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### Decoupling the Law of Will-Execution

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## ARTICLES

### DECOUPLING THE LAW OF WILL-EXECUTION

MARK GLOVER<sup>†</sup>

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## INTRODUCTION

For roughly forty years, a reform movement has advocated for change in the way that courts judge the validity of wills.<sup>1</sup> Traditionally, the court merely assesses whether the decedent complied with the writing, signature, and witnessing formalities of will-execution.<sup>2</sup> If the decedent complied, the will is valid.<sup>3</sup> If the decedent did not comply, the will is invalid, and the court has no discretion to overlook the formal defect.<sup>4</sup> Because this conventional law results in the invalidity of plainly authentic wills when decedents fail to comply due to mistake or ignorance, the reform movement has argued for change so that more genuine wills are validated.<sup>5</sup> Specifically, reformers suggest that courts should have discretion to validate a noncompliant will when there is clear and convincing evidence that the decedent intended the will to be legally effective.<sup>6</sup> However, despite broad support within the legal academy, this reform effort has been slow to instigate change.<sup>7</sup>

The reform movement's struggles can be explained in part by the way that scholars demonstrate the need for reform, which is typically focused on the purpose of will formalities.<sup>8</sup> A fundamental tenet of the law of wills is that decedents can distribute their estates as they choose.<sup>9</sup> However, because decedents are dead at the time of probate, the determination of testamentary intent cannot be achieved by simply asking them

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<sup>1</sup> See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 179 (9th ed. 2013); see, e.g., John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 526, 531 (1975); see also *infra* Part I.

<sup>2</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 148.

<sup>3</sup> See *id.* at 153.

<sup>4</sup> See *id.* at 171 ("The strict compliance rule creates a conclusive presumption of invalidity for an imperfectly executed will. Unless every last statutory formality is complied with exactly, the instrument is denied probate even if there is compelling evidence that the decedent intended the instrument to be his will.").

<sup>5</sup> See *infra* Part I.B–C.

<sup>6</sup> See UNIF. PROBATE CODE § 2-503 (amended 1997); see also 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).

<sup>7</sup> See 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, 580 (2007); see also *infra* note 107 and accompanying text.

<sup>8</sup> See, e.g., Langbein, *supra* note 1, at 492, 510.

<sup>9</sup> See *id.* at 491; see also Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 883–84 (2012).

what they intended.<sup>10</sup> Thus, to ensure that the court has a reliable and easily recognizable record of testamentary intent, the law requires that wills be written, signed, and witnessed.<sup>11</sup> These and other related formalities provide the court with robust evidence that the decedent intended the will to be legally effective, and therefore testamentary formality's purpose is to facilitate the law's fulfillment of the decedent's intent.<sup>12</sup>

Although the traditional law gives the court assurance that it can safely distribute the decedent's estate according to the terms of a formally compliant will,<sup>13</sup> critics contend that requiring courts to invalidate clearly genuine yet formally defective wills conflicts with formality's role in the realization of testamentary intent.<sup>14</sup> They argue that the rule of strict compliance is overly concerned with preventing the validation of fraudulent or unintended wills and should be more concerned with validating genuine wills.<sup>15</sup> In short, the reform movement suggests that the rule of strict compliance undermines both the

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<sup>10</sup> See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941).

<sup>11</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1999) ("The purpose of statutory formalities . . . is to determine whether the decedent adopted the document as his or her will."); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003) ("The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention.").

<sup>12</sup> 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." (footnotes omitted)).

<sup>13</sup> 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 with all of the Wills Act formalities unless the person intends the instrument to be his will."); see also Katherine R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 311 n.18 (2011) ("Few people would undergo such ceremony without holding testamentary intent.").

<sup>14</sup> See, e.g., Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235–36 (1996) ("[A] paradox exists: a primary purpose of will formalities is to ensure that the testator's final, deliberate intent controls, but judicial insistence on strict compliance with those formalities frustrates the testator's intent by aborting transfers the testator clearly intended to make.").

<sup>15</sup> See Lester, *supra* note 7, 578–79.

principle of testamentary freedom and formality's goal of effectuating the decedent's intent,<sup>16</sup> and therefore the law's insistence on strict compliance should be relaxed.<sup>17</sup>

The reform movement's focus on the purpose of testamentary formality is flawed because it primarily emphasizes the benefit of reform, namely that the abandonment of strict compliance would validate more genuine expressions of testamentary intent and therefore would advance the overall goal of will formalities. However, by focusing on this benefit, the reform movement's case for change largely overlooks the potential costs of abandoning strict compliance. Just as the writing, signature, and witnessing formalities serve specific purposes,<sup>18</sup> the requirement that all testators strictly comply with these formalities also serves various purposes.<sup>19</sup> Reform could undermine the objectives of strict compliance and therefore could have potential costs that are obscured when the reform movement focuses on the purpose of will formalities.<sup>20</sup> The movement does not completely ignore the potential costs of reform,<sup>21</sup> but because no framework exists to systematically analyze the effect of reform upon the goals of strict compliance, these costs are not clearly identified. In the end, the reform movement's failure to methodically examine the purposes of strict compliance has hindered its ability to plainly demonstrate the rule's disutility and may contribute to the movement's lack of widespread success.

To inject new life into the reform movement, this Article shifts the discussion regarding reform from an analysis that focuses on the purpose of will formalities to an analysis that recognizes the independent roles that formality and strict compliance play in the law of will-execution. Specifically, this Article argues that the formalities of will-execution and the rule

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<sup>16</sup> See Langbein, *supra* note 6, at 4; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1999) ("The formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves.").

<sup>17</sup> See *infra* Part I.B.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> For example, Langbein acknowledges that the abandonment of the strict compliance requirement could have some costs, but he frames them in terms of the functions of formality rather than in terms of the functions of strict compliance. See Langbein, *supra* note 6, at 4 ("In order to escape the rule of strict compliance with the Wills Act, . . . the case must be made that the benefits of Wills Act formality would be retained even if the law were changed to excuse execution blunders.").

<sup>21</sup> See, e.g., *infra* notes 211, 230, and 256.

of strict compliance serve similar yet discrete purposes and therefore the utility of the two should be analyzed separately.<sup>22</sup> This way of thinking about the law of will-execution acknowledges the purposes of strict compliance that could be undermined by reform and therefore provides a clearer picture of the potential costs and benefits of reform. Ultimately, this framework refines the case for reform by uniquely demonstrating the strict compliance requirement's disutility,<sup>23</sup> and provides hope that widespread change will one day be forthcoming.

This Article proceeds in four parts. Part I explains the context of reform, including the traditional law of will-execution, the criticism of strict compliance, and the reform movement. Next, by explaining the purpose of testamentary formality, Part II serves as the foundation for decoupling the analysis of will formalities from the analysis of strict compliance. Part III completes the process of decoupling the law of will-execution by examining the purpose of strict compliance. Finally, Part IV explores the implications that the recognition of the independent purposes of will formalities and strict compliance has for the law of wills. Specifically, it explains how this framework clarifies the costs and benefits of reform and how such an analysis ultimately galvanizes the arguments in favor of change.

## I. THE CONTEXT OF STRICT COMPLIANCE

### A. *The Traditional Law of Will-Execution*

Formality has long been a part of the will-execution process,<sup>24</sup> and the valid exercise of testamentary power now generally requires that a will be written, signed by the testator, and attested by two witnesses.<sup>25</sup> In addition to these primary formalities, a variety of ancillary formalities are required in various jurisdictions. For example, some states require that testators and witnesses be in each other's presence when wills are signed.<sup>26</sup> In other states, testators must attest to the

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<sup>22</sup> See *infra* Part II–III.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 415–18 (1988).

<sup>25</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 148.

<sup>26</sup> See *id.* at 159.

witnesses that the documents before them are their wills, and in other jurisdictions they must also subscribe wills, meaning that they must sign at the end of the document.<sup>27</sup>

Courts traditionally evaluate compliance with these formalities based upon a rule of strict compliance.<sup>28</sup> Pursuant to this requirement, any error in will-execution invalidates a will, regardless of how minor or technical the formal defect, and despite the court's confidence that the decedent intended the document to constitute a valid will.<sup>29</sup> The court cannot validate a will based upon other evidence that the testator intended it to be legally effective.<sup>30</sup> Compliance with the prescribed formalities is the only proof of testamentary intent that the court will recognize.<sup>31</sup>

To illustrate how will formalities and the strict compliance requirement operate, consider the attempted execution of wills by Hellen and Vasil Pavlinko,<sup>32</sup> an immigrant couple from Eastern Europe.<sup>33</sup> Hellen and Vasil spoke little English and were unfamiliar with the law of wills,<sup>34</sup> but both were certain that they wanted to implement mirror image estate plans. If Hellen died first, she wanted her property to go to her surviving husband.<sup>35</sup> Likewise, if Vasil predeceased Hellen, he wanted his property to go to his surviving wife.<sup>36</sup> Upon the death of the surviving spouse, both Hellen and Vasil wanted the remainder of their property to be left to Hellen's brother.<sup>37</sup> To ensure that their testamentary wishes would be legally memorialized, Hellen and Vasil consulted an attorney who spoke their native language and who prepared wills that reflected the couple's desired estate plan.<sup>38</sup> The couple followed their attorney's direction and signed the documents in the presence of the attorney and his assistant.<sup>39</sup>

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<sup>27</sup> See *id.* at 163.

<sup>28</sup> See *id.* at 153.

<sup>29</sup> See Langbein, *supra* note 1, at 489.

<sup>30</sup> See Bruce H. Mann, Essay, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035–36 (1994).

<sup>31</sup> See *id.*

<sup>32</sup> *In re Estate of Pavlinko*, 148 A.2d 528, 528 (Pa. 1959).

<sup>33</sup> See *id.* at 531 (Musmanno, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* at 532.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 531.

<sup>39</sup> See *id.* at 528 (majority opinion).

Hellen died several years later.<sup>40</sup> Her will was never submitted for probate, but Vasil took ownership of her property in accordance with her testamentary intent.<sup>41</sup> Eventually, Vasil also passed away,<sup>42</sup> and in an attempt to honor both Hellen and Vasil's wishes, Hellen's brother submitted Vasil's will to the probate court to begin the process of claiming ownership of the remainder of the couple's property.<sup>43</sup> Unfortunately, the court discovered that the Pavlinkos had not properly executed their wills, as each of them had mistakenly signed the other's will.<sup>44</sup> Hellen had signed the document that laid out Vasil's desired estate plan, and Vasil had signed the document that conveyed Hellen's testamentary wishes.<sup>45</sup>

Insisting on strict compliance, the court concluded that, because they failed to sign the proper documents, neither Hellen nor Vasil had executed a valid will.<sup>46</sup> Hellen's brother therefore could not take ownership of the couple's property.<sup>47</sup> The court reached this conclusion in the face of clear evidence that both Hellen and Vasil wanted Hellen's brother to have the remainder of their property.<sup>48</sup> As the dissenting judge explained, "Everyone in this case admits that a mistake was made: an honest, innocent, unambiguous, simple mistake . . . No one disputes this brute fact, no one can dispute this granitic, unbudgeable truth."<sup>49</sup> Despite the admittedly "unusual" circumstances of the case and its "unfortunate" outcome,<sup>50</sup> the court held that a will's form must take precedent over the testator's intent, and that Vasil's will

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<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* Hellen's brother did not actually submit the document purporting to be Vasil's will to probate. Instead he submitted the document that Vasil signed but that specified Hellen's estate plan. *Id.* at 528–29.

<sup>44</sup> *See id.* at 528.

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 529.

<sup>47</sup> *See id.* ("While no attempt was made to probate, as Vasil's will, the writing which purported to be his will but was signed by Hellen, it could not have been probated as Vasil's will, because it was not signed by him at the end thereof.")

<sup>48</sup> *See id.* at 532 (Musmanno, J., dissenting).

<sup>49</sup> *Id.* ("Can anyone go to the graves of the Pavlinkos and say that we do not know what they meant? They said in English and in Carpathian that they wanted their property to go to [Hellen's brother].")

<sup>50</sup> *See id.* at 528 (majority opinion).

was therefore invalid.<sup>51</sup> *Pavlinko* is representative of numerous similar instances in which the court was certain that the decedent intended to execute a will but nonetheless invalidated the will because the decedent failed to strictly comply with the prescribed formalities.<sup>52</sup>

### B. *The Criticism of Strict Compliance*

The specific result in *Pavlinko* and courts' general insistence on strict compliance have generated criticism for being overly formalistic. Critics contend that the rule of strict compliance unnecessarily values the form of a will over the substance of the testator's intent.<sup>53</sup> The court in *Pavlinko* illustrates this formalism when it explains, "The decedent may have thought he had made a will, but the statute says he had not. The question is not one of his intention, but of what he actually did, or rather what he failed to do."<sup>54</sup> Critics argue that this formalism conflicts with the cornerstone of the law of wills, which is the principle that testators have broad freedom to dispose of their estates, and that the law's ultimate purpose is to effectuate the testator's intent to exercise this freedom.<sup>55</sup>

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<sup>51</sup> See *id.* at 531 ("Once a Court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act in order to accomplish equity and justice in that particular case, the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened wide to countless fraudulent claims which the Act successfully bars.").

<sup>52</sup> See Mann, *supra* note 30, at 1036 ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator.").

<sup>53</sup> See Langbein, *supra* note 1, 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 was inconsequential.").

<sup>54</sup> *Pavlinko*, 148 A.2d at 530 (quoting *In re Churchill's Estate*, 103 A. 533, 535 (Pa. 1918)) (internal quotation marks omitted).

<sup>55</sup> See Langbein, *supra* note 6, at 4 ("The Wills Act is meant to implement the decedent's intent; the paradox in a case [that applies the rule of strict compliance] is that the Wills Act defeats that intent."); Langbein, *supra* note 1, at 491–92 ("A tension is apparent between this principle of 'free testation and the stiff, formal' requirements of the Wills Act." (footnote omitted)); Leslie, *supra* note 14, at 243 ("The argument for simplifying will formalities and forgiving 'harmless errors' in execution rests on the premise that effectuating testamentary intent, and thus protecting testamentary freedom, is the primary goal of wills law.").

The court in *Pavlinko* recognized the tension between a will's form and the testator's intent when it openly acknowledged this consequence of the strict compliance requirement:

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 i[f] frustrated by the act of the Legislature, of which the general object is to give effect to the intention.<sup>56</sup>

This conflict between a will's form and a testator's intent is precisely what critics of strict compliance find so troubling.

