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## Minimizing Probate-Error Risk

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## MINIMIZING PROBATE-ERROR RISK

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Mark Glover\*

*Probate-error risk is the possibility that a court will incorrectly assess the authenticity of a will. By prescribing the method courts use to evaluate the authenticity of wills, the law of will-execution allocates probate-error risk between false-positive outcomes and false-negative outcomes. When a court validates an inauthentic will, it creates a false-positive outcome. When a court invalidates an authentic will, it creates a false-negative outcome. Because false-positive outcomes result in the admission to probate of inauthentic wills and false-negative outcomes result in the denial of probate of genuine wills, both can be characterized as probate errors.*

*This framework has been used to identify the problem with the conventional law of will-execution, which is that it generates unnecessary probate errors by heavily allocating risk in favor of false-negative outcomes. It has also clarified the objective of will-execution reform, which is to reallocate risk more evenly between false-positive outcomes and false-negative outcomes so that the total number of probate errors is minimized.*

*This Article applies this framework more broadly to analyze potential methods of will-execution reform. Specifically, this Article identifies the various components of the law of will-execution that can be altered to reallocate probate-error risk and evaluates how different methods of reform can be manipulated to reallocate risk to varying degrees. With a better understanding of what is possible, state policymakers may be more willing to break away from the conventional law and implement change.*

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## INTRODUCTION

The law of will-execution differentiates wills from non-wills by prescribing the requirements for a valid will. Under conventional law, wills must be written, signed, and witnessed.<sup>1</sup> If a purported will complies with these formalities, it is valid;<sup>2</sup> but, if it does not, it is invalid.<sup>3</sup> These requirements are not intended to delineate an arbitrary boundary between what is and is not a will. Instead, will-execution is meant to distinguish authentic wills from inauthentic wills.

When framed in this way, the law of will-execution can be seen as a binary classification test. A binary classification test is simply a method to place individuals or things into one of two categories based upon a particular characteristic.<sup>4</sup> For example, a pregnancy test is a binary classification test that classifies a woman as either pregnant or not pregnant. Typically, the classification is not based upon direct observation of the relevant characteristic.<sup>5</sup> Because direct observation is impossible or impracticable, the test makes the classification based on indirect evidence.<sup>6</sup> For instance, a pregnancy test does not make a direct observation of the presence or absence of an embryo.<sup>7</sup> Rather, it classifies a woman as pregnant or not

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1. JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 148 (9th ed. 2013); *see also infra* Part I.A.

2. A will's validity also depends on other considerations, such as the testator possessing the required mental and legal capacities to execute a will. *See, e.g.*, Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 *MO. L. REV.* 69 (2014).

3. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 *HARV. L. REV.* 489, 489 (1975).

4. *See* GRAEME D. RUXTON & NICK COLEGRAVE, *EXPERIMENTAL DESIGN FOR THE LIFE SCIENCES* 120 (3d ed. 2011).

5. *See id.*

6. *See id.*

7. *See* MARY JANE MINKIN & CAROL V. WRIGHT, *THE YALE GUIDE TO WOMEN'S REPRODUCTIVE HEALTH* 296 (2003).

pregnant based upon indirect evidence found in the woman's blood or urine.<sup>8</sup>

Similarly, the law of will-execution is a binary classification test that places a purported will into one of two categories—authentic or inauthentic. A will is authentic if the decedent intended it to be legally effective, and conversely, a will is inauthentic if the decedent did not intend it to be legally effective. Direct observation of anyone's subjective intent is impossible.<sup>9</sup> Furthermore, because the decedent is dead at the time of probate, the court cannot ask the decedent whether she intended a particular document to constitute a legally effective will.<sup>10</sup> The classification of a will as authentic or inauthentic is therefore made using indirect evidence of the decedent's intent. Specifically, the law relies upon the decedent's compliance with the formalities of will-execution to serve as an easily recognizable proxy for the intent that a will be legally effective.<sup>11</sup>

Under conventional law, if the decedent complies with the formalities of will-execution, the court presumes that she intended the document to be a legally effective will, and it therefore classifies the will as authentic.<sup>12</sup> Alternatively, if the decedent does not comply with the prescribed formalities, the court presumes that she did not intend the document to be a will, and it therefore classifies the will as inauthentic.<sup>13</sup> Thus, like women who use pregnancy tests to determine whether or not they are pregnant, probate courts use the law of will-execution to determine whether or not the decedent intended a will to be legally effective. In this way, the law of will-execution distinguishes authentic wills from inauthentic wills.

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8. See *id.* (“All pregnancy tests, whether of urine or blood, look for the presence of beta hCG, the beta subunit of human chorionic gonadotropin, a hormone produced by the dividing cells of the embryo even before it is implanted with the uterus . . .”).

9. See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656 (1988) (explaining that intestacy statutes “suffer[ ] from the impossible search for subjective intent”); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 303 (2001) (“[A]s a philosophical truism, it may be well-nigh impossible to identify someone else's subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man's head.”).

10. See DUKEMINIER & SITKOFF, *supra* note 1, at 147.

11. See Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 391–92 (2001) (“To facilitate realization of testamentary freedom, the law historically has required individuals to set forth dispositive desires in a written statement executed with formalities sufficient to identify to the individual executing the instrument and the world at large that the writing is intended to be a will.”).

12. See Langbein, *supra* note 3, at 514–15.

13. See *id.* at 489.

Because binary classification tests make classifications based upon indirect evidence of the relevant characteristic, they sometimes produce erroneous results that do not reflect reality.<sup>14</sup> These inaccurate classifications can be categorized as either false-positive outcomes or false-negative outcomes.<sup>15</sup> In the context of pregnancy, a false-positive outcome occurs when the test indicates that a woman is pregnant but in fact she is not.<sup>16</sup> A false-negative outcome occurs when a pregnancy test indicates that a woman is not pregnant when in reality she is.<sup>17</sup> Similarly, the law of will-execution produces incorrect determinations regarding a will's authenticity. A false-negative outcome occurs when a court invalidates an authentic will because the decedent mistakenly failed to comply with the prescribed formalities.<sup>18</sup> A false-positive outcome occurs when a court validates a formally compliant document when the decedent nonetheless did not intend it to be a legally effective will.<sup>19</sup> Because false-negative outcomes deny probate to authentic wills and false-positive outcomes admit inauthentic wills to probate, both can be characterized as "probate errors."

Although most probate courts still differentiate wills in this way, the conventional law of will-execution has been a target of reform for roughly forty years.<sup>20</sup> Critics argue that the conventional law invalidates too many authentic wills because of harmless formal defects,<sup>21</sup> and they seek to change the law so that more authentic wills are validated.<sup>22</sup> This reform movement has near unanimous

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14. See RUXTON & COLEGRAVE, *supra* note 4, at 120 (explaining that because binary classification tests do "not observ[e] the condition directly, but instead rely[] on an indirect measure, there is an obvious question about the reliability of [the] classification"); Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 98 (2014) ("Because proxies are stand-ins for some other underlying phenomenon, they necessarily are under- and over-inclusive relative to the phenomenon they are representing, and inevitably produce false positives and negatives.").

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

16. MINKIN & WRIGHT, *supra* note 7, at 297 (explaining that a false-positive outcome "can come about if the test 'mistakes' luteinizing hormone (LH) for hCG, to which it is chemically similar").

17. See *id.* (explaining that a false-negative outcome "can come about if the test is done too soon in the pregnancy or too late, since hCG levels fall again after the second month of pregnancy").

18. See DUKEMINIER & SITKOFF, *supra* note 1, at 153.

19. This could occur when a decedent deceives someone during life by telling him that she intends a will to be legally effective, but in fact she does not. See *infra* notes 127–130 and accompanying text. This could also occur when wrongdoers attempt to forge a will. See *infra* notes 108–109 and accompanying text.

20. See Langbein, *supra* note 3; see also *infra* Part II.

21. See Langbein, *supra* note 3, at 498–503.

22. See *infra* Part II.

approval from the legal academy,<sup>23</sup> and many of its reform proposals have been incorporated into the Uniform Probate Code (“UPC”) and the Restatement (Third) of Property.<sup>24</sup> Yet despite this broad support and long history, few states have significantly departed from the conventional law.<sup>25</sup> Within this context, questions arise as to why the reform movement has been slow to instigate large-scale change.

This Article suggests that the reform movement’s struggles can be explained in part by its focus on implementing specific reforms without developing a reform framework that clearly identifies the problems with the conventional law and specifically explains how reform would resolve these problems. By framing the law of will-execution as a binary classification test that allocates probate errors among false-positive outcomes and false-negative outcomes, this Article seeks to clarify and refine the reform effort. Although the reform movement traditionally did not describe the law of will-execution in this way, a handful of scholars have recently outlined the debate regarding reform in these terms.<sup>26</sup> By doing so, these scholars have illuminated the overarching problem with the conventional law, which is that it presents a greater risk of false-negative outcomes than false-positive outcomes. They have also clarified the reform movement’s objective, which is to reallocate risk more evenly so as to minimize the total number of probate errors.<sup>27</sup>

Although this framework has provided focus to both the criticism of the conventional law and the goal of reform, scholars generally have not applied it more broadly to analyze particular methods of will-execution reform. To fill this analytical void, this Article identifies the various components of the law of will-execution that can be

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23. See *infra* notes 147–152 and accompanying text.

24. See, e.g., UNIF. PROBATE CODE §§ 2-502–03 (UNIF. LAW COMM’N 2010); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1–.3 (AM. LAW INST. 2003).

25. For example, only ten states have adopted a harmless error rule similar to the one found in the UPC and the Restatement. See DUKEMINIER & SITKOFF, *supra* note 1, at 184. Additionally, only two states have adopted the UPC provision authorizing notarized wills. See *id.* at 196.

26. See, e.g., DUKEMINIER & SITKOFF, *supra* note 1, at 153, 171; Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 877–82 (2012); Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 577–78 (2007); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647–49 (2014). Some scholars have framed other areas of the law in these terms. See, e.g., Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1 (2010) (focusing on testamentary capacity rules).

27. See *infra* Part II.

altered to reduce probate-error risk.<sup>28</sup> Ultimately, by framing the law of will-execution as a binary classification test that allocates probate-error risk among false-positive outcomes and false-negative outcomes, this Article shifts the discussion surrounding reform away from specific proposals and toward a more systematic approach to reform. With this framework in place, the goals and mechanics of will-execution reform become clearer, and consequently policymakers might be more willing to depart from the conventional law.

This Article proceeds in three parts. Part I describes the conventional law of will-execution and explains how it allocates probate-error risk among false-positive outcomes and false-negative outcomes. Part II shifts the focus of the Article to the reform movement by describing and expanding the movement's criticism of the conventional law. Specifically, Part II explains how the conventional law produces unnecessary probate errors. Finally, Part III analyzes how the various components of the law of will-execution affect the allocation of risk between false-positive outcomes and false-negative outcomes. It also develops a framework for thinking about how reform can minimize the overall risk of probate errors.

## I. PROBATE-ERROR RISK UNDER CONVENTIONAL LAW

The primary principle of the law of wills is that the decedent has broad freedom to distribute her property upon death.<sup>29</sup> To communicate the intent to exercise this freedom of disposition, a decedent traditionally executes a will.<sup>30</sup> But before accepting a will for probate administration and distributing the estate according to the will's terms, the court must decide whether the decedent intended the will to be legally effective.<sup>31</sup> If the decedent intended to leave behind a legally effective will, the court should grant probate so

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28. See *infra* Part III.

29. See Sitkoff, *supra* note 26, at 643 (“The organizing principle of the American law of succession . . . is *freedom of disposition*.”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882–85 (2012) (“The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.”).

30. See Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 156 (2008) (“[E]state planning . . . at one time involved not much more than the drafting and execution of a will.”).

31. See *Matter of Will of Smith*, 528 A.2d 918, 921 (N.J. 1987) (“No instrument . . . is a will unless the signer so intends.”); Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 106 (2006) (“Every will . . . requires testamentary intent.”).

that the decedent's property is disposed according to the decedent's intended estate plan. By contrast, if she did not intend the will to be legally effective, the court should deny probate so that the estate is not distributed in an unintended manner. The court's task of deciphering this intent may seem straightforward. But, because the decedent is dead at the time of probate, the court cannot simply ask her whether she intended a particular document to constitute a legally effective will.<sup>32</sup>

To overcome these evidentiary difficulties, the law of will-execution provides the decedent the means to communicate testamentary intent to probate courts. Under conventional law, the decedent must comply with a variety of formalities to execute a valid will, including the requirements that the will be written, signed by the decedent, and witnessed.<sup>33</sup> The primary purpose of these formalities is to provide courts with a reliable and easily identifiable record of testamentary intent.<sup>34</sup> In addition to these formalities, the conventional law includes the rule of strict compliance.<sup>35</sup> This rule prohibits courts from considering extrinsic evidence of testamentary intent that suggests the decedent intended a noncompliant document to be a legally effective will.<sup>36</sup>

### A. Will Formalities

Since the enactment of the English Wills Act of 1837<sup>37</sup> and its subsequent influence throughout the United States,<sup>38</sup> wills must be written, signed by the testator, and attested by two witnesses to be

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32. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J 1, 6 (1941); see DUKEMINIER & SITKOFF, *supra* note 1, at 147.

33. See DUKEMINIER & SITKOFF, *supra* note 1, at 148.

34. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003) ("The purpose of statutory formalities . . . is to determine whether the decedent adopted the document as his or her will.").

35. DUKEMINIER & SITKOFF, *supra* note 1, at 153.

36. See Langbein, *supra* note 3, at 489.

37. Wills Act of 1837, 7 Will. 4 & 1 Vict. Ch. 26 (Eng. 1837). Prior to the enactment of the Wills Act of 1837, the Statutes of Wills of 1540 required testamentary gifts of land to be in writing, and the Statute of Frauds of 1677 subsequently required wills disposing of land to be written, signed by the testator, and attested by three witnesses. See DUKEMINIER & SITKOFF, *supra* note 1, at 148-49.

38. See DUKEMINIER & SITKOFF, *supra* note 1, at 148; Victoria J. Haneman, *Changing the Estate Planning Malpractice Landscape: Applying the Constructive Trust to Cure Testamentary Mistake*, 80 UMKC L. REV. 91, 95 n.22 (2011) ("Though the Wills Act of 1837 was passed long after the American Revolution, it still had a profound impact upon the foundation of the law of wills in the United States.").



legally effective.<sup>39</sup> The formality of a written document renders oral wills invalid.<sup>40</sup> The signature formality mandates that the testator sign her will.<sup>41</sup> If the testator is physically unable to sign, someone else can sign the will at the testator's direction if the two are in each other's presence at the time the will is signed and the testator intends the signature to be legally effective.<sup>42</sup> Finally, the attestation formality requires that two witnesses observe the will-execution process and sign the will.<sup>43</sup>

Along with these general formalities, the conventional law of will-execution includes a variety of related technical details. Some states, for example, have a subscription requirement that directs the testator to sign at the end of the will rather than allowing the testator to sign anywhere on the document.<sup>44</sup> Other technical details include presence and publication requirements. In states that have a presence requirement, the testator and the attesting witnesses must be in each other's presence at the time the will is signed.<sup>45</sup> In states that require publication, the testator must indicate to the attesting witnesses that the document before them is her will.<sup>46</sup> These technical requirements, together with the primary formalities of writing, signature, and attestation, comprise the conventional formalities of will-execution.

As mentioned previously, the primary purpose of the prescribed will-execution formalities is to provide reliable evidence of the decedent's intent that a will be legally effective,<sup>47</sup> and indeed the formalities serve this function well. A decedent likely would not go through the highly formalized process of conventional will-execution without intending to leave behind a legally effective will.<sup>48</sup> As

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39. See DUKEMINIER & SITKOFF, *supra* note 1, at 147–48. In the United States, notarization of a will may be a valid alternative to a witness signature. *See id.* at 149.

40. Oral wills are recognized in a minority of states under extremely limited circumstances. *See id.* at 148 n.3.

41. *Id.* at 160–61.

42. *See id.* at 161.

43. See UNIF. PROBATE CODE, § 2-502(a)(3)(A) (UNIF. LAW COMM'N 2010).

44. See DUKEMINIER & SITKOFF, *supra* note 1, at 163.

45. *See id.* at 159.

46. *See id.* at 168–69 n.25 (“The testator may indicate to the witnesses that the instrument is a will by words, signs, or conduct. Publication can be inferred from the circumstances; even the words of another saying that the instrument is the testator's will may be sufficient.”).

47. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003). Will formalities may also serve an ancillary therapeutic function. *See generally* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012).

48. See DUKEMINIER & SITKOFF, *supra* note 1, at 153 (“A competent person not subject to undue influence, duress, or fraud is unlikely to execute an instrument in strict compliance

such, the probate court can validate a formally compliant will with little risk that such validation will produce a false-positive outcome.

Although the risk of false-positive outcomes is extremely low under conventional law, the risk of false-negative outcomes is relatively high. The same formalities that provide robust evidence of the decedent's intent also present opportunity for mistake.<sup>49</sup> Case after case reveals that well-meaning decedents often intend to execute valid wills but fail to comply with the prescribed formalities because of honest mistakes.<sup>50</sup> In such situations, the highly formalized will-execution process produces false-negative outcomes because the decedent intended a will to be legally effective, but the will did not comply with the conventional will-execution formalities. Thus, in this way, the formalities of will-execution allocate probate-error risk under conventional law toward false-negative outcomes and away from false-positive outcomes.<sup>51</sup>

### *B. Strict Compliance*

In addition to the formalities of the execution ceremony, the rule of strict compliance is the second primary component of the conventional law. The rule of strict compliance is the method by which the probate court evaluates a testator's compliance with the formalities of will-execution.<sup>52</sup> When the court applies the rule of strict compliance, it invalidates a will if the testator failed to comply with any of the prescribed formalities.<sup>53</sup> The reason for the testator's failure to strictly comply is irrelevant.<sup>54</sup> Any error in will-

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with all the Wills Act formalities unless the person intends the instrument to be his will."); Kathleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 311 n.18 (2011) ("Few people would undergo [the will-execution] ceremony without holding testamentary intent.").

49. See Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 433-34 (2009).

50. See Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 PA. L. REV. 1033, 1036 (1994) ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases . . .").

51. See Kelly, *supra* note 26, at 880 ("Currently, the concern about [false-negative outcomes] may be greater than the concern about [false-positive outcomes]. Most disputes over execution formalities . . . seem to involve technical defects . . . with little or no risk of fraud. If these cases are representative of all cases, perhaps there is a much greater chance of denying probate to a document the testator did intend to be her will . . . than probating a document the testate did not intend to be her will . . .").

52. See DUKEMINIER & SITKOFF, *supra* note 1, at 153.

53. See Langbein, *supra* note 3, at 489.

54. See *id.*

execution invalidates a will, regardless of the court's confidence that the testator intended the will to be legally effective.<sup>55</sup>

The case of *Stevens v. Casdorph* illustrates how the rule of strict compliance operates.<sup>56</sup> Miller, who “was elderly and confined to a wheelchair,”<sup>57</sup> asked his nephew to drive him to a bank so that he could have his will witnessed.<sup>58</sup> When Miller arrived, he informed Debra Pauley, a bank employee, that he desired to execute his will, and he signed the will in her presence.<sup>59</sup> Pauley did not sign the will as a witness but instead took the will to a different area within the bank.<sup>60</sup> Once there, Pauley told two other bank employees that Miller wanted his will properly executed and asked them to sign the will.<sup>61</sup> Although the bank employees did not observe Miller sign the will, they followed Pauley's instructions and signed as attesting witnesses.<sup>62</sup>

After Miller died, the validity of his will was challenged because he and the two witnesses could not see each other at the time the will was signed.<sup>63</sup> This was problematic because the relevant will-execution statute included a presence requirement.<sup>64</sup> Despite the lower court's finding that Miller had intended the will to be legally effective, the appellate court invalidated the will because of this error in execution.<sup>65</sup> The court reasoned that the “mere intent by a testator to execute a written will is insufficient.”<sup>66</sup> Instead, both “[t]estamentary intent and a written instrument” that complies with the prescribed formalities “are essential to the creation of a valid will.”<sup>67</sup>

As *Stevens v. Casdorph* illustrates, when the court applies the conventional rule of strict compliance, it invalidates a will for any formal defect regardless of how much evidence suggests that the

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55. *See id.* (“The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.”).

56. *See Stevens v. Casdorph*, 508 S.E.2d 610 (W. Va. 1998).

57. *Id.* at 611 n.1.

58. *See id.* at 611.

59. *See id.*

60. *Id.*

61. *See id.*

62. *See id.* at 611–12.

63. *See id.*

64. *See id.* The relevant statute states: “No will shall be valid unless it be in writing and signed by the testator” and “the signature shall be made or the will acknowledged by him *in the presence* of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will *in the presence* of the testator, and of each other.” W. VA. CODE § 41-1-3 (2015) (emphasis added).

65. *See Stevens*, 508 S.E.2d at 613 (“[T]here was no evidence of fraud, coercion or undue influence”).

