INCREMENTAL CHANGE IN WILLS ADJUDICATION

MARK GLOVER*

ABSTRACT

Probate courts must decide which wills are valid and which are not. The traditional law provides courts a straightforward process to make these decisions. If the court determines that a will complies with certain formalities, then the will is valid, but if the court determines that a will does not comply, then it is invalid. This decisionmaking process has been criticized for being overly formalistic. While the traditional law is relatively easy to apply, it places greater importance on the process by which a testator executes a will than on the substance of the testator's intent. Consequently, the traditional wills adjudication process invalidates noncompliant wills that are authentic expressions of testators' intended estate plans.

This criticism has led to major reforms being incorporated into the Uniform Probate Code that are designed to make the wills adjudication process more accurate in distinguishing authentic wills from inauthentic wills. Although no state has fully adopted the UPC's comprehensive reform package, few states still cling wholeheartedly to the traditional law. Instead, policymakers in many states have implemented changes that take incremental steps away from the traditional law's formalistic approach to wills adjudication.

While the preference of state policymakers for incremental change, rather than for comprehensive reform, is clear, questions remain regarding the merits of these more modest approaches to reform. This Article seeks to better understand why state policymakers might favor partial rather than wholesale change to the wills adjudication process. More importantly, it analyzes whether some incremental changes are preferable to others. Ultimately, by providing a better understanding of the merits and possibilities of incremental change, this Article provides guidance to state policymakers who are wary of comprehensive reform.

* Professor of Law, University of Wyoming College of Law; LL.M., Harvard Law School, 2011; J.D., *magna cum laude*, Boston University School of Law, 2008. Thanks to David Horton for helpful comments on earlier drafts of this Article and to the University of Wyoming College of Law for research support.

INTRODUCTION

The probate system provides a forum for the adjudication of what is and is not an authentic and therefore legally effective will.[1] Under traditional law, this process is relatively straightforward. If the probate court determines that a purported will complies with certain formalities, then the will is valid.[2] If the court determines that a purported will does not comply, then the will is invalid.[3] This approach to wills adjudication has garnered criticism by a reform movement that argues that the traditional law is overly formalistic, placing greater importance on formal compliance than on the substance of the testator's intent.[4]

1. *See* Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 39-40 (1985).

2. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 146 (10th ed. 2017); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975).

3. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 142-43.

4. *See* Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 147-51 (2015) (describing the reform of will execution as one "of several prominent national reform projects over the preceding two decades, most of which are now largely complete and have borne an abundance of fruit in the form of significant, modernizing reforms") (footnote omitted); Peter T. Wendel, *California Probate Code Section 6110(c)(2): How Big is the Hole in the Dike?*, 41 SW. L. REV. 387, 389 (2012) (explaining that the traditional law "came under vigorous attack during the 1970's" when "[c]ritics claimed the courts were giving too much weight to formalism").

This movement has successfully incorporated major reforms into the Uniform Probate Code (UPC).[5] In particular, the UPC makes two major changes to the wills adjudication process. First, it streamlines the formalities of will execution by eliminating the most technical requirements.[6] Second, it authorizes the harmless error rule, which grants the probate court discretion to validate a noncompliant document if it finds clear and convincing evidence that the decedent intended it to be a legally effective will.[7]

Although the UPC includes these major changes, the reform movement's success in persuading state policymakers to undertake comprehensive reform has been modest at best. Many states still require compliance with some of the most onerous formalities,[8] and only seven states have adopted the UPC's harmless error rule.[9] However, measuring the reform movement's influence solely by the number of states that have fully adopted the UPC's changes understates state policymakers' willingness to depart from the traditional law.

Instead of fully adopting the UPC's reform proposals, policymakers in many states have implemented changes that take incremental steps away from the traditional law's approach to wills adjudication. Some states have selectively eliminated traditional formalities while still requiring strict compliance with the formalities that remain.[10] Others have adopted watered-down versions of the UPC's harmless error rule that allow probate courts to validate noncompliant wills only in limited circumstances.[11] Still others have both selectively eliminated formalities and enacted a partial harmless error rule.[12]

While the preference of state policymakers for incremental change rather than for comprehensive reform is clear, questions remain regarding the merits of these more modest approaches to reform. This Article therefore seeks to better understand why state policymakers might favor partial rather than wholesale change to the wills adjudication process. More importantly, it analyzes whether some incremental changes are preferable to others. Ultimately, by providing a better understanding of the merits and possibilities of incremental reform,

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5. *See* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1009-14 (1992); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035-36 (1994); *see also infra* Part II.

6. UNIF. PROB. CODE § 2-502(a) (UNIF. L. COMM'N 2008); *see infra* Section II.A.

7. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2008); *see infra* Section II.B.

8. *See infra* Table I.

9. HAW. REV. STAT. § 560:2-503 (2021); OR. REV. STAT. § 112.238 (2021); MICH. COMP. LAWS § 700.2503 (2022); MONT. CODE ANN. § 72-2-523 (2021); N.J. STAT. ANN. § 3B:3-3 (West 2021); S.D. CODIFIED LAWS § 29A-2-503 (2021); UTAH CODE ANN. § 72-2-503 (West 2021).

10. *See infra* Section II.A.

11. *See, e.g.*, CAL. PROB. CODE § 6110 (West 2021); COLO. REV. STAT. § 15-11-503 (2022); OHIO REV. CODE ANN. § 2107.24 (West 2021); VA. CODE ANN. § 64.2-404 (2021); *see also infra* Section II.B.

12. *See infra* Table I.

this Article provides guidance to state policymakers who are wary of comprehensive reform and aims to ensure that the trend toward incremental change advances the reform movement's policy goals.

To supplement this policy analysis, this Article brings a real-world perspective to the discussion of incremental change in wills adjudication by presenting the results of an original empirical study of one of the jurisdictions that has enacted incremental reforms. Specifically, this study examines an extensive data set of probate matters that were opened in Hamilton County, Ohio in 2014.[13] This empirical study provides a glimpse into how probate courts actually implement incremental changes and consequently provides insights into the potential costs and benefits of these reforms. By pairing this empirical study with a theoretical and policy perspective, this Article seeks to answer some of the lingering questions regarding incremental change in wills adjudication.

This Article proceeds in five parts. Parts I and II provide context to the Article's focus on incremental reform by explaining the traditional law and the UPC's comprehensive reform proposal. Part III then describes the various ways that state policymakers have eschewed full-scale reform by implementing incremental changes to the wills adjudication process. Part IV explores the policy underlying will-execution reform and supplements this discussion with the results of the Hamilton County empirical study. Finally, aided by the insights of Part IV's policy analysis and empirical data, Part V offers suggestions regarding how state policymakers should implement incremental wills adjudication reforms.

I. TRADITIONAL LAW

To appreciate the need for reform of the wills adjudication process and the nuanced distinctions between comprehensive reform and incremental change, one must first understand the traditional law. In the United States, the traditional law originates from two English statutes, namely the Statute of Frauds of 1677[14] and the Wills Act of 1837.[15] Prior to the arrival of the UPC, most states adopted statutes that were largely modeled upon these statutes,[16] which include two main components: (1) will-execution formalities and (2) the rule of strict compliance.

13. *See infra* note 228 and accompanying text.

14. 29 Car. 2, c. 3, § 5.

15. 7 Wm. 4 & 1 Vict. c. 26, § 9.

16. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 1999) ("American statutes were . . . largely copied from one or the other (or, in some cases, partly from both) of two English statutes . . . ."); SITKOFF & DUKEMINIER, *supra* note 2, at 142-43 (explaining that the English statutes "served as models for American legislation"); David H. Horton, *Wills Without Signatures*, 99 B.U. L. REV. 1623, 1641-42 (2019) ("In 1837, the British Parliament passed the Wills Act . . . . Most current or former

A. Formalities

The first component of the traditional law is the prescribed menu of will-execution formalities. Under both the Statute of Frauds and the Wills Act, a will must comply with three primary formalities.[17] First, it must be written; second, it must be signed by the testator; and third, it must be attested by witnesses.[18] The Statute of Frauds required three witnesses, but the Wills Act and the American will-execution statutes reduced this number to two.[19] Moreover, these primary formalities of a writing, a signature, and witnesses are supplemented by various ancillary technicalities.[20]

For example, the Statute of Frauds required that the signatures of the attesting witnesses appear at the end of the document,[21] and the Wills Act extended this subscription technicality to the signature of the testator.[22] In jurisdictions that require subscription, a will that contains signatures elsewhere is either completely invalid or the provisions appearing after the signatures are void.[23]

Additionally, the Statute of Frauds required that the attesting witnesses sign the will "in the presence" of the testator.[24] The Wills Act again expanded the technical details of will execution by also requiring that the testator's signature "be made or acknowledged by the [t]estator in the [p]resence" of the witnesses.[25] Two general methods for evaluating a testator's compliance with this requirement have emerged.

English colonies, including American and Australian states, enacted similar laws shortly thereafter.").

17. *See* 29 Car. 2, c. 3, § 5; 7 Wm. 4 & 1 Vict. c. 26, § 9.

18. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 1999) (explaining that these "main statutory formalities for attested wills have been in force for centuries"); *see also* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014).

19. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 142-43. The requirement of more than two witnesses persisted in some states into the twentieth century. *See* Percy Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 1, 12, 16-17 (1928); John B. Rees, Jr., *American Wills Statutes: I*, 46 VA. L. REV. 613, 619, 624-25 (1960). In addition to being attested by two witnesses, Louisiana requires that a will be notarized. LA. CIV. CODE ANN. art. 1577 (2021). By contrast, Pennsylvania does require two witnesses under certain circumstances. 20 PA. CONS. STAT. § 2502 (2021).

20. *See infra* Section II.A.; *see also* SITKOFF & DUKEMINIER, *supra* note 2, at 142 (explaining that the "three core formalities have been interpreted and augmented by additional formalities in ways that vary from state to state").

21. 29 Car. 2, c. 3, § 5.

22. 7 Wm. 4 & 1 Vict. c. 26, § 9; *see* SITKOFF & DUKEMINIER, *supra* note 2, at 143.

23. *See* James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 548 & n.45 (1990).

24. 29 Car. 2, c. 3, § 5.

25. 7 Wm. 4 & 1 Vict. c. 26, § 9. Although, most states adopted statutes that largely incorporated the formalities of the Statute of Frauds and the Wills Act, some states added a publication requirement. In states that require publication, the testator must indicate to the attesting witnesses that the document before them is her will. *See* Langbein, *supra* note 2, at 493. Typically, however, no specific words or actions are required to satisfy this requirement. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 160 n.38.