Although the formality of will-execution long has been a topic of scholarly discourse,<sup>57</sup> criticism of strict compliance began in earnest with the publication of Professor John Langbein's 1975 article, entitled *Substantial Compliance with the Wills Act*.<sup>58</sup> In the article, Langbein criticizes strict compliance based upon a functional analysis of will formalities,<sup>59</sup> and since then a functional framework has framed the discussion of this area of the law.<sup>60</sup> Instead of relying on the fiction that will formalities

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<sup>56</sup> *Pavlinko*, 148 A.2d at 530 (quoting *In re Churchill's Estate*, 103 A. 533, 535 (Pa. 1918)) (internal quotation marks omitted).

<sup>57</sup> In the final quarter of the twentieth century, "[t]he proper place and scope of formalities in [the execution of] wills [became] a cause celebre in recent legal literature." Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 914 n.103 (1992). Earlier scholars also focused on the formality of will-execution. See, e.g., Gulliver & Tilson, *supra* note 10; Philip Mechem, *Why Not a Modern Wills Act? A Comment on the Wills Provisions of the Model Probate Code*, 33 IOWA L. REV. 501 (1948). Legal scholars' interest in will formalities and strict compliance has extended into the twenty-first century. See, e.g., Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 27 (2010).

<sup>58</sup> See generally Langbein, *supra* note 1. This push for reform has been characterized as the "Langbein Revolution." Lloyd Bonfield, *Essay, Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1896 (1996).

<sup>59</sup> See Langbein, *supra* note 1, at 489, 491–98.

<sup>60</sup> See Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 168 (1988). The functional analysis of will formalities, however, predated Langbein. See, e.g., Gulliver & Tilson, *supra* note 10, at 5–13. Moreover, the functional analysis of formality in other contexts predates the functional analysis of testamentary formality. See, e.g., Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 342 (1926) (analyzing the delivery requirement of inter vivos donative transfers and explaining that "the only sound and useful approach to a problem such as this is the pragmatic approach, i. e., [sic] the approach which defines a thing in terms of its functions").

possess inherent value, functionalists, such as Langbein, seek to identify the purposes of testamentary formality.<sup>61</sup>

When analyzed within this framework, formalities are explained as fulfilling several functions that ensure that a will accurately and reliably reflects the testator's intent.<sup>62</sup> The origin of this functional framework dates back as far as 1941, when Professor Ashbel Gulliver and his research assistant, Catherine Tilson, published a seminal work on the topic.<sup>63</sup> Gulliver and Tilson explain that will formalities serve three functions that might justify their place in the law of wills.<sup>64</sup> First, will formalities serve an evidentiary function by providing reliable evidence that the testator intended a particular document to constitute a legally effective will.<sup>65</sup> Second, they serve a protective function by reducing the possibility of fraudulent wills.<sup>66</sup> Finally, Gulliver and Tilson explain that will formalities serve a cautionary function by reminding the testator of the legal significance of executing a will.<sup>67</sup>

It is upon this framework that Langbein builds his functional analysis of testamentary formality, with his primary contribution being the placement of the channeling function alongside those functions identified by Gulliver and Tilson.<sup>68</sup> Langbein explains that will formalities serve this channeling function by funneling all wills into a substantially similar form.<sup>69</sup> Because all wills are written, signed, and witnessed, probate courts can more efficiently determine whether the testator intended to execute a valid will.<sup>70</sup> Since the publication of

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<sup>61</sup> See Gulliver & Tilson, *supra* note 10, at 5–13; Langbein, *supra* note 1, at 491–98 (drawing heavily from the Gulliver and Tilson analysis).

<sup>62</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (1999) (“The purpose of the statutory formalities . . . is to determine whether the decedent adopted the document as his or her will.”); see also *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (“The primary purpose of [will] formalities is to ensure that the document reflects the uncoerced intent of the testator.”); Langbein, *supra* note 1, at 492 (“The formalities are designed to perform functions which will assure that [the testator’s] estate really is distributed according to his intention.”).

<sup>63</sup> See generally Gulliver & Tilson, *supra* note 10.

<sup>64</sup> See *id.* at 5–13.

<sup>65</sup> See *id.* at 6–8.

<sup>66</sup> See *id.* at 9–10.

<sup>67</sup> See *id.* at 5 (referring to this function as the ritual function).

<sup>68</sup> See Langbein, *supra* note 1, at 493–94.

<sup>69</sup> See *id.* at 494.

<sup>70</sup> See *id.*

Langbein's work, the functional framework of testamentary formality generally has included the evidentiary, protective, cautionary, and channeling functions.<sup>71</sup>

Based on this understanding of testamentary formality, functionalists argue that because strict compliance frequently undermines the testator's intent, the effects of the strict compliance requirement are at odds with the overarching goal and specific functions of will formalities.<sup>72</sup> This conflict led Langbein to conclude that the formalism of strict compliance is "mistaken and needless."<sup>73</sup> Indeed, he proclaimed that "we should shudder that we still inflict upon our citizens the injustice of the traditional law."<sup>74</sup> Legal scholars have widely echoed this critique,<sup>75</sup> and few argue that the legal effectiveness of a will should be based upon the traditional rule of strict compliance.<sup>76</sup>

### C. *The Reform Movement*

The criticism of the traditional law of will-execution has fueled a reform movement that seeks to ease the harshness of the strict compliance requirement.<sup>77</sup> Two types of reform can achieve this result. First, the array of prescribed formalities can be altered.<sup>78</sup> The rationale behind this reform is that if the process of will-execution is less difficult, then the strict compliance requirement will invalidate fewer genuine expressions of

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<sup>71</sup> See 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*, 43 FLA. L. REV. 167, 256 n.473 (1991).

<sup>72</sup> See Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 457 (2002) ("[F]ormality rules for will execution prevent mistakes about intent and provide a means for expressing intent. At the same time, in a significant number of cases they may frustrate not only an individual testator's intent but also the principal objective of the law of wills.").

<sup>73</sup> Langbein, *supra* note 1, at 489.

<sup>74</sup> Langbein, *supra* note 6, at 54.

<sup>75</sup> See, e.g., Lester, *supra* note 7, at 578–79; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 541–43 (1990); Mann, *supra* note 30, at 1038, 1059–60.

<sup>76</sup> Some commentators have cautioned against reducing the role of formalities in the will-execution process. See, e.g., Bonfield, *supra* note 58, at 1896; John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73, 74–75, 81 (2008).

<sup>77</sup> See, e.g., Lester, *supra* note 7, at 579.

<sup>78</sup> See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 615 (1988).

testamentary intent.<sup>79</sup> Second, the rule of strict compliance can be replaced with a relaxed formal compliance standard that would allow the court to validate a formally deficient will despite the lack of strict compliance.<sup>80</sup> Under this reform, an error in will-execution would not necessarily lead to the invalidation of the will.<sup>81</sup> Instead, the court could validate the will based upon other evidence that the testator intended the will to be legally effective.<sup>82</sup>

Various plans to reduce or replace the formalities of will-execution have been proposed.<sup>83</sup> The most successful is the elimination of a variety of ancillary formalities, such as the requirement that testators and attesting witnesses be in each other's presence and the requirement that testators announce to the attesting witnesses that the documents before them are their wills.<sup>84</sup> The Uniform Law Commission championed this reform in its 1969 Uniform Probate Code ("UPC").<sup>85</sup> By requiring merely a written document, the testator's signature, and two witnesses, will-execution under the UPC is a less formal process than under traditional law.<sup>86</sup> Langbein explains this reform's rationale: "Doubtless the draftsmen balanced the injustice brought about by technical violations of the publication and presence requirements and decided that the . . . value of those two former requisites was not worth the price in wills invalidated for defective

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<sup>79</sup> See *id.* at 614.

<sup>80</sup> See Lester, *supra* note 7, at 579.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 579–80.

<sup>83</sup> For example, Professor James Lindgren proposed the elimination of the attestation requirement. Lindgren, *supra* note 75, at 543, 572–73. Lindgren argues that "[b]y continuing to insist on attestation, our current legal system does not protect testators from others," and that "[i]nstead, it protects many testators from effectuating their own estate plans." *Id.* at 573. Lindgren's proposal has not prompted widespread reform; only Pennsylvania does not require attestation. See 20 PA. CONS. STAT. ANN. § 2502 (West 2014). Another proposed reform is to allow testators to have their wills notarized instead of requiring attestation by two witnesses. See UNIF. PROBATE CODE § 2-502 (amended 2008); Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 AM. C. TR. & EST. COUNS. L.J. 83, 84–86 (2008).

<sup>84</sup> See UNIF. PROBATE CODE § 2-502; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f (1999).

<sup>85</sup> See Langbein, *supra* note 1, at 510.

<sup>86</sup> As the official comment explains, "The formalities for execution of a witnessed will have been reduced to a minimum." The comment continues, "The intent is to validate wills which meet the minimal formalities of the statute." UNIF. PROBATE CODE § 2-502 cmt. (1969).

compliance.”<sup>87</sup> Roughly twenty states have enacted statutes similar to the UPC, and several other states, while not going as far as the UPC, do not require all of the traditional ancillary formalities.<sup>88</sup>

The purpose of reducing the number of formalities is to decrease the likelihood that a genuine expression of testamentary intent is invalidated by the rule of strict compliance.<sup>89</sup> However, this reform does not ensure that all legitimate attempts to execute a will are legally effective. Consider, for example, the situation in *Pavlinko*.<sup>90</sup> Although the court was sure that the Pavlinkos intended to execute wills, neither Hellen’s nor Vasil’s will would be valid under the UPC’s will formalities provision because they did not sign the proper documents. Even under the UPC’s minimal formal requirements, the testator must sign the will.<sup>91</sup> Therefore, the court’s application of the strict compliance requirement would still undermine the Pavlinkos’ testamentary intent.

The strict compliance requirement’s effect of invalidating legitimate wills even under a regime of minimal formalities can be remedied with the second type of reform at the reform movement’s disposal. This reform is to replace the rule of strict compliance with a relaxed formal compliance standard. Critics of strict compliance argue that the validity of a will should depend less upon whether the testator strictly complied with the prescribed formalities and more upon whether the testator intended to execute a will.<sup>92</sup> With this objective in place, proponents of reform have suggested two alternatives to the requirement of strict compliance: (1) the substantial compliance doctrine<sup>93</sup> and (2) the harmless error rule.<sup>94</sup>

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<sup>87</sup> See Langbein, *supra* note 1, at 511.

<sup>88</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 statutory notes 3–7 (1999).

<sup>89</sup> See Fellows, *supra* note 78, at 615–16.

<sup>90</sup> See *supra* notes 32–52 and accompanying text.

<sup>91</sup> See UNIF. PROBATE CODE § 2-502 (amended 2008).

<sup>92</sup> See UNIF. PROBATE CODE § 2-503 (amended 1997); Langbein, *supra* note 6, at 4–5 (“The proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution—that the will expresses the decedent’s testamentary intent.”).

<sup>93</sup> See generally Langbein, *supra* note 1.

<sup>94</sup> See generally UNIF. PROBATE CODE § 2-503; Langbein, *supra* note 6.

The substantial compliance doctrine was proposed by Langbein, who believed that it would relieve some of the harshness of the strict compliance requirement.<sup>95</sup> Pursuant to this judicially implemented curative doctrine,<sup>96</sup> the court validates a formally deficient will if it is convinced that the testator intended to execute a will and the testator's method of expressing testamentary intent substantially fulfills testamentary formality's functions.<sup>97</sup> Put succinctly, Langbein's proposal requires the court to address two issues: first, whether the decedent intended to execute a will, and second, whether the will's form adequately serves the purposes of will formalities.<sup>98</sup> If these two issues are resolved in the affirmative, the court will validate the will, even though the testator did not strictly comply.<sup>99</sup> Although it initially garnered support within the legal academy, the doctrine has achieved little success, as only a small number of courts have dabbled with substantial compliance.<sup>100</sup>

Unhappy with the judicial application of the substantial compliance analysis, Langbein abandoned his support of the doctrine and instead backed the adoption of the harmless error rule.<sup>101</sup> In contrast to the substantial compliance doctrine, the harmless error rule is a legislatively prescribed relaxed formal compliance standard.<sup>102</sup> Pursuant to this rule, the court focuses on testamentary intent.<sup>103</sup> If the proponent of the will convinces the court by clear and convincing evidence that the decedent intended to execute a will, the court will not invalidate the will for lack of formal compliance.<sup>104</sup> Unlike the substantial compliance doctrine, the harmless error analysis contains no second prong; fulfillment of formality's functions is not an independent requirement.<sup>105</sup> Both the UPC and the Restatement

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<sup>95</sup> See *DUKEMINIER & SITKOFF*, *supra* note 1.

<sup>96</sup> See Langbein, *supra* note 6, at 6.

<sup>97</sup> See Langbein, *supra* note 1, at 515.

<sup>98</sup> See *id.* at 515–16.

<sup>99</sup> See *id.*

<sup>100</sup> See Lester, *supra* note 7, at 601–02 (explaining that “there are . . . few[] clear cases involving substantial compliance”).

<sup>101</sup> See Langbein, *supra* note 6, at 6–7; see also Lester, *supra* note 7, at 581. The harmless error rule is sometimes referred to as the dispensing power. See UNIF. PROBATE CODE § 2-503 cmt. (amended 1997).

<sup>102</sup> See Lester, *supra* note 7, at 579–80.

<sup>103</sup> See *id.* at 580.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

(Third) of Property have adopted the harmless error rule.<sup>106</sup> However, this reform effort has had little success, as only ten states have abandoned strict compliance.<sup>107</sup>

By placing greater emphasis on testamentary intent, both the substantial compliance doctrine and the harmless error rule reduce the importance of formal compliance on the validity of a will. For example, if the court in *Pavlinko* had applied the harmless error rule, Hellen and Vasil's testamentary wishes likely would have been fulfilled because the couple left behind such strong evidence of their intent to execute wills. Indeed, no doubt existed as to what Vasil wanted, and there was no question that the formal defect was the product of a simple mistake. The application of the harmless error rule in the *Pavlinko* case therefore likely would have resulted in the validity of Vasil's will.<sup>108</sup> Whether Vasil's will would have been valid under the substantial compliance doctrine is less clear because, although Vasil clearly intended to execute a will, the court would still have to determine whether Vasil's signing of his wife's will constituted substantial compliance.<sup>109</sup> Nonetheless, both the substantial compliance doctrine and the harmless error rule leave open the possibility that a formally deficient will can be valid. As such, both reduce the harsh formalism of the strict compliance requirement.

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<sup>106</sup> UNIF. PROBATE CODE § 2-503; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999).