66. *Id.*

67. *Id.* (quoting *Black v. Maxwell*, 46 S.E.2d 804, 805 (1948)).

decedent intended the will to be legally effective.<sup>68</sup> Put differently, the rule of strict compliance prohibits courts from correcting the false-negative outcomes that the conventional law's high level of formality produces. In fact, courts sometimes explicitly acknowledge that the application of the conventional law produces false-negative outcomes, but they also typically admit that their hands are tied by the rule of strict compliance.<sup>69</sup> For example, the Supreme Court of Pennsylvania explains, "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms; and whenever that happens, the genuine intention is frustrated . . . ."<sup>70</sup> Thus, the conventional law of will-execution produces false-negative outcomes even when the court has ample evidence to establish that the decedent intended a formally deficient will to be legally effective.<sup>71</sup>

All in all, the conventional law of will-execution heavily allocates probate-error risk in favor of false-negative outcomes. On the one hand, by requiring the testator to leave behind strong evidence of testamentary intent in the form a written, signed, and witnessed will, the conventional law minimizes the likelihood that the court will validate a will that the decedent did not intend to be legally effective.<sup>72</sup> The risk of a false-positive outcome is therefore extremely low. On the other hand, under the rule of strict compliance, the court will not validate a formally deficient will, even when it is certain that the decedent intended the noncompliant will to be legally effective. In this situation, the court refuses to validate the will despite the high probability of a false-negative outcome.<sup>73</sup> Consequently, under the conventional law of will-execution, the risk of false-negative outcomes is much greater than the risk of false-positive outcomes.

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68. Langbein, *supra* note 3, at 489.

69. See Mann, *supra* note 50, at 1036 (explaining the courts invalidate wills "sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator"); see also *In re Pavlinko's Estate*, 148 A.2d 528, 528 (Pa. 1959) (describing the invalidation of a will in a situation in which the decedent's intent was clear as a "very unfortunate" result).

70. *In re Churchill's Estate*, 103 A. 533, 535 (Pa. 1918).

71. See *DUKEMINIER & SITKOFF*, *supra* note 1, at 153 ("[B]y establishing a conclusive presumption of invalidity for an imperfectly executed instrument, the strict compliance rule denies probate even if the defect is innocuous and there is overwhelming evidence of authenticity—a false negative."); Lester, *supra* note 26, at 578 ("In the past, a fear of probating 'false positives' . . . has led to strict compliance with Wills Act formalities and denial of probate for documents that decedents intended to constitute their wills.").

72. See *supra* notes 47–51 and accompanying text.

73. See *supra* notes 68–71 and accompanying text.

## II. CRITICISM OF THE CONVENTIONAL LAW'S RISK ALLOCATION

The conventional law of will-execution enjoyed a relatively quiet existence until 1975, when Professor John Langbein published his article, *Substantial Compliance with the Wills Act*.<sup>74</sup> In this seminal work, Langbein criticizes the conventional law for being overly formalistic.<sup>75</sup> He argues that the validity of a will depends too much upon whether the decedent complied with the prescribed formalities and not enough upon whether the decedent intended the will to be legally effective.<sup>76</sup> As a result, too many authentic wills are invalidated because of honest and harmless mistakes.<sup>77</sup>

Langbein's argument is founded upon formality's underlying purpose of providing evidence of a will's authenticity.<sup>78</sup> He argues that requiring the court to invalidate a noncompliant document in cases in which the decedent clearly intended to execute a will is unnecessary.<sup>79</sup> If the testator's intent is clear, testamentary formality's purpose of providing evidence of the will's authenticity has been fulfilled.<sup>80</sup> The application of the rule of strict compliance

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74. Langbein, *supra* note 3. The reform movement became so associated with Langbein that it has been described as the "Langbein Revolution." Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1896 (1996). While Langbein sparked widespread reexamination of the conventional law, earlier critiques can be found. See, e.g., Philip Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 503 (1948) ("[T]he philosophy should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements."); Recent Case, *Probate Denied Husband's Will When Husband and Wife Each Mistakenly Signed the Other's Mutual Will*, 107 U. PA. L. REV. 1237, 1239-40 (1959) (criticizing "an unnecessarily literal and unsophisticated construction of the [will-execution] requirements").

75. See Langbein, *supra* note 3, at 489 ("The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect is inconsequential.").

76. See *id.* at 498-503 ("In other areas where legislation imposes formal requirements, the courts have taken a purposive approach to formal defects . . . . The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are independently satisfied. Why has the Wills Act not been interpreted with a similar purposiveness? There are factors which distinguish Wills Act defects from [other formal] violations, but we submit that none of them really justifies the harsher treatment of Wills Act defects.").

77. See *id.*; see also Lester, *supra* note 26, at 578-79.

78. See Langbein, *supra* note 3, at 491-98.

79. 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, 4-5 (1987).

80. See *id.*

and the resulting invalidity of a noncompliant will in such cases undermines the law's overall objective of effectuating the decedent's intent.<sup>81</sup>

The dissenting judge's response to the majority opinion in *Stevens v. Casdorff* illustrates this standard critique of the conventional law:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.<sup>82</sup>

Langbein's reaction to cases like *Stevens v. Casdorff* nicely summarizes a fundamental problem with the conventional law. He explains that the law of wills "is meant to implement the decedent's intent" and that "the paradox in [these] case[s] . . . is that the [conventional law] defeats that intent."<sup>83</sup> Put simply, the conventional law of will-execution is intended to provide courts evidence of a will's authenticity, yet it frequently requires courts to invalidate clearly authentic wills.

Langbein's criticism provides a helpful starting point for thinking about the inadequacies of the conventional law. His critique illuminates the inequity that results when the conventional law is applied in specific cases, and *Stevens v. Casdorff* exemplifies both

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81. See *id.* at 4; Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 457 (2002) ("[F]ormality rules for will execution prevent mistakes about intent and provide a means for expressing intent. At the same time, in significant number of cases they may frustrate not only an individual testator's intent but also the principal objective of the law of wills."); see also RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003) ("The formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves.").

82. *Stevens v. Casdorff*, 508 S.E.2d 610, 613 (W.Va. 1998) (Workman, J., dissenting). The dissent further criticizes the majority opinion: "The majority's conclusion is . . . [an] illiberal and inflexible construction, giving preeminence to the letter of the law and ignoring the spirit of the entire body of testamentary law, resulting in the thwarting of Mr. Miller's unequivocal wishes." *Id.* at 614.

83. Langbein, *supra* note 79, at 4; see *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) ("Compliance with statutory formalities is important not because of the inherent value that those formalities possess, but because of the purposes they serve. It would be ironic to insist on literal compliance with statutory formalities when that insistence would invalidate a will that is the deliberate and voluntary act of the testator.").

the high risk of false-negative outcomes that exists under the conventional law and the harshness that can result from such a probate-error risk allocation.<sup>84</sup>

However, the inequity of individual cases does not necessarily render the conventional law ineffective as a method for classifying wills as authentic or inauthentic. Instead of focusing on the inequity of particular cases, the law of will-execution must be analyzed as a broader system for differentiating authentic wills from inauthentic wills. When viewed from this more general perspective, the relevant issue is not whether a correct determination of a will's authenticity is made in a particular case. Rather, it is whether the system for evaluating the authenticity of wills is designed to make correct determinations of authenticity as frequently as possible. In other words, an evaluation of the conventional law of will-execution should focus on whether the law is designed to minimize the overall level of probate-error risk.

#### A. Probate-Error Costs

The goal of probate-error minimization stems from the relative costs of false-positive outcomes and false-negative outcomes. If one type of error is more costly than the other, minimization of the total number of errors is not necessarily the appropriate goal of the law. Consider, for example, criminal adjudication. A criminal trial can produce both false-positive outcomes (*i.e.*, convictions of innocent defendants) and false-negative outcomes (*i.e.*, acquittals of guilty defendants). Within this context, false-positive outcomes are widely considered more costly than false-negative outcomes because society views the acquittal of guilty defendants as more acceptable than the conviction of innocent persons.<sup>85</sup> This evaluation of the costs of criminal adjudication error is based upon "a moral judgment about the wrongfulness of inflicting the pain of criminal conviction on people who are not guilty of crimes."<sup>86</sup> Criminal adjudication is therefore not designed to minimize the overall risk of error. Instead, it is designed to minimize false-positive outcomes in

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84. See *Stevens*, 508 S.E.2d 610.

85. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); 4 WILLIAM BLACKSTONE, COMMENTARIES 352 ("[T]he law holds that it is better that ten guilty persons escape, than that one innocent suffer."); see generally Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

86. Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1688 (2001).

the form of wrongful convictions, but at the cost of an increased risk of false-negative outcomes through the acquittal of guilty defendants.<sup>87</sup>

Although the criminal adjudication system is not designed to minimize the total number of errors, the law's method of determining the authenticity of wills should be because false-positive outcomes are generally just as costly as false-negative outcomes within the probate context. Specifically, the decedent's freedom of disposition is undermined not only when the court validates an inauthentic will but also when the court invalidates an authentic will.<sup>88</sup> If the court validates an inauthentic will, the decedent's freedom of disposition is undermined because the estate passes according to the terms of a will that the decedent did not intend to be legally effective.<sup>89</sup> Conversely, if the court invalidates an authentic will, the decedent's freedom of disposition is undermined because a genuine expression of testamentary intent is ignored.<sup>90</sup>

Thus, in contrast to criminal adjudication errors,<sup>91</sup> probate errors in the form of false-positive outcomes are equally as costly as probate errors in the form of false-negative outcomes.<sup>92</sup> Both types of probate error place the decedent's estate in the hands of unintended beneficiaries.<sup>93</sup> Because the cost of a false-positive outcome equals the cost of a false-negative outcome, the law of will-execution should be designed to minimize overall probate-error risk. Indeed, as long as the court reaches the correct decision regarding a will's authenticity as frequently as possible, the law should be indifferent to whether the probate errors that occur are false-positive outcomes or false-negative outcomes. However, as detailed below, the conventional law of will-execution is not designed to minimize the overall level of probate-error risk. Instead, the law heavily protects against false-positive outcomes and consequently produces an unnecessarily high overall level of probate-error risk.

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87. This allocation of risk is achieved through the reasonable doubt standard of proof. See Richard A. Bierschback & Alex Stein, *Deterrence, Retributivism, and the Law of Evidence*, 93 VA. L. REV. IN BRIEF 189, 191 (2007) (“[B]y decreasing the incidence of false positives (erroneous convictions of the factually innocent), a ‘reasonable doubt’ standard increases the incidence of false negatives (erroneous acquittals and non-prosecutions of the factually guilty).”); see also *infra* notes 283–284 and accompanying text.

88. See DUKEMINIER & SITKOFF, *supra* note 1, at 148.

89. See *id.*

90. See *id.*

91. See *infra* notes 85–87 and accompanying text.

92. See Sherwin, *supra* note 81, at 463 (“[A]n erroneous decision upholding an informal will is [not] substantially more costly than an erroneous decision rejecting an informal will” because “an error either way results in a disposition the testator does not want.”).

93. See DUKEMINIER & SITKOFF, *supra* note 1, at 148 (“Both kinds of error dishonor the decedent’s freedom of disposition.”).



### B. Total Probate-Error Risk

The law of will-execution can allocate probate-error risk along a spectrum.<sup>94</sup> On one end, all probate errors would be false-positive outcomes. Under such a system, the court would validate a will if there were any chance that the decedent intended it to be legally effective.<sup>95</sup> On the other end, all probate errors would be false-negative outcomes. Under such a system, the court would validate a will only if it were unquestionably authentic. In the middle of the spectrum, probate-error risk would be evenly distributed; the number of false-positive outcomes would be the same as the number of false-negative outcomes. Between this midpoint and the two extremes lies an entire spectrum of potential probate-error risk allocations.

Critics argue that the conventional law of will-execution is flawed because it heavily allocates probate-error risk in favor of false-negative outcomes.<sup>96</sup> At the heart of this critique is the notion that the law should be designed to correctly determine a will's authenticity as frequently as possible. Put differently, because the primary objective of the law of wills is to dispose of the estate in the way that the decedent intended,<sup>97</sup> the law should minimize the overall risk of probate errors (*i.e.*, the combined risk of false-positive outcomes and false-negative outcomes).<sup>98</sup> Although critics argue that the conventional law's preference for false-negative outcomes is inequitable,<sup>99</sup> typically they do not clearly explain why a preference for false-negative outcomes is inconsistent with the goal of minimizing probate-error risk.

Although the conventional law's risk allocation may intuitively seem problematic, a false-negative heavy risk allocation does not necessarily undermine the goal of probate-error minimization. For

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94. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. REV. 1495, 1521 (2001) ("Systems that operate under uncertainty always balance type I and type II errors—false positives . . . and false negatives.").

95. Some have argued that this is the appropriate allocation of probate-error risk. See, e.g., Guzman, *supra* note 48, at 309 ("Selecting rules that risk over-inclusion by favoring the identification of testamentary intent—and therefore wills—is the better choice: no one will die for courts having done so . . . . [R]esponsibility for any marginal misstep in finding [testamentary intent] would rest appropriately with the decedent who had left evidence to that effect in the first place.").

96. See *supra* notes 74–83 and accompanying text.

97. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

98. See Sherwin, *supra* note 81, at 467 ("The fact that standard will formalities provide . . . benefits when used by testators does not alter the objective at the point of litigation, which should be to determine as accurately as possible whether or not the decedent had testamentary intent.").

99. See *supra* notes 74–83 and accompanying text; see also *infra* notes 147–150 and accompanying text.

instance, consider a scenario in which formality is not a useful proxy for authenticity. Under this scenario, the likelihood that a purported will is authentic is the same as the likelihood that it is inauthentic regardless of its level of formality. This scenario is illustrated by Graph 1 with the level of formality represented along the x-axis and the number of purported wills represented along the y-axis. The curved line represents the distribution of both authentic wills and inauthentic wills across different levels of formality. From this graph, one can determine the number of purported wills that possess a certain level of formality.

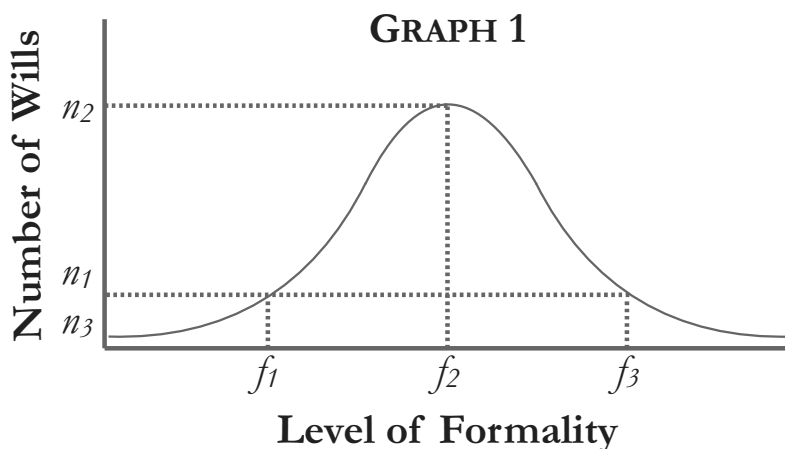
The point labeled  $f_1$  at the far left-hand side of the x-axis represents an extremely low level of formality, such as an oral will.<sup>100</sup> Relatively few wills possessing this low level of formality are submitted for probate,<sup>101</sup> and therefore the distribution curve indicates that the number of wills that possess an  $f_1$  level of formality falls at the lower end of the y-axis at the point labeled  $n_1$ . By contrast, the point labeled  $f_3$  at far right-hand side of the x-axis represents an extremely high level of formality, such as a written and signed document that is attested by five witnesses and is notarized.<sup>102</sup> Few wills likely possess this level of formality, and, as such, the distribution curve indicates that the number of wills that possess an  $f_3$  level of formality also falls at the lower end of the y-axis at the point labeled  $n_3$ . In the middle of the x-axis at the point labeled  $f_2$ , the level of formality is higher than an  $f_1$  level of formality but is lower than an  $f_3$  level of formality. A will that possesses an  $f_2$  level of formality might resemble a standard will that is written, signed, and attested by two witnesses. More wills that are submitted for probate likely possess this intermediate level of formality, and therefore the distribution curve indicates that the number of wills that possess an  $f_2$  level of formality falls at the top end of the y-axis at the point labeled  $n_2$ .

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100. Some states authorize oral wills (also referred to as nuncupative wills) in limited circumstances. DUKEMINIER & SITKOFF, *supra* note 1, at 148 n.3.

101. *See id.* (explaining that oral wills are “extremely rare”); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN’S L. REV. 683, 729 (2011) (“Although nuncupative wills can be traced to the origin of wills, the use of nuncupative wills today is limited.”).

102. Some commentators advise the inclusion of a notary and extra witnesses in the will-execution ceremony. *See, e.g.*, Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1, 15, 40 (2011).

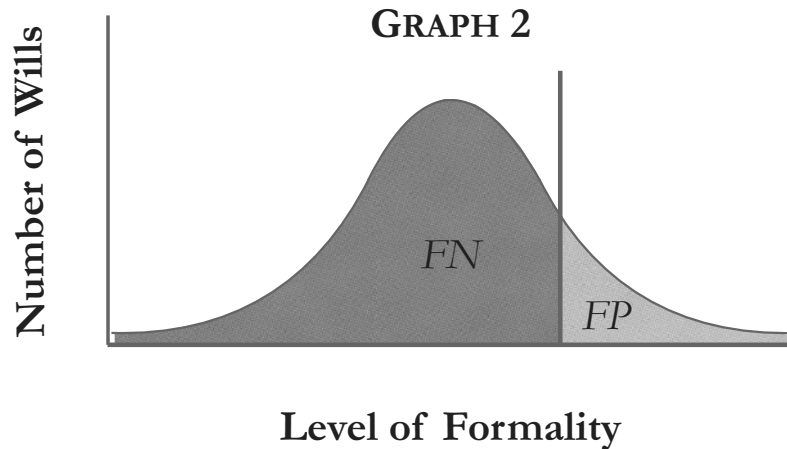


The basic assumption of this model is that the number of authentic wills that possess a certain level of formality is the same as the number of inauthentic wills that possess that level of formality. Regardless of the level of formality, the relationship between authentic wills and inauthentic wills remains constant; the number of authentic wills equals the number of inauthentic wills at any given level of formality. Although Graph 1 appears to contain a single distribution curve, it actually contains two identical overlapping distribution curves—one representing the distribution of authentic wills and one representing the distribution of inauthentic wills. Therefore, at the  $f_1$  level of formality,  $n_1$  wills are authentic and  $n_1$  wills are inauthentic. Likewise, both the number of authentic wills that possess an  $f_3$  level of formality and the number of inauthentic wills that possess an  $f_3$  level of formality is  $n_3$ . The same is true regardless of the level of formality. Under this model, the level of formality at which the law chooses to distinguish authentic wills from inauthentic wills does not affect the total number of probate errors.

Graph 2 represents a false-negative heavy risk allocation, similar to the conventional law's allocation.<sup>103</sup> The vertical line represents the high level of formality that the law uses to differentiate authentic wills from inauthentic wills.<sup>104</sup> Purported wills that possess a level of formality that is left of the differentiating line are classified as inauthentic, and purported wills that possess a level of formality that is right of the differentiating line are classified as authentic.

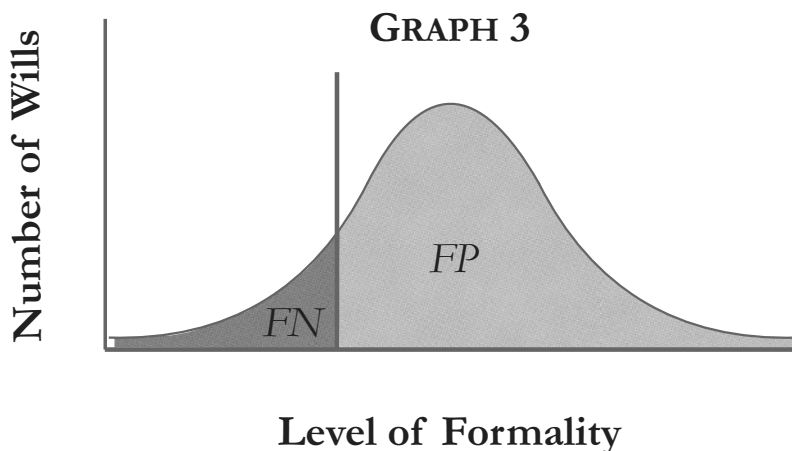
103. See *supra* Part I.

104. See *supra* Part I.A.



Because the single distribution curve represents two separate but identical distribution curves, one for authentic wills and one for inauthentic wills, the area to the left of the differentiating line and under the distribution curve represents both the number of inauthentic wills that are correctly classified as inauthentic (*i.e.*, true-negative outcomes) and the number of authentic wills that are incorrectly classified as inauthentic (*i.e.*, false-negative outcomes). Similarly, the area to right of the differentiating line and under the distribution curve represents both the number of true-positive outcomes and false-positive outcomes. Thus, the model represented in Graph 2 produces a high risk of false-negative outcomes as represented by the large area that is labeled *FN*, but it is offset by a relatively low risk of false-positive outcomes as represented by the small area that is labeled *FP*.