Under the line-of-sight test, the presence requirement is satisfied if the testator is capable of seeing the witnesses sign the will.[26] By contrast, under the conscious presence standard, the testator need not be able to see the witnesses.[27] Instead, the conscious presence standard is satisfied if the testator and the witnesses are generally aware that a will is being executed, even if they cannot see each other.[28] Thus, in sum, state laws that contain the traditional level of formality include the general writing, signature, and witnessing requirements and also the ancillary technicalities of subscription and presence.

B. Strict Compliance

In addition to the menu of formalities, the second main component of the traditional law is the rule of strict compliance.[29] Under this rule, any formal defect renders a purported will invalid regardless of how slight the deviation or how apparent the testator's intent to execute a legally effective will.[30] The Statute of Frauds articulated this rule when it stated that, if a will does not comply with the prescribed formalities, it "shall be utterly void and of none effect."[31] Although the Wills Act and subsequent American statutes do not contain such effusive language regarding the ineffectiveness of noncompliant wills, courts have interpreted these statutes to require strict literal compliance with the prescribed formalities.[32]

Consider, for example, the case of *Stevens v. Casdorph*, in which Homer Haskell Miller sought to execute his will while at a bank in West Virginia.[33] Upon entering the bank, Miller informed a bank employee that he would like his will witnessed.[34] The employee confirmed that she could assist in this endeavor, and Miller proceeded to sign his

26. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 153.

27. *See id.* at 152-53.

28. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. p (AM. L. INST. 1999) (explaining that under the conscious presence test, the requirement is satisfied "[i]f the testator and the witnesses are near enough to be able to sense each other's presence, typically by being within earshot of one another, so that the testator knows what is occurring").

29. *See* Sitkoff, *supra* note 18, at 647.

30. *See* Langbein, *supra* note 2, at 489 ("The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential."); Mann, *supra* note 5, at 1036 ("Courts have routinely invalidated wills for minor defects in form even in uncontested cases . . . .").

31. 29 Car. 2, c. 3, § 5.

32. *See, e.g.*, *In re* Estate of Chastain, 401 S.W.3d 612, 619 (Tenn. 2012) ("Tennessee courts have consistently interpreted statutes prescribing the formalities for execution of an attested will as mandatory and have required strict compliance with these statutory mandates."); Gardner v. Balboni, 588 A.2d 634, 637 (Conn. 1991) ("To be valid, [a] will must comply strictly with the requirements of this statute."); Waite v. Frisbie, 47 N.W. 1069, 1071 (Minn. 1891) ("It is a rule in respect to the execution of wills that the requirements of the law shall be strictly complied with.").

33. *See* Stevens v. Casdorph, 508 S.E.2d 610, 611 (W. Va. 1998).

34. *See id.*

will at her desk.[35] The employee then took Miller's signed will across the bank lobby to inform two other bank employees that Miller wanted his will witnessed, and the two willingly signed as witnesses.[36]

Upon Miller's death, his written, signed, and witnessed will was submitted to probate, but the validity of the will was challenged.[37] West Virginia law requires that the testator and the two witnesses be in each other's "presence" at the time the will is signed,[38] and the contestants argued that, because Miller and the two attesting witnesses were on opposite sides of the bank lobby when the will was signed, the will's execution did not strictly comply with this presence technicality.[39] Despite the physical distance between Miller and the witnesses at the time of the will's signing, the trial court found that the will was valid because Miller's intent that the will be legally effective was clear.[40]

On appeal, a divided Supreme Court of West Virginia rejected the will, and the majority based this outcome on its understanding of the traditional rule of strict compliance.[41] It explained: "[M]ere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the [prescribed will-execution formalities]."[42] Thus, as this outcome exemplifies, under the traditional rule of strict compliance, any deviation from the dictates of the will-execution statute renders a will ineffective, and the testator's intent that the formally deficient will be legally effective is irrelevant.

II. COMPREHENSIVE REFORM

Although the majority in *Stephens v. Casdorph* correctly applied the rule of strict compliance when it focused on formal compliance rather than on the testator's intent, its adherence to the traditional law is susceptible to criticism. Indeed, the dissent vehemently admonished

35. *See id.*

36. *See id.*

37. *See id.* at 612.

38. *See* W. VA. CODE § 41-1-3 (2021) ("No will shall be valid unless it be in writing and signed by the testator . . . [and] the signature shall be made or the will acknowledged by him *in the presence* of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will *in the presence* of the testator, and of each other . . . .") (emphasis added).

39. *See* Stevens v. Casdorph, 508 S.E.2d 610, 612-13 (W. Va. 1998). For a picture of the bank lobby in which Miller's will was signed, see SITKOFF & DUKEMINIER, *supra* note 2, at 150.

40. *See Stevens v. Casdorph*, 508 S.E.2d at 613 ("The trial court found that there was substantial compliance with the statute because everyone knew why Mr. Miller was at the bank. The trial court further concluded there was no evidence of fraud, coercion or undue influence. Based upon the foregoing, the trial court concluded that the will should not be voided even though the technical aspects of [the will-execution statute] were not followed.").

41. *See id.*

42. *Id.*

the majority for "slavishly worshiping form over substance."[43] Such adherence to strict formal compliance, the dissent explains, not only "create[s] a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills."[44]

In this passage, the dissent nicely summarizes the reform movement's concerns with the traditional process of wills adjudication. First, when viewed from the perspective of an individual case, the traditional law's coupling of technical formalities with a requirement of strict compliance can undermine the intent of decedents like Homer Haskell Miller.[45] After all, no one questioned whether Miller intended his purported will to be legally effective; instead, the entire dispute focused on whether the presence technicality had been satisfied.[46] As the dissent lamented, invalidating a genuine will because the testator failed to strictly comply with a technicality due to mistake or ignorance is "harsh and inequitable."[47]

Second, from a broader, systemic perspective, the traditional law undermines the primary goal of the entire law of wills, which is to facilitate the exercise of freedom of disposition.[48] Under American law, the donor has nearly unrestrained discretion to decide how her property should be distributed upon death, and this freedom is the

43. *Id.* (Workman, J., dissenting).

44. *Id.*

45. *See, e.g.*, *In re* Pavlinko's Estate, 148 A.2d 528, 528 (Pa. 1959) (describing the invalidation of a will when the decedent's intent was clear as a "very unfortunate" result); *see also* Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & CMTY. PROP. L.J. 27, 28 (2010) ("Requiring strict compliance with . . . execution formalities has led to unfortunate results in notorious cases in which obviously reliable wills were denied probate."); Mann, *supra* note 5, at 1036 (explaining how courts invalidate wills "sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator").

46. *See* Stevens v. Casdorph, 508 S.E.2d 610, 612 (W. Va. 1998) ("The [contestants'] contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided.").

47. *Id.* at 613 (Workman, J., dissenting). Professor John Langbein expresses a critique similar to the one raised in the *Stevens* dissent: "[W]e should shudder that we still inflict upon our citizens the injustice of the traditional law . . . ." 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, 54 (1987). In *Stevens*, the injustice becomes more apparent when one considers that there is reasonable explanation why Miller did not travel across the lobby to be in the witnesses' presence, namely that Miller "was elderly and confined to a wheelchair." *Stevens v. Casdorph*, 508 S.E.2d at 611 n.1.

48. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) ("The main function of the law in this field is to facilitate rather than regulate."); Sitkoff, *supra* note 18, at 644 ("For the most part, . . . the American law of succession facilitates, rather than regulates, the carrying out of the decedent's intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

cornerstone of the succession process.[49] Because of this primacy of freedom of disposition, the overarching goal of the law of wills is to determine and carry out the donor's intended estate plan.[50] However, when a court insists on strict literal compliance with a broad array of technical formalities, not only is injustice inflicted upon the individual decedent whose genuine will is rendered invalid, but also the law's main pursuit of facilitating freedom of disposition is stifled.

It is within this context that a reform movement emerged, which aims to reimagine the wills adjudication process so that it better serves the law's overarching goal of facilitating freedom of disposition. To achieve this end, the reform movement has simultaneously pursued two distinct avenues for change. First, it has proposed to refine the traditional will-execution formalities so that the most technical and burdensome requirements are eliminated.[51] Second, it has proposed to relax the traditional law's insistence on strict compliance by introducing the harmless error rule.[52] Under this rule, noncompliance does not inherently lead to a will's invalidity, but instead the court can validate a noncompliant document if there is clear and convincing evidence that the testator intended it to be legally effective.[53] The drafters of the UPC have been receptive to these proposals and have pursued both routes of reform.[54]

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49. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."); Sitkoff, *supra* note 18, at 643-44 ("The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.").

50. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) ("[T]he controlling consideration in determining the meaning of a donative document is the donor's intention . . . ."); Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) ("The primary goal of the American law of wills is the effectuation of the decedent's testamentary intent."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("One fundamental proposition is that, under a legal system of recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of courts should favor giving effect to an intentional exercise of that power."); *see generally* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016).

51. *See* Langbein, *supra* note 47, at 5 ("Our initial instinct is to amend the Wills Act to reduce the number and complexity of the formalities, so that the testator will have less to get wrong.").

52. *See id.* at 5-7 (explaining that, in addition to refining the formalities of will execution, "[t]he other solution is to abridge the rule of strict compliance by fashioning a harmless error rule to excuse blunders that do occur").

53. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999).

54. *See* UNIF. PROB. CODE §§ 2-502 to 2-503 (UNIF. L. COMM'N 2019).

A. Refined Formality

The first avenue for reform is to refine the formalities of will-execution.[55] The preface to the 1969 UPC explains: "If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible."[56] Professor John Langbein clarifies that the UPC attempted to achieve this objective by "reduc[ing] the number of formal requirements for . . . wills below the minimum levels customary in previous American Wills Acts."[57]

In particular, the 1969 UPC requires that a will be written, signed by the testator, and attested by two witnesses, but the ancillary technicalities are eliminated.[58] The signatures of the testator and the witnesses need not appear at the end of the document,[59] and the testator and the witnesses need not sign in each other's presence.[60] By eliminating these formal burdens, the UPC seeks to increase the likelihood that a decedent who intends to execute a legally effective will complies with the prescribed formalities.[61]

While the original 1969 UPC eliminated these ancillary technicalities in an attempt to make will execution simpler, subsequent iterations of the UPC implemented an additional type of formality refinement. Instead of eliminating formalities, this new type of formality

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55. *See* Langbein, *supra* note 47, at 5-6.

56. UNIF. PROB. CODE, art. 2, part 5, general cmt. (UNIF. L. COMM'N 1969).

57. Langbein, *supra* note 2, at 510.

58. UNIF. PROB. CODE § 2-502 (UNIF. L. COMM'N 1969); *Id.* § 2-502 cmt. ("The formalities for execution of a witnessed will have been reduced to a minimum."); SITKOFF & DUKEMINIER, *supra* note 2, at 143 ("The Will Act provision of the UPC is simpler . . . . It includes none of the presence, subscription, or publication requirements that are found in some states.").

59. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 1969) ("There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute.").

60. *See id.* ("The testator may sign the will outside the presence of the witnesses . . . ."). Moreover, the UPC makes clear that publication is not required. *See id.* ("There is no requirement that the testator publish the document as his will . . . .").

61. *See* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 614 (1988) ("The reduction in legal formalities minimizes the number of cases in which property owners take actions indicating that they probably intend to make a donative transfer, but, nevertheless, fail to meet the formalities because they are unadvised or ill-advised by their attorneys."); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1068 (1996) ("By streamlining the protocols of will execution, lawmakers reduce the danger that testators will fail by accident to abide by a procedural technicality, thereby voiding an estate plan intended to be legally performative."); Lindgren, *supra* note 23, at 546 ("Too many required formalities frustrate the wishes of testators who fail to meet them."); *see also* Langbein, *supra* note 2, at 511 (explaining that "the draftsmen [undoubtedly] balanced the injustice brought about by technical violations of the publication and presence requirements and decided that the incremental cautionary value of those two former requisites was not worth the price in wills invalidated for defective compliance").

refinement adds alternative methods of will execution.[62] Testators still have the option to execute a valid will by signing a written document and having it witnessed,[63] but the UPC now gives testators other ways to do so. The obvious rationale is that, if a testator has more than one option to execute a legally effective will, then there is a greater likelihood that she will effectively do so.[64]

The UPC pursued this type of reform strategy in 1990 when an alternative to the requirement that the testator and witnesses sign the will was adopted. Specifically, the 1990 UPC included a provision that states: "A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution."[65] By including this provision, the UPC allows the required signatures to appear either on the will itself or on a self-proving affidavit.[66]

A self-proving affidavit is a document in which the testator and witnesses declare that a will was properly executed.[67] In many states, these affidavits can make the probate of wills easier,[68] and as such, they are typically signed alongside wills at the same execution ceremony.[69] The UPC provision treating a signature on a self-proving affidavit as if it appears on the will was enacted in response to a line of cases in which courts applying the rule of strict compliance invalidated

62. *See* Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 370 (2016).

63. *See* UNIF. PROB. CODE § 2-502 (UNIF. L. COMM'N 2019).

64. *See* Glover, *supra* note 62, at 377-78.

65. UNIF. PROB. CODE § 2-504(c) (UNIF. L. COMM'N 1990).

66. *See id.*

67. *See* Mann, *supra* note 1, at 40-41.

68. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. r (AM. L. INST. 1999).

69. *See* Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83, 83 (2008) ("Now widely authorized in UPC and non-UPC states alike, the self-proved will procedure is routinely used by estate-planning professionals in supervising will-execution ceremonies.").

wills because the affidavit, but not the will, was signed.[70] By treating a signature on either the will or the accompanying self-proving affidavit as sufficient,[71] the UPC's formality refinement renders wills in these cases valid.[72]

Nearly two decades after allowing the prescribed signatures to appear on a self-proving affidavit rather than on the will itself, the UPC recognized an additional alternative method of will execution when it authorized notarization as a substitute for the traditional formality of attestation.[73] Under this reform, a testator has an option either to have his will notarized or to have it attested by two witnesses.[74] This formality refinement is founded upon the rationale that a notarization formality both conforms to lay expectations regarding the requirements for legal documents and provides equivalent evidence of the testator's intent as does the traditional attestation requirement.[75]

B. Relaxed Compliance

In addition to the refinement of will formalities, the second avenue for reform is to change the consequence of a testator's noncompliance.[76]

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70. *See* UNIF. PROB. CODE § 2-504 cmt. (UNIF. L. COMM'N 1990) ("A new subsection (c) is added to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will in cases where the testator or witnesses got confused and only signed on the self-proving affidavit."). For a discussion of a line of Texas cases, see Mann, *supra* note 1, at 46-58. For a recent example, see *In re* Estate of Chastain, 401 S.W.3d 612 (Tenn. 2012).

71. *See* Mann, *supra* note 1, at 50 ("[T]he nearly identical structure and language of self-proving affidavits and attestation clauses argue for treating the affidavits as the functional equivalent of attestation, at least when the proponent can establish the connection between the affidavit and the will.").

72. UNIF. PROB. CODE § 2-504(c) (UNIF. L. COMM'N 1990); *see* Mann, *supra* note 5, at 1045-46 (praising the UPC for "defining a formality with sufficient particularity to avert formalistic excess"); Weisbord, *supra* note 4, at 160 (describing the UPC provision as "an elegant legislative solution").

73. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 2019) (describing the section as "[a]llowing notarized wills as an optional method of execution"); Anne-Marie Rhodes, *Notarized Wills*, 27 QUINNIPIAC PROB. L.J. 419, 419 (2014) (explaining that a 2008 "amendment to the UPC permitted a notarized will as an option to the traditional witnessed will"); Waggoner, *supra* note 69, at 84 ("The 2008 UPC amendments introduced another new concept in will execution: the notarized will.").

74. UNIF. PROB. CODE § 2-502(a)(3)(B) (UNIF. L. COMM'N 2019) (authorizing wills to be "acknowledged by the testator before a notary public"); *see also* Waggoner, *supra* note 69, at 84 ("Notarization is an option only, and not required.").

75. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 2019); *see also* Waggoner, *supra* note 69, at 84-86. Some scholars have questioned the prudence of authorizing notarized wills. *See* Rhodes, *supra* note 73, at 431-33 (discussing "Five Concerns with a Notarized Will Option"); Reid Kress Weisbord & David Horton, *Inheritance Forgery*, 69 DUKE L.J. 855, 896-97 (2020) ("[W]e are less sanguine about notarized wills . . . [because] permitting notarized wills may actually provide *less* protection [from forgery] than the traditional attestation requirement.").

76. *See* Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence from the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 579-82 (2007).

Under the conventional strict compliance requirement, any formal defect invalidates the will regardless of how much evidence suggests that the decedent intended the will to be legally effective.[77] The reform movement's effort to refine the formalities of will execution is designed to increase the likelihood that a genuine will strictly complies with the prescribed formalities.[78] However, the refinement of formality does not help those testators who intend to execute wills but who, nonetheless, fail to strictly comply with the refined set of formalities. Even when coupled with minimal formalities, the rule of strict compliance can invalidate clearly genuine wills.

The reform movement's second strategy is therefore to alter the way that courts evaluate the validity of wills so that formally defective wills may be valid despite the testator's noncompliance.[79] Under this reform, the rule of strict compliance is replaced with a compliance standard that does not require the court to invalidate a formally defective will.[80] If strict compliance is no longer paramount, then minor technical deficiencies will no longer invalidate wills that decedents intended to be legally effective.

In 1990, the UPC adopted this reform strategy with the enactment of the harmless error rule.[81] Instead of insisting on strict compliance, this rule states: "Although a document . . . was not executed in compliance with [the prescribed formalities], the document . . . is treated as if it had been executed in compliance . . . if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will . . . ."[82] Under this rule, once the court determines that a will does not strictly comply, the will is not inherently invalid. The court's analysis shifts, instead, from whether the will complies with the prescribed

77. *See* Langbein, *supra* note 2, at 489; *see also supra* Section I.B.

78. *See supra* note 61 and accompanying text.

79. *See* Lester, *supra* note 76, at 579-82.

80. *See* Langbein, *supra* note 2, at 489 ("The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?").

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

82. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 1990). This Restatement also supports the harmless error rule. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. L. INST. 1999).

formalities to whether the decedent intended the will to be legally effective.[83] If the court determines by clear and convincing evidence that the decedent intended to execute a will, it overlooks the formal defect and validates the will.[84]

Montana was an early adopter of the UPC's harmless error rule,[85] and in 2002, its supreme court issued one of the first opinions upholding a lower court's use of the rule to save a formally defective will. The case of *In re Estate of Hall* presented the court a situation in which a will was not attested by two witnesses as directed by the state's will-execution statute but was instead notarized.[86] Montana has not adopted the UPC's provision authorizing notarized wills,[87] and a contestant of the will argued that the will should not be admitted to probate because it did not comply with the prescribed attestation requirement.[88]

The court explained, however, that the contestant's "numerous arguments about why the will was improperly witnessed are irrelevant."[89] Because the state legislature had explicitly authorized the use of the harmless error rule, the only issue the court had to decide was whether the decedent intended the notarized document to be his will.[90] Based on testimony from the decedent's wife indicating that he instructed her to destroy his previous will and that he believed the will to be legally effective, the Supreme Court of Montana ruled that the lower court had correctly applied the harmless error rule to validate the formally defective will.[91]

As exemplified by *Hall*, a court can use the UPC's harmless error rule to validate a will that is not witnessed by two witnesses.[92] Moreover, applying this relaxed compliance reform strategy, the court can

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83. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999); *see also* Sitkoff, *supra* note 18, at 648.

84. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 1990).

85. MONT. CODE ANN. § 72-2-523 (2021). Specifically, Montana enacted the harmless error rule three years after its introduction in the 1990 UPC. *See* 1993 Mont. Laws 1776-872.

86. *See In re* Estate of Hall, 51 P.3d 1134, 1135 (Mont. 2002).

87. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 197 (listing Colorado and North Dakota as the only states that have adopted the UPC's provision authorizing notarized wills); *see also infra* notes 126-28 and accompanying text.

88. *See Hall*, 51 P.3d at 1136.

89. *Id.*

90. *See id.*

91. *See id.*

92. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999) ("Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused."); SITKOFF & DUKEMINIER, *supra* note 2, at 182 ("*Hall* is authority for the proposition that the harmless error rule may be invoked to excuse a defect in *attestation*."); Langbein, *supra* note 47, at 52 ("[C]ourts have been quick . . . to excuse attestation defects under the [harmless error rule]."). Attestation errors theoretically could be avoided by eliminating the attestation requirement altogether. *See* Lindgren, *supra* note 23, at 572-73.

also validate a will that the testator did not sign.[93] Notably, however, because the harmless error rule is applicable only to a "document" that has "not [been] executed" in compliance with the prescribed formalities,[94] the UPC does not authorize courts to validate unwritten wills.[95] Under the UPC, a writing remains an essential element of a valid will.