<sup>107</sup> See *DUKEMINIER & SITKOFF*, *supra* note 1, at 184 (explaining that a version of the harmless error rule has been adopted in California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia).

<sup>108</sup> See UNIF. PROBATE CODE § 2-503 cmt. ("The main circumstance 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 execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other.")

<sup>109</sup> See *Allen v. Dalk*, 826 So. 2d 245, 249–50 (Fla. 2002) (quoting *Langbein*, *supra* note 1, at 518) ("[E]ven proponents of the substantial compliance doctrine to cure the results of defective execution have not suggested that the more 'fundamental' formalities for valid execution of a will, such as a signature, are dispensable. As noted by a prominent legal commentator, '[S]ignature is still the most fundamental of the Wills Act formalities. . . . The substantial compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply substantially with the Wills Act . . . .' (alteration in original)).

## II. THE FUNCTIONS OF WILL FORMALITIES

Before one can undertake a functional analysis of strict compliance and examine the resulting implications for the law of wills, a clear understanding of the functions of will formalities must be established. This Part therefore provides a functional analysis of testamentary formality. Although this analysis draws heavily from Langbein, it also provides new insights into the functions of will formalities and lays the foundation for the separation of formality's functions from those of strict compliance.

Despite the widespread reliance upon the traditional functional analysis of testamentary formality, formulating a clear picture of the functions of will formalities is not as simple as summarizing Langbein. For instance, Langbein's analysis blurs the distinction between the purposes of formality and the purposes of strict compliance. Consider, for example, the traditional articulation of testamentary formality's channeling function. As one commentator explains, the formalities "provide[] a legal framework upon which testators can model their actions," and "[t]he existence of this framework tends to make testamentary documents more uniform, which eases the administrative burden on the probate courts."<sup>110</sup>

This description of the channeling function contains two separate ideas. The first is a function of formality and relates to the benefit that an individual testator receives from the formalities of will-execution. Specifically, compliance with the prescribed formalities provides the testator a method of effectively communicating testamentary intent to the court.<sup>111</sup> The second is a function of strict compliance and relates to the benefit derived from a requirement that all testators comply with the prescribed formalities. Namely, because all wills must be in substantially the same form, the court can more easily and efficiently distinguish a will from a non-testamentary document.<sup>112</sup>

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<sup>110</sup> Kelly A. Hardin, Note, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1153 (1993).

<sup>111</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).

<sup>112</sup> See Langbein, *supra* note 1, at 494.

The traditional functional analysis of will formalities therefore touts administrative efficiency as a benefit of testamentary formality's channeling function. However, this benefit is properly understood as a function of the strict compliance requirement. The court is able to easily identify valid wills not because an individual testator complies with the prescribed formalities, but because all testators comply with them.<sup>113</sup> Thus, traditional functional analysis implicitly recognizes that the rule of strict compliance serves functions similar to those of the formalities themselves, but it does not explicitly differentiate the two sets of functions.

Adding to this murkiness regarding the functions of testamentary formality is the failure of legal scholars to reevaluate Langbein's functional analysis.<sup>114</sup> Functionalists typically rely exclusively upon his articulations of formality's functions.<sup>115</sup> However, nearly four decades of dependence upon Langbein has gradually produced misunderstanding and oversimplification regarding the functional analysis of testamentary formality.<sup>116</sup> Therefore, not only does past scholarship conflate the functions of will formalities with those of strict compliance, but legal scholars also unflaggingly rely on Langbein's functional analysis. Both issues present an opportunity for refinement of the traditional evidentiary, protective, channeling, and cautionary functions.

#### A. *The Evidentiary Function*

The traditional functional analysis of testamentary formality suggests that will formalities serve functions that ensure fulfillment of testamentary intent.<sup>117</sup> No function fulfills this

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<sup>113</sup> See Bonfield, *supra* note 58, at 1907.

<sup>114</sup> See Miller, *supra* note 71, at 255 n.473. *But see* Baron, *supra* note 60, at 172–79 (questioning the assumptions underlying the functional analysis of testamentary formality).

<sup>115</sup> See, e.g., Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 121–22 (2008); Lindgren, *supra* note 75, at 544.

<sup>116</sup> See, e.g., Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 54 n.141 (2006) (confusing the ritual function with the channeling function); David K. Johns, *Will Execution Ceremonies: Securing a Client's Last Wishes*, 23 COLO. LAW. 47, 48 (1994) (erroneously describing the four functions of will formalities as the ritual, cautionary, protective, and channeling functions).

<sup>117</sup> See Langbein, *supra* note 1, at 492.

purpose more than the evidentiary function.<sup>118</sup> During the administration of the testator's estate, certain evidentiary difficulties arise because the validity of a will is often determined long after it is executed.<sup>119</sup> At the time of probate, the testator is almost invariably dead,<sup>120</sup> and in such situations the testator cannot testify regarding testamentary intent.<sup>121</sup> Additionally, because the testator often makes notes and rough drafts in advance of executing a will,<sup>122</sup> questions sometimes arise regarding whether a particular document was intended to be a final expression of testamentary intent or was merely a preparatory writing.<sup>123</sup>

These unique circumstances, which result from the years and sometimes decades that intervene between the execution of a will and the administration of an estate, can lead to insufficient and unreliable evidence of testamentary intent.<sup>124</sup> Testamentary formality, however, alleviates some of these evidentiary difficulties.<sup>125</sup> By executing a written, signed, and attested document, the testator leaves behind "evidence of testamentary intent . . . in reliable and permanent form."<sup>126</sup> This consequence of formality is perhaps best exemplified by the writing

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<sup>118</sup> See Fuller, *supra* note 111, at 800; Langbein, *supra* note 1, at 492; Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 348, 351 (1979).

<sup>119</sup> See Gulliver & Tilson, *supra* note 10, at 6.

<sup>120</sup> Although probate typically occurs after the testator's death, statutes in five states now allow probate proceedings to occur during the testator's life. See DUKEMINIER & SITKOFF, *supra* note 1, at 312 (identifying Alaska, Arkansas, Nevada, North Dakota, and Ohio as states authorizing antemortem probate).

<sup>121</sup> See Gulliver & Tilson, *supra* note 10, at 6.

<sup>122</sup> Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1065 (1996) ("[M]any persons are given to speak and write off the cuff, many persons commit to words tentative *drafts* of their wills and then have second thoughts when the time for inking draws near.").

<sup>123</sup> See Langbein, *supra* note 1, at 494–95 (explaining that "the danger exists that [the testator] may make seeming testamentary dispositions . . . without . . . finality of intention" and observing that "[n]ot every expression that 'I want you to have the house when I'm gone' is meant as a will.>").

<sup>124</sup> Gulliver & Tilson, *supra* note 10, at 6; see Langbein, *supra* note 1, at 492–93.

<sup>125</sup> See Langbein, *supra* note 1, at 494–95.

<sup>126</sup> Gulliver & Tilson, *supra* note 10, at 6; see also Langbein, *supra* note 1, at 492–93.

requirement, which forecloses the possibility of an oral will and therefore eliminates the obvious evidentiary problems that accompany non-written forms of testamentary expression.<sup>127</sup>

Unlike a written will, an oral testamentary disposition is susceptible to the unreliability of witness accounts, which are subject to “lapse[s] of memory, misinterpretation[,] . . . and the more or less unconscious coloring of recollection in the light of . . . personal interest.”<sup>128</sup> By contrast, a written document provides clearer and more permanent evidence of the substance of the testator’s will and consequently is more reliable than an oral testamentary disposition.<sup>129</sup> Moreover, if the testator merely leaves behind the testimony of a witness, not only would the substantive provisions of the will be questionably evidenced, but the testator’s intent to execute a will at all would also be in doubt.<sup>130</sup> Either by mistake or in furtherance of fraud, a witness could produce evidence of a will that the decedent did not execute.<sup>131</sup> However, by requiring the testator to leave behind a tangible manifestation of testamentary intent, the writing requirement both produces a more reliable expression of the will’s terms and provides stronger evidence of the testator’s intent to execute a will.

The signature requirement also contributes to the evidentiary function of testamentary formality.<sup>132</sup> By requiring that testators affix their names to their wills, the signature requirement provides evidence of the will’s author.<sup>133</sup> The signature formality fulfills this evidentiary purpose not only by simply mandating that the testator’s name appear on the document but also by providing a handwriting sample that can

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<sup>127</sup> See Gulliver & Tilson, *supra* note 10, at 6–7 (“A written statement of intention may be ambiguous, but, if it is genuine and can be produced, it has the advantage of preserving in permanent form the language chosen by the testator to show his intent.”).

<sup>128</sup> *Id.* at 4; see also Baron, *supra* note 60, at 170 (“Reliable objective evidence is needed because those who survive the donor cannot be trusted to recount faithfully or truly what the donor said and did.”).

<sup>129</sup> See Langbein, *supra* note 1, at 492–93.

<sup>130</sup> See Gulliver & Tilson, *supra* note 10, at 3.

<sup>131</sup> See Miller, *supra* note 71, at 246 (explaining that “hardship and fraud . . . doubtless would be a consequence of permitting parties or interested persons to testify as to intent and authenticity” of an oral will).

<sup>132</sup> See Gulliver & Tilson, *supra* note 10, at 7; Langbein, *supra* note 1, at 492–93.

<sup>133</sup> See Gulliver & Tilson, *supra* note 10, at 7; Langbein, *supra* note 1, at 493.

be analyzed to authenticate the document.<sup>134</sup> In addition to the writing and signature requirements, the attestation formality provides evidence of testamentary intent.<sup>135</sup> This requirement introduces witnesses into the testamentary experience, who may be able to testify during probate proceedings regarding the legitimacy of the will-execution process.<sup>136</sup> Because of the lag between the execution of a will and probate, the witnesses of the ceremony may have fading memories or may be missing, incompetent, or deceased.<sup>137</sup> Nonetheless, the requirement at least presents the possibility that a reliable firsthand account of the will-execution process will be available at the time of probate.<sup>138</sup>

In addition to the genuineness of testamentary intent, another issue raised by the evidentiary difficulties of probate is distinguishing final expressions of testamentary intent from mere preliminary notes or rough drafts.<sup>139</sup> Making this distinction may be problematic because the testator cannot testify during probate. One purpose of will formalities is to alleviate this difficulty by providing evidence of the finality of testamentary intent.<sup>140</sup> Formalities remind testators of the importance and legal significance of their actions.<sup>141</sup> As Langbein

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<sup>134</sup> See Gulliver & Tilson, *supra* note 10, at 7 (“The possibility of a forged signature must be controlled by the abilities of handwriting experts.”). The evidentiary value of the signature requirement is diminished by “the typical statutory authorization of a signature made by another for the testator, and the generally recognized rule that the testator’s signature need not be his correct name.” *Id.* (footnote omitted). However, both of these situations “are probably quite rare in view of the usual custom in a literate era of signing documents with a complete name.” *Id.*

<sup>135</sup> See Langbein, *supra* note 1, at 493.

<sup>136</sup> See Gulliver & Tilson, *supra* note 10, at 8.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* Even “if the witnesses are dead or cannot be located or have moved far away[,] . . . a self-proving affidavit reciting that all the requirements of due execution have been complied with” can be prepared and will provide evidence of testamentary intent. DUKEMINIER & SITKOFF, *supra* note 1, at 169–70 (emphasis removed).

<sup>139</sup> See *supra* notes 122–23 and accompanying text.

<sup>140</sup> As Langbein explains, “Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent.” Langbein, *supra* note 1, at 495. For example, “[t]he signature tends to show that the instrument was finally adopted by the testator as his will and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling.” Gulliver & Tilson, *supra* note 10, at 5 (footnotes omitted).

<sup>141</sup> See Fuller, *supra* note 111, at 800; Gulliver & Tilson, *supra* note 10, at 5–6; Langbein, *supra* note 1, at 494–95.

explains, “It is difficult to complete the [will-execution] ceremony and remain ignorant that one is making a will.”<sup>142</sup> Accordingly, compliance with the formalities provides evidence that a formally executed will represents the decedent’s definitive expression of testamentary intent.<sup>143</sup>

### *B. The Protective Function*

In addition to serving an evidentiary function,<sup>144</sup> will formalities also protect testators from situations that threaten to undermine their testamentary intent.<sup>145</sup> This purpose of formality is labeled the protective function.<sup>146</sup> During the preparation of an estate plan and the execution of a will, the testator may be susceptible to various forms of imposition perpetrated by those who intend to benefit dishonestly from the will.<sup>147</sup> By mandating that the testator comply with the formalities of will-execution, the law provides the testator some protection from these scenarios, including protection from the possibility of fraud, duress, and undue influence at the time of will-execution.<sup>148</sup>

Will formalities protect the testator in a variety of ways. For example, by requiring that a will be written, will formalities reduce the potential for fraud that is inherent with an oral will, which leaves behind potentially unreliable evidence of testamentary intent.<sup>149</sup> Furthermore, the presence of witnesses reduces the possibility that the testator will be overcome by duress or undue influence at the time of will-execution.<sup>150</sup> The

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<sup>142</sup> Langbein, *supra* note 1, at 495.

<sup>143</sup> See Miller, *supra* note 71, at 260–62.

<sup>144</sup> See *supra* Part II.A.

<sup>145</sup> See Gulliver & Tilson, *supra* note 10, at 9–13; Langbein, *supra* note 1, at 496–97.

<sup>146</sup> See Gulliver & Tilson, *supra* note 10, at 9.

<sup>147</sup> See *id.* at 9 (“Some of the requirements of the statutes of wills have the objective, according to judicial interpretation, of protecting the testator against imposition at the time of execution.”).

<sup>148</sup> See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 66 n.139 (2008).

<sup>149</sup> See Miller, *supra* note 71, at 274 (explaining that “[t]he Statute of Frauds of 1677 substantially decreased the number of fraudulent wills because it required testators to reduce testamentary dispositions to writing.”); see also *supra* notes 127–31 and accompanying text.