By contrast, Graph 3 represents a false-positive heavy risk allocation. Instead of the differentiating level of formality falling toward the right-hand side of the x-axis, the differentiating line is now set toward the left-hand side of the x-axis where the level of formality is lower. With this change comes a higher risk of false-positive outcomes, but again this risk is offset by a relatively low risk of false-negative outcomes. Thus, in this hypothetical scenario, the overall risk of probate errors is fixed because formality is not a useful proxy for authenticity.



As a comparison of Graphs 2 and 3 reveals, a false-negative heavy risk allocation produces the same number of probate errors as a false-positive heavy risk allocation. In other words, the total area under the distribution curve that represents incorrect determinations of authenticity is the same regardless of how probate-errors are allocated among false-negative outcomes and false-positive outcomes. The role of the law of will-execution under this hypothetical scenario is simply to allocate risk among false-positive outcomes and false-negatives outcomes. It has no role in affecting overall probate-error risk, and therefore, a false-negative heavy risk allocation does not undermine the goal of probate-error minimization.

#### 1. Frequency of Inauthentic Wills

While the hypothetical scenario that is represented by Graphs 1 through 3 is useful for beginning to think about how the law allocates probate-error risk, the scenario does not reflect reality. First, this model assumes that the number of authentic wills that are submitted for probate is the same as the number of inauthentic wills that are submitted for probate. This assumption is in part responsible for the law's inability to alter the overall level of probate-error risk. Because the number of authentic wills is the same as the number of inauthentic wills at any given level of formality, a change in the differentiating level of formality results in an equal tradeoff between false-positive outcomes and false-negative outcomes. However, the number of authentic wills that are submitted to probate is likely not equal to the number of inauthentic wills that are submitted to probate. Instead, most purported wills are likely authentic.

Several factors support this new assumption. First, the vast majority of wills offered for probate pass through the system uncontested.<sup>105</sup> If there were questions regarding the will's authenticity, some interested party likely would contest the will during the probate process. Second, most wills that are submitted for probate possess high levels of formality,<sup>106</sup> which as discussed previously, provides robust evidence of authenticity.<sup>107</sup> Third, fraudulent wills are rare.<sup>108</sup> In the past, there was a significant risk that apparently authentic wills were instead forgeries, but today fraud is significantly less prevalent.<sup>109</sup> Finally, many scholars suggest that a significant number of wills that lack high levels of formality are nevertheless authentic.<sup>110</sup> Errors in will-execution are frequently attributed to simple mistake, rather than inauthenticity. Therefore, although precise measurement of the number of authentic wills and inauthentic wills that are submitted for probate is impossible, it seems safe to assume that most wills are authentic.

As seen in Graph 4, the disproportion in the number of authentic and inauthentic wills is illustrated by a lower distribution curve for inauthentic wills. This change creates two distinct distribution curves: one that reflects the distribution of authentic wills and another that reflects the distribution of inauthentic wills. These two distribution curves now illustrate a hypothetical scenario in which most wills are authentic at any given level of formality. The disparity between authentic wills and inauthentic wills is most pronounced at

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105. See Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in *INHERITANCE AND WEALTH IN AMERICA*, 173, 174–75 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (reporting will contests “are rare events, occurring in fewer than [three] percent of probated estates”); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 *HOUS. L. REV.* 1445, 1467 (2007) (“Every study of the probate process has found that will contests are quite rare events. . . . [T]he overwhelming majority of estates sail through probate without any real objection.”); David Horton, *Wills Law on the Ground*, 62 *UCLA L. REV.* 1094, 1131 (2015) (reporting only sixteen will contests out of a sample of 571 probate cases).

106. See Horton, *supra* note 105, at 1131 (reporting that only four wills out of a sample of 571 probate cases were challenged for improper execution); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 *REAL PROP. & TR. J.* 607, 647 (1987) (suggesting that “invalidation of wills in will contests on the ground of nonobservance of testamentary formalities is rare and of minimal significance”).

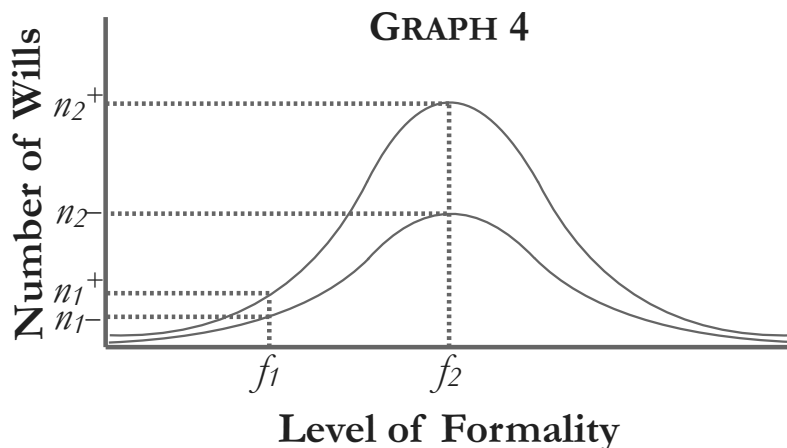
107. See *supra* notes 47–48 and accompanying text.

108. See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 *N.C. L. REV.* 541, 551 (1990) (“[F]raudulent wills are seldom a problem. If one judges simply from the cases are denied probate because attestation is botched or absent, extremely few involve the kind of fraud that the Statute of Frauds was designed to prevent.”).

109. See *id.*

110. See, e.g., Guzman, *supra* note 48, at 309 (suggesting that in cases of noncompliance “[t]estamentary-enough intent more than likely exists”); James Lindgren, *The Fall of Formalism*, 55 *ALB. L. REV.* 1009, 1029 (1992) (explaining that of the many cases involving attestation errors “[a]most all are defective because of ignorance or mistake”).

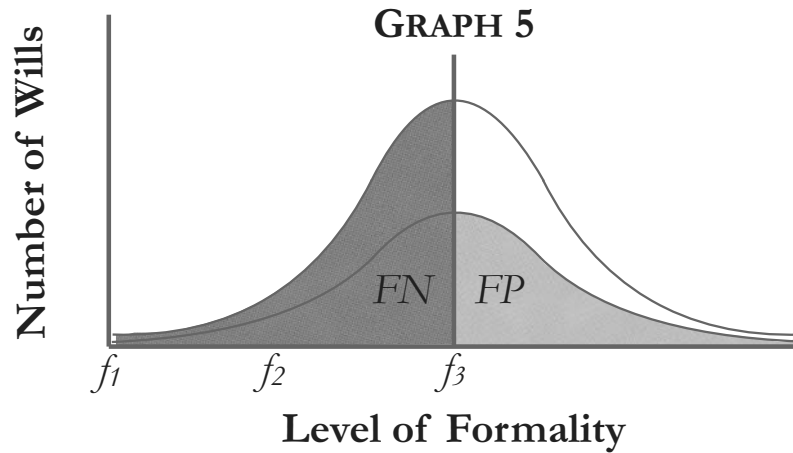
the  $f_2$  level of formality with the number of authentic wills falling at the top end of the y-axis at the point labeled  $n_2^+$  and the number of inauthentic wills falling in the middle of the y-axis at the point labeled  $n_2^-$ . At formality level  $f_1$ , the disparity is less pronounced with the number of authentic wills being only slightly greater than the number of inauthentic wills.



The decoupling of the distribution curves for authentic wills and inauthentic wills affects how probate-error risk is depicted. Consider, for example, Graph 5, which sets the level of formality at which the law distinguishes authentic wills from inauthentic wills in the middle of the x-axis at the point labeled  $f_3$ . Wills that fall to the left of the differentiating line are classified as inauthentic. Thus, the area left of the differentiating line and under the higher distribution curve for authentic wills represents the number of false-negative outcomes.<sup>111</sup> In other words, the area labeled *FN* represents those wills that are authentic but that are incorrectly classified as inauthentic. By contrast, wills that fall to the right of the differentiating line are classified as authentic, and the area to the right of the line and under the lower distribution curve for inauthentic wills represents those wills that are inauthentic but that are incorrectly classified as authentic.<sup>112</sup> As such, the area labeled *FP* represents the number of false-positive outcomes. A comparison of the areas labeled *FN* and *FP* reveals that setting the differentiating line at point  $f_3$  produces more false-negative outcomes than false-positive outcomes.

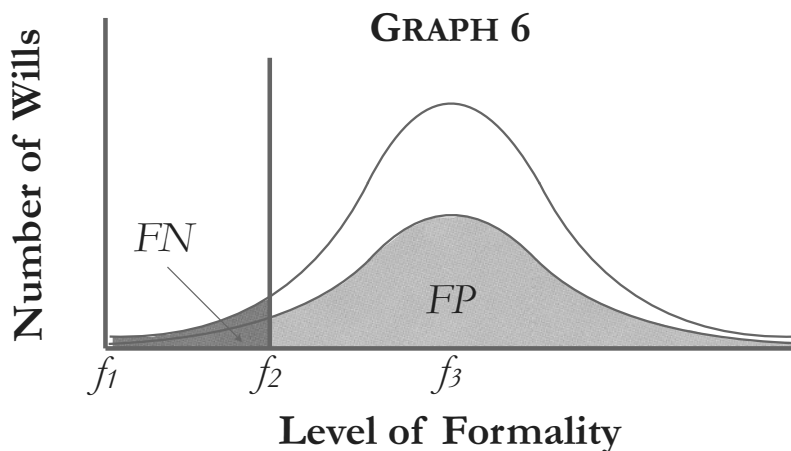
111. Similarly, the area to the left of the differentiating line and under the lower distribution curve for inauthentic wills represents the number of true-negative outcomes.

112. Likewise, the area to the right of the differentiating line and under the higher distribution curve for authentic wills represents the number of true-positive outcomes.

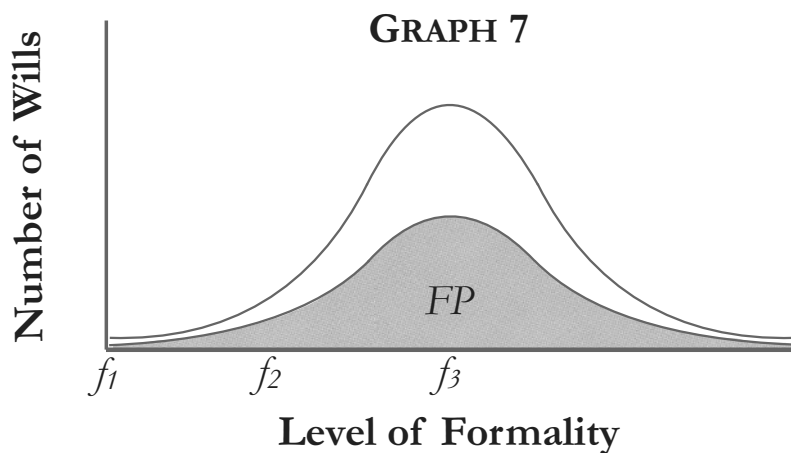


Because the distribution curves for authentic wills and inauthentic wills are no longer identical under this revised model, the overall level of probate-error risk is no longer fixed. Now, the law's allocation of risk among false-positive outcomes and false-negative outcomes plays a role in probate-error minimization. As depicted in Graph 6, when the differentiating line is moved from point  $f_3$  to a lower level of formality at point  $f_2$ , not only does the allocation of risk between false-negative outcomes and false-positive outcomes change, but also the overall level of probate-error risk drops. The total number of probate-errors decreases because moving the differentiating line reduces the number of false-negative outcomes more than it increases the number of false-positive outcomes. Thus, when the differentiating line is set at point  $f_2$  more false-positive outcomes are produced than when the differentiating line is set at point  $f_3$ , but that increase is offset by a greater decrease in the number of false-negative outcomes. The smaller combined area of the *FN* and *FP* regions illustrates the lower overall level of probate-error risk that results from the change in the differentiating line's location.





Although changing the differentiating line's location from  $f_3$  to  $f_2$  reduces the overall level of probate-error risk, a greater reduction is possible. Graph 7 represents a scenario in which the differentiating line coincides with the y-axis at point  $f_1$ . Because point  $f_1$  represents a level at which formality is absent, all purported wills are presumed to be authentic regardless of their level of formality. The entire distribution curve for both authentic wills and inauthentic wills falls to the right of the differentiating line, and no purported wills fall to the left. Consequently, all purported wills are classified as authentic and all probate errors are false-positive outcomes.



Not only does setting the differentiating line at the y-axis allocate all probate-error risk in favor of false-positive outcomes, but it also minimizes overall probate-error risk. Like the move from  $f_3$  to  $f_2$ , the move from  $f_2$  to  $f_1$  produces more false-positive outcomes, but that increase in false-positive outcomes is offset by a greater decrease in

the number of false-negative outcomes. In sum, allocating all probate-error risk to false-positive outcomes produces the smallest possible area below the distribution curves that represent incorrect determinations of authenticity. As such, this model of probate-error risk illustrates that a risk allocation that is heavily skewed toward one type of probate-error is not necessarily inconsistent with the goal of probate-error minimization. As discussed previously, under certain conditions, such an allocation does not affect the overall rate of error, and in fact, under other conditions, such an allocation can even achieve the goal of probate-error minimization.

## 2. Formality of Inauthentic Wills

Although recognizing that most wills submitted for probate likely are authentic brings the probate-error risk model closer to reality, more refinement is needed. Specifically, the model as currently constructed assumes that the mean level of formality is the same for both authentic wills and inauthentic wills. Under this assumption, the level of formality that most authentic wills possess is the same as the level of formality that most inauthentic wills possess. This assumption is exemplified by formality level  $f_2$  on previous Graph 4. Formality level  $f_2$  is the level of formality that most authentic wills possess (*i.e.*,  $n_2^+$  wills), and it is also the level of formality that most inauthentic wills possess (*i.e.*,  $n_2^-$  wills). Because  $f_2$  is the mean level of formality for both authentic and inauthentic wills, the number of both authentic wills and inauthentic wills decreases as the level of formality decreases along the left-hand side of the x-axis. Likewise, as the level of formality increases toward the right of formality level  $f_2$ , the number of authentic wills decreases and the number of inauthentic wills decreases.

The assumption that the mean level of formality is the same for both authentic wills and inauthentic wills is flawed. Instead, the mean level of formality of inauthentic wills is likely lower than the mean level of formality of authentic wills. Most authentic wills likely possess a relatively high level of formality simply because the law requires valid wills to possess a high level of formality. By mandating that a valid will be written, signed, witnessed, and compliant with various other requirements, the law encourages those wanting to leave behind valid wills to comply with a high level of formality.<sup>113</sup>

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113. See Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 625 (2014) ("[B]y requiring all testators to complete the formal will-execution process, the [conventional law] encourages those who desire to distribute their property through wills to

Therefore, most authentic wills possess the high level of formality that the conventional law requires. By contrast, most inauthentic wills likely possess a relatively low level of formality. Highly formal inauthentic wills are rare because most people do not complete a complex will-execution ceremony without intending to leave behind a legally effective will.<sup>114</sup> Furthermore, as previously discussed, fraud is no longer a significant problem, and consequently few forged wills, which possess high levels of formality, are submitted for probate.<sup>115</sup> Most inauthentic wills therefore possess a level of formality that is lower than the level of formality that most authentic wills possess.

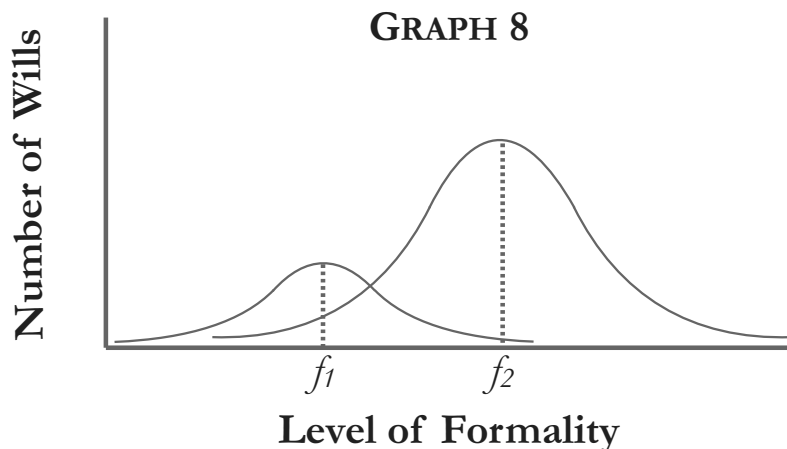
The different mean levels of formality for authentic and inauthentic wills are represented in Graph 8 by two offset distribution curves. The distribution curve that represents inauthentic wills is situated toward the left-hand side of the x-axis where formality levels are lower, and the mean level of formality is represented by formality level  $f_1$ . By contrast, the distribution curve that represents authentic wills is situated toward the right-hand side of the x-axis reflecting higher levels of formality. Because the distribution curve for authentic wills is shifted toward the right-hand side of the x-axis, the mean level of formality is located to the right of formality level  $f_1$  at point  $f_2$ . Thus, Graph 8 depicts a probate-error risk model in which not only are inauthentic wills less common than authentic wills but also inauthentic wills are on average less formal than authentic wills.

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comply with the prescribed will-execution formalities.”); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1066 (1996) (“[T]he very fact that the law demands formalities should function *ex ante* to encourage proper execution and hence yield, in more instances, better evidence both of the substance of the estate plan and of the testator’s resolve to put it into legal effect.”); see also *infra* notes 182–183 and accompanying text. Even in jurisdictions that authorize less formal holographic wills, empirical evidence suggests that informal authentic wills are rare. See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 42 (2008) (reporting that of the “approximately 10,000 estates [that] submitted an application for probate [in Allegheny County, Pennsylvania] during 1990 and 1995 collectively,” only “145 contained holographic testaments”).

114. See DUKEMINIER & SITKOFF, *supra* note 1, at 153. But see *infra* notes 127–130 and accompanying text.

115. See *supra* notes 108–109 and accompanying text.

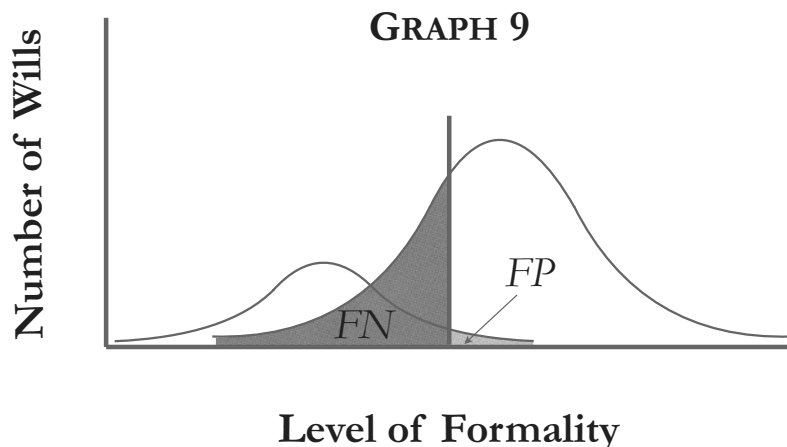


Recognizing that the mean level of formality for inauthentic wills is lower than the mean level of formality for authentic wills affects both the allocation of risk between false-positive outcomes and false-negative outcomes and the overall level of probate-error risk. Consider, for example, Graph 9, which depicts the conventional law's false-negative heavy risk allocation.<sup>116</sup> The differentiating level of formality is set toward the right-hand side of the x-axis at a relatively high level of formality. Specifically, the differentiating line is set at a level of formality that represents a written, signed, and attested document that also satisfies the ancillary requirements of presence, publication, and subscription.<sup>117</sup>

Because the mean level of formality for inauthentic wills lies significantly to the left of the differentiating line, many inauthentic wills are correctly classified as inauthentic, and very few false-positive outcomes are produced. The small number of inauthentic wills that are incorrectly classified as authentic is represented by the small area to the right of the differentiating line that is labeled *FP*. By contrast, the mean level of formality for authentic wills lies slightly to the right of the differentiating line. Consequently, a smaller percentage of authentic wills is classified as inauthentic, and more false-negative outcomes are produced. The relatively large area to the left of the differentiating line that is labeled *FN* represents the greater number of authentic wills that are incorrectly classified as inauthentic. Thus, when the differentiating level of formality is set toward the right-hand side of the x-axis, as it is under the conventional law of will-execution, the risk of false-negative outcomes is greater than the risk of false-positive outcomes.

