr., *American Wills Statutes: II*, 46 VA. L. REV. 856, 875–76 (1960) (noting that in the middle of the twentieth century, several states "require[d] that the will be 'destroyed'").

so pervasive that they effectively "destroyed" the document.[258] Second, "cancel" was once a term of art. Today, it simply means "[t]o terminate."[259] But at common law, its definition was narrower. As the Vermont Supreme Court explained in 1864, "cancellation" meant crossing out a document's *words*:

> To draw cross lines over the face of a written instrument has been, and is, a common mode of showing the intent, thereby, to make an end of it as an instrument in force. In earlier times, when the ability to write was possessed by very few, the great mass of persons of all grades from the highest lord to the lowest peasant, could manifest their intent, with pen and ink, only by unlettered marks.[260]

For these two reasons, courts held that to "cancel" a will meant making "marks or lines across the written parts of the instrument [and] . . . not merely on blank parts of the paper."[261]

This miserly approach operates in tandem with the equal dignity principle to achieve spectacular revocation failures. For example, in *Thompson v. Royall*, M. Lou Bowen Kroll, who had executed a will and a codicil, decided that she wanted to revoke both instruments.[262] Unfortunately, her lawyer convinced her to keep them as templates in case she wanted to make a new will.[263] Thus, on the manuscript cover of the will and again on the back of the codicil, the lawyer wrote: "This will null and void and to be only held . . . as a memorandum for another will . . . ."[264] Kroll then signed both instruments.[265] The Virginia Supreme Court observed that the sentence written by the lawyer did not "physically affect the written portion of the will [or the

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258 *See, e.g.*, *In re* Glass' Estate, 60 P. 186, 188 (Colo. App. 1900) ("[A] cancellation would be . . . effective as such, if done *with an intent to destroy an instrument* . . . ." (emphasis added)); Note, *supra* note 192, at 893 ("The English Wills Act requires that revocation by act shall be by 'burning, tearing, or otherwise destroying,' and hence no cancellation or obliteration can operate as such unless it amounts to a destruction of some part of the will.") (quoting Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 20 (Eng., Wales & Ir.)).

259 *Cancel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

260 Warner v. Warner's Estate, 37 Vt. 356, 362 (1864); Dowling v. Gilliland, 122 N.E. 70, 72 (Ill. 1919) (citing a dictionary definition of "cancel" as "[t]o mark out or cut off, as by the drawing of some letters across to signify that it is to be omitted; to blot or strike out, as to cancel figures or writing" (quoting an unspecified dictionary)).

261 Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934); *see also* Howard v. Hunter, 41 S.E. 638, 638 (Ga. 1902) (explaining that there is no revocation if the will remained "intact, and no material part of the same [was] obliterated, written across, or canceled in any way"); *supra* text accompanying notes 192–93.

262 175 S.E. at 748.

263 *See id.* at 748–49.

264 *Id.* at 749

265 *Id.*

codicil]."[266] Thus, it was not a revocation by the act of cancellation.[267] The state high court also reasoned that the inscriptions were not valid anti-wills because they were neither in Kroll's handwriting nor signed by two witnesses.[268] Thus, although "[t]he proof established the intention to revoke," both the will and the codicil remained valid.[269]

Likewise, in *Kronauge v. Stoecklein*, Helen White executed a will that left her assets to Jennifer Jones.[270] Three years later, White handwrote in the margin of the will: "This will is void. We have never heard or seen Jennifer Jones or did she come to Jess' funeral so I do not leave her anything."[271] An Ohio appellate court admitted that White's desire to revoke her will "is not questioned," but nevertheless held that she had not achieved this goal because her notation neither came into contact with the text of the will nor was attested.[272]

Decisions like *Thompson* and *Kronauge* illustrate the perversity of the majority approach to revoking by words of cancellation. If either Kroll's lawyer or White had written their respective sentences in a way that touched a stray word or punctuation mark, then they would have revoked by act. But that nuance does not illuminate the testator's wishes or assist courts in any way.

In fact, the law stacks the deck against words of cancellation even though it serves the evidentiary, ritual, protective, and channeling functions *better* than other ways of revoking by act. Indeed, like Kroll and White, testators who try to revoke by words of cancellation often explain *why* they wish to do so, which helps authenticate their wishes. And words of cancellation are often either signed (as in *Thompson*) or in the testator's handwriting (like in *Kronauge*). Thus, they are far more probative of the testator's intent than drawing lines, tearing, or burning the will, which "which can sometimes be ambiguous."[273]

F. Electronic Wills

Industry-drafted electronic will revocation laws suffer from several ambiguities and omissions. For starters, recall that they permit testators to invalidate e-wills by making them "unreadable."[274] One flaw

266 *Id.* at 750.

267 *See id.* at 749–50.

268 *See id.* at 749.

269 *Id.* at 749–50.