In sum, in an effort to reduce the number of genuine wills that are invalidated due to lack of formal compliance, the UPC has pursued a comprehensive reform strategy, which has two components. First, the UPC refines the traditional will-execution formalities so that the most technical requirements are eliminated and alternative execution processes are authorized.[96] Second, the UPC has relaxed the law's insistence on strict compliance by adopting the harmless error rule.[97] Under this reform, a written document coupled with clear and convincing evidence that the decedent intended the document to constitute a legally effective will is all that is required for the court to validate a noncompliant will.[98]

III. INCREMENTAL CHANGE

Although the UPC has laid out a comprehensive will-execution reform package that entails both the refinement of will-execution formalities and the relaxation of the traditional law's insistence on strict compliance,[99] no state has fully adopted this reform scheme.[100] Some states have adopted reforms that come close to the UPC's comprehensiveness. For instance, Hawaii, Michigan, Montana, and Utah have each eliminated the most onerous technicalities and enacted the UPC's

93. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999) ("Among the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will."); Langbein, *supra* note 47, at 52 ("If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument. An unsigned will is presumptively only a draft . . . but that presumption is rightly overcome in compelling circumstances . . . ."). Unsigned wills could theoretically be validated in ways other than the harmless error rule. *See generally* Horton, *supra* note 16.

94. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019).

95. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999) ("The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless . . . . Only a harmless error in executing a *document* can be excused . . . ."). It seems clear that the harmless error rule cannot be used to validate an oral will. *See* Langbein, *supra* note 47, at 52. However, questions remain regarding whether a will documented in an electronic medium, such as a computer file or text message, rather than a physical writing either satisfies the writing requirement or is an error that can be excused under the harmless error rule. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 192-96.

96. *See supra* Section II.A.

97. *See supra* Section II.B.

98. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019).

99. *See supra* Part II.

100. *See infra* Table I.

harmless error rule.[101] However, none of the four have followed the UPC's lead and recognized notarization as an alternative form of will execution.[102] Additionally, both Colorado and North Dakota have adopted all of the UPC's formality refinement reforms, but neither has adopted the UPC's version of the harmless error rule.[103] These states have therefore largely followed the UPC's comprehensive reform strategy but have not done so completely.

While no state has yet to fully embrace the UPC's reforms, few states still completely adhere to the traditional law of will execution.[104] Fewer than twenty states still ostensibly mandate strict compliance with the traditional formalities, including some form of subscription and presence requirement.[105] As such, most states take a middle-ground approach that moves away from the traditional law but does not go all the way to the UPC's position. This incremental approach to change in wills adjudication entails two primary reform strategies.

First, instead of fully adopting all of the UPC's refined formality proposals,[106] many states have taken a piecemeal approach to formality refinement by selectively eliminating some technicalities while retaining others.[107] Second, instead of adopting the UPC's harmless error rule,[108] some states have relaxed the traditional law's insistence on strict compliance by adopting a harmless error rule that permits the probate court to excuse formal defects under limited circumstances.[109] Moreover, some states have pursued both incremental reform strategies by both selectively eliminating formalities and adopting a partial harmless error rule.[110]

A. Piecemeal Formality Refinement

As explained previously, the UPC's refined formality reform proposal entails both eliminating technicalities and authorizing alternative methods of will execution.[111] Specifically, the UPC eliminates the

101. HAW. REV. STAT. §§ 560:2-502 to -504 (2021); MICH. COMP. LAWS §§ 700.2502 to -.2504 (2022); MONT. CODE ANN. §§ 72-2-522 to -524 (2021); UTAH CODE ANN. §§ 75-2-502 to -504 (West 2021).

102. *See infra* notes 125-28 and accompanying text.

103. *See* COLO. REV. STAT. §§ 15-11-502 to -504 (2022); N.D. CENT. CODE §§ 30.1-08-02 to -05 (2021).

104. *See* Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, WIS. L. REV. 269, 275 (2019) ("Although a few states continue to require rigid adherence to the presence or subscription requirements, most states have loosened in some way the requirements of wills formalities.").

105. *See infra* Table I.

106. *See supra* Section II.A.

107. *See infra* Section III.A.

108. *See supra* Section II.B.

109. *See infra* Section III.B.

110. *See infra* Table I.

111. *See supra* Section II.A.

subscription and presence requirements, and it also allows the mandated signatures to be found on self-proving affidavits and authorizes notarization as an alternative to attestation.[112] Only two states, namely Colorado and North Dakota, have fully adopted this approach to formality refinement.[113] Most states, however, no longer completely adhere to the traditional law's menu of formalities.[114] Instead, many states have adopted piecemeal approaches to formality refinement by eliminating some technicalities and authorizing some alternative forms of will execution. Consequently, there is variation amongst the states regarding precisely what formalities are required.[115]

Consider, for example, the traditional law's subscription requirement, which requires that the testator's signature or the witnesses' signatures or both appear at the end of the will.[116] In 1960, less than a decade before the UPC eliminated the subscription formality, thirty-seven states had will-execution statutes that referenced some form of subscription requirement.[117] Today, however, just twenty states have similar statutes.[118] Consider also the traditional law's presence requirement, which mandates that the testator and witnesses be in each other's presence at the time the will is signed.[119] Prior to the UPC's elimination of this technicality, nearly all states maintained some sort of presence requirement,[120] but as of 2019, only thirty-two states do so.[121]

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112. UNIF. PROB. CODE §§ 2-502 to -504 (UNIF. L. COMM'N 2019).

113. COLO. REV. STAT. §§ 15-11-501 to -505 (2022); N.D. CENT. CODE §§ 30.1-08-02 to -05 (2021).

114. *See infra* Table I.

115. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 142-43.

116. *See supra* Section I.A.

117. *See* Rees, *supra* note 19, at 619, 622-23. Specifically, in his survey of American will-execution statutes, Professor John Rees, Jr. indicates that fourteen states required that the testator's signature appear at the end of the will. *See id.* at 619. Rees also reported that twenty-seven states required that the witnesses subscribe the will. *See id.* at 622-23. Four states required that both the testator and the witnesses sign at the end of the will. *See id.* at 619, 622-23. For an earlier survey of will-execution statutes and its findings regarding subscription, see Bordwell, *supra* note 19, at 12, 16.

118. *See infra* Table I.

119. *See supra* Section I.A.

120. *See* Rees, *supra* note 19, at 621-22.

121. *See infra* Table I. As the presence requirement has waned, a new issue has emerged regarding the timing of attestation. Because the attesting witnesses need not be in the testator's presence when they sign the will, courts and legislatures have had to decide whether to impose a limitation on how long after the testator's signing of the will the witnesses must sign. Some states have imposed specific limitations. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 157. For example, New York requires that witnesses sign within thirty days. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(4) (McKinney 2022). California simply requires that the witnesses sign during the testator's lifetime. *See* CAL. PROB. CODE § 6110(c) (West 2021). The UPC's resolution of this issue is to require that the witnesses sign "within a reasonable time" of the testator's signing. UNIF. PROB. CODE § 2-502(a)(3)(A) (UNIF. L. COMM'N 2019). Following the UPC's lead in its quest to minimize the formal hurdles of will execution, some

In addition to eliminating technicalities,[122] the UPC's refined formality agenda includes alternatives to the traditional formalities.[123] For instance, the UPC provides that signatures appearing on a self-proving affidavit are treated as though they appear on the will itself.[124] Since its appearance in 1990, twenty-two states have adopted a provision that is substantially similar to the UPC's.[125] The 2008 amendments to the UPC also included a second alternative will-execution formality by authorizing notarized wills.[126] Prior to these amendments, no state included such a provision. In the decade-plus since, only Colorado and North Dakota have enacted statutes authorizing notarized wills,[127] and by doing so, they are the only states to have fully adopted the UPC's refined formality reforms.[128]

B. Partial Harmless Error

In addition to the refinement of formality,[129] the UPC's reform agenda includes relaxation of the traditional law's insistence on strict compliance.[130] Specifically, the 1990 UPC introduced the harmless error rule, which allows probate courts to validate a noncompliant will if the will is written and there is clear and convincing evidence that the decedent intended the will to be legally effective.[131] Despite its inclusion in the UPC, only seven states, namely Hawaii, Michigan, Montana, New Jersey, Oregon, South Dakota, and Utah, have fully adopted the harmless error rule.[132] But while most states maintain the traditional rule of strict compliance,[133] four have taken incremental

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states have interpreted their will-execution statutes quite broadly, including by allowing attesting witnesses to sign after the testator's death. *See, e.g.*, *In re* Estate of Miller, 149 P.3d 840 (Idaho 2006); *In re* Estate of Jung, 109 P.3d 97 (Ariz. Ct. App. 2005).

122. The UPC also eliminated the publication requirement. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 2019). Prior to the 1969 UPC, sixteen states had will-execution statutes that contained language suggesting that the testator must publish her will. *See* Rees, *supra* note 19, at 620-21. For an earlier survey of will-execution statutes and its findings regarding the publication requirement, see Bordwell, *supra* note 19, at 14-15. However, as of 2014, nine states have such statutes. *See* Katheleen R. Guzman, *Where Strict Meets Substantial: Oklahoma Standards for the Execution of a Will*, 66 OKLA. L. REV. 543, 609 (2014).

123. *See supra* notes 62-75 and accompanying text.

124. UNIF. PROB. CODE § 2-504(c) (UNIF. L. COMM'N 2019).

125. *See infra* Table I; *see also infra* note 387.

126. UNIF. PROB. CODE § 2-502(a)(3)(B) (UNIF. L. COMM'N 2008).

127. COLO. REV. STAT. § 15-11-502 (2022); N.D. CENT. CODE § 30.1-08-02(1) (2021); *see also* SITKOFF & DUKEMINIER, *supra* note 2, at 197.

128. *See infra* Table I.

129. *See supra* Section II.A.

130. *See supra* Section II.B.

131. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 1990).

132. HAW. REV. STAT. § 560:2-503 (2021); OR. REV. STAT. § 112.238 (2021); MICH. COMP. LAWS § 700.2503 (2022); MONT. CODE ANN. § 72-2-523 (2021); N.J. STAT. ANN. § 3B:3-3 (West 2021); S.D. CODIFIED LAWS § 29A-2-503 (2021); UTAH CODE ANN. § 75-2-503 (West 2021).

133. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 171; Lester, *supra* note 76, at 580.

steps in relaxing the law's insistence on strict compliance.[134] Specifically, California, Colorado, Ohio, and Virginia have enacted variations of the UPC's harmless error rule that limit the circumstances under which probate courts can validate noncompliant wills.[135]

1. Ohio

Of the four states that have enacted a partial harmless error rule, Ohio authorizes probate courts to validate noncompliant wills in the most limited circumstances.[136] In addition to the UPC's requirements that the will be written and that the decedent intended the will to be legally effective,[137] Ohio's harmless error rule also requires that "[t]he decedent sign[] the document . . . in the conscious presence of two or more witnesses."[138] Thus, whereas the UPC's harmless error rule can theoretically be used to validate an unsigned and unwitnessed document,[139] Ohio's harmless error statute specifically requires, not only a written document, but also the decedent's signature and the presence of two witnesses.[140]

To appreciate in what scenarios Ohio's harmless error statute might be used to validate noncompliant wills, one must understand the technicalities of the state's will-execution formalities, and in particular, one must recognize that Ohio has failed to embrace three of the UPC's refined formality proposals. First, Ohio still requires that the testator sign at the end of the will,[141] rather than simply requiring the signature to appear anywhere on the document.[142] Second, Ohio requires that the testator and the attesting witness be in each other's conscious presence at that the time that they sign the document,[143]

134. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 176 n.56; Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 828 n.157 (2014).

135. CAL. PROB. CODE § 6110(c)(2) (West 2021); COLO. REV. STAT. § 15-11-503 (2022); OHIO REV. CODE ANN. § 2107.24 (West 2022); VA. CODE ANN. § 64.2-404 (2021).

136. *See* Kyle B. Gee, *Beyond* Castro's *Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute*, 26 No. 4 OHIO PROB. L.J. 149, 150 (2016) ("Of the . . . states that have statutorily adopted the Harmless Error Doctrine, Ohio's modified version enacted in 2006 is perhaps the most limiting and the least forgiving of noncompliant wills."); *see also* David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 561 (2017) (stating that Ohio's legislation "barely seems like harmless error at all"); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 527 n.20 (2008) (comparing the Ohio statute to the UPC and referring to it as "a significantly more limited harmless error will execution statute").

137. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019).

138. OHIO REV. CODE ANN. § 2107.24 (West 2022).

139. *See supra* notes 92-95 and accompanying text.

140. OHIO REV. CODE ANN. § 2107.24 (West 2022).

141. *Id.* § 2107.03.

142. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 2019).

143. OHIO REV. CODE ANN. § 2107.03 (West 2022).

rather than following the UPC's lead and eliminating the presence requirement altogether.[144] Finally, Ohio has failed to adopt the UPC provision that expressly directs that signatures on a self-proving affidavit attached to a will should be treated as if they appear on the will itself.[145]

Based upon the limited scope of Ohio's harmless error rule and the technicalities of its will-execution statute, it appears that Ohio's probate courts can validate a noncompliant will under three general scenarios. First, on its face, Ohio's harmless error rule would seem to excuse noncompliance in one clear situation, namely when the testator appropriately signs a written will in the presence of two witnesses, but, for some reason, at least one of the witnesses does not sign.[146] This might occur, for instance, when numerous estate-planning instruments are executed at the same time, and one of the witnesses mistakenly passes over the decedent's will in a stack of other documents.[147] It might also occur if the testator and witnesses are ignorant of the requirements of the law,[148] or it might occur when the testator signs the will but the witnesses sign a self-proving affidavit that is attached to the will rather than signing the will itself.[149]

Second, the harmless error rule would seem to excuse noncompliance when the testator and the witnesses sign the will but the testator does not sign at the end.[150] Although there are no reported cases that apply the harmless error rule in this scenario, this conclusion flows from the language of Ohio's will-execution statutes. The provision that prescribes the formalities of will execution states that the will must "be signed *at the end* by the testator,"[151] but the harmless error statute

144. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 2019).

145. *See supra* notes 124-25 and accompanying text.

146. *See, e.g.*, *In re* Estate of Schaffer, No. L-17-1128, 2019 WL 337011 (Ohio Ct. App. Jan. 25, 2019); Mastro v. Glavan, No. 2010-A-0044, 2011 WL 2982412 (Ohio Ct. App. July 22, 2011); *In re* Jordan, No. 08CA773, 2008 WL 3990836 (Ohio Ct. App. Aug. 21, 2008).

147. *See* Robert G. Dykes & Brent A. Andrewsen, *Harmless Error in Will Execution*, 14 OHIO PROB. L.J. 36 (2003).

148. *See In re* Estate of Schaffer, No. L-17-1128, 2019 WL 337011, at *9 (Ohio Ct. App. Jan. 25, 2019) ("We also address the question of law addressed by the probate court as to whether R.C. 2107.24 is designed only for wills which were created to comply with R.C. 2107.03 but failed for some reason and not for wills which were created with ignorance of the statutory requirements. R.C. 2107.24 simply addresses wills which do not meet the formal standards of R.C. 2107.03. The General Assembly could have, but did not, limit the reason for the failure to inadvertent mistakes in execution or unusual circumstances rather than mere ignorance of the law.").

149. *See* George F. Frank, *Harmless Error, or Not? Applying R.C. § 2107.24*, 17 OHIO PROB. L.J. 38 (2006) (suggesting that Ohio's harmless error could apply to situations in which the witnesses sign a self-proving affidavit).

150. *See* David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2043 n.138 (2018) ("The state's harmless error statute creates a little more wiggle room by permitting the judge to admit a document if there is compelling evidence that '[t]he decedent signed the document' (presumably anywhere) . . . .").

151. OHIO REV. CODE ANN. § 2107.03 (West 2022) (emphasis added).

states merely that the "decedent [must] sign[] the document."[152] Because the harmless error statute omits the language that refers to the testator's signature appearing "at the end" of the will,[153] it suggests that probate courts can use the rule to validate wills that were signed elsewhere.

Finally, Ohio's partial harmless error rule would seem to excuse noncompliance when the testator and the witnesses sign the will but at least one witness does not do so in the presence of the testator. Again, there are no reported cases applying the rule under these circumstances, but the statutory language suggests that probate courts should apply the rule in this situation. Indeed, the provision that prescribes the formalities states: "The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses . . . ."[154] By comparison, the harmless error statute requires that the testator "sign[] the document . . . in the conscious presence of two or more witnesses," but it completely eliminates the need for the witnesses to sign.[155] Thus, if the witnesses sign but not in the conscious presence of the testator, the will's execution would not strictly satisfy the requirement of the will-execution statute, but the will theoretically could be validated through the harmless error statute.

2. California

While Ohio's approach to harmless error is extremely narrow and somewhat convoluted,[156] California's approach is both broader and relatively straightforward.[157] In fact, the language of California's harmless error rule largely tracks the UPC's but with the addition of language that limits the rule's scope.[158] Specifically, the statute provides:

> If a will was not executed in compliance with [the attestation requirement], the will shall be treated as if it was executed in compliance with that [requirement] if the proponent of the will establishes by clear and

152. *Id.* § 2107.24.

153. *Compare id.* ("The decedent signed the document . . . ."), *with id.* § 2107.03 ("The will shall be signed at the end by the testator . . . .").

154. *Id.* § 2107.03.

155. *Id.* § 2107.24.

156. *See supra* Section III.B.1.

157. *See* CAL. PROB. CODE § 6110(c)(2) (West 2021). Just because the California statute is less convoluted than Ohio's does not mean that there are no questions regarding the scope of California's harmless error rule. *See generally* Wendel, *supra* note 4. And just because it is broader than Ohio's does not mean it is close in scope to the UPC's harmless error rule. *See* Horton, *supra* note 150, at 2048-50 ("California's partial harmless error rule is actually quite limited.").

158. *Compare* CAL. PROB. CODE § 6110(c)(2) (West 2021), *with* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019). *But see* Wendel, *supra* note 4, at 409-10 (describing other differences in the language of the statutes).

> convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.[159]

With this provision, the California legislature expressly limited the probate court's ability to excuse formal defects to situations in which the testator leaves behind a signed document.[160] California's harmless error statute is therefore narrower than the UPC's because it cannot be used to excuse the omission of the testator's signature.[161] The statute does, however, authorize probate courts to excuse all types of attestation errors, including the complete absence of witnesses.[162] Moreover, based upon the technicalities of California's prescribed formalities,[163] various other types of attestation errors can occur, which probate courts can excuse under the harmless error rule.

First, California's will-execution statute directs the testator to sign in the presence of the witnesses, and therefore a will's execution does not strictly comply with the prescribed formalities when the testator signs outside the witnesses' presence.[164] Second, California has not adopted the UPC provision that authorizes notarized wills; thus, a will that is notarized but is not signed by another witness does not satisfy the attestation formality.[165] Finally, California has also failed to adopt the UPC provision that treats signatures on a self-proving affidavit as appearing on the will.[166] Consequently, a will does not strictly comply with the prescribed formalities when the witnesses sign a self-proving affidavit but not the will itself. Although there are no reported cases in which probate courts have done so, it would seem that the courts could excuse these errors and validate wills when the testator signs outside the presence of witnesses,[167] when the will is notarized, or when the witnesses sign a self-proving affidavit.

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159. CAL. PROB. CODE § 6110(c)(2) (West 2021).

160. *See* Horton, *supra* note 150, at 2048 (explaining the rule "cannot cure problems related to the testator's signature").

161. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019).

162. *See, e.g.*, Estate of Lara, No. H039060, 2014 WL 2108962 (Cal. Ct. App. May 20, 2014); Estate of Stoker, 122 Cal. Rptr.3d 529 (Cal. Ct. App. 2011); *see also* Horton, *supra* note 150, at 2048-50; Wendel, *supra* note 4, at 431-33. Obviously, the statute could also be used to validate a will that contains the signature of only one witness. *See, e.g.*, Estate of Reese, No. D060749, 2013 WL 64379 (Cal. Ct. App. Jan. 7, 2013); *see also* Horton, *supra* note 150, at 2048.

163. *See* CAL. PROB. CODE § 6110 (West 2021).

164. *See id.* § 6110(c)(1).

165. *See infra* Table I.

166. *Id*.

167. *See* Horton, *supra* note 150, at 2048; Wendel, *supra* note 4, at 415-18.

3. Colorado

Colorado's partial harmless error rule is similar to California's but slighter broader in scope.[168] Like California's statute,[169] Colorado's largely tracks the language of the UPC's harmless error rule, but it includes a provision that limits the types of will-execution error that probate courts can excuse.[170] In particular, Colorado's harmless error statute states that the rule "shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse."[171]

Thus, like the UPC,[172] Colorado requires that a will be written,[173] and, like California,[174] it requires that a will be signed by the testator in most instances.[175] Under Colorado's harmless error rule, however, the requirement that a will be signed by the testator is tempered by one minor exception,[176] namely in the so-called "switched wills" cases.[177] These cases arise when two testators, typically spouses, execute wills at the same time.[178] Occasionally, the wills get switched, so that *A* signs *B*'s will, and *B* signs *A*'s will.[179] Because neither *A* nor *B* signed the appropriate will, both wills would be invalid under the traditional rule of strict compliance.[180] Under Colorado's harmless error

168. *Compare* CAL. PROB. CODE § 6110(c)(2) (West 2021), *with* COLO. REV. STAT. § 15-11-503 (2022). Interestingly, the Colorado legislature originally enacted the UPC's harmless error rule but subsequently amended it to its current form. *See* Horton, *supra* note 150, at 2042-43.