116. See *supra* Part I.

117. See *supra* Part I.A.

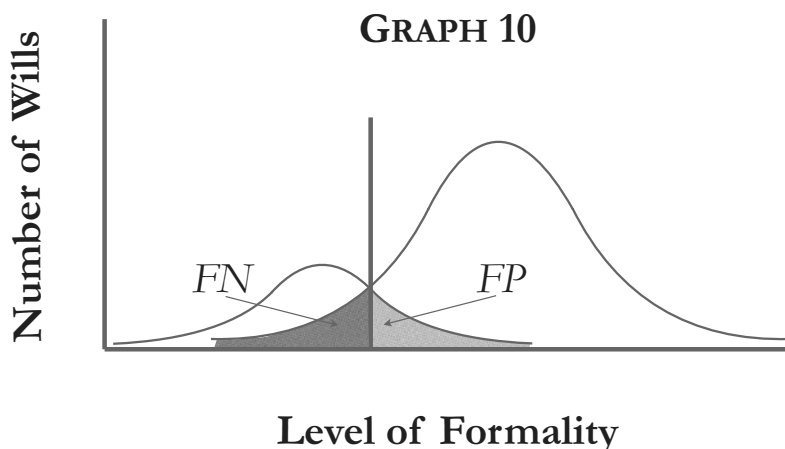


As explained previously, a false-negative heavy risk allocation is not necessarily inconsistent with the goal of probate-error minimization.<sup>118</sup> However, such an allocation does undermine this goal under a model in which most purported wills are authentic and the mean level of formality of inauthentic wills is lower than the mean level of formality of authentic wills. For example, consider a scenario in which the differentiating level of formality is set lower than the conventional law's differentiating level of formality. As depicted in Graph 10, this change in the differentiating line's location toward the left-hand side of the x-axis affects both the allocation of risk between false-positive outcomes and false-negative outcomes and the overall level of probate-error risk.

The shift in the differentiating line's location toward the left decreases the number of false-negative outcomes. But because of the differences in the distribution curves for authentic and inauthentic wills, the tradeoff between false-negative outcomes and false-positive outcomes is not one-for-one. Instead, false-negative outcomes decrease at a greater rate than false-positive outcomes increase. Consequently, moving to a lower differentiating level of formality decreases the overall risk of probate-errors. Comparing Graph 9 and Graph 10 shows this decline in the total risk of false-positive outcomes and false-negative outcomes, as the combined area of the *FN* and *FP* regions in Graph 10 is smaller than the combined probate-error regions in Graph 9.

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118. See *supra* Part II.B.1.



In sum, the conventional law of will-execution is not designed to minimize the overall likelihood of probate errors. Instead, it reduces the risk of false-positive outcomes at the expense of an increased risk of false-negative outcomes. As Graphs 9 and 10 illustrate, because inauthentic wills are both less prevalent and typically less formal than authentic wills, a false-negative heavy risk allocation produces more total probate errors than would an allocation that more evenly distributes probate errors between false-positive outcomes and false-negative outcomes. The conventional law's preference for false-negative outcomes and its consequent overproduction of total probate errors is inappropriate because the cost of a false-positive outcome is the same as the cost of a false-negative outcome.<sup>119</sup> When a probate error occurs, whether in the form of a false-positive outcome or a false-negative outcome, the decedent's intent is undermined.<sup>120</sup> Therefore, contrary to the way that the conventional law operates, the method for determining a will's authenticity should be designed to make correct determinations as frequently as possible.

### *C. Correction of False-Positive Outcomes*

Most of the discussion regarding the conventional law of will-execution centers on the effect of a testator's failure to comply with the prescribed formalities. Under the conventional rule of strict compliance, the only way that a proponent of a will can establish testamentary intent is by proving that the testator complied with the

119. See *supra* notes 88–93 and accompanying text.

120. See DUKEMINIER & SITKOFF, *supra* note 1, at 148.

prescribed formalities.<sup>121</sup> Noncompliance is conclusive evidence that the decedent did not intend a will to be legally effective,<sup>122</sup> and consequently the court has no discretion to correct obvious false-negative outcomes.<sup>123</sup> The bulk of the criticism of the conventional law therefore focuses on the harshness of invalidating a clearly genuine will because of a harmless formal defect.<sup>124</sup> But the effect of a decedent's noncompliance is only part of the law of will-execution. Relatively little attention has been paid to how the law operates when the decedent complies with the prescribed formalities.

Under conventional law, a decedent's formal compliance is not conclusive evidence of the existence of testamentary intent.<sup>125</sup> Even if a decedent strictly complies with the prescribed formalities, a contestant of the will can submit evidence showing that the decedent did not intend the will to be legally effective.<sup>126</sup> A group of cases dealing with the execution of wills by initiates of the Masonic order illustrate how this rebuttable presumption of testamentary intent operates.<sup>127</sup> In these cases, the Masonic order required Freemasonry candidates to execute wills as part of their initiation ceremony.<sup>128</sup> Because these wills strictly complied with the prescribed will-execution formalities, the court presumed that the Masonic initiates intended them to be legally effective.<sup>129</sup> However,

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121. See *supra* notes 52–55 and accompanying text.

122. See *DUKEMINIER & STIKOFF, supra* note 1, at 153.

123. See *supra* notes 68–71 and accompanying text.

124. See *supra* notes 74–83 and accompanying text.

125. See John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 541–42 (1982) (“Even the formalities for attested wills are common enough to other types of legal documents, and instruments that have nothing to do with testation could be said to comply with the Wills Act. It is the requirement of testamentary intent that prevents such things from qualifying as wills.”).

126. See, e.g., CAL. PROB. CODE § 8252(a) (West 2015) (“The contestants of the will have the burden of proof of lack of testamentary intent . . . .”); COLO. REV. STAT. ANN. § 15-12-407 (2015) (“Contestants of a will have the burden of establishing lack of testamentary intent . . . .”).

127. See Langbein & Waggoner, *supra* note 125, at 542 n.75; C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 275–76 (1991); see, e.g., *Vickery v. Vickery*, 170 So. 745, 745 (Fla. 1936); *In re Watkin’s Estate*, 198 P. 721, 721 (Wash. 1921); *Shiels v. Shiels*, 109 S.W.2d 1112, 1113 (Tex. Civ. App. 1937).

128. See *Vickery*, 170 So. at 745 (“One of the qualifications for membership in the Scottish Rite Masonry is that every candidate, prior to his being taken into the order, is required to execute his last will and testament, in the event he has not already prior thereto duly made his will.”); *Watkin’s Estate*, 198 P. at 721 (“It was testified by members of the order that the making of a will was a part of the ceremony of the particular degree, required of all candidates who had not theretofore made a will.”).

129. See, e.g., *Vickery*, 170 So. at 746 (explaining that a will “should be presumed to have been made with testamentary intent when appearing to have been executed with required

contestants of the wills were allowed to present evidence that the candidates did not complete the will-execution ceremony because they intended to leave behind legally effective wills; instead the evidence suggested that they completed the will-execution ceremony only because they were obligated to do so as part of their initiation rite.<sup>130</sup>

As the Masonic Order cases illustrate,<sup>131</sup> under the conventional law of will-execution formal compliance raises a rebuttable presumption of testamentary intent.<sup>132</sup> But as the previously discussed case of *Stevens v. Casdorff* illustrates,<sup>133</sup> noncompliance provides conclusive evidence of the absence of testamentary intent.<sup>134</sup> Put differently, the conventional law provides courts discretion to correct false-positive outcomes when extrinsic evidence suggests that the decedent did not intend a formally compliant will to be legally effective. For instance, the courts in the Masonic will cases were able to decide whether relying upon formal compliance as a proxy for the decedent's intent would produce false-positive outcomes.<sup>135</sup> Conversely, the conventional law denies courts the discretion to correct false-negative outcomes when extrinsic evidence suggests that the decedent intended a non-compliant document to be a legally effective will. For example, the dissent in *Stevens v. Casdorff* lamented that the invalidation of the clearly authentic will in the case at hand was "patently absurd,"<sup>136</sup> yet the court was unable to correct the obvious false-negative outcome by recognizing the noncompliant will as legally effective.<sup>137</sup>

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legal formalities" but when "uncertainty and doubt is . . . shown to have surrounded the supposed making and execution of the alleged will" the probate judge can "refus[e] to allow such doubtful will to probate as the testamentary act of the alleged testator").

130. See, e.g., *Watkin's Estate*, 198 P. at 722 (describing the testimony of one witness who testified that the decedent, after executing the purported will, remarked, "That is quite a josh"); *Shiels*, 109 S.W.2d at 1113 (describing that the decedent "protested and said that he did not want to make a will, that he did not have anything to make a will for").

131. These cases have been labeled the "sham will cases." Langbein & Waggoner, *supra* note 125, at 541.

132. See *id.* at 541-42.

133. 508 S.E.2d 610 (W. Va. 1998); see *supra* notes 56-67 and accompanying text.

134. See DUKEMINIER & STIKOFF, *supra* note 1, at 153; see also *supra* Part I.B.

135. See, e.g., *Shiels*, 109 S.W.2d at 1113 ("Testamentary intent on the part of the maker is essential to constitute an instrument a will, regardless of its correctness in form. And the issue of such intention is not limited to the language of the instrument alone. The facts and circumstances surrounding its execution may be looked to in determining whether the maker intended it to be a testamentary disposition of his property or merely to be used for some other purpose."); see also *Fleming v. Morrison*, 72 N.E. 499, 499-500 (Mass. 1904) ("We are of [the] opinion that it is competent to contradict by parol the solemn statements contained in an instrument that it is a will; that it has been signed as such by the person named as the testator, and attested and subscribed by persons signing as witnesses.").

136. *Stevens*, 508 S.E.2d at 615 (Workman, J., dissenting).

137. See *id.* at 613.



If the risk of false-positive outcomes were higher than the risk of false-negative outcomes, then the conventional law's grant of discretion to probate courts to correct false-positive outcomes might be appropriate. Under such a scenario, court discretion to correct false-positive outcomes would counterbalance the uneven distribution of probate-error risk between false-positive outcomes and false-negative outcomes. But, as described above, the conventional law does not produce a higher risk of false-positive outcomes. In fact, as depicted by previous Graph 9, the risk of false-positives is much lower than the risk of false-negative outcomes.<sup>138</sup> As such, the conventional law counter-intuitively grants courts the discretion to correct probate errors in situations in which the risk of error is low, but denies courts the ability to correct probate errors when the risk of error is relatively high.

Because formal compliance with the prescribed will-execution formalities provides such strong evidence of the decedent's intent that a will be legally effective, the likelihood of a false-positive outcome is extremely low.<sup>139</sup> Consequently, courts seldom need to use the discretion that the conventional law grants them to correct false-positive outcomes. Indeed, in addition to the Masonic wills cases,<sup>140</sup> few other cases exist in which courts question whether the decedent intended a formally attested will to be legally effective.<sup>141</sup> Conversely, because the risk of false-negative outcomes is greater than the risk of false-positive outcomes,<sup>142</sup> courts would have a much greater opportunity to reduce the number of probate errors if they could correct obvious false-negative outcomes. *Stevens v. Casdorff* is merely one of many cases in which the great weight of the evidence suggests that the decedent intended a noncompliant will to be legally effective.<sup>143</sup> Thus, many probate errors could be avoided if courts could correct the obvious false-negative outcomes that occur in cases like *Stevens v. Casdorff*.

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138. See *supra* Part I.

139. See DUKEMINIER & SITKOFF, *supra* note 1, at 153.

140. See *supra* notes 127–130 and accompanying text.

141. See, e.g., *Fleming v. Morrison*, 72 N.E. 499 (Mass. 1904) (involving a will that was purportedly drafted and executed not with the intent that the document be legally effective but with the intent to induce the sole beneficiary to engage in a sexual relationship with the testator); *Miller*, *supra* note 127, at 275 (describing as “exceptional” the “cases in which extrinsic evidence . . . is admitted to controvert the validity of a properly executed and attested will”).

142. See *supra* notes 51 and accompanying text.

143. See *Stevens v. Casdorff*, 508 S.E.2d 610 (W. Va. 1998); see also *In re Churchill's Estate*, 103 A. 533, 535 (Pa. 1918) (“It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms”) (internal citations omitted).

In sum, the conventional law's allocation of probate-error risk is inappropriate not only because it produces unnecessary probate errors by initially allocating risk heavily in favor of false-negative outcomes,<sup>144</sup> but also by denying courts the ability to correct obvious false-negative outcomes. Many probate errors could be avoided if courts could correct obvious false-negative outcomes, but the conventional law denies courts this discretion. Courts' inability to correct obvious false-negative outcomes appears particularly egregious when one considers that courts can correct false-positive outcomes.<sup>145</sup> The conventional law's authorization of courts to correct false-positive outcomes is not inherently inappropriate, but it has little benefit. Indeed, the conventional law's authorization of courts to correct false-positive outcomes does not significantly reduce probate-error risk because the risk of false-positive outcomes is extremely low and therefore courts have little opportunity to correct such errors.<sup>146</sup>

### III. MINIMIZING PROBATE-ERROR RISK THROUGH REFORM

After persuasively arguing that the conventional law produces obvious false-negative outcomes, Langbein concludes that such results are "mistaken,"<sup>147</sup> "needless,"<sup>148</sup> and "embarrassing."<sup>149</sup> Langbein's exasperation is perhaps clearest when he proclaims, "[W]e should shudder that we still inflict upon our citizens the injustice of the traditional law."<sup>150</sup> From Langbein's criticism, a reform movement has emerged that seeks to reduce the number of authentic wills that are invalidated because of noncompliance with the prescribed formalities. Numerous scholars have joined this call for change,<sup>151</sup> while few have argued for maintaining the conventional law.<sup>152</sup>

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144. See *supra* Part II.A.

145. See *supra* notes 125–126 and accompanying text.

146. See *supra* notes 139–141 and accompanying text.

147. Langbein, *supra* note 3, at 489.

148. *Id.*

149. Langbein, *supra* note 79, at 54.

150. *Id.*

151. See, e.g., Lester, *supra* note 26, at 578–79; Lindgren, *supra* note 108, at 541–43; Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 59–60 (1985). In this regard, Professor Lawrence Waggoner, as the reporter for both the UPC and the Restatement (Third) of Property, has been instrumental in the push for reform. See Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 731–34 (2012). Many of the reform movement's proposals have been adopted by the UPC and the Restatement, and consequently both have been tools for reform. See, e.g., *id.* at 732 n.24.

152. But see, e.g., Bonfield, *supra* note 74; John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 75 (2008).

To achieve its goal of validating more authentic wills, the reform movement has proposed two avenues for change. First, the formality of the will-execution process could be refined.<sup>153</sup> Proposals to change the prescribed formalities are designed to make formal defects less likely by minimizing the formal burdens of will-execution. Therefore fewer authentic wills would fail because of simple mistakes.<sup>154</sup> Second, the way that courts evaluate a decedent's compliance with the prescribed formalities could change.<sup>155</sup> If courts focused less on formal compliance and more on testamentary intent, they could excuse formal defects in situations in which the decedent clearly intended to execute a legally effective will.<sup>156</sup>

These avenues of reform could undoubtedly avoid some of the inequitable results that occur when a court invalidates clearly authentic wills. However, as previously explained, an analysis of the law of will-execution must focus not on the outcomes of individual cases but on the law's broader system of differentiating authentic wills from inauthentic wills.<sup>157</sup> Because of the evidentiary difficulties of probate,<sup>158</sup> no method of evaluating a will's authenticity is infallible.<sup>159</sup> Under any system, probate errors will occur. But once the inevitability of probate errors is recognized, the issue becomes how the law can minimize the frequency with which they occur. Reform of the law of will-execution should therefore be evaluated with respect to how specific proposals affect the overall level of probate-error risk. When the law is viewed in this way, policymakers should implement reform proposals that increase the frequency of correct determinations of authenticity. By contrast, they should dismiss proposals that increase the overall level of probate-error risk.

Although reform that avoids the inequitable cases upon which critics of the conventional law typically focus would certainly reduce the number of false-negative outcomes, such change would not necessarily reduce the overall level of probate-error risk. As one leading casebook explains, the question is "whether relaxing the number of formalities, relaxing the exactness with which those formalities must be complied, or both might reduce the rate of false negatives without increasing the rate of false positives."<sup>160</sup> If the elimination

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153. See Fellows, *supra* note 9, at 615.

154. See *id.* at 614.

155. See Lester, *supra* note 26, at 579–82.

156. See *id.*

157. See *supra* notes 84–90 and accompanying text.

158. See *supra* note 32 and accompanying text.

159. See Guzman, *supra* note 48, at 309 ("Where perfection is unattainable, this 'hard place' 'between over- or under-inclusion errors' is familiar yet frighteningly irreversible.").

160. DUKEMINIER & SITKOFF, *supra* note 1, at 153. Elsewhere the casebook explains: "The challenge is to prescribe a set of formalities, and a rule for the exactness with which those

of some false-negative outcomes produces no increased risk of false-positive outcomes, reform would decrease the total number of probate errors. Attempts to reduce the risk of false-negative outcomes, however, likely come with at least some increased risk of false-positive outcomes. But as long as the risk of false-negative outcomes decreases more than the risk of false-positive outcomes increases, reform will result in overall fewer probate errors.

Because the debate surrounding will-execution reform is not typically framed in terms of risk allocation, no systematic discussion has taken place regarding how the refined formality and relaxed compliance reform strategies alter the allocation of false-positive outcomes and false-negative outcomes. Consequently, the reform movement has not clearly explained how their reform proposals would affect the overall level of probate-error risk. This Part therefore develops a framework for thinking about how will-execution reform can minimize probate-error risk so that the law achieves the goal of fulfilling the decedent's intent as frequently as possible. With this framework in place, the benefits of reform become clearer and consequently policymakers might be more willing to implement change.

#### *A. Formal Allocation of Errors*

The first avenue of reform is to refine the formality of will-execution.<sup>161</sup> As the complexity of the prescribed formalities increases, the will-execution process provides greater evidence of a will's authenticity, which reduces the risk of false-positive outcomes. However, the risk of false-negative outcomes increases because more decedents leave behind formally deficient wills that they nonetheless intended to be legally effective. In this way, a highly formalized will-execution process poses a decreased risk of false-positive outcomes and an increased risk of false-negative outcomes.

By contrast, a will-execution process that entails a lower level of formality results in a lower risk of false-negative outcomes and an increased risk of false-positive outcomes. On the one hand, with some of the potential stumbling blocks removed, decedents who intend to leave behind legally effective wills more likely complete

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formalities must be complied, that balances the risk of probating an inauthentic will with the risk of denying probate to an authentic will." *Id.* at 147–48.

161. See Fellows, *supra* note 9, at 615.

the will-execution process successfully.<sup>162</sup> On the other hand, formal compliance provides less assurance that the decedent intended to execute a valid will,<sup>163</sup> which increases the likelihood of false positive outcomes. Therefore, because the formality of will-execution allocates probate-error risk between false-positive outcomes and false-negative outcomes, policymakers can reallocate risk by refining the prescribed formality.<sup>164</sup>

In this regard, the reform movement has suggested many ways that the conventional will-execution formalities could be changed, as each of the primary formalities of writing, signature, and attestation has been the subject of numerous reform proposals.<sup>165</sup> Specific proposals can be separated into two general categories. Refined formality proposals that fall within the first category focus on the will-execution ceremony's overall level of formality.<sup>166</sup> For instance, the UPC has eliminated many of the ancillary requirements of the conventional law, such as the presence and publication requirements.<sup>167</sup> By eliminating these requirements, the UPC reduces the prescribed level of formality for valid will-execution.

Reform proposals that fall within the second category focus on the breadth of the prescribed formality.<sup>168</sup> In contrast to simply altering the conventional level of formality, a refined formality reform proposal can authorize alternative methods of will-execution. For example, in addition to recognizing attested wills as valid, the UPC also recognizes wills that are notarized but not attested as legally effective.<sup>169</sup> By authorizing notarized wills, the UPC broadens the types of formality with which decedents can comply to execute valid wills.

The stated goal of both categories of refined formality reform is to make the will-execution process easier so that fewer mistakes are

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162. *See id.* at 614.

163. *See id.* at 615 (“The state’s willingness to reduce formalities stems from its willingness to infer from fewer objective facts a property owner’s deliberate and final intent to make a will.”).

164. *See* Lindgren, *supra* note 108, at 546 (“Too many required formalities frustrate the wishes of testators who fail to meet them. Too few formalities do not give us reliable enough evidence of what the testator wanted.”).

165. *See, e.g.*, UNIF. PROBATE CODE § 2-502 (UNIF. LAW COMM’N 2010) (eliminating the subscription and publication requirements); Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 121–35 (2008) (proposing a Model Electronic Wills Act); Lindgren, *supra* note 108, at 542 (proposing the elimination of the attestation requirement).

166. *See infra* Part III.A.1.

167. *See* UNIF. PROBATE CODE § 2-502.

168. *See infra* Part III.A.2.

169. *See* UNIF. PROB. CODE § 2-502; *see also infra* notes 195–201 and accompanying text.

made and consequently fewer authentic wills are invalidated because of harmless formal defects.<sup>170</sup> But again, policymakers should not focus solely on the reduced risk of false-negative outcomes.<sup>171</sup> Instead, they should evaluate refined formality strategies according to how specific proposals affect the overall level of probate-error risk. Although refining the formality of will-execution might reduce the risk of false-negative outcomes, it could also increase the risk of false-positive outcomes. Reforms that reduce the combined risk of false-positive outcomes and false-negative outcomes should be implemented. Proposals that increase the total number of probate errors should be rejected.