<sup>150</sup> See Nelson & Starck, *supra* note 118, at 352 (“Functionally, the presence of multiple parties acts as a check against imposition by third parties and by parties present at the signing of the will.”).

attesting witnesses can defend the testator against third parties who may attempt to interfere with the will-execution process, and the requirement of multiple witnesses can protect the testator from the fraudulent behavior of one attesting witness. This protective quality is further bolstered by the requirement that witnesses be disinterested,<sup>151</sup> a requirement which eliminates those who stand to benefit from fraud or undue influence from the pool of potential witnesses.<sup>152</sup>

In addition to fraud, duress, and undue influence at the time of will-execution, other scenarios involving fraud occur at the time of probate.<sup>153</sup> These include both the “fraudulent suppression of a valid will after the testator dies”<sup>154</sup> and the fraudulent admission of a will that the testator never executed.<sup>155</sup> However, just as will formalities protect against fraud at the time of will-execution, they also serve a protective function at the time of probate. For instance, by providing such strong evidence that the testator intended to execute a valid will,<sup>156</sup> formalities make it difficult for contestants to argue that a duly executed will does not represent a genuine expression of testamentary intent.<sup>157</sup> Furthermore, by requiring the testator’s signature and attestation by witnesses, will formalities increase the difficulty of forging a will that can pass through the probate process undetected.<sup>158</sup> The protective function therefore encompasses the purposes of both protecting the testator from imposition at the time of will-execution and preventing fraud at the time of probate.

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<sup>151</sup> See Gulliver & Tilson, *supra* note 10, at 11–12; Langbein, *supra* note 1, at 496.

<sup>152</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 166–67.

<sup>153</sup> See Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 558 (2005) (“The formalities help guard against a person’s being defrauded or unduly influenced into accepting a disposition she does not really want to make.”).

<sup>154</sup> STEWART E. STERK ET AL., *ESTATES AND TRUSTS* 228 (4th ed. 2011).

<sup>155</sup> See *supra* notes 132–34 and accompanying text.

<sup>156</sup> See *supra* Part II.A.

<sup>157</sup> See Miller, *supra* note 71, at 276 (“In most instances, . . . the existence of a duly executed and attested will effectively resolves the issue of a testamentary intent.”).

<sup>158</sup> For example, by requiring a written document, formality eliminates the ability of wrongdoers to submit fraudulent evidence of an oral will. See *supra* notes 128–31 and accompanying text.

### C. *The Signaling Function*

The third function of testamentary formality is the signaling function. Under Langbein's traditional functional analysis, this function is described as part of formality's channeling function.<sup>159</sup> However, as explained previously, the two functions are distinct.<sup>160</sup> Whereas the channeling function is a function of the strict compliance requirement, the signaling function is a function of testamentary formality.<sup>161</sup> With the discussion of the strict compliance requirement's channeling function reserved for a later Section,<sup>162</sup> this Section focuses on formality's signaling function, which provides testators with a method of effectively communicating their intent to execute a will.<sup>163</sup>

The hallmark of the law of wills is the principle that testators have broad freedom to leave their property to whomever they choose.<sup>164</sup> Despite its fundamental status, testamentary freedom could be undermined if the law did not provide the testator a means to definitively convey testamentary intent. As Langbein explains, without a prescribed method of communicating testamentary intent, "the testator would be left to grope for his own means of persuading the probate court that

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<sup>159</sup> See, e.g., Hardin, *supra* note 110, at 1153; Langbein, *supra* note 1, at 493–94; Miller, *supra* note 71, at 269, 271; Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 178–79 (2008).

<sup>160</sup> See *supra* notes 110–13 and accompanying text.

<sup>161</sup> See *supra* notes 110–13 and accompanying text.

<sup>162</sup> See *infra* Part III.C.

<sup>163</sup> See Fuller, *supra* note 111, at 801 ("[F]orm offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention."); Langbein, *supra* note 1, at 493.

<sup>164</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. b (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention."); Langbein, *supra* note 1, at 491 ("The first principle of the law of wills is freedom of testation"). In addition to allowing the testator to dispose of the estate as the testator desires, testamentary freedom may also be therapeutic for the testator. See Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444–46 (2012).

his intentions were final and volitional.”<sup>165</sup> Because of the evidentiary difficulties of probate,<sup>166</sup> the task of signaling intent to execute a will could be difficult.<sup>167</sup>

Recognizing the potentially troublesome consequences of these evidentiary difficulties, will formalities provide testators the language by which they can unequivocally communicate testamentary intent.<sup>168</sup> The testator's compliance with the prescribed will-execution process leaves little doubt regarding testamentary intent, and thus all documents that satisfy the formalities of will-execution are presumed to express testamentary intent.<sup>169</sup> In this regard, will formalities form a safe harbor for the exercise of testamentary freedom.<sup>170</sup> When testators communicate testamentary intent through a written, signed, and attested document, they have assurance that the court will recognize their expression of testamentary intent as legally valid.<sup>171</sup>

This idea that formality is a method to effectively communicate intent to enter legal transactions stems from the scholarship of Professor Lon Fuller, who explains that formality “serves . . . to mark or signalize the enforceable promise [and] furnishes a simple and external test of enforceability.”<sup>172</sup> In other

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<sup>165</sup> Langbein, *supra* note 6, at 4; *see* Fuller, *supra* note 111, at 802 (explaining that “[o]ne planning to enter a legal transaction faces a . . . problem” because “[h]is mind first conceives an economic or sentimental objective” and “[h]e must then . . . cast about for the legal transaction . . . which will most nearly accomplish these objectives”).

<sup>166</sup> *See supra* notes 119–21 and accompanying text.

<sup>167</sup> James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1031 (1992) (“In a system without the safe harbor of a will, a testator might have to go to extraordinary lengths to ensure that her wishes were followed after her death.”).

<sup>168</sup> *See* Fuller, *supra* note 111, at 801–02 (drawing an analogy between formality and language).

<sup>169</sup> *See* Langbein, *supra* note 1, at 514–15; J. G. Miller, *Substantial Compliance and the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 564–65 (1987); *see also* 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).

<sup>170</sup> *See* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 150–52 (2012); Langbein, *supra* note 6, at 4.

<sup>171</sup> *See* Langbein, *supra* note 6, at 4 (“The greatest blessing of the Wills Act formalities is the safe harbor that they create” because “[t]he testator who complies with [them] assures his estate of routine probate in all but exceptional circumstances.”); Lindgren, *supra* note 167, at 1031 (“One of the positive effects of formalism is that known acts produce known results. Formalities bring consistency and protection against arbitrariness.”).

<sup>172</sup> Fuller, *supra* note 111, at 801.

words, formalities provide those who wish to enter into a legally enforceable transaction, such as a contract or a gift, a clear route of effectuating the intent to enter the transaction.<sup>173</sup> In making this argument, Fuller writes about legal formalities generally, but as recognized by Langbein and subsequent scholars,<sup>174</sup> this function is a consequence not only of contract formalities and the formal requirements of gifts, but also of will formalities.

#### *D. The Cautionary Function*

The fourth function of testamentary formality is known by several names, the most common of which are the cautionary function<sup>175</sup> and the ritual function.<sup>176</sup> Some scholars also refer to this function as the ceremonial function<sup>177</sup> or the deterrent function.<sup>178</sup> This function is intended to impress upon the testator the importance and legal significance of the will-execution process, thereby encouraging the testator to complete the process after careful planning and with a circumspect state of mind.<sup>179</sup> By fulfilling their cautionary function, will formalities help ensure that the will reflects the decedent's considered and reasoned intent.<sup>180</sup>

Will formalities serve this cautionary function by providing the will-execution process a "general ceremonial" quality.<sup>181</sup> The ceremony distinguishes the testamentary experience from the routine tasks of daily life and "precludes the possibility that the testator was acting in a casual or haphazard fashion."<sup>182</sup> Each formality contributes to this ceremonial quality in a distinct way.

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<sup>173</sup> *See id.*

<sup>174</sup> *See supra* note 159.

<sup>175</sup> *See, e.g.,* Grant, *supra* note 115, at 121–22; Langbein, *supra* note 1, at 494; Sherwin, *supra* note 72, at 456.

<sup>176</sup> *See, e.g.,* Bonfield, *supra* note 58, at 1907; Clowney, *supra* note 148, at 66 n.139; Gulliver & Tilson, *supra* note 10, at 5.

<sup>177</sup> *See, e.g.,* Leslie Pickering Francis, *The Evanescence of Living Wills*, 24 REAL PROP. PROB. & TR. J. 141, 162 (1989); Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 439 (2009); Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 159 n.7 (1988).

<sup>178</sup> *See, e.g.,* Fuller, *supra* note 111, at 800.

<sup>179</sup> *See* Langbein, *supra* note 1, at 494–95; Miller, *supra* note 71, at 261–62.

<sup>180</sup> *See* Miller, *supra* note 71, at 261–62 ("A secondary aspect of formality is its tendency to induce deliberation and reflection on the part of the testator. Formality thus prevents enforcement of casual statements and unpremeditated action . . .").

<sup>181</sup> Gulliver & Tilson, *supra* note 10, at 5.

<sup>182</sup> *Id.*

First, the writing requirement serves the cautionary function by preventing the execution of a will through a careless oral expression of testamentary intent.<sup>183</sup> Because “[w]riting has always been regarded as the most solemn form of expression,”<sup>184</sup> testators more likely approach the execution of a written will with greater aforethought than they would the execution of an oral will.<sup>185</sup> Second, one’s signature has traditionally indicated authenticity and finality of intent, and therefore the signature requirement also reminds the testator of the importance of will-execution.<sup>186</sup> Finally, by introducing outsiders into the testamentary experience, the formality of attestation sets the execution of a will apart from ordinary transactions.<sup>187</sup>

Whereas the individual formalities remind the testator of the importance and legal significance of the testamentary act, the will-execution ceremony’s general level of formality also contributes to the cautionary function.<sup>188</sup> By prescribing a process that the testator must complete to execute a will, thereby preventing the immediate exercise of testamentary power, testamentary formality provides the testator time to reflect on the task at hand. Indeed, by requiring testators to prepare a written document, to locate attesting witnesses, and to

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<sup>183</sup> See Fuller, *supra* note 111, at 800 (explaining that the requirement of writing “induc[es] [a] circumspective frame of mind”); Langbein, *supra* note 1, at 495 (“The requirement[] of writing . . . [is a] primary cautionary formalit[y]. Writing is somewhat less casual than plain chatter. As we say in a common figure of speech, ‘talk is cheap.’”).

<sup>184</sup> Nelson & Starck, *supra* note 118, at 349; see Gulliver & Tilson, *supra* note 10, at 14 (“[T]here is a certain ritual value in writing out [a] document . . .”); Langbein, *supra* note 1, at 519 (explaining that “[a]lthough some modes of electronic communication can perform some of the functions of writing[,] . . . they lack the solemnity and finality of a signed document”).

<sup>185</sup> Nelson & Starck, *supra* note 118, at 349.

<sup>186</sup> See Langbein, *supra* note 6, at 3 (“Signature . . . caution[s] the testator about the seriousness and finality of his act.”). Langbein argues that the “growing use of signature in routine petty transactions has reduced its cautionary value.” Langbein, *supra* note 1, at 518. “However, it could be argued that the routine use of signature as an implementing act in ordinary business transactions may enhance its ‘ritual’ impact, because the omission of a signature from a document produces an inference of a lack of finality of intention.” Miller, *supra* note 71, at 265.

<sup>187</sup> See Langbein, *supra* note 1, at 521. Ancillary will formalities, such as the subscription and publication requirements, also contribute in various ways to the ceremonial nature of will-execution. See Gulliver & Tilson, *supra* note 10, at 6. However, as Langbein explains, they do so only “incremental[ly].” Langbein, *supra* note 1, at 521.

<sup>188</sup> See Langbein, *supra* note 1, at 497–98.

coordinate the execution ceremony, will formalities not only remind testators of the importance of making thoughtful decisions but also provide them time to step back, consider their goals, and develop a plan that best achieves those objectives. Will formalities therefore both caution testators and allow them to react to that cautioning.

### III. THE FUNCTIONS OF STRICT COMPLIANCE

As Part II illustrates, the functional analysis of testamentary formality entails identifying the purposes served by an individual testator's compliance with the prescribed formalities. The relevant issues are the costs and benefits of formality. For example, a functional analysis of will formalities is concerned with whether attestation provides reliable evidence of testamentary intent<sup>189</sup> or whether the disinterested witness requirement protects the testator from fraud and undue influence.<sup>190</sup> This focus on the purpose of formality is evident in the analysis of Gulliver and Tilson, when they assert that "any [formal] requirement of transfer should have a clearly demonstrable affirmative value."<sup>191</sup> Their focus, as well as that of subsequent scholars, is the purpose of will formalities and the identification of the functions served by an individual testator's compliance with those formalities.

By contrast, a functional analysis of strict compliance is concerned with the purposes served by a requirement that all testators comply with the prescribed formalities. The relevant issue is not what functions are served by an individual testator's compliance with the formalities, but is instead what goals are achieved by a rule that requires strict compliance from all who wish to execute wills. Although scholars generally have overlooked this distinction, at least one has identified the relevant issue. Writing in the context of contract formalities, Professor Eric Posner suggests that "[a]lthough [a functional analysis] may explain why parties would often want to use a

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<sup>189</sup> See *supra* Part II.A.

<sup>190</sup> See *supra* Part II.B.

<sup>191</sup> See Gulliver & Tilson, *supra* note 10, at 9.

writing or other precautions, [it] do[es] not explain why . . . formalities should [be] immutable.”<sup>192</sup> Referring to formality’s signaling function, Posner argues:

[P]arties could send . . . a signal by simply stating orally whether they desire legal enforcement or not. If they want to increase the likelihood of the result they desire, they might write it down. But there is no reason that the use of a writing should *necessarily* count as a signal.<sup>193</sup>

In this critique of contract formalities, Posner draws upon the distinction between formality and strict compliance. He notes that there might be good reason for contracting parties to fulfill some formal requirements, but he also raises doubts as to why all contracting parties must follow the same formal process.<sup>194</sup> Ultimately, he concludes by asserting that traditional functional analysis “fail[s] because [it] do[es] not explain why parties are forbidden to bargain around [the] formalities.”<sup>195</sup> Put differently, Posner’s concern with traditional functional analysis is that it does not explain why everyone must comply with the prescribed formalities, and therefore it does not explain the law’s insistence on strict compliance.

Although Posner primarily is concerned with contract formalities, his insight is relevant to the study of will formalities. Indeed, Langbein expresses concerns about will formalities similar to Posner’s concerns regarding contract formalities: “The puzzle about the Wills Act formalities is not why we have them, but why we enforce them so stringently.”<sup>196</sup> This Part addresses

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<sup>192</sup> Eric A. Posner, *Norms, Formalities, and the Statute of Frauds: A Comment*, 144 U. PA. L. REV. 1971, 1983–84 (1996).

<sup>193</sup> *Id.* at 1984. Posner makes similar observations regarding the other functions of formality. For example, concerning the protective function he writes:

[I]t does not explain why the law should *require* promisees to protect themselves . . . . If the promisee wants the additional protection of a writing, he can insist on it. But if drafting costs exceed the value of additional protection, he should not be required by an immutable rule to agree to a writing.