169. CAL. PROB. CODE § 6110 (West 2021); *see supra* Section III.B.2.

170. COLO. REV. STAT. § 15-11-503 (2022).

171. *Id.*

172. UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019); *see supra* Section II.B.

173. COLO. REV. STAT. § 15-11-503 (2022).

174. CAL. PROB. CODE § 6110 (West 2021).

175. COLO. REV. STAT. § 15-11-503 (2022).

176. *See* Horton, *supra* note 136, at 560 n.163 (referring to the exception as applying to a "tiny category of cases"). *But see* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 562 n.152 (1982) ("There is every reason to suppose that this situation occurs more frequently than we know from reported cases. In view of the hostile attitude of the American case law on the question, there has been little incentive to appeal unreported decisions or even to attempt probate in such cases.").

177. *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 880 (2012); Langbein, *supra* note 47, at 6.

178. *See* Langbein, *supra* note 47, at 24.

179. *See, e.g.*, *In re* Snide, 418 N.E.2d 656 (N.Y. 1981); *In re* Estate of Pavlinko, 148 A.2d 528 (Pa. 1959).

180. *See* Langbein & Waggoner, *supra* note 176, at 562-63. A potential solution in this situation is to allow courts to reform the language of the will that the decedent actually signed. *See id.*

rule, however, both *A* and *B*'s wills would be valid if their proponents proved by clear and convincing evidence that the testators intended their unsigned wills to be legally effective.[181]

In addition to these relatively rare switched wills cases, Colorado's harmless error rule could be used to validate wills for any type of attestation defect.[182] Technical attestation errors are likely uncommon because Colorado is one of only two states that has fully adopted the UPC's refined formality proposals.[183] Thus, probate courts would not need to use the harmless error rule to excuse subscription or presence errors.[184] Likewise, the courts would not need to apply the harmless error rule to notarized wills or to unsigned wills that are accompanied by a signed self-proving affidavit.[185] Colorado's harmless error rule can therefore be invoked to validate wills that are neither notarized nor signed by two witnesses.

4. Virginia

Virginia's harmless error rule is the broadest of the four partial harmless error statutes. Similar to the harmless error rules enacted in California and Colorado,[186] Virginia's statute includes the UPC's broad language but limits the rule's scope with an additional provision.[187] In particular, Virginia's statute states that it "may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself."[188] Thus, like Colorado, Virginia requires that a will be written and that, in most cases, it be signed.[189] Also like Colorado, this signature requirement is not absolute, as the probate court can use the harmless error rule to validate unsigned wills in switched wills cases.[190]

In addition to the switched wills exception, Virginia's harmless error rule also authorizes probate courts to excuse signature errors when the testator signs a self-proving affidavit rather than the will itself.[191] As explained previously, this type of will-execution error is addressed

181. COLO. REV. STAT. § 15-11-503 (2022).

182. *Id.*

183. COLO. REV. STAT. §§ 15-11-501 to -505 (2022); *see supra* notes 111-13 and accompanying text.

184. *See supra* Section II.A.

185. *See supra* notes 65-75 and accompanying text.

186. *See supra* Sections III.B.2-3.

187. *See* VA. CODE ANN. § 64.2-404 (2021); *see also* J. Rodney Johnson, *Wills, Trusts, and Estates*, 43 U. RICH. L. REV. 435, 436-38 (2008).

188. *See* VA. CODE ANN. § 64.2-404 (2021).

189. *See id.*

190. *See id.*; *see also supra* notes 176-81 and accompanying text.

191. *See* VA. CODE ANN. § 64.2-404 (2021).

in many states by the UPC provision that treats signatures on self-proving affidavits as if they appear on the will.[192] Virginia has not adopted this UPC provision, but has instead elected to resolve this issue under its harmless error rule. The difference between addressing the self-proving affidavit cases by the UPC's refined formality strategy or by Virginia's relaxed compliance strategy is a presumption of testamentary intent.

On the one hand, the UPC's strategy treats the wills in these cases as strictly complying with the signature requirement, and consequently a presumption that the testator intended the will to be legally effective is triggered.[193] The will's proponent therefore need not introduce additional evidence that suggests the testator intended the document to be her will. On the other hand, Virginia's harmless error strategy treats the wills in these cases as not strictly complying with the signature requirement, and therefore a presumption that the testator did not intend the will to be legally effective is triggered.[194] Under the harmless error rule, the will's proponent then has the opportunity to establish that the testate did, in fact, intend the will to be legally effective.[195]

In addition to signature errors in the switched wills cases and in the self-proving affidavit cases, Virginia's statute allows probate courts to excuse any type of attestation error.[196] Virginia's will-execution statute mandates that the testator sign "in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator."[197] Thus, probate courts can use the statute to validate a will when no witnesses sign the will,[198] which might occur because they sign a self-proving affidavit rather than the will itself.[199] Likewise, probate courts can use the statute to validate a will when only one witness signs, and because Virginia has not adopted the UPC provision authorizing notarized wills, this scenario might occur when a testator mistakenly has a will notarized rather than attested. Finally, although there are no reported cases

192. *See supra* notes 65-72 and accompanying text.

193. *See id.*

194. *See* VA. CODE ANN. § 64.2-404 (2021).

195. *See id.*

196. *See id.*

197. *Id.* § 64.2-403(C).

198. *See, e.g.*, Palesis v. Hlouverakis, Nos. 13-275, 13-500, 2014 WL 8240007, at *4 (Va. Cir. Ct. May 29, 2014) ("In the unusual circumstances of this case, the evidence is sufficient to meet the high standard [of the harmless error rule]. As noted above, John, Mary and Manny saw Nick sign [the purported will] even though they did not sign as witnesses.").

199. Although there are no reported cases on this issue, it seems clear that, because Virginia's harmless error rule expressly applies to situations in which the testator signs a self-proving affidavit, it would also apply to situations in which the witnesses sign a self-proving affidavit.

holding as such, because Virginia's attestation statute requires the witnesses' "presence" and that they "subscribe" the will,[200] the harmless error statute would seem to excuse presence and subscription errors.[201]

In sum, Virginia's partial harmless error statute stands alongside those of Ohio, California, and Colorado as examples of one of the two avenues for incremental change in wills adjudication.[202] These statutes allow probate courts to validate noncompliant wills under circumstances that are more limited than under the UPC's harmless error rule.[203] The other, more prevalent avenue for incremental will-execution reform is to selectively refine the formalities of will execution.[204] This incremental approach to reform reduces the technicalities of will execution, although not as much as UPC's refined formality proposal.[205] Moreover, these two reform strategies are not mutually exclusive, as a state can both eliminate some execution technicalities and grant probate courts limited discretion to validate noncompliant wills. Although there is much variation amongst the states, it is clear that policymakers prefer to pursue reform of the wills adjudication process incrementally rather than to adopt the UPC's comprehensive reform strategy.

IV. POLICY IMPLICATIONS

While the variety and pervasiveness of incremental change in wills adjudication are clear,[206] precisely how state policymakers should implement these types of reform is uncertain. Consider, for example, the problems that arise when the testator and/or witnesses sign a self-proving affidavit rather than the will itself.[207] Under traditional law, the will is invalid because it does not strictly comply with the requirement that the prescribed signatures appear on the will.[208] Recognizing that a will in this scenario should not necessarily be void, policymakers in most states have implemented incremental reforms that a court can use to validate the will. However, policymakers have not been uniform in their reform strategies.

200. VA. CODE ANN. § 64.2-403(C) (2021).

201. Indeed, relying simply on the language of Virginia's statues would lead one to believe that its harmless error rule should apply to situations in which the witnesses do not subscribe the will but instead sign elsewhere on the document. However, as discussed later, Virginia's courts have interpreted the subscription language in the will-execution statute to simply require the witnesses' signatures and not that those signatures appear at the end of the document. *See infra* note 276 and accompanying text. Consequently, courts need not turn to the harmless error rule when the witnesses do not sign at the end.

202. *See supra* Section III.B.

203. *See supra* Section II.B.

204. *See supra* Section III.A.

205. *See supra* Section II.B.

206. *See supra* Part III.

207. *See supra* notes 67-72 and accompanying text.

208. *See* Mann, *supra* note 1, at 46-58.

Most states have taken a refined formality reform strategy by adopting the UPC provision that treats signatures on a self-proving affidavit as if they appear on the will.[209] Under this strategy, a will is considered to be in strict compliance regardless of whether the will or a self-proving affidavit is signed.[210] Other states, by contrast, have taken a relaxed compliance reform strategy, which treats wills in the self-proving affidavit cases as not strictly complying with the prescribed formalities but which allows courts to validate these wills if there is clear and convincing evidence that they were intended to be legally effective.[211] Policymakers in most states, therefore, agree that wills in the self-proving affidavit cases should not necessarily be invalid, but questions remain regarding which reform strategy is preferable.

To answer these questions, a clear understanding of the relative costs and benefits of these types of reform is needed so that policymakers can chose the strategy that produces the greatest net benefit. In this regard, the wills adjudication process can be analyzed through the economic lens of decision theory.[212] Decision theory suggests that when a decisionmaker, such as a probate court, makes a binary decision, such as whether a will is authentic or not, it should use a decisionmaking process that minimizes the total costs of making the decision.[213]

Perhaps most intuitively, decision theory suggests that error costs should be considered when selecting a decisionmaking process.[214]

209. *See infra* Table I.

210. *See* UNIF. PROB. CODE § 2-504(c) (UNIF. L. COMM'N 2019).

211. *See supra* Section III.B.

212. *See* C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 41-42 (1999) ("Decision theory sets out a *process* for making factual determinations and decisions when information is costly and therefore imperfect. It formulates a methodology for determining when to make decisions on the basis of current information and when to gather and consider further information before making a decision."); Keith H. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 498 (2001) ("Decision theory provides a powerful framework for understanding situations in which choices among alternative actions must be based on imperfect information. It helps us understand the tradeoffs between, in effect, convicting the innocent and absolving the guilty."); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1065 (1968) ("[T]he typical decision-theory problem involves the proper course of action to be taken by a decisionmaker who may gain or lose by taking action upon uncertain data that inconclusively support or discredit differing hypotheses about the state of the real but nonetheless unknowable world."); *see also, e.g.*, Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 229-36 (2019).