### 1. Level of Formality

The first element of a refined formality reform strategy is the will-execution process's overall level of formality. Consider for example the UPC's proposal to eliminate many of the technical details of the general attestation formality, such as the presence and publication requirements.<sup>172</sup> The elimination of these technicalities both reallocates risk among false-positive outcomes and false-negative outcomes and reduces the overall frequency of probate errors.<sup>173</sup> Because the elimination of these requirements makes the will-execution process less formal and therefore easier to complete, decedents who intend to execute legally effective wills are more likely to comply with the prescribed formalities and fewer false-negative outcomes will result. Moreover, the risk of false-positive outcomes will not significantly increase because the elimination of these technical details represents only a small decrease in the conventional law's level of formality. Even without the publication and presence requirements, will-execution provides strong evidence that the decedent intended the will to be legally effective. The elimination of these technicalities therefore likely reduces overall

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170. See Fellows, *supra* note 9, at 614 (“The reduction in legal formalities minimizes the number of cases in which property owners take actions indicating that they probably intend to make a donative transfer, but, nevertheless, fail to meet the formalities because they are unadvised or ill-advised by their attorneys.”).

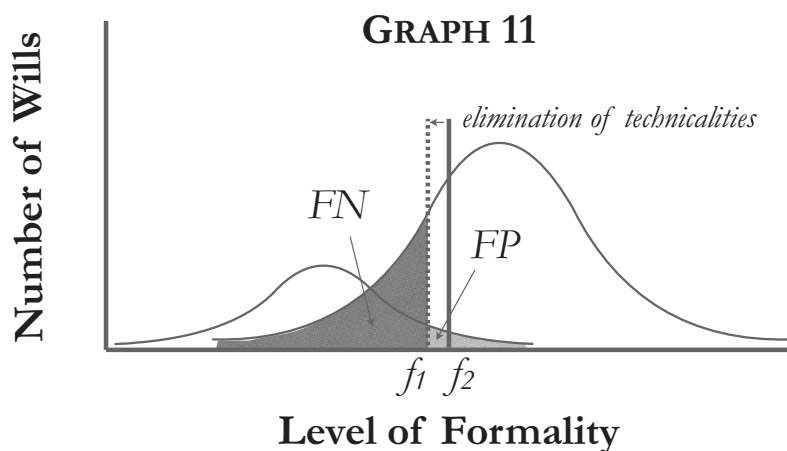
171. See *supra* notes 84–90, 157–160 and accompanying text.

172. See UNIF. PROBATE CODE § 2-502; see also *id.* § 2-502 cmt. (“The formalities for execution of a witnessed will have been reduced to a minimum. . . . The intent is to validate wills which meet the minimal formalities of the statute.”).

173. See Langbein, *supra* note 3, at 511 (explaining that “the draftsmen [undoubtedly] balanced the injustice brought about by technical violations of the publication and presence requirements and decided that the incremental cautionary value of those two former requisites was not worth the price in wills invalidated for defective compliance”).

probate-error risk because the risk of false-negative outcomes decreases by a greater amount than the risk of false-positive outcomes increases.

Graph 11 illustrates the elimination of these ancillary requirements that are associated with the general attestation formality. The vertical line located at point  $f_2$  on the x-axis represents the conventional law's differentiating level of formality, which includes the publication and presence requirements. The vertical line located at point  $f_1$  represents a differentiating level of formality that does not include the technical requirements of attestation. Because the elimination of these technicalities results in a marginally lower overall level of formality, the shift from formality level  $f_2$  to formality level  $f_1$  moves the differentiating line slightly toward the left-hand side of the x-axis. This reduction in the prescribed level of formality both reduces the risk of false-negative outcomes and increases the risk of false-positive outcomes. However, the shift from  $f_2$  to  $f_1$  reduces the risk of false-negative outcomes more than it increases the risk of false-positive outcomes.



The area labeled *FP* represents the number of false-positive outcomes that are produced when the publication and presence requirements are eliminated. By contrast, the area labeled *FN* represents the number of false-negative outcomes that are produced after the change in formality. When the differentiating level of formality is shifted from  $f_2$  to  $f_1$ , the area representing false-negative outcomes decreases by a greater amount than the area representing false-positive outcomes increases. As such, the change in the differentiating level of formality reduces the overall level of probate-error

risk. Because total probate-error risk is decreased, the UPC's elimination of the publication and presence requirements represents a beneficial refined formality reform proposal.

Although it seems clear that the UPC's elimination of some technical details likely would reduce the risk of false-negative outcomes without substantially increasing the risk of false-positive outcomes, the effect of more drastic reductions of formality is less clear. For example, Professor James Lindgren proposes the complete elimination of the attestation requirement.<sup>174</sup> He argues that “[b]y continuing to insist on attestation, our current legal system does not protect testators from others,” but “[i]nstead, it protects many testators from effectuating their own estate plans.”<sup>175</sup> Because the attestation requirement undermines testamentary intent by invalidating wills that were clearly intended to be legally effective,<sup>176</sup> Lindgren concludes that the attestation requirement should be abolished.<sup>177</sup>

Under such a reform, the risk of false-negative outcomes would certainly be reduced because no authentic will would fail due to an attestation error.<sup>178</sup> However, the risk of false-positive outcomes would increase because an unattested writing provides less evidence that the decedent intended the document to be a legally effective will. Some believe that this increased risk of false-positive outcomes would not be significant,<sup>179</sup> but the net effect of the elimination of the attestation requirement is certainly less clear than the results produced by more modest reductions of formality.

Graphs 12 and 13 illustrate the elimination of the attestation requirement. The vertical line located at point  $f_3$  represents the conventional law's high differentiating level of formality. Whether the elimination of the attestation requirement reduces the total number of probate errors depends upon how far such a reduction of formality pushes the differentiating line toward the left-hand side

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174. Lindgren, *supra* note 108, at 542; *see* Lindgren, *supra* note 110, at 1016.

175. Lindgren, *supra* note 108, at 573.

176. *See* Lindgren, *supra* note 110, at 1016 (“There have been several thousand American appellate opinions on the attestation requirement alone—case reports that should leave any neutral observer wondering whether anything worthwhile is being accomplished.”).

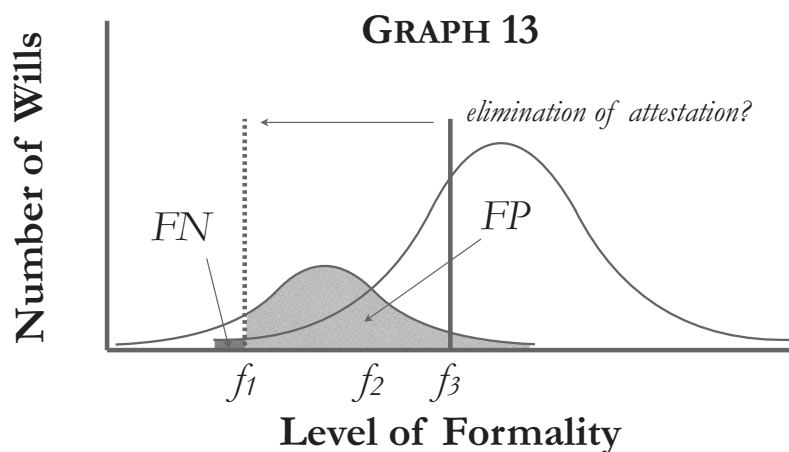
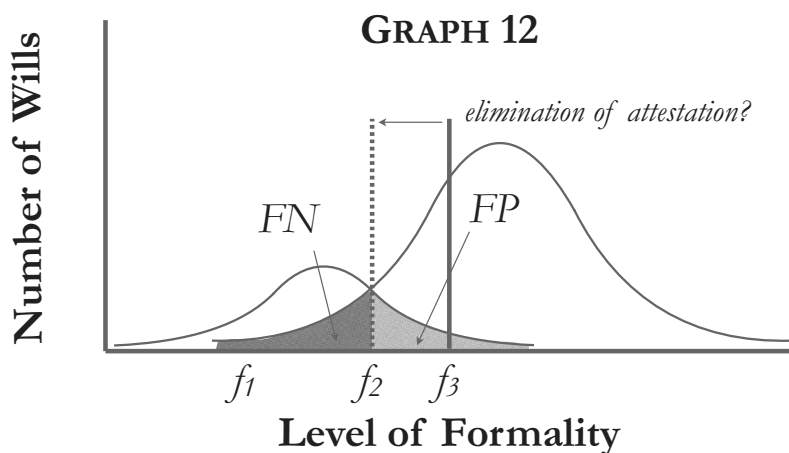
177. *See id.*; Lindgren, *supra* note 108, at 542.

178. *See* Kelly, *supra* note 26, at 889 (explaining that if the attestation requirement were abolished “there would no longer be any Type II errors as a result of defects in attestation because lack of attestation would not prevent probate of a document that otherwise is a valid will”).

179. *See id.* at 890 (“[I]t seems unlikely that most formal wills, at least as currently drafted, would be seen as anything other than a ‘virtually unmistakable testamentary act,’ even without attestation.”); Langbein, *supra* note 3, at 498 (“Writing and signature are the minimum requirements which assure the finality, accuracy and authenticity of purported testamentary expressions.”).



of the x-axis. For example, if the elimination of the attestation requirement pushes the differentiating line to point  $f_2$ , as depicted in Graph 12, the reform would reduce the overall risk of probate error because more false-negative outcomes are avoided than false-positive outcomes are produced. However, as depicted in Graph 13, if the elimination of the attestation formality pushes the differentiating line farther to the left, such as to point  $f_1$ , the net effect of the tradeoff between false-negative outcomes and false-positive outcomes becomes less clear. Thus, because the elimination of the attestation requirement is a substantial reduction in the will-execution process's overall level of formality, the reform's net effect on total probate-error risk is uncertain.



In addition to the uncertain tradeoff between false-positive outcomes and false-negative outcomes, another issue with a substantial reduction of formality is the potential effect on the distribution of

both authentic and inauthentic wills. As discussed previously, it is likely that more authentic wills are submitted for probate than inauthentic wills, and authentic wills, on average, possess a higher level of formality than inauthentic wills.<sup>180</sup> These two characteristics of the distribution of authentic and inauthentic wills cause the conventional law's false-negative heavy risk allocation to produce an unnecessarily high overall risk of probate errors.<sup>181</sup>

The elimination of the attestation requirement could affect the distribution of both authentic wills and inauthentic wills, which in turn could increase the overall level of probate-error risk. One reason authentic wills possess a high level of formality is simply that the law requires valid wills to possess a high level of formality. By mandating that valid wills be written, signed, and attested, the conventional law encourages those who want to leave behind legally effective wills to comply with these formalities.<sup>182</sup> By eliminating the attestation requirement, reform could reduce the decedent's incentive to leave behind attested wills.<sup>183</sup> With this incentive eliminated, the mean level of formality for authentic wills could decrease over time. This change is illustrated in Graph 14, which depicts a shift in the distribution curve for authentic wills toward the left-hand side of the x-axis.

The elimination of the attestation requirement could also affect the distribution of inauthentic wills. One purpose of will formalities is to protect against fraud,<sup>184</sup> and the attestation requirement serves this purpose by making forgery of a will more difficult.<sup>185</sup> By increasing the likelihood that a forged will is discovered as a fraud during probate, the attestation requirement disincentivizes attempts of fraud.<sup>186</sup> When wrongdoers know that a successful attempt at fraud will be unlikely or difficult, they have less reason to attempt fraud in

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180. See *supra* notes 105–115 and accompanying text.

181. See *supra* Part II.A.

182. See Ian Ayres, *Ya-Huh: There Are and Should be Penalty Default Rules*, 33 FLA. ST. U. L. REV. 589, 610 (2006) (“By pretending to have a penalty default rule of denying probate to unattested wills, we encourage people to use witnesses.”); see also Hirsch, *supra* note 113, at 1066.

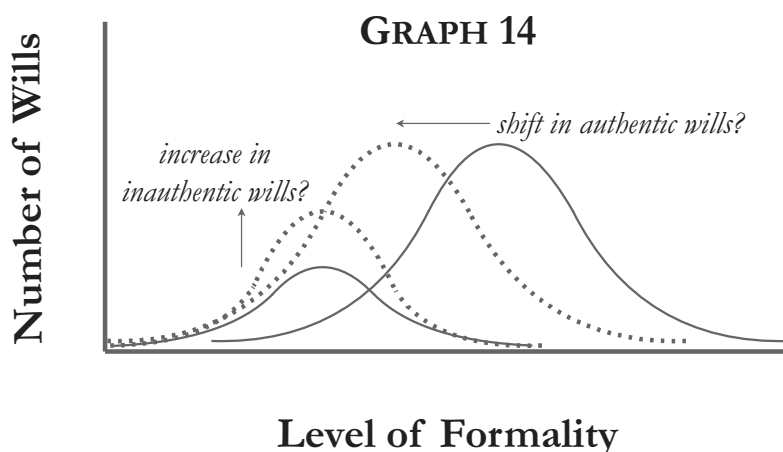
183. See Kelly, *supra* note 26, at 890 (“One argument in favor of retaining the attestation requirement is that attestation may create better incentives for testators *ex ante*.”); Lindgren, *supra* note 110, at 1026 (“[T]he main argument for retaining the attestation requirement is that we want to encourage attestation.”).

184. See Gulliver & Tilson, *supra* note 32, at 9–13; Langbein, *supra* note 3, at 496–97.

185. See Glover, *supra* note 113, at 617–18.

186. See STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, *ESTATES AND TRUSTS* 228 (4th ed. 2011) (suggesting that “the presence of witnesses . . . makes[s] scoundrels think twice”); Sherwin, *supra* note 81, at 456 (explaining that formalities “serve a protective function by reducing the possibility that wrongdoers might interfere with the process of execution”).

the first place. If the attestation requirement were eliminated, fraud would be easier because wrongdoers would not have to persuade the court that a purported will was genuinely attested. Consequently, wrongdoers may be more inclined to attempt to pass fraudulent wills through the probate system.<sup>187</sup> Thus, over time the distribution of inauthentic wills could change. In addition to the potential shift of the distribution curve for authentic wills, Graph 14 illustrates the potential change in the distribution curve for inauthentic wills. Specifically, with a shift upward toward the top of the y-axis, the distribution curve now reflects increased rates of inauthentic wills.



These changes in the way authentic and inauthentic wills are distributed could increase overall probate-error risk. Because the distribution curve for inauthentic wills now more closely resembles the distribution curve for authentic wills, formal compliance becomes a less accurate proxy for authenticity. As seen in previous Graphs 2 and 3, when the two distribution curves are identical, the law plays a role in allocating risk between false-positive outcomes and false-negative outcomes, but less accurately classifies a will as authentic or inauthentic.<sup>188</sup> Consequently, when the distribution curve for inauthentic wills moves closer to the curve for authentic wills, total probate-error risk increases.

Because the possible adjustments in the way that wills are distributed across levels of formality are based upon unverifiable assumptions, these changes are not inevitable. As Professor Daniel

187. See Kelly, *supra* note 26, at 891 (“[I]f attestation were abolished, more wrongdoers might attempt to engage in fraud, thereby reviving the relevance of the protective function.”); *supra* Part I.

188. See *supra* Graphs 2 & 3.

Kelly explains, “The continuing relevance of attestation . . . depends to a certain extent on predictions about how testators, potential wrongdoers, and others are likely to act if attestation were abolished.”<sup>189</sup> But while these changes might not occur if the attestation requirement were eliminated, the possibility of these changes creates uncertainty regarding the effect that reform will have on overall probate-error risk. The uncertainty regarding how individuals will react to reform, together with the uncertainty regarding the tradeoff between false-positive outcomes and false-negative outcomes,<sup>190</sup> renders substantial decreases in the prescribed level of will-execution formality less attractive than more modest reform proposals.

In sum, policymakers can reallocate the risk of probate errors by adjusting the will-execution process’s level of formality. Some reduction of formality would likely reduce the total number of probate errors because the risk of false-negative outcomes would decrease more than the risk of false-positive outcomes would increase.<sup>191</sup> By contrast, the effect of drastic reductions in formality is less clear because the decrease in false-negative outcomes is likely accompanied by a more substantial increase in false-positive outcomes.<sup>192</sup> Thus, it seems clear that policymakers should implement relatively minor reforms like the UPC’s elimination of the technical requirements of attestation.<sup>193</sup> But it remains uncertain whether policymakers should implement major reforms, like Lindgren’s proposal to eliminate the attestation requirement.<sup>194</sup> However, with the role that the level of formality plays in allocating probate errors clearly articulated, policymakers can select a level that they believe strikes the appropriate balance between false-positive outcomes and false-negative outcomes.

## 2. Breadth of Formality

The second component of a refined formality reform strategy is the breadth of the prescribed formalities. Allowing decedents to comply with multiple sets of formalities can decrease the risk of false-negative outcomes because decedents who intend to execute legally effective wills have an increased opportunity to complete the

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189. Kelly, *supra* note 26, at 891.

190. See *supra* notes 174–179 and accompanying text.

191. See *supra* notes 172–173 and accompanying text.

192. See *supra* notes 175–179 and accompanying text.

193. See UNIF. PROBATE CODE § 2-502 (UNIF. LAW COMM’N 2010).

194. See Lindgren, *supra* note 108, at 542.

will-execution process successfully. For example, under the conventional law, two witnesses must attest legally effective wills.<sup>195</sup> This requirement led to the invalidity of clearly authentic wills in situations in which decedents had wills notarized instead of attested.<sup>196</sup> Because notarization, like attestation, is a highly formalized process that decedents likely would not complete if they did not intend their wills to be legally effective, courts had no reason to question the authenticity of notarized wills.<sup>197</sup> Yet, because they were unattested, the conventional law required courts to deny probate and consequently to produce obvious false-negative outcomes.<sup>198</sup>

In response, the UPC gives decedents the option to have their wills either attested or notarized.<sup>199</sup> The rationale underlying this alternative method of will-execution is that notarization provides evidence of a will's authenticity equally as strong as attestation.<sup>200</sup> As such, this notarization alternative decreases the risk of false-negative outcomes because clearly genuine wills are admitted to probate. However, it produces only a slightly increased risk of false-positive outcomes because, like the conventional attestation requirement, the notarization alternative is highly formalized and the decedent would not have completed the process without intending the will to be legally effective.

Graph 15 depicts notarized wills as legally effective. The differentiating line that is set at formality level  $f_2$  represents a scenario in which valid wills must be attested by two witnesses. Purported wills that lie slightly to the left of the differentiating line possess some formality, such as being written, signed, and attested by one witness, but they are nonetheless classified as inauthentic. The UPC's authorization of notarized wills recognizes that some of these wills that lie slightly to the left of the differentiating line possess extremely robust evidence of authenticity.

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195. See DUKEMINIER & SITKOFF, *supra* note 1, at 147–48; see also *supra* Part I.A.

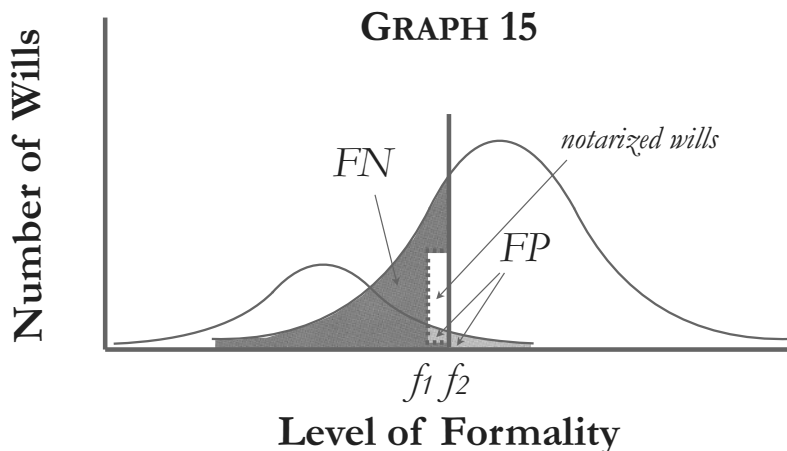
196. See, e.g., *In re Will of Ferree*, 848 A.2d 81 (N.J. Ch. 2003), *aff'd* 848 A.2d 1 (N.J. App. 2004) (invalidating a notarized will while purporting to apply the substantial compliance doctrine); *In re Estate of Hall*, 51 P.3d 1134 (Mont. 2002) (applying the harmless error rule to save a notarized will).

197. See DUKEMINIER & SITKOFF, *supra* note 1, at 182 (explaining that notarization “is perhaps even better evidence of finality of intent to transfer than attestation by two witnesses”).

198. See UNIF. PROBATE CODE § 2-502 cmt. (UNIF. LAW COMM'N 2010) (“Under non-UPC law, the will is usually held invalid in such cases, despite the lack of evidence raising any doubt that the will truly represented the decedent’s wishes.”).

199. See *id.* § 2-502; see generally Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83 (2008). Only Colorado and North Dakota have followed the UPC's lead and authorized notarized wills. See COLO. REV. STAT. § 15-11-502 (2015; N.D. CENT. CODE § 30.1-08-02(1) (2015).