270 293 N.E.2d 320 (Ohio Ct. App. 1972).

271 *Id.* at 321.

272 *Id.* at 321–22.

273 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 reporter's note 6 (AM. L. INST. 1999).

274 *See supra* text accompanying notes 199–202. In addition, Arizona, Florida, and Nevada allow testators to revoke by canceling an e-will, but Indiana does not. It is too early

with this test is that people often try to dispose of digital documents through methods that do not make them inaccessible. Indeed, users commonly drag icons into the "recycle bin" on their desktop, from which they can be easily retrieved.[275] Thus, it is not clear that this intuitive-seeming way to try to revoke a digital testamentary instrument accomplishes anything.[276]

Likewise, these statutes' approach to copies is problematic. E-wills are unique because they blur the distinction between originals and non-originals that looms so large with paper wills. A testator might have a copy of her e-will on her desktop, one in the cloud, another on a removable drive, and no idea which one was generated first. To try to solve this problem, Indiana requires individuals who have not entrusted their wills to a custodian to delete "*each copy* . . . in [their] possession or control."[277] Yet this creates the risk of that a single overlooked file will doom a person's wish to revoke. Conversely, Arizona, Florida, and Nevada do not clarify whether a testator must revoke an original.[278]

The role of custodians further complicates matters. Most consumers probably assume that they can revoke a will held by a

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to tell which approach is preferable. Testators could reasonably believe that opening an electronic will and typing "revoked" or some synonym would do the trick. However, unlike paper wills, where testators often handwrite and sign or initial words of cancellation—thus reinforcing their authenticity—font lacks the distinctiveness of penmanship. Accordingly, permitting revocation by cancellation might create fertile ground for fraud.

275 *See, e.g.*, Mayank Parmar, *Microsoft is Working on a New Data Recovery Tool for Windows 10*, WINDOWS LATEST (June 27, 2020), https://www.windowslatest.com/2020/06/27/microsoft-is-working-on-a-new-data-recovery-tool-for-windows-10/ [https://perma.cc/NF7D-FZ8Y].

276 In fact, even if a testator takes the extra precaution of emptying the recycle bin, data recovery tools can dredge up deleted items. *See, e.g.*, Tomiwa Onaleye, *Do You Know That Files Deleted from Your Recycle Bin Can Still be Recovered? Here Is How*, TECHNEXT (Jul. 6, 2020), https://technext.ng/2020/07/06/do-you-know-that-files-deleted-from-your-recycle-bin-can-still-be-recovered-here-is-how/ [https://perma.cc/57ZB-42XP]. Of course, it is possible that a court might find that making an e-will *temporarily* unreadable is sufficient to revoke it. *But see* IND. CODE § 29-1-21-8(c) (2021) (announcing that a testator must "*permanently* delet[e] each copy of the electronic record associated with the electronic will in the testator's possession or control or . . . render[] the electronic record for the associated electronic will unreadable and *nonretrievable*" (emphasis added)).

277 IND. CODE § 29-1-21-8(c) (2021) (emphasis added). This is a sharp departure from the common law, which holds that "[t]he testator need not perform a revocatory act on all the duplicates." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. f (AM. L. INST. 1999); *see also* UEWA, *supra* note 28, § 7 cmt. (Multiple Originals) ("Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will.").

278 These statutes declare that testators can revoke through an act performed "on the will." ARIZ. REV. STAT. ANN. § 14-2507(A)(2) (2021); *see also* FLA. STAT. § 732.506 (2021); NEV. REV. STAT. § 133.120(2)(b) (2019). But it is not clear whether "the electronic will" refers only to the first file generated or to copies of it.

company by sending an email, calling customer service, or logging into their account and pressing a button on a website. But this is not the case. For one, as mentioned, in Arizona and Nevada, a custodian is only bound by a directive "in a writing executed with the same formalities required for the execution of an electronic will."[279] Thus, anything short of a signed and witnessed writing does not suffice. Even worse, Florida has no method for testators to inform custodians of their intent to revoke. And because the Sunshine State continues to require that a third party revoke in the testator's presence,[280] annulling an e-will held by a custodian would be close to impossible.

The UEWA's revocation section attempts to float above these complications. It merely states that a testator can revoke by act by performing "a physical act."[281] This amorphous standard essentially delegates the task of rulemaking to courts. Unfortunately, though, the model statute's comments are internally inconsistent. In one breath, the drafters contend that if an e-will is lodged with a custodian that "provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act."[282] In the next breath, they assert that "[s]ending an email that says, 'I revoke my will,' is not a physical act performed on the will itself because the email is separate from the will."[283] But the same logic should apply to the previous example of pressing a delete button on a custodian's webpage, which is *also* not "a physical act performed on the will itself."[284] Accordingly, it is unclear whether testators can revoke through conduct that does not affect the electronic document.[285]

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279 ARIZ. REV. STAT. ANN. § 14-2522(C) (2021); *see also* NEV. REV. STAT. § 133.120(2)(a) (2019). *But see* IND. CODE § 29-1-21-8(e) (2021) (only requiring that testators contact a custodian to request revocation "in writing").