213. *See* Beckner & Salop, *supra* note 212, at 46 ("A rational decision maker will try to minimize the sum of the two types of costs. This is the second key insight of the decision theoretic approach."); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 910 (2009) ("The optimal rule from among a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs."); Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 879 (2011) ("[D]ecision theory's instruction [is] to craft legal rules so as to minimize the sum of decision and error costs.").

214. *See* Hylton & Salinger, *supra* note 212, at 502 ("Decision theory implies that the best legal rule minimizes the overall expected costs of error. The three important factors

These costs relate to the accuracy of the decisionmaking process, and they entail the harm produced when the process makes incorrect decisions. For instance, error costs are generated when a probate court makes an incorrect determination regarding the authenticity of a purported will, which can occur in two scenarios. First, a false-negative outcome occurs when a probate court determines that a truly authentic will is inauthentic.[215] Second, a false-positive outcome occurs when a probate court decides that an inauthentic will is authentic.[216] When a probate court makes either type of erroneous decision, error costs are produced because the decedent's intent is undermined.[217]

While accuracy certainly should be a goal of any decisionmaking process, decision theory suggests that error cost minimization should not be the sole consideration. Instead, it recognizes that the process of making accurate decisions can generate costs as the decisionmaker gathers and reviews information relevant to the decision.[218] These costs are referred to as decision costs,[219] and in the context of the wills adjudication process, they include the time, money, and effort expended by the parties and the court in litigating and deciding the issue of whether a will should be admitted to probate. Decision theory suggests that, while increased decision costs might lead to more accurate decisions, reforms to a decisionmaking process should not be

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suggested by the analysis are the base rate probability of harm, the ratio of the false conviction to the false acquittal probability (relative error rates), and the ratio of the false conviction to the false acquittal cost (relative error costs)."); Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 864 (2007) ("Error costs are minimized by the joint minimization of the costs of Type I and Type II errors, as measured by their frequency and the severity of harm that results from their occurrence.").

215. *See* Kelly, *supra* note 177, at 880; Sitkoff, *supra* note 18, at 647.

216. *See* Kelly, *supra* note 177, at 880; Sitkoff, *supra* note 18, at 647.

217. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 142; *see generally* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016).

218. *See* Beckner & Salop, *supra* note 212, at 46 (explaining that "gather[ing] and consider[ing] additional information" can "reduce the risk of error" and increase the likelihood of "mak[ing] a better decision"); Michael Owens, Comment, *A Cure for Collusive Settlements: The Case for a Per Se Prohibition on Pay-for-Delay Agreements in Pharmaceutical Patent Litigation*, 78 MO. L. REV. 1353, 1380 (2013) ("The more intensive the process of gathering and using additional information, the more likely a court can reach a correct . . . determination.").

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

implemented if decision costs increase to a greater extent than error costs decrease.[220] Put simply, increased accuracy should not be pursued if the cost of making more accurate decisions is too great.[221]

In addition to error costs and decision costs, other costs can be factored into the cost-benefit analysis. In particular, policymakers should recognize that the process of changing the law might generate costs.[222] These costs can be referred to as transition costs,[223] and they can include, among other things, the costs associated with legislatures formulating and courts implementing new laws.[224] "The proper role of a sensitivity to legal transition costs," Professor Michael Van Alstine suggests, "is as one important input in a reasoned decisionmaking process."[225] He explains further that "[s]ubstantive benefit may remain the principal focus in the politics of legal change," but "[a]s the likely extent of transition costs increases, . . . this input suggests that lawmakers should proceed with increasing care in weighing any particular law reform proposal."[226] Transition costs are therefore simply one type of cost, alongside error costs and decision costs, that policymakers should consider when changing the law.

To provide real world insights into policymakers' incremental reform efforts, this Article's policy discussion is supplemented by an original empirical study of one of the many jurisdictions that has taken an incremental approach to reform. In particular, this Article presents the findings of a study of 657 estates that were opened in the probate courts of Hamilton County, Ohio, which contains the city of Cincinnati and its surrounding metropolitan area.[227] The data for this study were gathered from a search of the online probate records of decedents' estates that were opened in Hamilton County in the first quarter of 2014.[228]

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220. *See* Beckner & Salop, *supra* note 212, at 46; Bone, *supra* note 213, at 910.

221. *See* Beckner & Salop, *supra* note 212, at 46 ("The efficiency of gathering and using additional information depends on the cost of the information versus the benefits."); Owens, *supra* note 218, at 1380-81 ("The desirability of discovering additional information . . . depends on the costs of obtaining that information relative to the benefits of considering it.").

222. *See generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

223. *See id.* at 795.

224. *See id.* at 845-50.

225. *Id.* at 858.

226. *Id.*

227. *See Hamilton County About,* HAMILTON CNTY. (last visited July 17, 2022), http://www.hamiltoncountyohio.gov/about [https://perma.cc/Y3QS-HY88].

228. *Court Record Search*, HAMILTON CNTY. PROB. CT. (last visited July 17, 2022), https://www.probatect.org/court-records [https://perma.cc/HTZ7-A96G]. The initial search of these records revealed that 700 estates were opened during the search period. From these 700, two types of estates were excluded to arrive at the total sample of 657 estates. The first set of excluded estates (totaling eleven estates) included ancillary probate estates that involved decedents who were domiciled at death in a state other than Ohio but who owned real

Of the 657 probate matters in this study, 424 (64.5%) included the submission of a will and 233 (35.5%) did not. The docket of each of the 657 probate matters was reviewed to determine whether any wills were denied probate due to lack of formal compliance and whether any wills were validated under Ohio's partial harmless error rule. Moreover, for each of the 424 purported wills that was submitted for probate, a copy was reviewed to determine whether the will, on its face, complies with the formalities prescribed by Ohio's will-execution statute.

As explained above, Ohio's incremental approach to reform has kept the prescribed will-execution formalities rather stringent while slightly relaxing the traditional law's insistence on strict compliance through the adoption of an extremely narrow partial harmless error rule.[229] This modest approach to reform makes Ohio's probate system a good context to evaluate the potential pitfalls of incremental change in wills adjudication, including the possible error costs, decision costs, and transition costs that might accompany incremental reform strategies.

A. Error Costs

Because the reform movement was sparked by the realization that the traditional law results in the invalidity of too many truly genuine wills, error cost minimization is a primary goal of the UPC's comprehensive reform proposal.[230] To be sure, a testator's strict compliance with numerous technical formalities provides robust evidence that she intended the will to be legally effective, and therefore a probate court can safely validate the will with little risk that it is actually inauthentic.[231] By contrast, however, a decedent's failure to strictly comply with various technicalities does not necessarily mean that the will is truly

property in Ohio. The second set of excluded estates (totaling thirty-two estates) included decedents who died prior to the effectiveness of Ohio's partial harmless error rule.

In addition to full administration of decedents' estates, Ohio recognizes two streamlined procedures that are available to estates whose assets are below certain thresholds. First, summary release from administration is available to estates that include assets that do "not exceed the lesser of five thousand dollars or the amount of the decedent's funeral and burial expenses." OHIO REV. CODE ANN. § 2113.031 (West 2022). Second, release from administration is available to estates that include assets that do not exceed either $35,000 or $100,000 if other criteria are satisfied. *Id.* § 2113.03. Of the 657 estates in this Article's study, 334 were subject to full administration, with 267 involving wills and 67 not involving wills; 180 were released from administration, with 103 involving wills and 77 not involving wills; and 143 were summarily released from administration, with 54 involving wills and 89 not involving wills.

229. *See supra* Section III.B.1.

230. *See* Crawford, *supra* note 104, at 290-91.

231. *See* Sitkoff, *supra* note 18, at 647 ("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 or her will."); Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 311 n.18 (2011) ("Few people would undergo [the will-execution] ceremony without holding testamentary intent.").

inauthentic.[232] A decedent's failure to strictly comply could be due to mistake or ignorance of the law, and so the automatic invalidity of noncompliant wills presents a potentially significant risk of inaccurate authenticity decisions.[233]

Stated in the parlance of decision theory, the reform movement suggests that the traditional law minimizes false-positive outcomes but generates false-negative outcomes.[234] The process can therefore be made more accurate if reform decreases the risk of false-negative outcomes while not increasing the rate of false-positive outcomes.[235] The UPC's refined formality strategy pursues greater accuracy in the wills adjudication process by eliminating the technical requirements that pose the greatest risk of invalidating genuine wills and maintaining the formalities that provide the most robust evidence that the decedent intended a will to be legally effective.[236] By contrast, the UPC's relaxed compliance reform strategy pursues greater accuracy by vesting probate courts with the power to validate noncompliant yet genuine wills, thereby avoiding false-negative outcomes.[237]

Although state policymakers seem to agree with the drafters of the UPC that the traditional law is not the most accurate wills adjudication process, by opting for incremental reform, these policymakers might be expressing doubt regarding whether the UPC's comprehensive reform proposal is the most accurate. For instance, with respect to the refined formality reform strategy, the UPC strips away the technicalities of will execution to a bare minimum,[238] but most state policymakers have taken a piecemeal approach to formality refinement,

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232. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 146 ("[B]y establishing a conclusive presumption of invalidity for an imperfectly executed instrument, the strict compliance rule denies probate even if the defect is innocuous and there is overwhelming evidence of authenticity . . . .").

233. *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.").

234. *See* Kelly, *supra* note 177, at 880 ("Currently the concern about [false-negative outcomes] may be greater than the concern about [false-positive outcomes]. Most disputes over execution formalities . . . seem to involve technical defects . . . with little or no risk of fraud. If these cases are representative of all cases, perhaps there is a much greater chance of denying probate to a document the testator did intend to be her will . . . than probating a document the testator did not intend to be her will . . . .").

235. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 147 ("[T]he question [is] whether relaxing the number of formalities, relaxing the exactness with which those formalities must be complied, or both might reduce the rate of false negatives without increasing the rate of false positives.").

236. *See supra* Section II.A.

237. *See supra* Section II.B.

238. *See supra* Section II.A.

eliminating some traditional requirements but maintaining others.[239] The decision to selectively eliminate formalities might be driven by concerns that a significant reduction in formality could lead to higher rates of false-positive outcomes.

The UPC's comprehensive formality refinement likely reduces the risk of false-negative outcomes because, when potential stumbling blocks are removed, a decedent who intends to execute a will is less likely to make a mistake in the execution process.[240] As the will-execution process becomes less formal, however, the risk of false-positive outcomes increases because a simpler process provides less assurance that the decedent truly intended a document to constitute a legally effective will.[241] State policymakers might therefore opt for piecemeal formality refinement in order to selectively eliminate the formalities that they believe present the greatest risk of false-negative outcomes, while maintaining other formalities so as not to significantly increase the risk of false-positive outcomes. Put differently, state policymakers that have taken a piecemeal approach to formality refinement seem to have assessed the relative risk of false-positive outcomes and false-negative outcomes differently than the drafters of the UPC, and they have taken an incremental approach to formality refinement that reflects this different risk assessment.