200. See Waggoner, *supra* note 199, at 84.



Purported wills that contain the signature of one witness might possess less formal evidence of authenticity than wills that are attested by two witnesses, but when the lone witness is a notary, the distinction between two witnesses and one witness becomes fuzzy.<sup>201</sup> Therefore, by authorizing notarized wills, the UPC classifies as authentic some wills that are witnessed by a single person, but only those that present little increased risk of false-positive outcomes. Because this reform decreases the number of false-negative outcomes, while not significantly increasing the risk of false-positive outcomes, it reduces the overall level of probate-error risk. Therefore, like its proposal to eliminate the technicalities of attestation,<sup>202</sup> the UPC's authorization of notarized wills represents a beneficial reform proposal.

This type of reform is not the same as simply moving the differentiating line toward the left-hand side of the x-axis, where formality levels are lower.<sup>203</sup> For example, authorization of notarized wills does not push the differentiating line to point  $f_1$ , where wills are written, signed, and attested by a single witness, because such a reform does not validate all purported wills that fall to the right of that differentiating line. Indeed, as the UPC makes clear, not all wills that are signed by one witness are classified as authentic.<sup>204</sup> Instead, by authorizing only notarized wills, the UPC selectively classifies only some wills that fall between formality levels

201. *See id.* at 85 (“A testator who goes to the trouble of going to a bank or even a package store or photocopy store to get a home-drawn will notarized shows as much of a deliberate purpose to make the will final and valid as asking a couple of individuals to sign as witnesses.”).

202. *See* UNIF. PROBATE CODE § 2-502 (UNIF. LAW COMM’N 2010); *see also* Part III.A.1.

203. *See supra* Part III.A.1.

204. *See* UNIF. PROBATE CODE § 2-502.

$f_2$  and  $f_1$  as authentic. The UPC's notarization option therefore illustrates that, if alternative formalities present evidence of authenticity equally as reliable as conventional formalities, the broadening of the available will-execution methods can diminish the total number of probate errors.

Although the notarization and attestation alternatives entail roughly equivalent levels of objective evidence of authenticity, other alternatives could involve less evidence of authenticity than the conventional attested will. For example, the UPC authorizes holographic wills, which must be written by hand and signed but need not be witnessed.<sup>205</sup> By eliminating the necessity of witnesses, holographic wills give decedents a less formal alternative to the conventional attested will.<sup>206</sup> This reduced formality diminishes the risk of false-negative outcomes because some decedents intend certain handwritten documents to constitute legally effective wills but nonetheless do not have the documents witnessed.<sup>207</sup> Thus, if holographic wills are recognized as legally effective, some false-negative outcomes are avoided because these wills are classified as authentic. However, because holographs require significantly less formality than conventional attested wills, they provide less certainty that they were intended to be legally effective; and therefore they increase the risk of false-positive outcomes.<sup>208</sup> Because holographs both decrease the risk of false-negative outcomes and increase the risk of false-positive outcomes, their net effect on the overall risk of probate errors is unclear.

Graphs 16 and 17 depict the authorization of holographic wills. In both graphs, the differentiating line is set at a high level of formality, which represents the conventional law's requirement of a written, signed, and attested will.<sup>209</sup> The recognition of holographic wills results in some wills that fall to the left of the differentiating line being classified as authentic despite not satisfying the requirements of a conventional attested will. Whether recognition of

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205. See *id.* § 2-502(b).

206. See Langbein, *supra* note 3, at 498 ("The legislative decision to authorize holographic wills is, therefore, a fundamental one. It represents both an abandonment of the protective policy, and an acceptance of a significantly lowered level of formality for implementing the other Wills Act policies.")

207. See Clowney, *supra* note 113, at 46 ("[H]olographs are an indispensable tool for testators who are either unwilling or unable to commission a traditional will.")

208. See Brown, *supra* note 31, at 110–11 ("The testamentary intent requirement is usually not an issue with formal, attested wills. . . . In contrast, holographic wills invite suspicion as to the existence of testamentary intent. Holographic wills are often informal documents, such as letters or memoranda, which lack any formal designation as a will or last testament. Even if the holograph is denominated a will, the absence of the ceremonial execution that accompanies attested wills, creates less certainty that the document was intended to be final.")

209. See *supra* Part I.A.

holographic wills reduces overall probate-error risk depends upon the tradeoff between false-negative outcomes avoided and false-positive outcomes produced. However, unlike the authorization of notarized wills, which clearly results in a net reduction of probate errors,<sup>210</sup> the net effect of holographic wills is less certain.<sup>211</sup>

Some scholars believe that holographic wills provide good evidence of authenticity and therefore present little risk of false-positive outcomes.<sup>212</sup> Graph 16 represents a scenario in which recognition of holographic wills reduces the overall number of probate errors. The areas between the two dashed vertical lines and below the distribution curves represent holographic wills. Because the area below the distribution curve for authentic wills is larger than the area under the distribution curve for inauthentic wills, recognizing holographs as legally effective avoids more false-negative outcomes than it produces false-positive outcomes.

By contrast, other scholars suggest that recognition of holographic wills presents a significant risk of false-positive outcomes because holographic wills provide significantly less evidence of authenticity than attested wills.<sup>213</sup> Graph 17 represents this scenario, as the two dashed vertical lines lie farther to the left-hand side of the x-axis. The area under the distribution curve for inauthentic wills is now greater than the area under the distribution curve for authentic wills. Consequently, under this scenario, more false-positive outcomes are produced than false-negative outcomes are avoided. Thus, similar to the decision of whether to abolish the attestation requirement,<sup>214</sup> it is unclear whether policymakers should

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210. See *supra* notes 195–201 and accompanying text.

211. See DUKEMINIER & SITKOFF, *supra* note 1, at 201. Compare Brown, *supra* note 31 with Clowney, *supra* note 113.

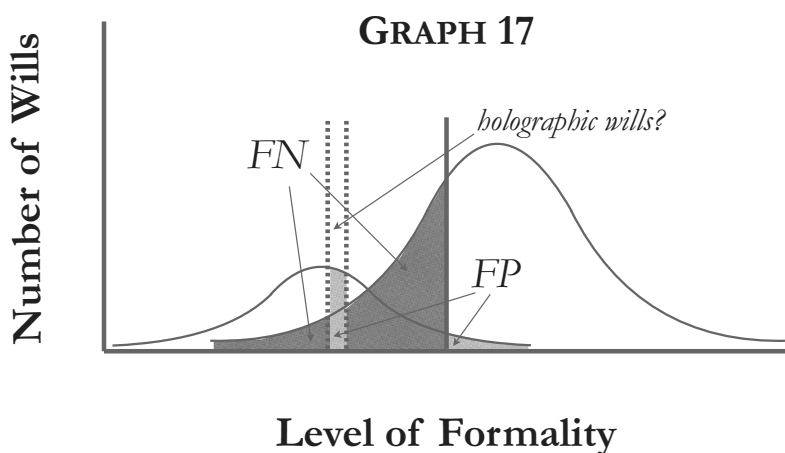
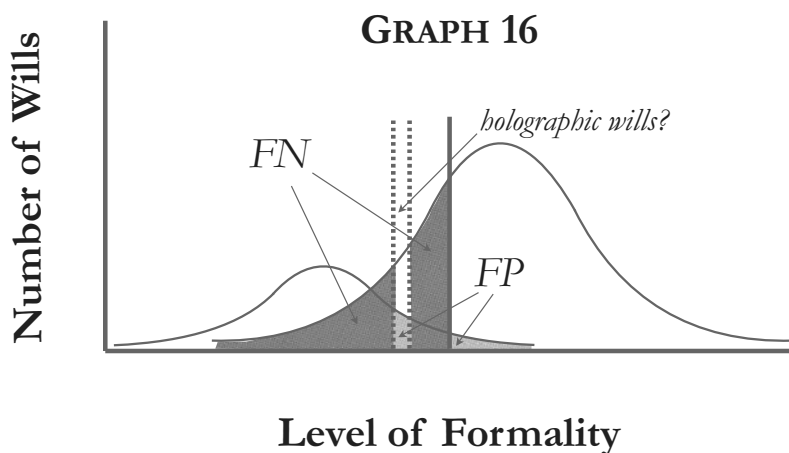
212. See, e.g., Clowney, *supra* note 113, at 60 (arguing that “neither forgery nor deceit poses a significant threat to the integrity of do-it-yourself willmaking,” and that little evidence suggest that “potential heirs attempt[] to probate handwritten notes not intended as final testaments”).

213. Some argue that holographs are particularly susceptible to fraud and forgery. See, e.g., Captain Theresa A. Bruno, *The Deployment Will*, 47 A.F. L. REV. 211, 214–15 (1999) (“[Holographic wills have carried with them the Statute of Frauds stigma of fraud and forgery.”); Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 169 (1998) (“Because of the absence of an attestation requirement, a legitimate concern with holographic wills is that there be sufficient protection against forgery or fraud.”). Others argue that a handwritten document provides little evidence that the decedent intended it to be a legally effective will. See, e.g., Brown, *supra* note 31, at 113 (“Holographic wills, because of their informality, often leave . . . testamentary intent uncertain.”).

214. See *supra* notes 174–179 and accompanying text. The recognition of holographic wills could also affect a decedent’s incentive to leave behind an attested will and a wrongdoer’s disincentive to attempt fraud. See *supra* notes 180–187 and accompanying text.



authorize holographic wills because the net effect that such reform would have on overall probate-error risk is uncertain.



In sum, in addition to reducing the will-execution process's overall level of formality,<sup>215</sup> policymakers can adjust the allocation of probate errors by broadening the scope of the prescribed formalities. Some alternative will-execution methods, such as notarized wills, likely reduce the chance of false-negative outcomes while presenting little increased risk of false-positive outcomes.<sup>216</sup> Other alternatives, such as holographic wills, both reduce the risk of false-negative outcomes and increase the risk of false-positive outcomes.<sup>217</sup> This analysis suggests that state policymakers should follow the UPC's lead and authorize notarized wills, but whether

215. See *supra* Part III.A.1.

216. See *supra* notes 195–201 and accompanying text.

217. See *supra* notes 205–214 and accompanying text.

more states should authorize holographic wills is less clear. However, by identifying the role that the breadth of formality plays in allocating probate errors, policymakers can make a more informed decision regarding reform proposals aimed at refining the formalities of will-execution. In turn, policymakers may become more amenable to straying from the conventional law and the reform movement may be more likely to achieve its goal of reallocating the risk of probate errors.

### *B. Judicial Correction of Errors*

Like the refined formality reform strategy, the relaxed compliance reform strategy is aimed at minimizing probate-error risk. However, it pursues this goal very differently. Whereas the refined formality strategy changes the way that risk is initially allocated by the formal will-execution process,<sup>218</sup> the relaxed compliance reform strategy reduces probate-error risk by granting courts the discretion to correct some probate errors that will-execution formalities produce. The conventional rule of strict compliance denies courts the discretion to evaluate the authenticity of noncompliant wills based upon extrinsic evidence of testamentary intent.<sup>219</sup> Consequently, courts traditionally cannot correct the obvious false-negative outcomes that are produced by the highly formal will-execution process.<sup>220</sup> By contrast, relaxed compliance rules allow probate courts to validate formally defective wills if the courts are convinced that the wills are authentic.<sup>221</sup>

The prototypical relaxed compliance rule is the UPC's harmless error rule.<sup>222</sup> Under the UPC, if a decedent fails to comply with the prescribed will-execution formalities, the probate court need not automatically invalidate the will.<sup>223</sup> Instead, the UPC allows the court to excuse harmless formal defects when evidence suggests

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218. See *supra* Part III.A.

219. See Langbein, *supra* note 3, at 489; see also *supra* Part I.B.

220. As previously discussed, the conventional law's denial of discretion to correct false-negative outcomes is inconsistent with its grant of discretion to correct false-positive outcomes. See *supra* Part II.B.

221. See Glover, *supra* note 2, at 100–02; Lester, *supra* note 26, at 579–82.

222. UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 2010); see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2003); see generally Langbein, *supra* note 79. A related relaxed compliance rule is the substantial compliance doctrine, which “rework[s] the strict compliance rule’s conclusive presumption of invalidity for an imperfect execution into a rebuttable one that could be overcome with strong evidence of intent and satisfaction of the purposes of the Wills Act.” DUKEMINIER & SITKOFF, *supra* note 1, at 179; see generally Langbein, *supra* 3.

223. See UNIF. PROBATE CODE § 2-503.

that a decedent intended a noncompliant document to constitute a legally effective will.<sup>224</sup> Thus, relaxed compliance reform proposals, such as the UPC's harmless error rule, authorize courts to correct false-negative outcomes by reclassifying noncompliant wills as authentic.

Although courts could use the harmless error rule to avoid some probate errors, probate courts will not always correctly judge the authenticity of a noncompliant will.<sup>225</sup> On the one hand, courts could correctly excuse harmless formal defects and avoid some obvious false-negative outcomes.<sup>226</sup> On the other hand, courts could validate some noncompliant wills that were not intended to be legally effective.<sup>227</sup> Granting courts discretion to excuse formal defects could therefore produce some false-positive outcomes that would have been avoided under the conventional law. Nevertheless, as long as the number of false-negative outcomes that are avoided is greater than the number of false-positive outcomes that are created, reform of this type will result in fewer total probate errors.

In the past, concern regarding whether probate courts could accurately evaluate the authenticity of wills may have explained the conventional law's rule of strict compliance.<sup>228</sup> Probate courts traditionally possessed limited jurisdiction and were frequently presided over by judges with no formal legal training.<sup>229</sup> Because of this inferior status, the duties and responsibilities of probate courts typically were limited.<sup>230</sup> As Professor Bruce Mann explains, "The responsibilities of the probate judge tended to be ministerial," and "[t]he

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224. *See id.* ("Although a document . . . was not executed in compliance with [the prescribed formalities], the document . . . is treated as if it had been executed in compliance . . . if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will . . .").

225. *See* Sherwin, *supra* note 81, at 467 ("If factfinding were . . . unreliable . . . , the dispensation rule would be a very dangerous proposition.").

226. *See* Kelly, *supra* note 26, at 889 ("The harmless error rule may decrease one type of error costs—specifically, false negatives or 'Type II' errors—as a court is authorized to excuse an execution defect . . .").

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

228. *See* Langbein, *supra* note 3, at 503 ("It is open to argument that the rule of literal compliance with the Wills Act formalities is the doctrinal consequence of the inferior status of the probate courts. Such courts cannot be trusted with anything more complicated than a wholly mechanical rule."); *see also* Glover, *supra* note 113, at 41–43.

229. *See* Mann, *supra* note 151, at 62; Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 139 (1944) (reporting that in the first half of the twentieth century half the states allowed non-lawyer probate judges); *see also* Langbein, *supra* note 3, at 502–03 (describing the "downgrading of probate courts").

230. *See* Mann, *supra* note 151, at 62.

functions of probate courts in wills matters were essentially administrative—to determine whether or not to accept the will for probate, issue the necessary letters, approve the final accounting, and similar tasks.”<sup>231</sup> Within this context, the rule of strict compliance prohibited probate courts from making individualized determinations of a will’s authenticity based upon evidence other than formal compliance. As Mann continues, “The requirement of strict compliance with the wills act formalities limits discretionary interpretation of the formalities by discouraging anything other than mechanical, literal application of them,” and, as such, it “provid[es] a measure of control over probate courts of limited jurisdiction.”<sup>232</sup>

Although concerns that probate courts could not evaluate the authenticity of wills accurately may previously have been legitimate, today these concerns seem questionable.<sup>233</sup> Now non-lawyer judges rarely staff probate courts,<sup>234</sup> and courts with more expansive jurisdiction frequently handle probate matters.<sup>235</sup> Langbein dismisses the previous concerns regarding the ability of probate courts by explaining that “the litigation which would occur [if courts could excuse formal defects] raises familiar issues which the courts have demonstrated their ability to handle well.”<sup>236</sup> Although probate courts are now likely better equipped to accurately evaluate the authenticity of wills, some policymakers may still want to limit courts’ discretion to correct probate errors. By restricting courts’ ability to reclassify noncompliant wills as authentic, policymakers can reduce the risk that the court will inadvertently create false-positive outcomes. In this regard, policymakers can limit courts’ discretion by

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231. *Id.*

232. *Id.*; see Langbein, *supra* note 3, at 503.

233. See Kelly, *supra* note 26, at 882 (“Overall, the harmless error rule . . . appear[s] to reduce the probability of Type II errors without substantially increasing the likelihood of Type I errors.”); Sherwin, *supra* note 81, at 467 (“[A] high rate of error is improbable. To date, no evidence suggests a systematic judicial bias in favor of unintended dispositions.”).

234. See James Findley, Note, *The Debate Over Nonlawyer Probate Judges: A Historical Perspective*, 61 ALA. L. REV. 1143, 1156 (2010) (“Today, only Alabama, Connecticut, Maryland, and New Jersey allow nonlawyers to become judges handling matters of probate, and in some states, existing nonlawyer probate judges continue to serve under grandfather clauses.”).

235. See Langbein, *supra* note 3, at 503 n.62 (explaining that “the recent trend is to upgrade the probate courts to the status of courts of general jurisdiction”); Mann, *supra* note 151, at 62–63 (“The small but growing number of jurisdictions that have adopted the Uniform Probate Code have consolidated the probate court as a division of the trial court of general jurisdiction with full adjudicative power. Other states have given the probate court the powers of a court of general jurisdiction over probate matters.”).

236. Langbein, *supra* note 3, at 525 (adding that similar issues “arise in other contexts in current litigation when courts examine whether purported wills evidence testamentary intent and were executed freely and with finality”); see Sherwin, *supra* note 81, at 464 (“A judicial power to dispense with formality requirements, in comparison with the traditional rule of strict enforcement, increases decisional accuracy.”).

specifying the type of formal defects that courts can excuse as harmless.<sup>237</sup> They can also require courts to possess a particular degree of certainty regarding a will's authenticity before it can reclassify a noncompliant will as authentic.<sup>238</sup>

### 1. Scope of Discretion

If policymakers decide that noncompliance should not necessitate the invalidity of a will, they must delineate the scope of the court's discretion to reclassify noncompliant wills as authentic. In other words, they must decide which formal defects a court can excuse as harmless. In this regard, policymakers in the few states that have relaxed the requirement of strict compliance have chosen either to extend the court's discretion to all formal defects or to limit the court's discretion to specific formal defects.

Under the UPC's harmless error rule, courts have broad discretion. Drastic departures from the prescribed formalities would render testamentary intent difficult to establish, but courts could theoretically use the harmless error rule to excuse any formal defect.<sup>239</sup> Furthermore, under the UPC, courts can consider all evidence of testamentary intent, and no particular evidence is necessary.<sup>240</sup> The Restatement (Third) of Property explains that a court should consider any "evidence regarding the overall conduct of the testator."<sup>241</sup> The conventional law and the UPC therefore favor two radically different approaches to defining the scope of the court's discretion to reclassify formally defective wills as authentic. The conventional law denies courts discretion to evaluate evidence of authenticity by mandating that they consider only the testator's compliance with the prescribed formalities. By contrast, the UPC suggests that courts should have broad discretion to correct any formal defect and that they should not be limited to a particular type of evidence of authenticity.

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237. See *infra* Part III.B.1.

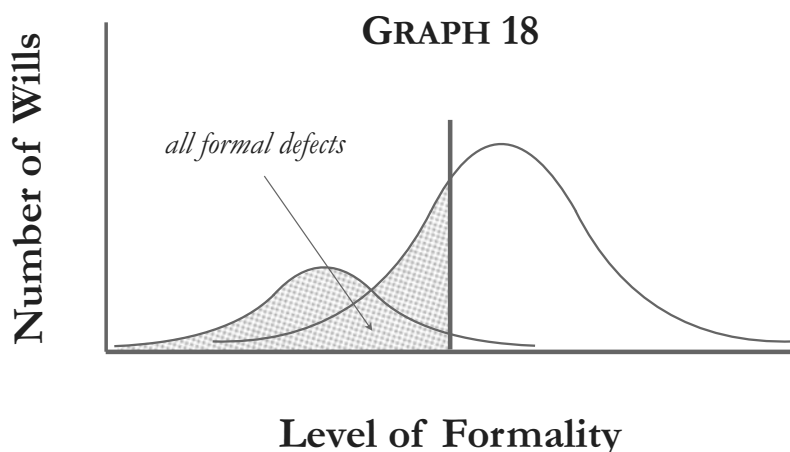
238. See *infra* Part III.B.2.

239. See UNIF. PROBATE CODE § 2-503 cmt. (UNIF. LAW COMM'N 2010) ("The larger the departure from [the prescribed] formality, the harder it will be to satisfy the Court that the instrument reflects the testator's intent."); *In re Estate of Ehrlich*, 47 A.3d 12, 17 (N.J. Sup. Ct. 2012). But see RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003) ("The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless . . .").

240. See UNIF. PROBATE CODE § 2-503.

241. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b.