280 *See* FLA. STAT. § 732.506 (2021).

281 UEWA, *supra* note 28, at § 7(b)(2); COLO. REV. STAT. § 15-12-1507(2)(b) (repealed 2021); N.D. CENT. CODE § 30.1-37-05(2)(b) (2021); UTAH CODE ANN. § 75-2-1407(2)(b) (West 2021); WASH. REV. CODE §§ 11.12.400–11.12.491 (2021).

282 UEWA, *supra* note 28, § 7 cmt. (Physical Act Revocation).

283 *Id.*

284 *Id.*

285 The UEWA's comments also declare that a testator can revoke an e-will by an act performed on a print-out of the underlying file. *See id.* This might be unwise. Recall that when a will was last in the testator's possession and cannot be found at her death, courts presume that she revoked it. *See supra* text accompanying notes 164–68. As a result, under the UEWA, any time a testator printed a copy of a digital will and then discarded it, there would be a colorable revocation claim. *See* Hirsch, *supra* note 29, at 849 ("[A] testator might well view the printout of an e-will as a copy for review and thus treat it carelessly . . . ."). For Australian cases with dueling views on this subject, compare *Mahlo v Hehir* [2011] QSC 243 ¶¶ 44–45 (19 Aug. 2011) (Austl.) (assuming that the presumption would apply in a case where the testator printed a copy of a will but only the electronic file was located after she

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Although some revocation rules further the same evidentiary, ritual, protective, and channeling functions as the execution formalities, others serve no objective. And yet these doctrines frequently thwart a testator's expectations. Accordingly, the next Part discusses ways for courts and lawmakers to soften the blow of the revocation formalities.

IV. SOLUTIONS

This Part explores solutions to intent-defeating revocation rules. It begins by examining two existing attempts to relax the high formalism of revocation law: the constructive trust and the 1990 UPC revisions. It demonstrates that even though these approaches are superior to traditional revocation doctrine, they leave much to be desired. Finally, this Part offers a novel solution to the revocation conundrum: aligning will revocation with the rules that govern the revocation of trusts.

A. Constructive Trusts

Some courts have tried to avoid unfair results in revocation cases by imposing a constructive trust on inheritances that would be an undeserved windfall. But as this section reveals, the constructive trust is, at best, a partial solution to the problem of revocation formalism.

The constructive trust is an ancient equitable remedy. It is a legal fiction that applies when someone has acquired property through unfair means:

> A constructive trust is one that arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice[,] concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.[286]

To prevent unjust enrichment, courts deem the defendant to be a trustee of the assets, forcing her "to convey [her] interest to another

died), with *Yazbek v Yazbek* [2012] NSWLR 594 ¶ 131 (1 June 2012) (Austl.) (reasoning that testators "may feel more ready to discard a paper copy in circumstances where the electronic one is retained" and that "[t]he unavailability of the paper copy is more likely to be explained by such an attitude to electronic record keeping . . . than it is by an inference that the document had been destroyed").

286 *In re* Estate of Abernathy, 778 So. 2d 123, 126 (Miss. 2001) (citing Saulsberry v. Saulsberry, 78 So. 2d 758, 760 (Miss. 1955)).

to whom it justly belongs."[287] Judges often invoke this mechanism in cases involving breaches of contracts either to make or not to revoke a will[288] and beneficiaries who murdered the decedent[289] or used fraud or force to prevent her from changing her estate plan.[290]

Likewise, some judges have used constructive trusts in failed revocation cases. For example, in *Gushwa v. Hunt*, eighty-five-year-old George Gushwa executed a will leaving his estate largely to his nieces and nephews, not his longtime wife.[291] The husband of one of his nieces, Ted Dale, retained the original.[292] But gradually, Gushwa began to resent the fact that his relatives rarely called or visited, and so he allegedly called Dale and requested the will so he could revoke it.[293]

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287 CARYL A. YZENBAARD, GEORGE GLEASON BOGERT, AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 471, Westlaw (database updated June 2021); *see also* Garrigus v. Viarengo, 963 A.2d 1065, 1075 (Conn. Ct. App. 2009) ("The issue raised by a claim for a constructive trust is, in essence, whether a party has committed actual or constructive fraud or whether he or she has been unjustly enriched." (quoting Cadle Co. v. Gabel, 794 A.2d 1029, 1040 (Conn. Ct. App. 2002))); Roscoe Pound, *The Progress of the Law, 1918–1919 Equity*, 33 HARV. L. REV. 420, 421 (1920) (explaining that in equity courts "one of the most effective remedial expedients at [the judge's] command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly").