*Id.* at 1985.

<sup>194</sup> *See id.* at 1981–86.

<sup>195</sup> *Id.* at 1986.

<sup>196</sup> Langbein, *supra* note 6, at 3; *see* Langbein, *supra* note 1, at 501 (“The ‘chief justification’ for the Wills Act formalities . . . is that the testator must inevitably be unavailable at the time of litigation to authenticate or clarify his intention. This factor justifies the formalities; the present question is whether it justifies formalism, that is, whether it also mandates the rule of literal compliance with the formalities.” (footnote omitted)).

this question by presenting four functions of the strict compliance requirement, which include the clarifying function, the deterrent function, the channeling function, and the impediment function. By separating these functions of strict compliance from the functional analysis of will formalities, this Part explains why all testators are required to comply with the formalities of will-execution.

A. *The Clarifying Function*

The clarifying function of strict compliance is the analogue to the evidentiary function of will formalities.<sup>197</sup> The evidentiary function encompasses the idea that, by executing a written, signed, and attested will, the testator leaves behind reliable evidence of testamentary intent.<sup>198</sup> By contrast, the clarifying function suggests that because all testators must comply with the prescribed formalities, an individual testator is more likely to behave in a way that produces reliable evidence of testamentary intent.<sup>199</sup> Strict compliance serves this function by incentivizing the testator to prepare for the execution of a will, an incentive that manifests itself in a variety of ways.

First, by requiring all testators to complete the formal will-execution process, the rule of strict compliance encourages those who desire to distribute their property through wills to comply with the prescribed will-execution formalities.<sup>200</sup> As discussed previously, a testator's compliance with the formalities produces reliable evidence of testamentary intent, and a written, signed, and attested document robustly signals the testator's intent to execute a will.<sup>201</sup> Strict compliance therefore serves its clarifying function by prompting the testator to precisely follow the

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<sup>197</sup> The clarifying function of strict compliance was inspired by Professor Joseph Perillo's discussion of contract formalities. See Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39, 56–58 (1974).

<sup>198</sup> See *supra* Part II.A.

<sup>199</sup> Perillo, *supra* note 197, at 56–57.

<sup>200</sup> See Hirsch, *supra* note 122, at 1065–66 (“[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.”).

<sup>201</sup> See *supra* Part II.A.

mandates of testamentary formality. Consequently, the benefits of formality's evidentiary function are realized and little doubt is left regarding testamentary intent.

Second, the strict compliance requirement incentivizes the consultation of an estate planning lawyer, who can assist the testator with the preparation of an estate plan and the execution of a will.<sup>202</sup> Although a testator may seek legal advice for various reasons, including to prevent probate litigation and to minimize estate taxes,<sup>203</sup> the strict compliance requirement encourages the testator to consult an attorney to ensure compliance with the formal requirements of will-execution.<sup>204</sup> Because testamentary formality contributes a level of technical complexity to the execution of a will, the will-execution process "provides [the testator] a fertile field for error."<sup>205</sup> When this possibility of formal deficiency is coupled with a rule of strict compliance, the testator has a strong incentive to engage an estate planning attorney who can safely navigate the formalities of will-execution.<sup>206</sup>

The estate planning attorney in turn provides clarity to the testator's expression of intent. For example, the lawyer ensures compliance with the prescribed formalities.<sup>207</sup> Moreover, the estate planning attorney is equipped with the knowledge and expertise to draft a will that clearly and precisely reflects the testator's intent.<sup>208</sup> Testators will not be left to draft the

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<sup>202</sup> See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 367–68; Hirsch, *supra* note 122, at 1067 n.31 ("[T]he intervention of attorneys" in the will-execution process, "though not mandatory, is encouraged simply by the requirement that testators fulfill the technical formalities."); Langbein, *supra* note 1, at 494 n.26.

<sup>203</sup> See Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 551–54 (2008).

<sup>204</sup> See Friedman, *supra* note 202, at 367–68.

<sup>205</sup> Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How To Prevent Them*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 61, 93 (2008).

<sup>206</sup> See Gregory S. Alexander, Essay, *Demythologizing Property and the Illusion of Rules: A Response to Two Friendly Critics*, 92 CORNELL L. REV. 1275, 1282 (2007) ("The rules prescribing formalities for execution of wills . . . traditionally have been hard-edged . . . . It is easy for the lay person to get tripped up by them, making it strongly advisable for people to have lawyers prepare their wills.").

<sup>207</sup> See Langbein, *supra* note 1, at 524.

<sup>208</sup> See STERK ET AL., *supra* note 154, at 228 ("[T]he mysteries created by the formalities channel testators to lawyers, who are trained in helping people think about their property, preparing wills, presiding over their execution, storing them, etc."); Friedman, *supra* note 202, at 368 (explaining that formalities "encourage the

complicated provisions of their wills, and the testamentary document will more clearly convey both testators' intent to execute a will and the substance of their chosen estate plan.

Finally, the strict compliance requirement serves a clarifying function by encouraging the testator to execute a will earlier in life. A requirement of strict compliance provides an incentive for the testator to actively prepare for the exercise of testamentary power because compliance with the technicalities of will-execution can be both difficult and time-consuming.<sup>209</sup> As a result, testators are more likely to undertake the will-execution process while young and in good health, rather than on their deathbeds.<sup>210</sup> At such time, testators will more likely be able to clearly convey their testamentary preferences and will not be riddled with the plights of sickness and old age that can diminish their ability to effectively communicate their testamentary intent.

In sum, by incentivizing the testator to undertake steps that clarify and evidence the testator's intent, the requirement of strict compliance serves a clarifying function. By invalidating all formally defective documents, the rule of strict compliance prompts the testator to carefully and precisely comply with the prescribed formalities. This incentive bolsters testamentary formality's evidentiary function and induces testators to plainly convey their intent. Moreover, by making the execution of a will burdensome, the strict compliance requirement encourages the testator to seek the aid of an estate planning attorney and to prepare for the execution of a will early in life, both of which increase the likelihood that the testator will clearly communicate testamentary preferences. By contrast, if the strict compliance

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use of middlemen (lawyers) who can help plan a rational, trouble-free disposition of assets"); Hirsch, *supra* note 122, at 1067 n.31 ("[F]ormalities tend to funnel the substance of estate plans into standardized, efficiently interpreted lines of expression, owing to the intervention of attorneys whose participation, though not mandatory, is encouraged simply by the requirement that testators fulfill the technical formalities."); Schenkel, *supra* note 159, at 179 ("By channeling the testator to a will, we also usually channel the testator to a lawyer, and hopefully to a lawyer who has the general competence and specific expertise to draft a will that carries out the testator's wishes.").

<sup>209</sup> See Hirsch, *supra* note 122, at 1065 n.28 ("[K]nowledge that a will must be elaborately formalized may serve *ex ante* to discourage procrastination resulting in 'deathbed wills,' common before formalities were required in England, and notoriously poorly planned.").

<sup>210</sup> See *id.*

requirement were abandoned and all formally deficient wills were not necessarily invalid, then the testator's incentive to behave in these ways would be diminished because the cost of a formal defect would be reduced.<sup>211</sup>

*B. The Deterrent Function*

The deterrent function of strict compliance corresponds to the protective function of testamentary formality. By satisfying the formal requirements of valid will-execution, an individual testator places protective measures within a testamentary document that are designed to prevent fraud.<sup>212</sup> For example, by executing a will in the presence of disinterested witnesses who can later testify regarding the execution process, the testator provides protection against fraudulent claims that the testator did not intend the document to be a will.<sup>213</sup> Likewise, by putting a testamentary scheme in writing and signing the document, the testator places protective barriers against the potential fraudulent suppression of a valid will.<sup>214</sup>

By contrast, the deterrent function refers to the disincentive that a requirement of strict compliance creates for attempted fraud.<sup>215</sup> If prospective wrongdoers know that a document that does not strictly comply with the prescribed formalities is invalid, they will have less of an incentive to attempt fraud.<sup>216</sup> By

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<sup>211</sup> Langbein acknowledges that the potential loss of this aspect of the clarifying function is a potential cost of relaxing the law's insistence on strict compliance, although he ultimately concludes that the incentive to comply would remain under a relaxed formal compliance standard. *See* Langbein, *supra* note 1, at 524 (“[T]he substantial compliance doctrine would have no effect whatever upon primary conduct. The incentive for due execution would remain.”).

<sup>212</sup> *See supra* Part II.B.

<sup>213</sup> *See supra* Part II.B.

<sup>214</sup> *See supra* Part II.B.

<sup>215</sup> *See* Gulliver & Tilson, *supra* note 10, at 12; Sherwin, *supra* note 72, at 456 (explaining that “the requirement that the testator sign the will serves . . . the protective function by deterring forgery”).

<sup>216</sup> *See id.* at 12–13. Gulliver and Tilson question the effectiveness of the deterrent function based largely upon their belief that potential wrongdoers do not know the formal requirements of will-execution. As they argue, “The deterrent effect of any penalty depends on the extent to which it is generally known to exist. It is extremely improbable that laymen would be aware of the legal rules concerning the competency of attesting witnesses without legal advice . . .” *Id.* at 12. However, it seems safe to assume that most people understand that the execution of wills requires some form of special procedure. Potential wrongdoers therefore likely know that some formality is required. Moreover, a general awareness of the need for special procedures combined with ignorance of the specific requirements may serve

requiring that all testators execute a written, signed, and attested document, the law places obstacles that wrongdoers must precisely navigate in order to pass a fraudulent will through the probate system. As a result, they may reconsider their actions and will be less likely to act on their fraudulent impulses. Conversely, if wills were valid despite formal defects, the opportunity for fraud would be greater because the task of submitting a fraudulent will would be less difficult. The strict compliance requirement therefore serves a deterrent function because it provides greater potential for the invalidation of fraudulent wills and makes attempted fraud more costly.

The notion that formality serves as a deterrent to prospective fraud is not absent from the traditional functional analysis of testamentary formality. For instance, although they question the efficacy of this “deterrent effect,” Gulliver and Tilson acknowledge that formality may deter wrongdoers as well as protect testators.<sup>217</sup> More recent scholarship also contains hints of this deterrent function. For example, one trusts and estates case book explains that “the presence of witnesses . . . make[s] scoundrels think twice.”<sup>218</sup> Although traces of the deterrent function can be found, traditional functional analysis fails to explicitly distinguish this deterrent effect from formality’s protective function. However, while it is similar to formality’s protective function, the deterrent function is properly understood as a function of strict compliance.

### C. *The Channeling Function*

The third function of strict compliance is the channeling function, which relates to the signaling function of testamentary formality. Much like how the signaling function reduces the testator’s difficulty of communicating testamentary intent,<sup>219</sup> the channeling function contributes to the efficiency of the probate process by easing the court’s burden of identifying testamentary

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as a greater deterrent than a potential wrongdoer’s comprehensive knowledge of the will-execution process.

<sup>217</sup> *Id.* at 12–13.

<sup>218</sup> STERK ET AL., *supra* note 154, at 228; *see also* Sherwin, *supra* note 72, at 456 (explaining that formalities “serve a protective function by reducing the possibility that wrongdoers might interfere with the process of execution”).

<sup>219</sup> *See supra* Part II.C.

intent.<sup>220</sup> A large number of estates pass through the probate system each year, and consequently, the probate process can be expensive and time-consuming.<sup>221</sup> However, as Langbein explains, “[c]ompliance with the . . . formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills.”<sup>222</sup>

This standardization is a product of the strict compliance requirement, which requires the court to indiscriminately invalidate all formally deficient documents. By providing courts a mechanical method of judging the validity of wills based upon the testator’s compliance with the prescribed formalities, rather than requiring courts to make individualized determinations of testamentary intent based upon all available evidence, the channeling function of strict compliance promotes the efficiency of the probate system.<sup>223</sup> Additionally, by channeling all valid wills into substantially the same form, the strict compliance requirement minimizes the court’s discretion in evaluating the genuineness of wills and consequently increases certainty regarding which wills are valid and which are not. This increased certainty suppresses litigation involving informal wills,<sup>224</sup> thereby further diminishing the administrative burdens of the probate system.

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<sup>220</sup> See Lindgren, *supra* note 75, at 544 (“[F]ormalities channel almost all wills into the same patterns, letting well-counseled testators know what they must do to execute a valid will, reducing the administrative costs of determining which documents are wills, and thus increasing the reliability of our system of testation.”); John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 89 n.232 (2009) (explaining that the channeling “function demands that a document be recognizable as a will in order to permit routine processing of the steps in probate administration.”).

<sup>221</sup> See Langbein, *supra* note 1, at 504.

<sup>222</sup> *Id.* at 494; see Friedman, *supra* note 202, at 368.

<sup>223</sup> See Langbein, *supra* note 1, at 494 (explaining that because will formalities produce uniformity, “[c]ourts are seldom left to puzzle whether the document was meant to be a will” and explaining further that “[t]he court can process [the testator’s] estate routinely, because his testament is conventionally and unmistakably expressed and evidenced”).

<sup>224</sup> See Langbein, *supra* note 6, at 37 (“A harmless error rule opens for litigation an issue of potential difficulty that the traditional strict compliance rule forecloses, namely, whether to enforce a defectively executed will.”).

As exemplified by Langbein's explanation,<sup>225</sup> the channeling function represents a prominent part of traditional functional analysis in the law of wills.<sup>226</sup> Like other aspects of the functional analysis of strict compliance, scholars have erroneously identified the channeling function as a function of will formalities. However, the channeling function is not a function of testamentary formality, but is instead a function of the formalism that requires strict compliance with the prescribed formalities. Indeed, the channeling function is properly understood as a consequence of the strict compliance requirement because its benefits are realized only if many, if not all, testators are required to comply with the formalities.<sup>227</sup>

For the purposes of comparison, consider formality's signaling function. The benefit of this function is realized every time an individual testator complies with the prescribed formalities.<sup>228</sup> If individual testators satisfy the formal requirements of will-execution, they have assurance that they have effectively communicated testamentary intent to the probate court and that their testamentary preferences will be fulfilled.<sup>229</sup> The signaling function is therefore a consequence of testamentary formality because the testator who complies with the formalities receives the benefit of the function regardless of whether other testators comply with the formalities.

By contrast, the benefit of the channeling function is realized only if a large portion of testators are required to comply with the prescribed formalities. If all testators need not comply with the prescribed formalities, the efficiency of the probate system is diminished because the probate court must determine whether each formally defective document reflects testamentary intent.<sup>230</sup>

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<sup>225</sup> See Langbein, *supra* note 1, at 494.