Graph 18 represents the scope of the court's discretion to reclassify noncompliant wills as authentic under the UPC's harmless error rule. The differentiating line is set at the conventional law's high level of formality, and all wills that fall to the left of the differentiating line are initially presumed to be inauthentic. Under the conventional law's rule of strict compliance, courts have no discretion to change an initial inauthentic classification. However, under the UPC's harmless error rule, courts have broad discretion to reevaluate all initial inauthentic classifications and to reclassify noncompliant wills if extrinsic evidence establishes authenticity. The shaded area that encompasses all wills that fall to the left of the differentiating line represents this broad discretion.



Despite the divergent viewpoints that the conventional law and the UPC take concerning the scope of the court's discretion, policymakers are not limited to these two extremes. Instead of granting courts the discretion to excuse all formal defects, policymakers could restrict the scope of the court's discretion by specifying a limited set of formal compliance errors that courts can overlook. By striking a compromise between the conventional law and the UPC regarding the scope of the court's discretion, a formal compliance rule that specifies a limited set of formal defects that the court can excuse also strikes a compromise regarding probate-error risk. Harmless error rules that limit the scope of the court's discretion allow courts to correct some of the more apparent false-negative outcomes but attempt to limit the risk that the court's discretion will increase the rate of false-positive outcomes.

Following this approach to reform, California, Colorado, and Virginia each enacted formal compliance rules that limit the court's

discretion to reclassify formally defective wills as authentic to particular types of will-execution defects.<sup>242</sup> As such, they attempt to minimize probate-error risk by allowing courts to correct obvious false-negative outcomes and by denying courts the ability to evaluate a noncompliant will's authenticity in less obvious cases. For instance, California enacted a will-execution statute that requires strict compliance with the writing and signature requirements.<sup>243</sup> However, it grants probate courts the discretion to excuse will-execution errors related to the attestation requirement.<sup>244</sup> Under this rule, courts have no discretion to reclassify an oral declaration or an unsigned document as authentic, but a document that fails to satisfy the attestation formality is not necessarily invalid. Instead, noncompliance with the attestation requirement raises a rebuttable presumption of inauthenticity. If the will's proponent can prove that the testator intended the document to be his will, the court will validate the will despite the attestation defect.<sup>245</sup>

California's harmless error rule represents a compromise between the conventional law's denial of discretion and the UPC's grant of broad discretion. On the one hand, by maintaining the strict compliance requirement with respect to the writing and signature formalities, California's rule removes from the court's discretion those formal defects that are least likely to produce false-negative outcomes. The writing and signatures formalities are strong evidence of testamentary intent, and without this evidence,

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242. See CAL. PROB. CODE § 6110 (West 2015); COLO. REV. STAT. § 15-11-503 (2015); VA. CODE ANN. § 64.2-404 (2015). Ohio has also enacted a harmless error rule that limits the scope of courts' discretion. See *infra* note 244. Six other states have enacted the UPC's harmless error rule thereby granting courts discretion to excuse all harmless formal defects. See Dukeminier & Sitkoff, *supra* note 1, at 184.

243. See CAL. PROB. CODE § 6110; see generally Peter T. Wendel, *California Probate Code Section 6110(C)(2): How Big is the Hole in the Dike?*, 41 SW. U. L. REV. 387 (2012).

244. See CAL. PROB. CODE § 6110(c)(2) ("If a will was not executed in compliance with [the prescribed formalities], the will shall be treated as if it was executed in compliance . . . if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will."). Ohio has also enacted a will-execution statute that limits courts' discretion to attestation errors. Under the statute, the court can excuse an attestation error if it finds that "[t]he decedent signed the document . . . in the conscious presence of two or more witnesses." OHIO REV. CODE ANN. § 2107.24. Thus, Ohio courts can excuse witnesses' failure to sign the will, but to decide the issue of testamentary intent, the court must look for the specific evidence that the decedent signed the will in the presence of witnesses. See, e.g., *In re Estate of Pittson*, No. 2008 CA 00014, 2009 WL 1065384 (Ohio Ct. App. Apr. 20, 2009) (affirming the lower court's decision to deny a formally defective document admission to probate); *In re Jordan*, No. 08CA773, 2008 WL 3990836 (Ohio Ct. App. Aug. 21, 2008) (affirming the lower court's decision to admit a formally defective document to probate).

245. See CAL. PROB. CODE § 6110(c)(2).

the court would seldom conclude that a noncompliant will is authentic.<sup>246</sup> Because the strict compliance requirement reaches the correct result in most instances of oral and unsigned wills, California's harmless error rule denies courts discretion to overlook writing and signature defects.

On the other hand, by providing courts discretion with respect to attestation defects, California's harmless error rule prevents automatic invalidation in situations in which formally defective wills more likely reflect genuine testamentary intent.<sup>247</sup> The Restatement (Third) of Property explains, "Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused."<sup>248</sup> Put differently, a testator's failure to strictly comply with the attestation formality raises fewer doubts regarding a will's authenticity than a testator's failure to leave behind a signed writing. The application of the strict compliance requirement in cases involving attestation errors consequently produces more false-negative outcomes than the rule's application in cases involving writing and signature defects. Therefore, by providing courts discretion to validate wills despite attestation errors, California's harmless error rule allows courts to correct easily recognizable false-negative outcomes. However, by denying courts the discretion to excuse writing and signature formalities, it minimizes the risk that courts' discretion will increase false-positive outcomes.

Graph 19 depicts California's reform strategy with the shaded area representing the scope of the court's discretion. In contrast to the UPC's harmless error rule, which extends the court's discretion to all formally defective wills,<sup>249</sup> California's rule allows courts to evaluate the authenticity of wills that fall just to the left of the differentiating line, but denies discretion for wills that fall farther toward the left-hand side of the x-axis. Because the shaded area under the distribution curve for authentic wills is greater than the shaded area

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246. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b ("The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless . . . . Among the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will."); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 30–31 (2004).

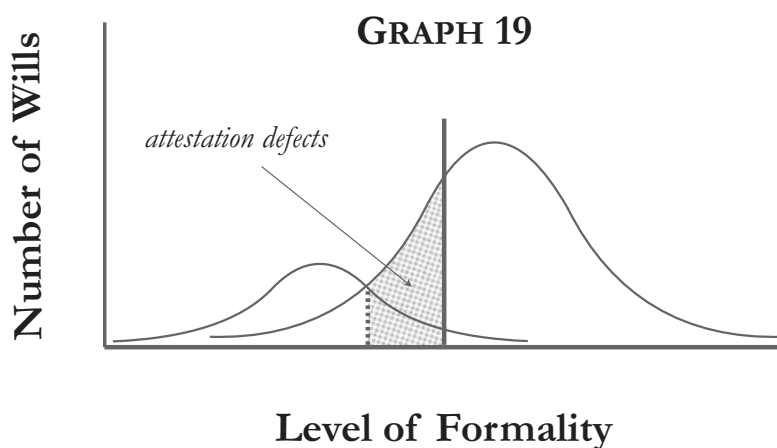
247. See UNIF. PROBATE CODE § 2-503 cmt. (UNIF. LAW COMM'N 2010) (describing attestation defects as a "recurrent class of case[s]" that will be excused as harmless).

248. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b.

249. See *supra* notes 239–241 and accompanying text.



under the distribution curve for inauthentic wills, most wills within the scope of the court's discretion are authentic.<sup>250</sup> Thus, by allowing courts to excuse attestation defects, California's harmless error rule grants courts discretion to evaluate authenticity in cases that pose the greatest risk of false-negative outcomes. By contrast, wills that fall to the left of the shaded area have signature or writing defects, consequently possessing less objective evidence of authenticity.<sup>251</sup> Because these wills are more likely inauthentic,<sup>252</sup> California denies courts discretion to reclassify them as authentic out of concern that courts might incorrectly evaluate authenticity in these more difficult cases.



Like California's harmless error rule, Colorado's will-execution statute gives courts discretion to excuse all attestation defects.<sup>253</sup> But whereas California denies courts the discretion to overlook other types of will-execution defects, Colorado allows courts to excuse some signature errors.<sup>254</sup> Indeed, the statute limits the court's ability to excuse signature defects by requiring the court to find specific evidence of authenticity before excusing such errors. Colorado courts can only correct a probate error produced by a decedent's

250. Some may suggest that allowing courts to excuse the complete absence of attestation could extend the scope of discretion to wills that are more likely inauthentic. See *supra* notes 174–179 and accompanying text.

251. See *supra* note 246 and accompanying text.

252. The increased likelihood of inauthenticity is represented by the larger area under the distribution curve for inauthentic wills and left of the shaded area.

253. See COLO. REV. STAT. § 15-11-503(1) (2015).

254. See *id.* § 15-11-503(2).

failure to comply with the signature requirement when spouses mistakenly sign each other's wills.<sup>255</sup> This situation occurs when a husband and wife intend to execute similar wills at the same execution ceremony, but the couple's lawyer erroneously instructs the spouses to sign the wrong documents.<sup>256</sup> Other than the limited situations in which this evidence of authenticity is present, Colorado courts cannot excuse signature errors.<sup>257</sup>

Although the lack of a signature may represent strong evidence of inauthenticity,<sup>258</sup> the switched-wills context is different than most other circumstances in which the decedent fails to sign the will. Unlike situations in which the decedent merely leaves behind an unsigned document, when spouses sign each other's wills, they leave behind robust evidence that they intended the wills to be legally effective.<sup>259</sup> The wills of spouses frequently contain similar terms and are typically executed at the same time.<sup>260</sup> These circumstances strongly suggest that spouses who sign each other's wills do so mistakenly. The application of the strict compliance requirement in this context therefore requires the court to invalidate the wills despite strong evidence of testamentary intent. To avoid these obvious false-negative outcomes, Colorado's harmless error rule allows the court to reclassify switched wills as authentic. However, the rule denies courts the discretion to excuse other signature errors, which provide less evidence of authenticity and consequently pose a

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255. *Id.* (allowing courts to excuse harmless errors "only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document to be the will of the decedent's spouse"). Virginia allows courts to excuse signature defects in similar situations. *See infra* note 270.

256. *See* Langbein, *supra* note 79, at 24; *see, e.g., In re Estate of Pavlinko*, 148 A.2d 528 (Pa. 1959).

257. *See* COLO. REV. STAT. § 15-11-503(2).

258. *See* Langbein, *supra* note 246, at 31 ("One of the things that you are free to do with a will that has been drafted for you is to decide not to execute it. Failure to sign the will is seldom harmless, because it raises a grave doubt about whether the testator intended the instrument to be his or her will.").

259. *See* UNIF. PROBATE CODE § 2-503 cmt. (UNIF. LAW COMM'N 2010) ("The main circumstances in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other."); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2003); ("A particularly attractive case for excusing the lack of the testator's signature is a crossed will case, in which, by mistake, a wife signs her husband's will and the husband signs his wife's will."); Langbein, *supra* note 79, at 6 ("Nobody favors abolishing the requirement that the testator sign his will, yet many would agree that noncompliance with the signature should be excused under extraordinary circumstances, as in the switched-wills cases . . .").

260. *See, e.g., In re Estate of Pavlinko*, 148 A.2d 528.

higher risk that courts will incorrectly reclassify the noncompliant will as authentic.

Graph 20 illustrates Colorado's reform strategy with the shaded area representing the limited scope of Colorado's harmless error rule. Like California, Colorado authorizes courts to excuse attestation errors,<sup>261</sup> which lie immediately to the left of the differentiating line. But whereas the scope of California's harmless error rule ends at attestation errors,<sup>262</sup> Colorado's rule extends the courts' discretion to other will-execution defects that lie farther to the left of the x-axis. Because a signature defect raises serious doubts regarding a will's authenticity,<sup>263</sup> if the court's discretion extended to all signature defects, the shaded area representing the scope of courts' discretion would include a greater number of inauthentic wills than authentic wills. This raises concerns that courts might incorrectly reclassify wills with signature defects and that this discretion could therefore increase the risk of false-positive outcomes more than it would decrease the risk of false-negative outcomes.

However, instead of extending the courts' discretion to all signature errors, Colorado's rule carves out a subset of signature errors that courts can excuse.<sup>264</sup> Because the switched-will context provides strong evidence of authenticity,<sup>265</sup> by limiting courts' discretion to this subset of cases, Colorado's harmless error rule weeds out the cases in which the will's authenticity is most in question while allowing courts to excuse signature errors in the cases that more likely produce false-negative outcomes. The shaded area that represents the scope of courts' discretion therefore does not extend all the way to the distribution curve for inauthentic wills. Rather, it is confined to a region in which the likelihood of false-negative outcomes is roughly equivalent to the likelihood of false-positive outcomes.<sup>266</sup> By limiting the courts' discretion to this subset of signature defects, Colorado's harmless error rule allows courts to correct obvious false-negative outcomes without significantly increasing the likelihood of false-positive outcomes.

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261. See COLO. REV. STAT. § 15-11-503.

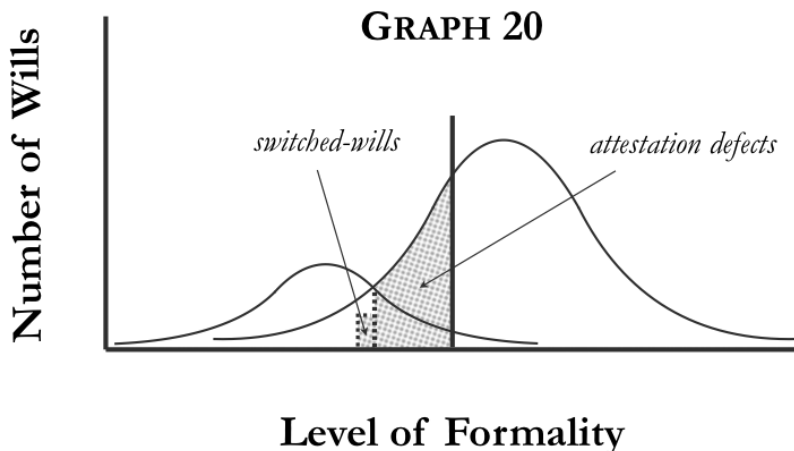
262. See *supra* notes 243–252 and accompanying text.

263. See *supra* note 258 and accompanying text.

264. See COLO. REV. STAT. § 15-11-503(2).

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

266. While Graph 20 depicts a scenario in which the likelihood of authenticity and of inauthenticity for switched-wills is equal, it could be argued that the likelihood of authenticity is much greater than the likelihood of inauthenticity.



Like Colorado, Virginia authorizes the courts to excuse all attestation errors when extrinsic evidence establishes the will's authenticity, but significantly limits courts' discretion to excuse signature errors.<sup>267</sup> Virginia authorizes courts to excuse signature errors in two specific situations.<sup>268</sup> First, a court can overlook the testator's failure to sign a will when two testators mistakenly sign each other's wills.<sup>269</sup> Second, a court can excuse signature errors when the testator mistakenly signs a self-proving affidavit rather than the will itself.<sup>270</sup> Thus, with the addition of the ability to overlook the mistaken signing of a self-proving affidavit, the courts' authority to excuse signature errors is broader under the Virginia statute than under the Colorado statute.

Like the switched-wills context, the situation in which the testator mistakenly signs a self-proving affidavit instead of the will itself provides strong evidence of testamentary intent. In such situations, the testator's signature upon an affidavit asserting that she previously signed the will strongly suggests the failure to sign the will was simply a mistake and that she intended the will to be legally effective.<sup>271</sup>

267. See VA. CODE ANN. § 64.2-404 (2015).

268. See *id.* § 64.2-404(B).

269. See *id.*

270. See *id.* The Virginia statute, however, is also broader in that it applies to all situations in which two testators mistakenly sign each other's will. Unlike the Colorado statute, it is not limited to situations in which married couples sign the wrong wills. Compare COLO. REV. STAT. § 15-11-503(2) (2015) (authorizing the court to excuse errors where a "decendent erroneously signed a document to be the will of the decedent's spouse"), with VA. CODE ANN. § 64.2-404(B) (authorizing the court to excuse errors "where two persons mistakenly sign each other's will") (emphasis added). The limitation in Colorado's statute that allows excusal of signature errors only in switched-wills cases involving married spouses is problematic. See COLO. REV. STAT. § 15-11-503(2).

271. See Mann, *supra* note 50, at 1045 ("Sometimes . . . execution goes awry, and the testator or witnesses sign only the self-proving affidavit rather than the will or attestation

Thus, just as the application of the strict compliance requirement in the switched-wills context produces clear instances of false-negative outcomes, the application of the conventional law in the self-proving affidavit context also invalidates clearly authentic wills. Virginia's compliance rule authorizes excusal of signature errors in such cases,<sup>272</sup> and it therefore allows courts to avoid obvious false-negative outcomes while creating little increased risk of false-positive outcomes.<sup>273</sup>

Graph 21 depicts Virginia's reform strategy. The shaded area that represents the scope of the court's discretion encompasses all attestation errors, which lie immediately to the left of the differentiating line, and two subsets of signature errors, namely the switched-wills cases and the self-proving affidavit cases, which lie farther to the left of the differentiating line.<sup>274</sup> By limiting the court's discretion to excuse signature errors to these two subsets of cases, Virginia allows the court to avoid some of the more obvious false-negative outcomes but limits the possibility that the court will incorrectly reclassify noncompliant wills as authentic in some of the more difficult signature error cases.

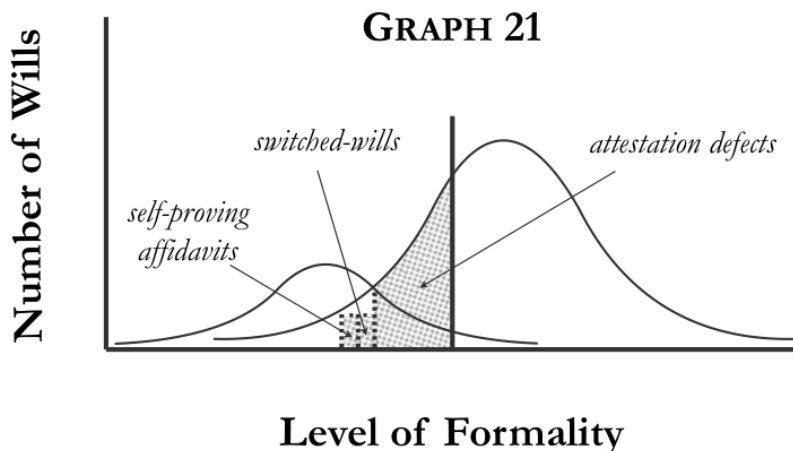
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clause. Given that self-proving affidavits closely resemble attestation clauses and are typically executed with the will and attached to it, there is scant reason not to accept the signatures to them as sufficient attestation.”).

272. See VA. CODE ANN. § 64.2-404(B).

273. See J. Rodney Johnson, *Wills, Trusts, and Estates*, 43 U. RICH. L. REV. 435, 438 (2008) (“It is believed that [Virginia’s] forward-looking legislation will . . . result in an increased honoring of Virginians’ testamentary intent because wills that are substantively valid will now be probatable notwithstanding technical defects in their execution.”).

274. While Graph 21 depicts a scenario in which the likelihood of authenticity and of inauthenticity for self-proving affidavit cases is equal, it could be argued that the likelihood of authenticity is much greater than the likelihood of inauthenticity. Indeed, signature of the self-proving affidavit provides such strong evidence of testamentary intent that the UPC suggests that authenticity should be presumed in such cases. See UNIF. PROBATE CODE § 2-504(c) (UNIF. LAW COMM’N 2010) (“A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will . . .”).



In sum, when crafting a formal compliance rule, policymakers must delineate the scope of courts' discretion. As a compromise between the conventional law's strict compliance requirement and the UPC's harmless error rule, policymakers can decide to allow courts to excuse only certain formal defects. This approach gives courts greater discretion to evaluate a noncompliant will's authenticity than the conventional law but less than the UPC's harmless error rule. As exemplified by the statutes adopted by California, Colorado, and Virginia,<sup>275</sup> such an approach allows courts to excuse formal defects in situations in which the application of the strict compliance requirement would produce obvious false-negative outcomes. However, because courts' discretion is limited to specific circumstances that provide strong evidence of authenticity, allowing courts to excuse noncompliance results in little increased risk of false-positive outcomes.

Because this more moderate reform strategy provides courts less discretion to excuse formal defects than does the UPC's harmless error rule, some proponents of reform might look upon it with disfavor.<sup>276</sup> Indeed, if there is little concern that courts will incorrectly reclassify noncompliant wills as authentic,<sup>277</sup> the UPC's harmless error rule and its broader grant of discretion would result in a greater reduction in probate-errors. Nevertheless, by providing courts at least some discretion to evaluate a noncompliant will's authenticity,

275. See CAL. PROB. CODE § 6110 (West 2015); COLO. REV. STAT. § 15-11-503; VA. CODE ANN. § 64.2-404.

276. See Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 27, 34 (2010) (suggesting that statutes like those found in California, Colorado and Virginia, which "merge[ ] . . . the dispensing power and strict compliance[,] may disappoint purist advocates of the [UPC's] Harmless Error Rule").