288 *See, e.g.*, Cowin v. Salmon, 13 So. 2d 190, 198 (Ala. 1943) ("A will as such is revocable. But when it is the result of a contract on a valuable consideration, the revocation of the will does not prevent the enforcement of a trust upon the basis of its obligation."); Stahmer v. Schley, 157 Cal. Rptr. 756, 758 (Ct. App. 1979) (citing Notten v. Mensing, 45 P.2d 198 (Cal. 1935)) ("[W]hen the testators have made a written agreement not to revoke, and the agreement is supported by consideration, equity will enforce the agreement by requiring the recipients of the estate to hold the property in constructive trust for the intended beneficiaries."); Jason Thomas King, *Lifetime Remedies for Breach of a Contract to Make a Will*, 50 S.C. L. REV. 965, 971 (1999) ("If a promisor dies intestate, or without a will conforming to the contract, equity will enforce the contract in the form of a constructive trust against the testator's heirs, ensuring the promisee receives what is deserved.").

289 *See, e.g.*, Kelley v. State, 196 A.2d 68, 69–70 (N.H. 1963) (reasoning that, in states that do not bar a slayer from inheriting by statute, "a court applying common law techniques can reach a sensible solution by charging the spouse, heir or legatee as a constructive trustee of the property where equity and justice demand it"); John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 717 (1936) (observing that some jurisdictions have dealt with this conundrum by holding "that title will pass to the slayer, but that equity will hold him a constructive trustee for the heirs or next of kin of the decedent").

290 *See, e.g.*, Latham v. Father Divine, 85 N.E.2d 168, 171 (N.Y. 1949) ("The story is, simply, that defendants by force and fraud, kept the testatrix from making a will in favor of plaintiffs."); White v. Mulvania, 575 S.W.2d 184, 190 (Mo. 1978) ("[I]f the testatrix were fraudulently prevented from changing her will in favor of the plaintiffs due to the fraud, . . . then the property which devolves to the grandchildren solely as a result of this fraud must be held by them in a constructive trust for the plaintiffs." (emphasis omitted)).

291 197 P.3d 1, 2 (N.M. 2008).

292 *Id.* Dale and his wife were not beneficiaries. *See id.*

293 *See id.*

Dale responded by sending Gushwa a partial photocopy of the document.[294] Gushwa then hired a lawyer, who told him to take elaborate measures to cancel the instrument:

> [H]is new lawyer assisted him in drafting a document entitled "Revocation of Missing Will(s)," in which Decedent repeatedly stated that he wanted to revoke his previous Will. At the same time, on the advice of counsel Decedent wrote "Revoked" on the copy of three pages of the Will . . . and attached those pages to the Revocation of Missing Will(s) document. That document was signed by Decedent and two witnesses and was notarized.[295]

The New Mexico Supreme Court held that this document was not a revocation.[296] For starters, Gushwa's defacement of the Xerox was invalid under the copy rule.[297] Moreover, because New Mexico did not recognize anti-wills at the time, Gushwa's signed, witnessed, and notarized declaration of intent to revoke was meaningless.[298] However, the court acknowledged that Gushwa's wife might be entitled to a constructive trust over the assets she would have received in the absence of the will.[299] The court remanded the case for the trial court to decide whether Dale "wrongfully prevented [Gushwa] from obtaining the original Will, thereby making it virtually impossible for [him] to comply with the statutory requirements for revocation."[300]

Similarly, in *Estate of Tolin*, Alexander Tolin told his neighbor, who was a retired lawyer, that he wished to revoke a codicil that named

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294 *See id.*

295 *Id.*

296 *See id.* at 3–4.

297 *See id.* at 6–7.

298 *See id.* at 3–5. As noted above, New Mexico has since amended its revocation statute to recognize anti-wills. *See supra* note 185 and accompanying text.

299 *See Gushwa*, 197 P.3d at 7.

300 *Id.* Likewise, as mentioned, in the late eighteenth and early nineteenth centuries, heirs often claimed that a beneficiary had tricked the testator into believing that her will had been destroyed. *See supra* text accompanying notes 126–30. Although courts refused to find that these instruments had been revoked, some held that the allegations, if proven, would entitle the heir to a constructive trust. *See, e.g.*, Brazil v. Silva, 185 P. 174, 177–78 (Cal. 1919), *disapproved of on other grounds by* Ludwicki v. Guerin, 367 P.2d 415 (Cal. 1961) (holding that plaintiff could pursue cause of action for constructive trust when the testator's wife had supposedly burnt an envelope that she falsely said contained the will); *In re* McCloskey's Estate, 6 Pa. D. & C.2d 97, 97–98, 107 (Pa. Orphans' Ct. 1956) (acknowledging the possibility that a constructive trust might arise from allegations "that decedent's sister, who is the proponent and sole beneficiary of the will, falsely represented to decedent that his will in her possession had been destroyed in a fire and that decedent relied thereon"); RESTATEMENT (FIRST) OF RESTITUTION § 184 cmt. e (AM. L. INST. 1937) ("Where a testator is by fraud, duress or undue influence prevented from revoking his will, or from revoking a devise or bequest, by the person who takes the property under the will, he holds it upon a constructive trust for the person who would have taken if the will or devise or bequest had been revoked.").