<sup>226</sup> See, e.g., Greenawalt, *supra* note 153, at 558; Lindgren, *supra* note 75, at 544; Martin, *supra* note 220, at 89 n.232.

<sup>227</sup> See Langbein, *supra* note 1, at 494.

<sup>228</sup> See *supra* notes 168–70 and accompanying text.

<sup>229</sup> See *supra* notes 168–71 and accompanying text.

<sup>230</sup> See Bonfield, *supra* note 58, at 1907 (“If all wills are executed according to a single pattern, courts will spend less time determining whether a document offered for probate was really intended by the decedent to be a will rather than some other writing.”); Leigh A. Shipp, Comment, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723, 733 (2005) (“While compliance with statutory formalities ostensibly increases the speed and efficiency of the probate process by standardizing the requirements for a valid will, the adoption of a dispensing power requires an examination on a case-by-case basis

Whether an individual testator strictly complies makes no difference; without the formalism that requires strict compliance from all testators, any expression of testamentary intent could be a valid will. As a result, the administrative efficiency produced by the channeling function is diminished, regardless of how many testators choose to comply with the prescribed formalities. Thus, because a requirement that all testators comply with the prescribed formalities funnels all wills into an easily identifiable form, the strict compliance requirement serves a channeling function.

*D. The Impediment Function*

The final function of the strict compliance requirement is the impediment function. This function correlates to the cautionary function of testamentary formality, which impresses upon the testator the importance of the will-execution process and encourages careful consideration of the decisions that affect the testator's estate plan.<sup>231</sup> Similarly, the impediment function of strict compliance serves as a means of validating only those attempts to exercise testamentary power that display objective evidence of the testator's contemplative state of mind.<sup>232</sup> Put differently, the strict compliance requirement weeds out those attempts to exercise testamentary power that are more likely hurried and undertaken with inadequate preparation.<sup>233</sup>

The law discards deficiently executed wills in this way because the default distributive scheme of intestacy backstops the impediment function and distributes the decedent's estate in a manner that is believed to represent most testators' probable

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of whether the document offered for probate truly represents the decedent's testamentary desires."). Langbein recognizes that the potential loss of this channeling function is a potential cost of relaxing the law's insistence on strict compliance. See Langbein, *supra* note 1, at 524 ("The substantial compliance doctrine must necessarily impair something of the channeling function, because it permits the proponents of noncomplying instruments to litigate the question of functional compliance, an issue which the rule of literal compliance presently forecloses.").

<sup>231</sup> See *supra* Part II.D.

<sup>232</sup> See Glover, *supra* note 170, at 158.

<sup>233</sup> See Sarajane Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309, 340 (1978) ("By limiting judicial recognition to transfers which comply with such formalities, the courts reduce the chance of giving legal import to words carelessly spoken or to idle ruminations about actions to be taken in the future.").

intent. Given this objective, intestacy statutes distribute the estates of those who die without wills within the family, an outcome that is traditionally considered socially beneficial.<sup>234</sup> Distribution within the decedent's family was once so greatly valued that a preference for intestacy was at times made explicit in both case law and legislative history.<sup>235</sup> For example, the drafters of an early nineteenth century New York statute explained: "We may safely lean in favor of intestacy; since it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides."<sup>236</sup> Similarly, the Supreme Court of California once stated that "[i]n the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all is often gravely questioned."<sup>237</sup> Furthering this partiality for intestacy, the strict compliance requirement provides an obstacle that the testator must navigate to validly execute a will, and the requirement therefore discourages the distribution of the testator's estate outside the family.<sup>238</sup>

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<sup>234</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 65 (explaining that intestacy "serves the secondary policy of protecting the economic health of the decedent's family"); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 27 (2000) (explaining that "society has decided that intestacy statutes should benefit and strengthen families"). At one time, intestacy was so preferred that the law contained a presumption against testacy. See Lindgren, *supra* note 75, at 552–53.

<sup>235</sup> See Hirsch, *supra* note 122, at 1066 n.30; Mann, *supra* note 30, at 1049 ("[O]ne occasionally glimpses a belief that intestacy should have a privileged status . . .").

<sup>236</sup> See W.W. Ferrier, Jr., *Revival of a Revoked Will*, 28 CALIF. L. REV. 265, 267 (1940) (quoting Report of Revisers of N.Y. Statutes of 1827–1828, pt. II, c. VI, § 61, in 3 N.Y. REV. STAT. (2d ed. 1836) App. 633–634).

<sup>237</sup> *In re Walker's Estate*, 42 P. 815, 818 (Cal. 1895); see also *Banks v. Sherrod*, 52 Ala. 267, 270 (1875) ("The law, and courts of justice, pursuing its spirit and maxims, have always favored heirs."); *Reed v. Roberts*, 26 Ga. 294, 300–01 (1858) ("Why a desire to favor the wills of testators made *in extremis*, should exist in this State, we do not very well understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property.")

<sup>238</sup> See John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 542 (1977) ("[P]eople normally do not think of the formalities of wills as a needed protection against disinheritance, yet they clearly are, and undoubtedly are often used as such."); Hirsch, *supra* note 122, at 1066 n.30 (explaining that "a formalities requirement could reflect . . . a preference for the distributive scheme mandated by the intestacy statute" and that "[a] formalities requirement effectively places upon testators who do wish to deviate from the intestacy scheme the onus of evincing unequivocally their intention to do so"). The impediment function of strict

This idea that formality and strict compliance can impede undesirable transactions is not absent in the study of legal formalities, as some legal scholars argue that this impediment function exists in contexts outside the law of wills.<sup>239</sup> For example, writing about the contract formality of the seal, Professor Eric Mills Holmes explains:

Formalities not only warn the promisor that he is making a deal (a wakening of legal consciousness), they also serve other policies of deterrence. For example, formalities deter legal enforcement of importune and socially undesirable agreements. Formalities underwrite our societal unwillingness to give legal sanction to transactions perceived as suspect or of marginal value. Formal promises assure that our legal machinery is used to enforce deliberative intent.<sup>240</sup>

Similarly, some scholars suggest that will formalities also serve this purpose.<sup>241</sup>

Like the clarifying, deterrent, and channeling functions, the impediment function is not a function of formality but is instead a function of strict compliance. When individual testators comply with the formal requirements of will-execution, the cautionary function is served because they more likely understand the legal significance of their actions and have time to contemplate the important decisions that they must make.<sup>242</sup> The cautionary function is therefore a function of formality.<sup>243</sup> By contrast, the impediment function is served only when all testators are required to comply with the prescribed formalities. If strict

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compliance is further illuminated by the relatively informal method of will revocation available to the testator—while it is difficult to opt out of intestacy, it is relatively easy to opt back in. See Glover, *supra* note 177, at 442–53.

<sup>239</sup> See Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLIAMETTE L. REV. 617, 627 (1993) (analyzing contract formalities); see also Love, *supra* note 233, at 339–40 (discussing gratuitous transfer formalities generally).

<sup>240</sup> Holmes, *supra* note 239, at 627.

<sup>241</sup> See, e.g., Gaubatz, *supra* note 238, at 542; Glover, *supra* note 177, at 431–34; Hirsch, *supra* note 122, at 1066 n.30; Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 MISS. L.J. 495, 519 (2006) (“In the case of a bequest that wrongly fails, there is a backup mechanism, the law of intestate succession, which operates to distribute the testator’s estate to the most natural objects of his or her bounty, but in the case of a bequest wrongly interpreted based on parol evidence, there is no such backup system. Hence, the incentive in the case of a will is to force any changes which depart from the standard to be in writing.”).

<sup>242</sup> See *supra* Part II.D.

<sup>243</sup> See *supra* Part II.D.

compliance were abandoned, testators who are not cautioned by the requirements of testamentary formality could nonetheless validly exercise testamentary power.<sup>244</sup> However, when all testators must strictly comply, those wills that do not display objective evidence of a deliberate and contemplative will-execution process are invariably invalid.

In sum, the functions of strict compliance are distinct from the function of testamentary formality. Whereas testamentary formality serves the evidentiary, protective, signaling, and cautionary functions,<sup>245</sup> the strict compliance requirement furthers four similar yet discrete functions, which include the clarifying, deterrent, channeling, and impediment functions. First, the clarifying function provides the testator an incentive to act in ways that produce a clear expression of testamentary intent.<sup>246</sup> Second, the deterrent function disincentivizes attempts of fraud by potential wrongdoers.<sup>247</sup> Third, the channeling function ensures that all wills are similarly executed and promotes the administrative efficiency of the probate system.<sup>248</sup> Finally, the impediment function separates expressions of testamentary intent that reflect objective evidence of careful planning and consideration from those that do not and discourages the testator from distributing property outside the family.<sup>249</sup>

#### IV. THE EVALUATION OF FORMAL COMPLIANCE RULES

The uncoupling of the functional analysis of strict compliance from that of testamentary formality has important implications for the law of wills. On the one hand, by clarifying and refining the study of will formalities, the distinction between the functions of formality and the functions of strict compliance illuminates the proper analytical role of traditional functional analysis. Instead of using the functional analysis of will formalities as a tool to evaluate reforms of the strict compliance requirement,<sup>250</sup> scholars should use it to examine the utility of

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<sup>244</sup> See *infra* Parts IV.B–C.

<sup>245</sup> See *supra* Part II.

<sup>246</sup> See *supra* Part III.A.

<sup>247</sup> See *supra* Part III.B.

<sup>248</sup> See *supra* Part III.C.

<sup>249</sup> See *supra* Part III.D.

<sup>250</sup> See, e.g., Langbein, *supra* note 1, at 514–26.

the formalities and to identify alternative formalities that better serve the policy objectives of the law of wills.<sup>251</sup> Indeed, the intuitiveness and simplicity of evaluating reforms of will formalities in light of their underlying purpose likely has contributed to the reform movement's success in this area.

On the other hand, the functional analysis of strict compliance provides a fresh perspective of the role that the strict compliance requirement plays in the probate process. More importantly, it provides a novel framework through which to evaluate the utility of the strict compliance requirement and to assess the merits of the proposed reforms that would implement a rule of relaxed formal compliance. Accordingly, this Section employs this new functional analysis to examine the traditional strict compliance requirement,<sup>252</sup> Langbein's substantial compliance doctrine,<sup>253</sup> and the UPC's harmless error rule.<sup>254</sup>

#### A. *The Strict Compliance Requirement*

The strict compliance requirement serves four functions: the clarifying, deterrent, channeling, and impediment functions.<sup>255</sup> This functional analysis raises the issue of whether these functions justify the strict compliance requirement's place in the law of wills. Because the strict compliance requirement invalidates genuine expressions of testamentary intent, the rule's continued place in the law of wills depends upon the utility of the rule's functions. By examining the consequences of abandoning the strict compliance requirement, this Section concludes that the functions of strict compliance are incongruent with or are outweighed by other policy considerations in the law of wills. Moreover, it suggests that the strict compliance requirement should be replaced by a relaxed formal compliance standard.<sup>256</sup>

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<sup>251</sup> See, e.g., Lindgren, *supra* note 75, at 541–43, 568 (arguing for the abolishment of the attestation requirement); Waggoner, *supra* note 83, at 84 (analyzing the authorization of notarized wills).

<sup>252</sup> See *supra* Part IV.A.

<sup>253</sup> See *supra* Part IV.B.

<sup>254</sup> See *supra* Part IV.C.

<sup>255</sup> See *supra* Part III.

<sup>256</sup> Langbein has suggested a similar framework for evaluating reform. See Langbein, *supra* note 1, at 523 (“If the substantial compliance doctrine can do individual justice only at the price of disorder and uncertainty in the patterns of transfer and testation, the gain may not be worth the cost.”).

The first function of strict compliance is the clarifying function. The strict compliance requirement serves this function by providing the testator an incentive to act in ways that produce clear evidence of testamentary intent.<sup>257</sup> For example, the strict compliance requirement encourages the testator to carefully fulfill all of the formal requirements of will-execution<sup>258</sup> and to do so relatively early in life<sup>259</sup> and with the aid of an attorney.<sup>260</sup> By encouraging the testator to execute a will in this way, the law increases the likelihood that the testator will leave behind clear evidence of testamentary intent.<sup>261</sup> The clarifying function, however, does not justify the requirement's place in the law of wills because the testator likely would act similarly absent a rule of strict compliance.

For instance, if the law abandoned the strict compliance requirement, testators would still have a strong inducement to strictly comply,<sup>262</sup> and they would therefore still have incentive to consult an estate-planning attorney. Under the proposals to replace the strict compliance requirement with a relaxed formal compliance standard, a formal defect does not automatically invalidate a will.<sup>263</sup> However, strict compliance is still advantageous to the testator.<sup>264</sup> The court only applies the substantial compliance doctrine or the harmless error rule to formally deficient wills.<sup>265</sup> If testators strictly comply, they trigger a presumption of testamentary intent, which a contestant of the will can overcome only by proving that the decedent did not intend the will to be legally effective.<sup>266</sup> Therefore, if the strict compliance requirement were replaced, the testator's incentive to strictly comply would persist because formal

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<sup>257</sup> See *supra* Part III.A.

<sup>258</sup> See *supra* notes 200–01 and accompanying text.

<sup>259</sup> See *supra* notes 209–10 and accompanying text.

<sup>260</sup> See *supra* notes 202–08 and accompanying text.

<sup>261</sup> See *supra* Part III.A.

<sup>262</sup> See Langbein, *supra* note 1, at 524 (“The incentive for due execution would remain. Precisely because the substantial compliance doctrine is a rule of litigation, it would have no place in professional estate planning.”).

<sup>263</sup> See *infra* Part IV.B–C.

<sup>264</sup> Langbein, *supra* note 6, at 23 (explaining the effect of the harmless error rule and stating that “[n]oncompliance is hardly an enticing option”); see also Langbein, *supra* note 1, at 524 (explaining the effect of the substantial compliance doctrine).

<sup>265</sup> See *infra* Part IV.B–C.

<sup>266</sup> See *supra* note 169 and accompanying text; see also Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 100 (2014).

compliance would reduce the chances of estate litigation regarding testamentary intent.<sup>267</sup> The experiences of foreign jurisdictions that have adopted relaxed compliance rules confirm this result, as these jurisdictions have not seen an increase in informal will-execution.<sup>268</sup>

Additionally, the clarifying function does not justify the strict compliance requirement's place in the law of wills because testators would likely execute their wills while relatively young and in good health, even if a relaxed compliance rule were adopted. The prevalence of deathbed wills has declined over the course of many years.<sup>269</sup> Whereas in earlier times, many testators left the task of executing a will to the final moments of their life,<sup>270</sup> testators today typically understand the importance of preparing an estate plan and generally execute wills before reaching old age.<sup>271</sup> As Langbein explains, "In the seventeenth century when the first Wills Act was written, most wealth was in the form of realty, and passed either by intestacy or conveyance. Will making could thus be left to the end . . . ."<sup>272</sup> By contrast, as Gulliver and Tilson suggest, "[W]ills are [now] probably executed by most testators in the prime of life and in the presence of attorneys."<sup>273</sup> The benefits of the clarifying function therefore do not warrant the strict compliance requirement's continued role in the probate process because testators are incentivized in other ways to execute wills by means that produce clear evidence of testamentary intent.