277. See *supra* notes 225–236 and accompanying text.

the relaxed compliance rules that were adopted by California, Colorado, and Virginia decrease the likelihood that courts will invalidate genuine wills because of harmless formal defects. As such, a formal compliance rule that limits courts' discretion by specifying the formal defects that can be excused furthers the reform movement's goal of reducing the risk of false-negative outcomes while not also significantly increasing the risk of false-positive outcomes. Despite some potential disappointment, most advocates of reform would therefore seem to prefer California, Colorado, or Virginia's harmless error rule to the conventional rule of strict compliance. Ultimately, these variations of reform suggest that, if given a clear picture of the possible types of formal compliance rules, other states may be willing to implement change and move away from the conventional rule of strict compliance.<sup>278</sup>

## 2. Degree of Certainty

When probate courts are given discretion to validate formally defective wills, policymakers not only must delineate the scope of courts' discretion but also must decide how convincingly the proponent must establish the will's authenticity. More specifically, state policymakers must select the standard of proof that a proponent must satisfy before a court will excuse a formal defect. Policymakers have three primary options from which to choose. These include the beyond a reasonable doubt standard that is traditionally used in criminal trials,<sup>279</sup> the preponderance of the evidence standard that is typically used in civil litigation,<sup>280</sup> and the clear and convincing evidence standard, which is incorporated into the UPC's harmless error rule.<sup>281</sup> These different standards require the proponent of a formally deficient will to establish a will's authenticity to varying degrees of certainty and therefore provide courts varying degrees of discretion to correct probate errors by excusing formal defects.

The first option that state policymakers could select is the reasonable doubt standard. This standard requires the court to be convinced to a near certainty that the decedent intended to execute a legally effective will in order to validate a noncompliant

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278. Only ten states have enacted a reform that grants courts discretion to excuse formal defects. See *DUKEMINIER & SITKOFF*, *supra* note 1, at 184.

279. See *Langbein*, *supra* note 79, at 461.

280. See *Sherwin*, *supra* note 81, at 461.

281. See *UNIF. PROBATE CODE* § 2-503 (*UNIF. LAW COMM'N* 2010); *Langbein*, *supra* note 79, at 53.

document.<sup>282</sup> Langbein explains that the reasonable doubt standard “originates in the criminal law, where it serves the special purpose of tilting the scales in favor of liberty for an accused who is threatened with penal sanctions.”<sup>283</sup> By requiring the prosecution to establish a very high likelihood of guilt and therefore tipping the scales in favor of liberty, the reasonable doubt standard minimizes the likelihood of a wrongful conviction.<sup>284</sup> In other words, because the prosecution has the burden of establishing guilt, the reasonable doubt standard diminishes the likelihood of false-positive outcomes in the criminal law context, while producing a higher incidence of false-negative outcomes.

The reasonable doubt standard would operate similarly in the law of wills. Like the scales of justice in the criminal law context are tilted in favor of liberty, the determination of authenticity in the will-execution context would be skewed in favor of invalidity. The proponent of a formally defective will would have to establish to a near certainty that the decedent intended the will to be legally effective, and if she could not satisfy this high evidentiary burden, the will would be invalid. Therefore, if the reasonable doubt standard were integrated into a relaxed formal compliance rule, the court would be able to correct only the most obvious false-negative outcomes.

Because the courts discretion to reclassify formally defective wills as authentic is so limited, a relaxed compliance rule that requires the proponent to establish authenticity beyond a reasonable doubt does not significantly reduce overall probate-error risk. Indeed, the reasonable doubt standard requires such strong evidence of authenticity and tilts the scales in favor of invalidity so much that it would essentially render reform ineffective. Langbein explains that “adherence to the [reasonable doubt] standard would . . . require[ ] the courts to frustrate well-proven testator’s intent under a remedial statute that was designed to achieve the opposite.”<sup>285</sup>

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282. See Langbein, *supra* note 79, at 34.

283. *Id.* Criminal law tips the scales in favor of liberty because a wrongful conviction is considered more costly than a wrongful acquittal. See *supra* notes 85–86 and accompanying text.

284. See Bierschback & Stein, *supra* note 87, at 191; see also *supra* note 87 and accompanying text.

285. See Langbein, *supra* note 79, at 34. Langbein’s analysis was informed by the experience of the Australian state of South Australia, which enacted a harmless error statute requiring the will’s proponent to establish testamentary intent beyond a reasonable doubt. See *id.* at 34–35. Langbein explains that the South Australian courts did not allow the reasonable doubt standard to undermine the purpose of the harmless error rule, and that “[i]nstead, they . . . weakened the [reasonable doubt] standard while purporting to apply it.” *Id.* at 35.



Thus, a harmless error rule that includes a reasonable doubt standard is substantially equivalent to the rule of strict compliance. Whereas under the conventional rule of strict compliance courts have no discretion to reclassify formally defective wills as authentic, a relaxed compliance rule that includes a reasonable doubt standard of proof allows courts to correct only unmistakable false-negative outcomes.

The second standard of proof that state policymakers could select is the preponderance of the evidence standard.<sup>286</sup> A proponent of a will satisfies this standard if the court is convinced simply that the decedent more likely than not intended to execute a legally effective will.<sup>287</sup> In percentage terms, the proponent of the will meets this standard if she convinces the court that the likelihood that the will is authentic is greater than fifty percent.<sup>288</sup> By requiring this minimal level of certainty regarding the decedent's intent, the preponderance standard provides the court substantial discretion to reclassify formally defective wills as authentic. Whereas the reasonable doubt standard limits the court's discretion to only the most obvious false-negative outcomes,<sup>289</sup> the preponderance standard allows courts to evaluate the authenticity of wills in more difficult cases. By granting courts broad discretion, this standard reaches the correct outcome as frequently as possible.<sup>290</sup> Therefore, because the goal of the law of will-execution is to minimize probate-error risk, the preponderance standard would seem to be the appropriate standard of proof for a relaxed compliance rule.<sup>291</sup>

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286. See Sherwin, *supra* note 81, at 461.

287. See *id.*

288. See Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983) ("This traditionally requires demonstrating that the existence of the contested fact is more probable than its nonexistence."); see also Sherwin, *supra* note 81, at 461 ("The preponderance standard is a concession to the fact that whether or not truth is discoverable in theory, it cannot be discovered with absolute certainty in the limited circumstances of a trial. Because courts must reach their decisions under conditions of uncertainty, their goal should be to come as close as possible to the truth, or in other words, to reach the outcome that is most probably correct.")

289. See *supra* notes 282–285 and accompanying text.

290. See Mitchell N. Berman, *Replay*, 99 CAL. L. REV. 1683, 1694 (2011) ("Error minimization . . . is precisely the rationale behind the law's preponderance of the evidence . . . standard of proof."); Orloff & Stedinger, *supra* notes 288, at 1172 ("If the goal is to minimize the number of erroneously decided cases . . . the preponderance-of-the-evidence rule emerges as the superior choice."); Sherwin, *supra* note 81, at 462–63 ("A preponderance standard produces the greatest number of correct decisions, within the limits of the court's factfinding abilities.")

291. See Sherwin, *supra* note 81, at 467 (arguing that "the objective . . . should be to determine as accurately as possible whether or not the decedent had testamentary intent" and that "[f]or this purpose, the preponderance standard can be expected to produce the best set of outcomes"). But see *infra* notes 298–315 and accompanying text.

Other reasons also suggest that the preponderance standard might be the appropriate standard of proof. First, a higher standard of proof would be appropriate if false-positive outcomes were more costly than false-negative outcomes.<sup>292</sup> For instance, the reasonable doubt standard is applied in criminal trials in order to avoid convictions of innocent defendants, which are considered more costly than acquittals of guilty defendants.<sup>293</sup> But, as previously explained, within the law of wills false-positive outcomes and false-negative outcomes produce equal error costs, as both undermine the decedent's intent.<sup>294</sup> Thus, the preponderance standard seems appropriate because it values false-negative outcomes and false-positive outcomes equally. Second, a higher standard of proof could be justified if there were concerns regarding the court's ability to accurately evaluate the authenticity of wills.<sup>295</sup> A higher standard would limit the court's discretion to easier cases in which the court would more likely make accurate determinations of authenticity.<sup>296</sup> But as discussed above, concerns regarding the competency of probate courts are largely unfounded,<sup>297</sup> and therefore, broader discretion would likely lead to reduced rates of probate errors.

The final standard of proof that state policymakers could select is the clear and convincing evidence standard.<sup>298</sup> This option falls somewhere between the preponderance and reasonable doubt standards.<sup>299</sup> Although the clear and convincing standard is difficult to state in percentage terms,<sup>300</sup> it requires more certainty than the fifty-one percent that is required by the preponderance standard, but less than the near one hundred percent certainty that is required by the reasonable doubt standard. Langbein selected this standard for the reform movement's harmless error rule because it

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292. See Sherwin, *supra* note 81, at 463 (suggesting that a higher standard of proof "might be appropriate if an erroneous decision upholding an informal will is substantially more costly than an erroneous decision rejecting an informal will").

293. See *supra* notes 85–87, 282–284 and accompanying text.

294. See *supra* notes 88–93 and accompanying text.

295. See Sherwin, *supra* note 81, at 467 ("If there were reason to think that courts will make frequent mistakes in applying the dispensation rule, a high standard of proof might be warranted.").

296. See *id.* ("[I]f the number of unintended wills that court would admit under a preponderance standard exceeds the number of intended wills that would be rejected under a rule of strict enforcement of will formalities, [a higher standard of proof] might serve to counteract judicial error.").

297. See *supra* notes 233–236 and accompanying text.

298. See UNIF. PROBATE CODE § 2-503 cmt. (UNIF. LAW COMM'N 2010); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2003).

299. See Sherwin, *supra* note 81, at 462.

300. See *id.*; Vars, *supra* note 26, at 8.

strikes a compromise between the broad discretion to validate formally defective wills that courts enjoy under the preponderance standard and the severely restricted discretion that courts have under the reasonable doubt standard.<sup>301</sup>

Langbein favored the compromise of the clear and convincing standard because he had concerns about the preponderance standard.<sup>302</sup> As previously discussed, the preponderance standard would seem to be appropriate because it grants courts the broadest discretion to correct false-negative outcomes by reclassifying formally defective wills as authentic.<sup>303</sup> However, just as there are good reasons to tilt the scales in favor of the defendant in the criminal law context,<sup>304</sup> Langbein believed that compelling policy objectives weighed in favor of tilting the scales in the will-execution context slightly in favor of false-negative outcomes. Langbein explains, “Even granting, as some allege, that the [clear and convincing] standard is hard to define and to enforce, its hortatory effect, cautioning the trier that the issue is one of special seriousness, is worth preserving.”<sup>305</sup> Similarly, the official comment to the UPC explains that,

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which courts at the trial and appellate levels are urged to police with rigor), [the harmless error rule] imposes procedural standards appropriate to the seriousness of the issue.<sup>306</sup>

This cautioning as to the seriousness of the issue could be directed toward courts that must evaluate the authenticity of formally defective wills. Under this reading of Langbein’s concerns, the higher standard of proof could encourage courts to use their best efforts to correctly decide the issue of a will’s authenticity, thereby

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301. See Langbein, *supra* note 79, at 37 (“The widespread longing for an afforded standard of proof in these cases, coupled with the equally widespread sense that the criminal standard is misapplied in civil litigation, leads me to believe that the [clear and convincing] standard strikes the appropriate balance.”); accord Sherwin, *supra* note 81, at 460 (“The dispensation rule of the Restatement and the UPC purports to strike a balance between formalism and case-by-case evaluation of testamentary intent by tempering judicial power to disregard will execution formalities with a requirement of clear and convincing evidence.”).

302. See Langbein *supra* note 3 at 36–37.

303. See *supra* notes 286–297 and accompanying text.

304. See *supra* notes 85–87, 282–284 and accompanying text.

305. Langbein, *supra* note 79, at 37.

306. UNIF. PROBATE CODE § 2-503 cmt. (UNIF. LAW COMM’N 2010).

reducing the potential that they incorrectly reclassify formally defective wills as authentic.<sup>307</sup> However, the cautioning effect of the clear and convincing standard could also be directed toward those who attempt to execute legally effective wills. As discussed previously, by requiring wills to be written, signed, and witnessed, the conventional law of will-execution encourages decedents to comply with these formalities and therefore to leave behind robust evidence of authenticity.<sup>308</sup> Because authentic wills on average possess a greater level of formality than inauthentic wills, courts more accurately identify authentic wills, and consequently probate-error risk is reduced.<sup>309</sup>

But just as some refined formality reform proposals could decrease the level of formality of authentic wills,<sup>310</sup> a relaxed compliance rule could increase the number of informal wills that are nonetheless authentic. If a decedent knows that strict compliance with the prescribed formalities is not required and that the will's proponent must only satisfy the preponderance standard to validate the will, the incentive that she has to leave behind clear evidence of authenticity could be reduced.<sup>311</sup> Over time, this reduced incentive could lead to more authentic wills possessing lower levels of formality, which in turn would make courts' task of determining a will's authenticity more difficult.<sup>312</sup> Thus, a relaxed compliance rule could increase probate-error risk because the distinction between authentic wills and inauthentic wills could become blurred.<sup>313</sup>

However, the clear and convincing standard would likely maintain the decedent's incentive to leave behind clear evidence of authenticity. By requiring the proponent of a formally defective will to present stronger evidence of authenticity, a higher standard of proof reduces the likelihood that the court will reclassify a formally

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307. However, as discussed previously, there seems to be little concern regarding the competency of probate courts to make accurate determinations of authenticity. *See supra* notes 295–297 and accompanying text.

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

309. *See supra* Part II.A.2.

310. *See supra* note 183 and accompanying text.

311. *See* Sherwin, *supra* note 81, at 468 (“It is generally understood that judges have power to dispense with formality requirements and accept non-standard testamentary transactions, testators might come to believe that the statutory procedures are no longer necessary.”).

312. *See id.* (explaining that because testators “might gradually abandon traditional testamentary procedures in favor of other, perhaps cheaper, means of expressing testamentary intent[,] [t]he language of testation would lose its currency, and the advantages of coordination and simplification could be lost”).

313. The potential effect of a relaxed compliance rule could be similar to the potential effect of eliminating the attestation requirement. *See supra* notes 182–190 and accompanying text.

defective will as authentic, and consequently, those who want to leave behind legally effective wills will find noncompliance less attractive under a relaxed compliance rule that includes a clear and convincing standard than under one that includes a preponderance standard.<sup>314</sup> Put simply, the reform movement wants to ease the harshness of the conventional rule of strict compliance, but it does not want to encourage testators to disregard the will-execution process altogether. By titling the scales slightly in favor of invalidity, the clear and convincing standard encourages decedents to carefully comply with the prescribed formalities,<sup>315</sup> and it therefore likely maintains the formal distinction between authentic wills and inauthentic wills.

In sum, policymakers must select the standard of proof that the proponent of a will must satisfy before the court excuses a formal defect. By requiring nearly incontrovertible evidence of authenticity and tilting the scales heavily in favor of invalidity, the reasonable doubt standard substantially restricts the instances in which the court could correct false-negative outcomes.<sup>316</sup> Because a relaxed formal compliance rule that includes a reasonable doubt standard would produce results similar to the conventional rule of strict compliance, such a standard of proof would render reform ineffective.<sup>317</sup>

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314. *E.g.*, Sherwin, *supra* note 81, at 469 (“[A] clear and convincing evidence standard might be offered as a way to minimize the dangers of the dispensation rule: a higher standard of proof will weight judicial decision-making against the acceptance of informal document, and so minimize the number and variety of judicial exceptions to formality rules. Fewer and narrower exceptions will in turn make alternate means of expression riskier and therefore less attractive.”); *see also* Langbein, *supra* note 79, at 23 (explaining that under the harmless error rule “[n]oncompliance is hardly an enticing option”). *But see* Sherwin, *supra* note 81, at 469–70 (“The reason why testators and their lawyers would continue to comply with statutory formalities rather than experiment with other more informal transactions is not to avoid having to produce clear and convincing evidence at a later trial, but to avoid any litigation over the question of testamentary intent. Because a high standard of proof provides no significant incentive to testators, it contributes little, if anything, to preserving the practice of compliance with statutory formalities.”).

315. A related concern with a relaxed compliance rule is that the possibility that a formally defective will might be valid could increase the likelihood that wrongdoers will attempt to pass a fraudulent will through the probate process. *See* Kelly, *supra* note 26, at 881 (“[O]ne concern with harmless error . . . is that th[is] doctrine[ ] might increase . . . the opportunity for fraud and undue influence”). This concern is similar to the concerns raised by the proposal to eliminate the attestation requirement. *See supra* notes 184–187 and accompanying text. However, proponents of reform argue that the clear and convincing standard reduces the risk of fraud. *See* Kelly, *supra* note 26, at 881 (explaining that “one concern with harmless error . . . is that th[is] doctrine[ ] might increase . . . the opportunity for fraud and undue influence” but that the UPC’s harmless error rule “mitigate[s] this potential concern by requiring ‘clear and convincing evidence.’”).

316. *See supra* notes 282–284 and accompanying text.

317. *See supra* note 285 and accompanying text.

Although the reasonable doubt standard should be dismissed, the preponderance of the evidence and the clear and convincing evidence standards represent viable standard of proof options. The preponderance standard allows the court to excuse formal defects when the decedent more likely than not intended to execute a will.<sup>318</sup> By contrast, the clear and convincing evidence standard requires a greater likelihood of authenticity than the preponderance standard but does not require the near certainty that the reasonable doubt standard requires.<sup>319</sup> Proponents of the preponderance standard argue that courts should have the broadest discretion to correct false-negative outcomes so that probate-error risk is minimized.<sup>320</sup> Some advocates of reform argue, however, that the preponderance standard is too drastic a departure from the conventional law and that such reform may have adverse consequences that could increase probate-error risk.<sup>321</sup> Therefore, while it seems clear that a relaxed compliance rule that includes a clear and convincing standard would reduce the probate-error risk that exists under the conventional law, the question as to whether the preponderance standard would further reduce probate-error risk remains open.

#### CONCLUSION

The law of will-execution is a binary classification test that classifies wills as either authentic or inauthentic.<sup>322</sup> However, no method of differentiating authentic wills from inauthentic wills is perfect. Some authentic wills will be incorrectly classified as inauthentic, and some inauthentic wills will be incorrectly classified as authentic. Because both false-negative outcomes and false-positive outcomes undermine the decedent's intent,<sup>323</sup> the goal of the law of will-execution should be to minimize the frequency of incorrect classifications.<sup>324</sup> Yet, the conventional law of will-execution is not designed to minimize the total number of probate errors.<sup>325</sup>

By requiring the decedent to comply with a high level of formality, the conventional law produces a low risk of false-positive

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318. See Sherwin, *supra* note 81, at 461.

319. See *id.* at 461–62.

320. See *supra* notes 141–152 and accompanying text.

321. See *supra* notes 160–170 and accompanying text.

322. See *supra* notes 4–13 and accompanying text.

323. See DUKEMINIER & SITKOFF, *supra* note 1, at 148; see also *supra* notes 88–90 and accompanying text.

324. See *supra* notes 74–93 and accompanying text.

325. See *supra* Part II.A.

outcomes and a relatively high risk of false-negative outcomes.<sup>326</sup> Indeed, a decedent likely would not comply with a high level of formality without intending the will to be legally effective.<sup>327</sup> Conversely, a high level of formality raises the possibility that a decedent intends to execute a legally effective will but fails to comply due to mistake or ignorance.<sup>328</sup> Moreover, by denying courts the discretion to excuse harmless formal defects, the conventional law prevents courts from correcting obvious false-negative outcomes.<sup>329</sup> In this way, the conventional law heavily allocates risk in favor of false-negative outcomes, and does not minimize the overall risk of probate errors.

A reform movement has developed over the course of several decades that seeks to change the conventional law of will-execution.<sup>330</sup> This reform movement has proposed various reforms that are designed to avoid the inequitable results that occur when courts invalidate clearly authentic wills.<sup>331</sup> Although many of these proposals would decrease probate-error risk, the reform movement traditionally has not framed the goal of reform in this way. Consequently, it has not fully explained the shortcomings of the conventional law of will-execution or how reform would improve the law's accuracy in differentiating authentic wills from inauthentic wills. This lack of clarity has likely contributed to the reform movement's struggle to implement widespread change. Therefore, to provide clarity and focus to the goals and mechanics of will-execution reform, this Article develops a framework for thinking about how the law of will-execution differentiates authentic wills from inauthentic wills and how policymakers can adjust probate-error risk.

In sum, reform of the conventional law of will-execution has proven to be a slow and incremental process. Nonetheless, the push for reform continues, and relatively recent developments in a handful of states provide hope that more widespread change is possible.<sup>332</sup> This Article's framework clarifies the purpose and effect of will-execution reform and, consequently, increases the likelihood that policymakers will implement change.

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326. See *supra* Part I.A.

327. See DUKEMINIER & SITKOFF, *supra* note 1, at 153; see also *supra* notes 47–48 and accompanying text.

328. See Glover, *supra* note 49, at 433–34; see also *supra* notes 49–50 and accompanying text.

329. See *supra* Part I.B.

330. See *supra* notes 149–152 and accompanying text.

331. See *supra* notes 153–156 and accompanying text.

332. See *supra* Part III.B.1.