a charity, Broward Art Guild, as the residuary beneficiary.[301] The neighbor advised Tolin to destroy the codicil.[302] In front of the neighbor, Tolin tore up a document that he believed was the codicil but was actually a high-quality photocopy of it.[303] The Florida Supreme Court first applied the copy rule and determined that Tolin had failed to revoke the codicil.[304] But then, observing that even Broward Art Guild admitted that Tolin had ripped up the codicil thinking that it was the original, the court "f[ou]nd that a constructive trust is appropriate under these unique and undisputed facts."[305]

Despite opinions like *Gushwa* and *Tolin*, the constructive trust is no panacea. First, some courts refuse to employ the remedy in revocation cases on the grounds that doing so would be an improper end-run around the revocation formalities.[306] As the Ohio Supreme Court opined, the Statute of Frauds was "designed to prevent the frauds and perjuries arising out of mere parol revocations, and to sanction a recovery . . . would open the door for the very evils which the [S]tatute intended to exclude."[307] Accordingly, in some states, the constructive trust is a non-starter.

Second, even in states that are willing to use the tool, a constructive trust is "not appropriate where there is an error in the execution of [a] document."[308] For example, Florida courts have refused to extend *Tolin* to cases in which decedents failed to sign a will or obtain the proper witnesses. Thus, constructive trusts likely cannot provide relief when a testator tries to create an anti-will but does not comply with the Wills Act or a holograph statute.

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301 *In re* Estate of Tolin, 622 So. 2d 988, 989 (Fla. 1993).

302 *Id.*

303 *Id.*

304 *See id.* at 990.

305 *Id.* at 991.

306 *See, e.g.*, Kent v. Mahaffey, 10 Ohio St. 204, 220 (1859) ("[T]o hold the legatee a trustee in such case would seem to nullify the statute prohibiting revocations except in a specified manner."); *In re* Evans' Will, 98 N.Y.S. 1042, 1044 (N.Y. App. Div. 1906) ("Legislative limitations or omissions do not constitute a court as a curative Legislature."); *cf.* Reiter v. Carroll, 198 S.W.2d 163, 166 (Ark. 1946) (declining to impose a constructive trust when the plaintiffs merely proved that the testator "instructed the appellee to destroy the will, and that the appellee [falsely] told him that the will had been destroyed"). In addition, in some states, probate courts lack the power to adjudicate causes of action that seek a constructive trust. *See, e.g.*, Graham v. Birch, 49 N.W. 697, 699 (Minn. 1891) (refusing to entertain constructive trust argument on appeal from probate court that lacked jurisdiction over the matter).

307 *Kent*, 10 Ohio St. at 221.

308 Kelly v. Lindenau, 223 So. 3d 1074, 1078 (Fla. Dist. Ct. App. 2017); *see* Allen v. Dalk, 826 So. 2d 245, 248 (Fla. 2002) (refusing to impose a constructive trust when the decedent failed to sign the will).

Third, a plaintiff who seeks a constructive trust must carry a heavy burden. Indeed, "the proof must be so clear, convincing, strong, and unequivocal as to lead to one conclusion."[309] Even strong evidence that a testator intended to revoke may be insufficient. For instance, in *Davis v. Howard*, Olive Davis executed a will that left $1 to her daughter and everything else to her son.[310] Davis then mailed the will to her son.[311] Decades later, she wrote to her son and asked him to revoke the lopsided document, saying "I can't have that bitterness now. Time is too short."[312] However, the son did not destroy the will.[313] The Oregon Supreme Court held that these facts were not sufficiently egregious to warrant making the son a constructive trustee for the daughter's benefit.[314] Thus, the constructive trust only provides partial relief for the ruthless revocation formalities.

B. The UPC

The 1990 UPC also attempted to de-formalize revocation law. Unfortunately, it only took modest steps in this direction.

The 1990 UPC revisions tried to liberalize revocation doctrine in two ways. First, the drafters reformed the test for revoking by writing words of cancellation. Recall that when the testator writes "void" or "revoked" on the will, most courts only deem the language to be a cancellation if it overlaps with the text of the will.[315] Section 2-507 of the 1990 UPC abolishes that nuance by providing that a revocatory act is effective "whether or not [it] . . . touched any of the words on the will."[316] Second, although the UPC's harmless error rule primarily targets will execution, it also spills over into the realm of revocation. Indeed, the doctrine allows courts to enforce failed attempts to execute not only wills, but also *anti*-wills:

> Although a document or writing added upon a document was not executed in compliance with [the execution formalities], the document or writing is treated as if it had been executed in compliance with [the execution formalities] if the proponent of the document or writing establishes by clear and convincing evidence

309 Kurtz v. Solomon, 656 N.E.2d 184, 191 (Ill. App. Ct. 1995) (citing Suttles v. Vogel, 533 N.E.2d 901, 905 (Ill. 1988)).