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<sup>267</sup> See Sherwin, *supra* note 72, at 469 ("A testator sufficiently informed to know of the will statutes has powerful reasons to follow them, whether or not courts have authority to accept defective wills."); see also Miller, *supra* note 169, at 577 (arguing that relaxed formalism will not "breed some contempt for the prescribed formalities" because "human instinct is more likely to lead to a desire to do things properly").

<sup>268</sup> See Langbein, *supra* note 6, at 51–52 (concluding after a review of the experience of a variety of foreign jurisdictions that a rule of relaxed compliance has not "inspired testators to become sloppy about executing their wills"); see also Miller, *supra* note 169, at 575 (explaining that "[t]he reported cases" in South Australia "do not seem to reveal any weakening in the attitude to formalities").

<sup>269</sup> See Lindgren, *supra* note 75, at 554.

<sup>270</sup> See *id.*

<sup>271</sup> See *id.* at 555.

<sup>272</sup> Langbein, *supra* note 1, at 496–97.

<sup>273</sup> Gulliver & Tilson, *supra* note 10, at 10.

The second function of strict compliance is the deterrent function.<sup>274</sup> This function corresponds to the protective function of testamentary formality and deters attempts of fraud.<sup>275</sup> However, the deterrent function is susceptible to the same criticism that has plagued formality's protective function, and it therefore does not support the continued use of the strict compliance requirement.<sup>276</sup> Criticism of formality's protective function extends back to the origins of the functional analysis of will formalities, when Gulliver and Tilson argued that formality's goal of protecting the testator is "difficult to justify under modern conditions."<sup>277</sup>

This criticism is based on four arguments. First, the objective of guarding testamentary intent from outside imposition is at odds with formality's tendency to undermine testamentary intent.<sup>278</sup> This result directly conflicts with the goal of the law of wills and is aptly summarized by Langbein, who explains simply that "[p]rotective formalities do more harm than good."<sup>279</sup> Second, will formalities do not adequately protect the testator.<sup>280</sup> As exemplified by the many cases of attempted fraud and undue influence, knowledgeable and determined wrongdoers can circumvent formality's protective measures.<sup>281</sup> Third, the probate system possesses more effective methods of identifying and rectifying instances of fraud and undue

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<sup>274</sup> See *supra* Part III.B.

<sup>275</sup> See *supra* Part III.B.

<sup>276</sup> See Gulliver & Tilson, *supra* note 10, at 9–13; Langbein, *supra* note 1, at 496–97; Miller, *supra* note 71, at 271–73.

<sup>277</sup> Gulliver & Tilson, *supra* note 10, at 9. Gulliver and Tilson further explain that "while the provisions of the statutes of wills seeking to fulfill the protective function must be reckoned with doctrinally as part of our enacted law, this function is not sufficiently important in the present era to justify any more emphasis than these provisions require." *Id.* at 10.

<sup>278</sup> See *id.* at 9 ("[T]here are numerous decisions interpreting these requirements . . . wholly or partially invalidating wills that do not seem from the opinions to be in any way improper or suspicious."); Langbein, *supra* note 1, at 496 (explaining that "formalities . . . void[] homemade wills for harmless violations").

<sup>279</sup> Langbein, *supra* note 1, at 496.

<sup>280</sup> See Gulliver & Tilson, *supra* note 10, at 9 ("[I]t is extremely doubtful that these provisions effectively accomplish any important purpose."); Langbein, *supra* note 1, at 496.

<sup>281</sup> See Langbein, *supra* note 1, at 496 ("The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in preventing the many cases of fraud and undue influence which are proved each year.").

influence.<sup>282</sup> As Gulliver and Tilson explain, “there are appropriate independent remedies for the various forms of imposition, and these prophylactic [formalities] are therefore not, in the long run, of any essential utility.”<sup>283</sup> Finally, the instances in which formality might prove useful to prevent fraud and undue influence have decreased in modern times, as testators typically execute wills earlier in life and with the aid of an attorney.<sup>284</sup> Testators are now therefore better equipped to protect themselves.

These critiques of formality’s protective function directly apply to the deterrent function of the strict compliance requirement. First, while strict compliance deters attempts of fraud, it also undermines testamentary intent, two results that are at odds with each other.<sup>285</sup> Second, the disincentive for fraud does not deter all potential wrongdoers.<sup>286</sup> Those who are brazen enough to defraud the testator likely will not be stopped by the possibility that their plan will fail. Third, the probate process has other methods of detecting and preventing fraudulent wills that deter attempts of fraud.<sup>287</sup> Finally, because modern testators generally execute wills earlier in life, they are in less need of protection than their earlier counterparts and consequently the need for deterrence is diminished.<sup>288</sup> In short, the deterrent function’s utility is questionable, and it therefore does not justify the law’s insistence on strict compliance.

The strict compliance requirement’s third function is the channeling function, which promotes the administrative efficiency of the probate system by allowing the court to determine whether the decedent intended to execute a will based

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<sup>282</sup> See Gulliver & Tilson, *supra* note 10, at 9; Langbein, *supra* note 1, at 496 (“Protective formalities are not needed. Since fraud or undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.”).

<sup>283</sup> Gulliver & Tilson, *supra* note 10, at 9.

<sup>284</sup> See *id.* at 9–10 (“[T]he makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of society.”); Langbein, *supra* note 1, at 496–97 (“The protective policy is probably best explained as an historical anachronism.”).

<sup>285</sup> See *supra* notes 278–79 and accompanying text.

<sup>286</sup> See *supra* notes 280–81 and accompanying text.

<sup>287</sup> See *supra* notes 282–83 and accompanying text.

<sup>288</sup> See *supra* note 284 and accompanying text.

solely on compliance with the prescribed formalities.<sup>289</sup> If the decedent complies with the formalities of will-execution, testamentary intent is presumed; if the decedent does not comply, the will is invalid.<sup>290</sup> In the past, probate courts typically held an inferior status, possessing limited jurisdiction and often staffed by non-lawyer judges,<sup>291</sup> and therefore the channeling function may have justified the strict compliance requirement's place in the probate process.

Due to their inferior status, probate courts were once better equipped to perform administrative tasks rather than to undertake the adjudicative responsibilities of other courts.<sup>292</sup> Individualized determinations of testamentary intent by unskilled judges based upon evidence other than mere formal compliance could lead to inconsistent outcomes across similar cases.<sup>293</sup> The uncertainty produced by this inconsistency could, in turn, increase the likelihood of probate litigation and disrupt the efficiency of the probate system.<sup>294</sup> With these concerns in mind, Professor Bruce Mann explains that “[t]he underlying question is how to limit the discretion of [probate] judges that are not chosen or trained to perform general adjudicatory functions.”<sup>295</sup>

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<sup>289</sup> See *supra* Part III.C.

<sup>290</sup> See *supra* note 169 and accompanying text.

<sup>291</sup> See Langbein, *supra* note 1, at 502–03 (describing the “downgrading of probate courts”); Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U.L.Q. 39, 62 (1985) (“Probate courts in most states customarily were courts of inferior status and limited jurisdiction. The office of probate judge was often a part-time one that required little, if any, professional training.” (footnote omitted)).

<sup>292</sup> See Mann, *supra* note 291, at 62 (“The responsibilities of the probate judge tended to be ministerial . . . . The 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>293</sup> See Langbein, *supra* note 6, at 51 (reporting that an English law reform committee declined to recommend reform of the strict compliance requirement due to concerns “that by making it less certain whether or not an informally executed will is capable of being admitted to probate, [a dispensing power] could lead to litigation, expense, and delay” (alteration in original) (internal quotation mark omitted)).

<sup>294</sup> See Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 33 (2010) (“A leading model posits that uncertainty over the outcome of a will contest drives litigation.”).

<sup>295</sup> Mann, *supra* note 291, at 63.

One strategy to minimize the discretion of probate courts and foster consistent outcomes is to transform the determination of testamentary intent into a largely ministerial duty by requiring probate judges to evaluate testamentary intent based solely on formal compliance.<sup>296</sup> As Mann explains, “The requirement of strict compliance with the [W]ills [A]ct formalities limits discretionary interpretation of the formalities by discouraging anything other than mechanical, literal application of them.”<sup>297</sup> The strict compliance requirement’s channeling function therefore “provid[es] a measure of control over probate courts of limited jurisdiction.”<sup>298</sup>

The utility of the channeling function, however, has been diminished by a change in the nature of probate courts. While the law has maintained the strict compliance requirement’s place in the probate system, the status of probate courts and the qualifications of probate judges generally have increased. Whereas seventy years ago about half of the states staffed probate courts with non-lawyers,<sup>299</sup> today only four states allow laymen to preside over the probate system.<sup>300</sup> Moreover, some states have reallocated probate responsibilities to courts of general jurisdiction, which have greater experience with making adjudicative determinations.<sup>301</sup> Because probate courts are now generally better equipped to make individualized determinations

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<sup>296</sup> See Langbein, *supra* note 1, 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.”).

<sup>297</sup> Mann, *supra* note 291, at 64.

<sup>298</sup> *Id.*; see also Langbein, *supra* note 1, at 503.

<sup>299</sup> See Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 139 (1944).

<sup>300</sup> 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.”).

<sup>301</sup> See Langbein, *supra* note 1, 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 291, 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.” (footnote omitted)).

of testamentary intent in a consistent and reliable manner,<sup>302</sup> the utility of the strict compliance requirement's channeling function is diminished.

Moreover, the channeling function's utility is further diminished by the way that modern probate courts apply the rule of strict compliance. Sympathetic judges, bothered by the harsh consequences of the rule, have searched for ways to save wills that do not strictly comply with the prescribed formalities.<sup>303</sup> As Langbein explains, "Many of the formalities have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance."<sup>304</sup> This willingness to relax the rule of strict compliance through ad hoc exceptions creates uncertainty in the rule's application and consequently invites litigation.<sup>305</sup> By allowing litigation regarding the testator's compliance with the formalities, the inconsistent application of the strict compliance requirement undermines the channeling function's goal of promoting the efficiency of the probate system.

Because probate courts have opened the door for litigation regarding formal compliance, if the rule of strict compliance were replaced by a relaxed formal compliance standard, probate litigation levels likely would not increase dramatically.<sup>306</sup> Much of the litigation produced by these reforms would simply replace

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<sup>302</sup> See Langbein, *supra* note 1, at 525 ("[T]he litigation which would occur would for the most part raise familiar issues which the courts have demonstrated their ability to handle well. We have seen that the elements of the substantial compliance doctrine arise in other contexts in current litigation when courts examine whether purported wills evidence testamentary intent and were executed freely and with finality.").

<sup>303</sup> See *id.*; see also Lindgren, *supra* note 75, at 572.

<sup>304</sup> Langbein, *supra* note 1, at 525; see also Lindgren, *supra* note 75, at 572 ("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." (footnote omitted)).

<sup>305</sup> See Langbein, *supra* note 6, at 28 ("[T]he rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict."); see also Lindgren, *supra* note 75, at 572 ("Courts . . . often decide like cases dissimilarly because some courts will strain to avoid the unduly harsh rules for formal validity. Thus, even where the case or statutory law seems to be clear, disappointed beneficiaries will still litigate to try to win their devises.").

<sup>306</sup> See Langbein, *supra* note 1, at 525; Lindgren, *supra* note 167, at 1016.

the litigation produced by the rule of strict compliance.<sup>307</sup> As Langbein expounds, “The choice is not between litigation and no litigation. In cases of defective compliance the important choice is between litigation resolved purposefully and honestly under the substantial compliance doctrine [or the harmless error rule], or irrationally and sometimes dishonestly under the rule of literal compliance.”<sup>308</sup> Therefore, the utility of the channeling function is diminished because the lax application of the strict compliance requirement has generated litigation regarding formal compliance.

The final function of strict compliance is the impediment function.<sup>309</sup> This function ensures that all testamentary documents that do not display objective evidence of careful and considered planning are invalid.<sup>310</sup> In the past, when courts and legislatures sometimes hinted at their preference for intestacy, the impediment function may have been an implicit check on testamentary freedom.<sup>311</sup> Today, however, respect for testamentary intent is the cornerstone of the law of wills.<sup>312</sup> Given the strict compliance requirement’s effect of indiscriminately invalidating genuine expressions of testamentary intent, the impediment function is directly at odds with the law’s fundamental objective. As such, the impediment function no longer justifies the law’s continued adherence to strict compliance.

The other functions of strict compliance similarly undermine testamentary freedom’s fundamental status. If the fulfillment of the testator’s intent is the primary goal of the law of wills, the policies served by the clarifying function, the deterrent function, and the channeling function are necessarily of secondary importance. Moreover, as described above, the utility of each function of strict compliance has decreased over time. Because they are of diminished importance and are at odds with the law’s

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<sup>307</sup> See Langbein, *supra* note 1, at 525 (“The substantial compliance doctrine would not simply add to the existing stock of probate litigation, but would to some extent substitute one type of dispute for another.”); Lindgren, *supra* note 167, at 1016 (“Litigation about formalities will lessen; litigation about testamentary intent will increase.”).

<sup>308</sup> Langbein, *supra* note 1, at 526.

<sup>309</sup> See *supra* Part III.D.

<sup>310</sup> See *supra* Part III.D.

<sup>311</sup> See *supra* notes 234–38 and accompanying text.

<sup>312</sup> See Langbein, *supra* note 1, at 491.

goal of effectuating testamentary intent, the functions of strict compliance no longer justify the rule's place in the law of wills. As such, the strict compliance requirement should be replaced by a relaxed formal compliance standard.

### *B. The Substantial Compliance Doctrine*

The substantial compliance doctrine is the first alternative to the strict compliance requirement.<sup>313</sup> This doctrine, which was proposed by Langbein, would allow courts to validate a formally deficient document if the testator intended to execute a will and substantially complied with the formalities.<sup>314</sup> Although the substantial compliance doctrine has not been widely adopted, the functional analysis of strict compliance confirms the merits of Langbein's attempt to construct a relaxed formal compliance standard.<sup>315</sup> However, the analysis also suggests that the structure and mechanics of Langbein's substantial compliance doctrine are flawed.