310 527 P.2d 422, 423 (Or. Ct. App. 1974).

311 *See id.*

312 *Id.*

313 *See id.* To be fair, the son testified that he told Davis "that he could not change the will and that if she wanted it changed she would have to write another will" and that she "neither asked him to destroy the will nor asked him to mail the will to her." *Id.*

314 *See id.* at 424.

315 *See supra* subsection II.B.3.

316 UNIF. PROB. CODE § 2-507(a)(2) (UNIF. L. COMM'N 2019).

> that the decedent intended the document or writing to constitute (i) the decedent's will[or] (ii) *a partial or complete revocation of the will* . . . .[317]

These curative measures are major upgrades. For example, unlike conventional law, the UPC's approach to revocation by act would validate words of cancellation written in the margins or a blank part of the will. As noted above, there is rarely doubt that words of cancellation are authentic because they tend to be both in the testator's handwriting and to explain the reason for the testator's actions.[318] In fact, harmless error could even resuscitate written words of cancellation that appear on another document, rather than the will. Indeed, the rule applies to "a document"—that is, *any* document—that the testator intended to be "a . . . revocation of the will."[319] Finally, harmless error would excuse garden variety execution defects in anti-wills, such as the testator's failure to sign or acknowledge the anti-will in front of two witnesses who were present at the same time.

But the UPC's approach does not go far enough. The most revolutionary of the UPC's changes—harmless error—excludes many botched revocations by act. Indeed, because the rule only governs a faulty "document or writing," it excludes deficient attempts to revoke by burning, tearing, and obliterating.[320] For example, harmless error could not cure a would-be revocation that violates the copy rule or the presence requirement.[321] Thus, if someone torches a copy of her will

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317 UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019) (emphasis added).

318 *See supra* text accompanying note 272.

319 UNIF. PROB. CODE § 2-503.

320 Moreover, there is a disconnect between harmless error's remedy and revocation by act. When harmless error applies, it compels the probate judge to treat the "document or writing . . . as if it had been executed in compliance with" the Wills Act formalities. UNIF. PROB. CODE § 2-503. But a revocation by act never even tries to *satisfy* the Wills Act formalities. Instead, it is governed by the revocation formalities. *See* UNIF. PROB. CODE § 2-507. Thus, it would make no sense to deem a failed attempt to revoke by act as a valid writing under the Wills Act.

321 Some Australian states have also adopted a forward-looking harmless error rule for revocations. They treat a will as revoked if the "the testator . . . or another person in the testator's presence and at the testator's direction . . . deal[t] with the will in such a manner that the [c]ourt is satisfied from the state of the will that the testator intended to revoke it." *Wills Act 2000* (NT) s 13(f); *Succession Act 2006* (NSW) pt 2.1 div 5 s 11; *Succession Act 1981* (Qld) pt 2 s 13(e)(ii); *Wills Act 2008* (Tas) pt 2 div 3 s 15; *Wills Act 1997* (Vic) div 5 s 12(2)(g). This doctrine allows judges to deem acts other than burning, canceling, tearing, obliterating, or destroying to be revocations. However, like American harmless error, it also retains the presence requirement and the copy rule. *See In re Estate of Miruzzi* [2018] NSWSC 1899 ¶ 58 (defending the copy rule on the grounds that "[i]n an age of widespread, high-quality reproduction of documents by mechanical or electronic means, . . . a testator's testamentary intentions [would be] at risk of challenge if ever any form of copy were to be observed 'destroyed'").

or hears her lawyer destroy the instrument over the telephone, harmless error cannot help.[322]

C. Importing Trust Formalities

The core requirements for revoking a will are nearly 350 years old. This section urges lawmakers to reimagine these formalities by replacing them with the pliable rules that govern the revocation of a trust.

Recall that the popularity of trusts has been one of the catalysts for the liberalization of the law of will execution.[323] Because trusts convey billions of dollars every year but do not need to be attested by two witnesses or entirely handwritten, they have helped convince some scholars and lawmakers that the Wills Act and holograph statutes are overkill.[324]

Likewise, trust law's approach to revocation is light-years ahead of wills law. Settlors usually do not need to satisfy rigid mandates. Instead, trust revocation formalities are two-tiered. First, as a general principle, individuals can rescind a trust "in any way that provides clear and convincing evidence of the[ir] . . . intention to do so."[325] Second, people who prefer to narrow the permissible methods of revocation enjoy the freedom to grant themselves "a power to revoke . . . by

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322 The comments to the *Restatement (Third) of Property* suggests that this is not the case by providing the following example of the harmless error rule in action:

> G's will was in the possession of her executor, a neighbor. G telephoned the executor at home and told him to tear up her will. The executor retrieved the will from his desk and tore it up. . . . If G's intent to revoke is proved by clear and convincing evidence, . . . the failure to perform the act in G's conscious presence may be a harmless error that can be excused . . . .

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. *l* illus. 9 (AM. L. INST. 1999). Although I agree that this *should* be the law, for the reasons stated above in the text accompanying notes 319–320, it is currently *not* the law.

323 *See supra* text accompanying notes 83–87.

324 *Id.*

325 RESTATEMENT (THIRD) OF TRUSTS § 63(3) (AM. L. INST. 2003); *see also* ARK. CODE ANN. § 28-73-602(c)(2)(B) (2021); FLA. STAT. § 736.0602(3)(b)(2) (2021); KAN. STAT. ANN. § 58a-602(c)(2)(B) (2021); KY. REV. STAT. ANN. § 386B.6-020(3)(b)(2) (West 2020); ME. STAT. tit. 18-B, § 602(3)(B)(2) (2021); N.D. CENT. CODE § 59-14-02(3) (2021); TENN. CODE ANN. § 35-15-602(c)(2)(B) (2021); UTAH CODE ANN. § 75-7-605(3)(b)(ii) (West 2021); WIS. STAT. § 701.0602(3)(b)(2) (2021); *cf.* OHIO REV. CODE ANN. § 5806.02(C) (West 2021) (adding the caveat that unless a trust expressly provides otherwise, "a revocable trust may not be revoked or amended by a will or codicil"); MICH. COMP. LAWS § 700.7602(3)(b)(i) (2021) (only allowing written trusts to be revoked "by another writing manifesting clear and convincing evidence of the settlor's intent to revoke"); MINN. STAT. § 501C.0602(c)(2)(i)-(ii) (2021) (same). Other states follow a more restrictive approach that only allows a settlor to revoke a written trust by "a later written instrument delivered to the trustee." ALA. CODE § 19-3B-602(c)(2)(B) (2021).

[following] a particular procedure."[326] For example, settlors often provide that they can revoke the instrument by delivering a signed writing to the trustee.[327]

Extending this flexibility to testators would be an improvement in several ways. For one, it would liberate them from the straitjacket of the revocation formalities. As we have seen, near-miss revocations are endemic: people routinely disfigure copies of their wills,[328] have third parties who are not present destroy the document,[329] write words of cancellation in the margins,[330] and fail to satisfy the equal dignity principle.[331] But in virtually all these cases, there is clear and convincing evidence of what the testator sought to accomplish. Thus, adopting the lenient standard from trust law would change these harsh outcomes.

Moreover, this approach would pay dividends in the context of electronic wills. For starters, it would harmonize revocation principles for paper and digital wills. As noted, lawmakers have promulgated unique rules for the rescission of e-wills, which makes an already byzantine area of law even more convoluted.[332] By contrast, trust revocation rules offer a one-size-fits-all rubric that would reduce confusion. Likewise, as I have argued, industry-drafted statutes make revoking an e-will too difficult.[333] Deleting them and using loose rules from trust law would prevent the cruel history of revocation formalism from repeating itself in this brave new world.

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326 RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. i (AM. L. INST. 2003); MARY F. RADFORD, GEORGE GLEASON BOGERT, AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1000, Westlaw (database updated June 2021) ("The settlor may make provision for the method by which a power of revocation or termination is to be exercised and such a provision must be followed."); ALA. CODE § 19-3B-602(c) (2021) ("The settlor may revoke . . . by substantial compliance with a method provided in the terms of the trust . . . ."); *accord* ARK. CODE ANN. § 28-73-602(c)(1) (2021); FLA. STAT. § 736.0602(3)(a) (2021); KAN. STAT. ANN. § 58a-602(c)(1) (2021); KY. REV. STAT. ANN. § 386B.6-020(3)(a) (West 2021); ME. STAT. tit. 18-B, § 602(3)(A) (2021); MICH. COMP. LAWS § 700.7602(3)(a) (2021); MINN. STAT. § 501C.0602(c)(1) (2021); OHIO REV. CODE ANN. § 5806.02(C) (West 2021); N.D. CENT. CODE § 59-14-02(3) (2021); TENN. CODE ANN. § 35-15-602(c)(1) (2021); UTAH CODE ANN. § 75-7-605(3)(a) (West 2021); WIS. STAT. § 701.0602(3)(a) (2021).