Consider, for instance, the two components of the substantial compliance doctrine: (1) the identification of testamentary intent and (2) a determination of whether the functions of formality have been fulfilled.<sup>316</sup> Although a finding of testamentary intent is a logical requirement for the validity of a will, the need for independent confirmation that the functions of formality have been served is less clear. If the court is convinced that a particular document represents a legitimate attempt to exercise testamentary power, then the will necessarily fulfills testamentary formality's primary purpose of providing a reliable and accurate record of testamentary intent. After this finding, further inquiry into the purposes of will formalities is largely duplicative because the court would have been unsure of the testator's intent had the will's form not adequately served the functions of testamentary formality.<sup>317</sup>

Langbein's reaction to the judicial employment of the substantial compliance doctrine in Australia demonstrates the confusion caused by the doctrine's two-pronged construction. After proposing the doctrine and its two independent

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<sup>313</sup> See generally *id.*

<sup>314</sup> See Lester, *supra* note 7, at 579–80.

<sup>315</sup> See *supra* Part IV.A.

<sup>316</sup> See Langbein, *supra* note 1, at 513.

<sup>317</sup> See Langbein, *supra* note 6, at 43.

components, Langbein later criticized Australian courts for not focusing exclusively on the showing of testamentary intent.<sup>318</sup> For example, he complains that “courts read into their substantial compliance doctrine a near-miss standard, ignoring the central issue of whether the testator’s conduct evidenced testamentary intent.”<sup>319</sup>

Langbein’s reaction to a decision from the Australian state of Queensland is particularly illustrative. He recounts the decision of a judge who declined to find that a testator substantially complied with the prescribed formalities despite clear evidence that the document reflected testamentary intent.<sup>320</sup> Langbein then ponders rhetorically, “What could ‘substantial compliance’ mean if the testator’s conduct can evince unmistakable testamentary intent and still be insubstantial?”<sup>321</sup> This retort and his other comments regarding the judicial application of the substantial compliance doctrine suggests that the finding of testamentary intent is tantamount to a determination that the decedent’s method of will-execution fulfilled the functions of will formalities.

This construction of the substantial compliance doctrine, which focuses on testamentary intent but also references formality’s functions, contains two flaws. First, the doctrine implicitly abandons formality’s cautionary function. The cautionary function is the only function of will formalities that does not focus on the court’s recognition of the testator’s intent to execute a will. The cautionary function instead is concerned with the testator’s formulation of testamentary intent.<sup>322</sup> By impressing the importance and legal significance of the

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<sup>318</sup> *See id.*

<sup>319</sup> *Id.* at 53.

<sup>320</sup> *See id.* at 43.

<sup>321</sup> *Id.* Langbein and other scholars may be clear as to what substantial compliance means. *See, e.g.,* Lindgren, *supra* note 167, at 1014 (“As a former student of Langbein’s, I consider myself a Langbeinian in these matters; I know what John meant. I wouldn’t have had trouble applying his test, nor do I think that anyone who very carefully read his work would have trouble.”). However, others are not so certain. *See, e.g.,* Nelson & Starck, *supra* note 118, at 355 (“A second problem is the ambiguity of ‘substantial compliance.’ Does it mean that whenever the previously set forth goals have been met, we then have substantial compliance? Does it mean that some formalities are more important than others and that substantial compliance involves completion of only the important formalities?” (footnote omitted)).

<sup>322</sup> *See supra* Part II.D.

testamentary act upon the testator, the cautionary function helps ensure that the testator approaches the execution of a will with proper planning and consideration.<sup>323</sup>

By focusing primarily on the existence of testamentary intent, the substantial compliance doctrine largely ignores the process by which the testator forms that intent, thereby valuing the evidentiary, protective, and signaling functions over the cautionary function. A relaxed compliance rule need not necessarily take into account the cautionary function, but if the rule's proponents intend to disregard formality's cautionary value, they should do so explicitly in order to avoid confusion regarding the proper mechanics of the substantial compliance analysis. The substantial compliance doctrine's failure in this regard is especially confusing given that it does not merely omit the cautionary function from consideration but specifically claims to take into account all functions of formality, including the cautionary function.<sup>324</sup>

The substantial compliance doctrine's second flaw is that its concern with the functions of formality obscures the role that the functions of strict compliance play in the substantial compliance analysis. More specifically, because traditional functional analysis conflates the functions of formality with those of strict compliance,<sup>325</sup> the substantial compliance doctrine's second prong raises the issue of whether courts should consider the functions of strict compliance. On the one hand, consideration of the functions of strict compliance would make more sense than consideration of formality's functions because formality's primary purpose of providing reliable evidence of testamentary intent is already taken into account by the doctrine's first prong.<sup>326</sup> On the other hand, the reform movement's goal is to relax the formalism of strict compliance,<sup>327</sup> and, as such, fulfillment of strict compliance's functions is at odds with the purpose of the substantial compliance reform.

The confusion caused by these flaws is evident in case law, which suggests that courts are sometimes reluctant to implement the substantial compliance doctrine out of concerns relating to

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<sup>323</sup> See Langbein, *supra* note 1, at 494–95; Miller, *supra* note 71, at 261–62.

<sup>324</sup> See Langbein, *supra* note 1.

<sup>325</sup> See *supra* Parts II–III.

<sup>326</sup> See *supra* notes 316–17 and accompanying text.

<sup>327</sup> See Langbein, *supra* note 1.

the functions of strict compliance.<sup>328</sup> For example, in a case in which it declined to apply the substantial compliance doctrine, the Supreme Court of Louisiana explained:

The fact that there is no fraud [in a given case] . . . will not justify the courts in departing from the statutory requirements, even to bring about justice in the particular instance, since any material relaxation of the statutory or codal rule will open up a fruitful field for fraud, substitution, and imposition.<sup>329</sup>

Because the court focused on the effect that the substantial compliance doctrine would have on the probate system generally and not on the individual testator, this language suggests that the court was concerned with the effects that a relaxed compliance rule would have on the deterrent function of strict compliance.<sup>330</sup> Likewise, courts sometimes express concerns regarding the negative effects that the substantial compliance doctrine would have on the administration of the probate system,<sup>331</sup> thereby raising concerns related to the channeling function of strict compliance.<sup>332</sup> As exemplified by these cases, concerns regarding the effect of the substantial compliance doctrine on the functions of strict compliance may have contributed to the reform effort's failure.

In sum, the functional analysis of strict compliance illuminates flaws of the substantial compliance doctrine. These flaws lie not with the doctrine's policy objectives, but instead stem from the doctrine's implicit analytical omissions.<sup>333</sup> By not

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<sup>328</sup> See, e.g., *In re Estate of Peters*, 526 A.2d 1005, 1014 (N.J. 1987) ("Our courts have thus acknowledged the important policy interest advanced by a rule of strict compliance.").

<sup>329</sup> *Succession of Roussel*, 373 So. 2d 155, 157 (La. 1979).

<sup>330</sup> See *supra* Part III.B.

<sup>331</sup> See, e.g., *Peters*, 526 A.2d at 1015 ("To adopt the doctrine of substantial compliance . . . would unsettle the probate process . . ."); *Hopkins v. Hopkins*, 708 S.W.2d 31, 32 (Tex. App. 1986) ("We conclude that we cannot properly apply [the substantial compliance doctrine]. Such a departure from Code requirements would lead to confusion and uncertainty, which the Code seeks to avoid."). Courts also often reject the substantial compliance doctrine while providing no explanation. See *Mann*, *supra* note 30, at 1039.

<sup>332</sup> See *supra* Part III.C.

<sup>333</sup> See *supra* notes 322–32 and accompanying text. As others have noted, the term, "substantial compliance," may have added to the confusion. See *Miller*, *supra* note 71, at 307 ("Since Langbein's substantial compliance doctrine is predicated on the 'compliance' of an otherwise defective execution with the functions of the wills act formalities as the test for determining whether the defect should be treated as harmless error, a more descriptive and less misleading term would be 'functional compliance.'" (footnote omitted)).

acknowledging formality's cautionary function or the functions of strict compliance, and by not expressly advocating a relaxed compliance rule's effect on these functions, proponents of reform contribute unnecessary confusion to the reform effort. This confusion likely has hindered the push for reform and has ultimately led to the abandonment of the substantial compliance doctrine as the preferred alternative to the rule of strict compliance. By contrast, if the intent to diminish the functions of strict compliance were made explicit and the benefits of such a change were made clear, the substantial compliance doctrine may have been more widely applied and more liberally construed.

### C. *The Harmless Error Rule*

The second alternative to the strict compliance requirement is the harmless error rule, which would allow a court to validate a formally defective document based solely on whether the testator left behind clear and convincing evidence of testamentary intent.<sup>334</sup> Unlike the substantial compliance doctrine, the harmless error rule does not require the probate court to consider whether the testator's method of will-execution sufficiently fulfills the functions of will formalities.<sup>335</sup> The harmless error rule's single prong construction eliminates some of the confusion raised by the substantial compliance doctrine's focus on the functions of testamentary formality.

By removing all discussion of formality's functions, the harmless error rule makes no illusions that formality's cautionary function should be included in the harmless error analysis.<sup>336</sup> Moreover, the rule's sole focus on testamentary intent may also reduce the confusion caused by the reform movement's conflation of the functions of formality and the functions of the strict compliance requirement.<sup>337</sup> The harmless error rule has garnered widespread support within the reform movement, including among legal scholars<sup>338</sup> and the drafters of both the UPC<sup>339</sup> and the Restatement (Third) of Property.<sup>340</sup>

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<sup>334</sup> See generally Langbein, *supra* note 6.

<sup>335</sup> See Lester, *supra* note 7, at 580.

<sup>336</sup> See *supra* notes 322–24 and accompanying text.

<sup>337</sup> See *supra* notes 325–32 and accompanying text.

<sup>338</sup> See, e.g., Langbein, *supra* note 6, at 6–7; Lester, *supra* note 7, at 606; Lindgren, *supra* note 167, at 1016.

<sup>339</sup> See UNIF. PROBATE CODE § 2-503 (amended 1997) (“Although a document . . . was not executed in compliance with [the prescribed formalities], the

Moreover, whereas courts have “rarely fully embrace[d] the [substantial compliance] doctrine,”<sup>341</sup> ten states have passed legislation approving the use of the harmless error rule,<sup>342</sup> including one state in which courts had previously used the substantial compliance doctrine.<sup>343</sup> Nonetheless, despite this relative success, the vast majority of states continue to judge the validity of wills based upon the traditional strict compliance requirement.

Recognizing the connection between the harmless error rule’s comparative clarity and its relative success, this Article seeks to awaken renewed support of reform by bringing further transparency to the costs and benefits of the harmless error rule. By providing a focused picture of the need to replace the strict compliance requirement and of the benefits of a relaxed formal compliance rule, this Article’s functional analysis of strict compliance hones the arguments in favor of reform. The clarification and refinement of this call for reform increases the likelihood that policymakers will recognize the need for change in this area, and, as a result, Langbein’s hope for widespread adoption of the harmless error rule may eventually be realized.

#### CONCLUSION

A reform movement in the law of wills has long called for the relaxation of the formalism that requires all testators to strictly comply with the prescribed formalities of will-execution.<sup>344</sup> However, this push for reform has largely failed, as the vast majority of states maintains the traditional rule and requires strict formal compliance from all testators.<sup>345</sup> In an effort to

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document . . . is treated as if it had been executed in compliance . . . if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent’s will. . . .”)

<sup>340</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999) (“A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.”).

<sup>341</sup> Lester, *supra* note 7, at 601.

<sup>342</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 184 (explaining that a version of the harmless error rule has been adopted in California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia).

<sup>343</sup> See Lester, *supra* note 7, at 601.

<sup>344</sup> See, e.g., Langbein, *supra* note 1.

<sup>345</sup> See DUKEMINIER & SITKOFF, *supra* note 1, at 184; Lester, *supra* note 7, at 601.

spark renewed support for change in this context, this Article develops an innovative framework through which to analyze various proposed reforms of the traditional strict compliance requirement.<sup>346</sup> Specifically, this Article argues that a functional analysis of strict compliance should drive the reform effort and suggests that, once the purposes of the requirement are identified, reform in this area may be more likely.

This framework is built upon the insight that the analytical foundation of the reform movement's case for change is flawed. Consider, for example, the triumphant call for reform that concludes Langbein's seminal article in support of a relaxed formal compliance standard. Langbein proclaims, "The rule of literal compliance has outlived whatever utility it may have had. The time for the substantial compliance doctrine has come."<sup>347</sup> Despite this reference to the utility of the strict compliance requirement, Langbein constructs his argument for reform upon a functional analysis of testamentary formality.<sup>348</sup> Instead of focusing on the utility of strict compliance, Langbein largely devotes his analysis to the utility of will formalities.<sup>349</sup>

Formality and the rule of strict compliance, however, are different components of the law of wills, and each serves distinct purposes. Whereas the formalities of writing, signature, and attestation serve functions that aid in the fulfillment of testamentary intent, the formalism of the strict compliance requirement serves functions that often undermine testamentary intent. By focusing on the functions of testamentary formality, instead of on the functions of strict compliance, the reform movement obscures the need for reform and adds confusion to the various reform proposals.

By contrast, this Article clarifies the reform effort by focusing on the functional analysis of strict compliance. Specifically, it identifies the functions of strict compliance, which although are similar to the functions of testamentary formality, are separate and discrete. These functions include the clarifying function,<sup>350</sup> the deterrent function,<sup>351</sup> the channeling function,<sup>352</sup>

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<sup>346</sup> See *supra* Parts II–III.

<sup>347</sup> Langbein, *supra* note 1, at 531.

<sup>348</sup> See *id.* at 491–98.

<sup>349</sup> See *id.*

<sup>350</sup> See *supra* Part III.A.

<sup>351</sup> See *supra* Part III.B.

<sup>352</sup> See *supra* Part III.C.

and the impediment function.<sup>353</sup> This functional analysis illuminates both the benefits of a relaxed formal compliance standard and the costs of the traditional strict compliance requirement.<sup>354</sup> Ultimately, this Article echoes Langbein's proclamation in support of reform and demonstrates that the rule of strict compliance has indeed outlived whatever utility it may have had. Thus, equipped with this Article's novel analytical framework, the reform effort can move forward with refined purpose and renewed vigor.

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<sup>353</sup> See *supra* Part III.D.

<sup>354</sup> See *supra* Part IV.