327 *See, e.g.*, 3 JEFFREY H. TIERMAN, CALIFORNIA TRANSACTIONS FORMS: ESTATE PLANNING § 13:46 n., Westlaw (database updated June 2021) (observing that "[t]his form is common in most trusts"); Schlossberg v. Estate of Kaporovsky, 303 So. 3d 982, 986 (Fla. Dist. Ct. App. 2020) (holding that deed conveying condo qualified as "an instrument in writing delivered to the trustees"); Thompson v. Waukesha State Bank, 510 F. Supp. 2d 453, 460 (N.D. Ill. 2007) (featuring a settlor who revoked through this mechanism).

328 *See supra* text accompanying notes 1–4, 216–18, 291–305.

329 *See supra* text accompanying notes 225–30, 234–43.

330 *See supra* text accompanying notes 5–8, 262–72.

331 *See supra* text accompanying notes 134–37, 262–72.

332 *See supra* subsection II.B.4.

333 *See supra* text accompanying notes 274–80.

Admittedly, like any dilution of testamentary formalities, this change could sow doubt about a testator's intent and undermine the channeling function. For one, the clear and convincing evidence test might raise tough line-drawing questions. Testators sometimes deal with their wills in ways that are ambiguous, such as crumpling them up and "dropp[ing] them in the waste basket"[334] or "placing [them] . . . in a paper sack with other items of trash."[335] Similarly, some people allegedly try to revoke their wills through oral statements.[336] Say what you will about current revocation law, but it makes these into easy cases. Conversely, my thesis would force courts to wade into the factual record.

But trust law also offers a way around this morass. As mentioned, settlors can create private formalities.[337] As a result, my proposal would also accommodate testators who want more protection against fraudulent revocations. For example, cautious testators could expressly preclude revocation by act or specify that a revocatory writing would need to have five witnesses.[338] In fact, authorizing private will revocation formalities would be fitting. As mentioned, the original revocatory acts in the Statute of Frauds were crowdsourced: Parliament chose "burning[,] cancelling[,] teareing [sic,] or obliterating the [will]" because that was how most testators showcased their desire to revoke.[339] Thus, at a time when wills law is in flux, it would make sense to once again democratize the issue.[340]

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334 Gassman v. Stanton (*In re* Estate of Stanton), 472 N.W.2d 741, 746 (N.D. 1991).

335 SouthTrust Bank of Ala. v. Winter, 689 So. 2d 69, 71 (Ala. Civ. App. 1996).

336 *See, e.g.*, Milbourne v. Milbourne, 799 S.E.2d 785, 792 (Ga. 2017).

337 *See supra* text accompanying notes 325–26.

338 Apparently, some testators already try to personalize the revocation formalities. *See, e.g.*, Generic Probate Pleading at 3, Estate of McAdam, No. PES-14-298205 (Cal. Super. Ct. filed Oct. 28, 2014) ("I do hereby declare that I will not at any time revoke this Will except by a later Will . . . or by the destruction of both copies [of the Will].").

339 *See supra* text accompanying notes 122, 127–28.

340 Admittedly, private formalities could also muddy the waters about a testator's wishes. There has been a steady stream of litigation over whether a settlor meant a procedure to be the exclusive way to revoke a trust. *See, e.g.*, Cundall v. Mitchell-Clyde, 265 Cal. Rptr. 3d 254, 261–65 (Ct. App. 2020) (surveying California caselaw); Barlow v. Olguin (*In re* Estate of Schlicht), 329 P.3d 733, 737 (N.M. Ct. App. 2014) (upholding a revocation when "the settlor's trust provided a method to revoke the trust's provisions, but that method was not expressly stated to be the exclusive method of revocation"); Warne v. Warne, 275 P.3d 238, 248 (Utah 2012) (same for partial revocation of a particular beneficiary's interest). Thus, lawmakers and courts would need to provide guidance on how to distinguish a will that merely gives the testator the option to follow a unique revocatory method from one that displaces all other revocation rules. In addition, wills are already laden with boilerplate that testators do not read and could not understand. *See* Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 668 (2018) (examining 230 wills from Sussex County, New Jersey, and finding that they often used "language that sounds authoritative, but makes little sense

CONCLUSION

Unlike the requirements for making a valid will, the revocation formalities have never received sustained attention. This Article has tried to remedy this omission. It has demonstrated that these finicky rules routinely frustrate a testator's wishes and yet do not always serve demonstrable policy objectives. Lawmakers should abandon them, adopt principles of revocation from the field of trusts, and thus bring will revocation into the twenty-first century.

in context"); David Horton & Reid Kress Weisbord, *Boilerplate No Contest Clauses*, 82 LAW & CONTEMP. PROBS., no. 4, 2019, at 69 (2019) (reaching similar conclusions about no contest clauses in a study of 457 wills from Alameda County, California). If private revocation rules in wills also devolve into legalese, they are unlikely to improve outcomes.