Likewise, state policymakers might have concerns regarding the UPC's relaxed compliance reform strategy, as they might fear that the discretion granted to probate courts under the UPC's harmless error rule is too broad. Some noncompliant wills are clearly authentic, so the court's ability to validate these wills reduces the rate of false-negative outcomes with little risk of increasing the rate of false-positive outcomes. Recall, for example, the previously discussed case of *Stevens v. Casdorph* in which the court invalidated a clearly authentic will because the testator and the attesting witnesses were not in each other's presence at the time the will was executed.[242] If a court has the ability to validate noncompliant wills in these easy cases, then the accuracy of the wills adjudication process will increase because there is a high likelihood that the court will exercise its discretion correctly, thereby reducing the rates of false-negative outcomes while not increasing the rates of false-positive outcomes.

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239. *See supra* Section III.A.

240. *See supra* note 61.

241. *See* Lindgren, *supra* note 23, at 546 ("Too many required formalities frustrate the wishes of testators who fail to meet them. Too few formalities do not give us reliable enough evidence of what the testator wanted.").

242. 508 S.E.2d 610 (W. Va. 1998); *see also supra* notes 33-47 and accompanying text.

Not all decisions that a probate court must make under the UPC's harmless error rule are so easy, however.[243] In more difficult situations, where the decedent's intent is murky, a court might exercise its discretion to validate noncompliant wills that are truly inauthentic. When these more difficult decisions are considered alongside the easier ones, it is less clear that state policymakers should have confidence in probate courts' ability to make the wills adjudication process more accurate.[244] Indeed, if the rate of false-positive outcomes increases more than the rate of false-negative outcomes decreases because the court erroneously validates inauthentic wills, then the UPC's harmless error rule might actually decrease the accuracy of the will-authentication process.

State policymakers might therefore opt for incremental reform to ensure that the probate court's authority to validate noncompliant wills increases the overall accuracy of the wills adjudication process. In particular, by enacting partial harmless error rules, state policymakers seek to limit the ability of probate courts to validate noncompliant wills to situations that produce the most obvious will-execution mistakes. For example, Virginia and Colorado deny probate courts the ability to excuse most errors related to the testator's signature, such as the complete absence of a signature.[245] However, both allow courts to validate noncompliant wills in the switched wills cases.[246] By limiting the court's authority to validate noncompliant wills in these limited cases that produce obvious error costs,[247] state policymakers in Virginia and Colorado seem to express less confidence in the ability of probate courts to accurately validate noncompliant wills in the most difficult cases than do the drafters of the UPC.

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243. *See* UNIF. PROB. CODE § 2-503 cmt. (UNIF. L. COMM'N 2019) ("The larger the departure from [the prescribed] formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent.").

244. *See* Glover, *supra* note 62, at 386-96.

245. *See supra* Sections III.B.1-4. A will that lacks the testator's signature raises difficult questions regarding the testator's intent. John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills—The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 31 (2004) ("Failure to sign the will is seldom harmless, because it raises a grave doubt about whether the testator intended the instrument to be his or her will.").

246. *See* COLO. REV. STAT. § 15-11-503 (2022); VA. CODE ANN. § 64.2-404 (2021).

247. *See* UNIF. PROB. CODE § 2-503 cmt. (UNIF. L. COMM'N 2019) ("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."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999) ("A particularly attractive case for excusing the lack of the testator's signature is a crossed will case, in which, by mistake, a wife signs her husband's will and the husband signs his wife's will."); Langbein, *supra* note 47, at 6 ("Nobody favors abolishing the requirement that the testator sign his will, yet many would agree that noncompliance with the signature requirement should be excused under extraordinary circumstances, as in the switched-wills cases . . . .").

Although state policymakers have legitimate concerns regarding the efficacy of comprehensive reform in minimizing error costs, the incremental reforms that they prefer do not necessarily result in greater accuracy. If state policymakers had perfect information regarding precisely what will-execution errors lead to inaccurate authenticity decisions and how frequently those errors occur, then they could craft incremental reforms that are narrowly tailored to ensure that they reduce error costs. State policymakers, however, are not in a good position to access and assess this information.

Reported case law can provide some guidance in this regard, but published opinions alone do not provide the full picture.[248] The vast majority of probate matters do not produce published opinions,[249] but instead, the data that legislatures need to successfully implement incremental reform typically is buried in the probate files of county courthouses strewn across the states.[250] Because of the time and effort that compilation of this data requires, it is unlikely that state legislatures have sufficient information to successfully craft incremental reforms that are effective in minimizing error costs.

This problem of inadequate information could arise in the context of the refined formality reform strategy. Under the UPC's broad refinement proposal, nearly all technicalities are eliminated, and consequently, the vast majority of minor technical errors can be avoided by reform.[251] Some errors might occur frequently and some might occur rarely, but all are addressed by the UPC's comprehensive reforms. By contrast, state policymakers that take a piecemeal approach to formality refinement selectively choose which formalities to discard, and without sufficient information, they might eliminate formalities that rarely produce errors. If these formalities are the only ones eliminated, then the accuracy of the wills adjudication process will not increase significantly, if at all.

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248. *See* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1432 (2013) ("Ultimately, then, we should rate a data set composed of published cases in the inheritance realm as suggestive, rather than definitive, and we cannot ignore the possibility that results gleaned from published cases comprise an artifact of the data set.").

249. *See id.* at 1430-31 ("[O]nly a fraction of probate proceedings degenerate into a will contest, only a fraction of those contests culminate in a decision rather than a settlement, and only an (apparently shrinking) fraction of those decisions ultimately appear, in print or *in silica*, as disseminated opinions.").

250. *See* Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 344 (2016) (describing the conventional way in which probate research was conducted as "pawing through physical court files in a local courthouse as the clerks of court bustle about trying to keep the administration of justice moving"). Increasingly, probate records are accessible through online electronic filing systems. *See id.* However, these systems generally are not as easily navigable as the online databases that contain published opinions. *See* Hirsch, *supra* note 248, at 1430 ("The cases are helpfully collected in electronic databases that the researcher can search by algorithm to pinpoint pertinent units of data.").

251. *See* UNIF. PROB. CODE § 2-502 cmt. (UNIF. L. COMM'N 1990) ("The formalities for execution of a witnessed will have been reduced to a minimum. . . . The intent is to validate wills which meet the minimal formalities of the statute."); *see also supra* Section II.A.

Consider, for example, the subscription requirement for the testator's signature.[252] Under this traditional formality, the testator's signature must appear at the end of the will,[253] but the UPC and many states have eliminated this requirement.[254] While the abandonment of the subscription technicality seems sensible, just how much its elimination increases the accuracy of the wills adjudication process is unclear. Indeed, to understand how elimination of the subscription requirement reduces error costs, state policymakers in states that require subscription must know how frequently decedents sign a will in places other than at the end of the will.

As explained above, this information is not readily accessible, but although it is tedious and time-consuming to compile this data, it is not impossible. For instance, 424 wills were reviewed for this Article's original empirical study of the probate records of Hamilton County, Ohio to see whether each testator satisfied Ohio's subscription requirement. Of the wills in the study's sample, all were signed by the testator at the end of the document, or put differently, none of the wills in the sample contained subscription errors.[255] Thus, if the Ohio legislature chooses to pursue a piecemeal refinement formality strategy by only eliminating the subscription requirement, the data suggests that error costs likely would not be significantly reduced because the subscription requirement seldom generates errors.

In addition to its effect on refined formality reform strategies, imperfect information regarding the types of will-execution errors that occur can also impede policymakers' ability to successfully craft relaxed compliance reform strategies. Generally, one would expect that the more narrowly state policymakers craft a harmless error rule, the less frequently the rule would be invoked by probate courts because fewer will-execution errors fall within the rule's scope. Consider, for example, California's partial harmless error rule, which applies only to attestation errors.[256] Because the rule does not apply to will-execution errors related to the testator's signature, a potentially large subset of

252. *See supra* Section I.A.

253. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 156.

254. *See infra* Table I.

255. There are two possible exceptions to this statement. First, one will included an "Addendum" after the testator's and witnesses' signatures that listed certain identifying information of beneficiaries who were named in portions of the will appearing before the signatures. *See* Last Will and Testament of Alice C. Weyer at 5, *In re* Estate of Weyer, No. 2014000241 (Ohio Prob. Ct. Hamilton Co. Jan. 22, 2014). Under Ohio's subscription requirement, whether Weyer's will was subscribed depends upon whether the identifying information found in the Addendum constitutes a dispositive provision of the will. *See In re* Estate of Metz, No. H–05–024, 2006 WL 2641862 (Ohio Ct. App. Sept. 15, 2006). The second possible exception involves a will that appears to be signed by the testator on an "Affidavit" attached to the will rather than on the will itself. Last Will and Testament of Michael J. Tometich, *In re* Estate of Tometich, No. 2014000529 (Ohio Prob. Ct. Hamilton Co. Jan. 10, 2014); *see also infra* note 288.

256. *See supra* Section III.B.2.

noncompliant wills is excluded from the rule's purview.[257] With signature errors excluded, the question then becomes how substantial is the subset of noncompliant wills that does fall within the rule's scope.

Professor David Horton found a potential answer to this question when he conducted an empirical study of probate records from Alameda County, California. In a study of 1,543 cases, he discovered that the harmless error rule was invoked in only five.[258] Put differently, California's partial harmless error rule was applicable to less than one percent of the cases in Horton's sample. As explained above, the infrequency of the applicability of California's harmless error rule is due partly to the exclusion of signature errors from its scope. However, Horton explains the rule was infrequently invoked also because the errors that the rule was designed to address rarely occurred. He explains:

> [T]he specific Wills Act glitches that [the] harmless error [rule] was designed to remedy were practically nonexistent . . . . [T]he reform was inspired, in part, by outrage over cases in which courts nullified a purported will due to the fact that the witnesses were not "present at the same time" when the testator signed . . . the will. This problem arose just once, in an uncontested matter.[259]

This finding should not be surprising because, again, state legislatures lack information regarding precisely what types of will-execution errors occur and their frequency. Without this information, state policymakers run the risk of implementing incremental will-execution reforms that do little to make the wills adjudication process more accurate.

While California's harmless error rule grants probate courts the authority to excuse all types of attestation errors, Ohio's harmless error rule is even more limited in scope.[260] Although Horton found that California's narrow rule is rarely invoked, one might assume that Ohio's narrower rule is invoked even less frequently. Supporting this assumption, this Article's study of Hamilton County probate records reveals that Ohio's extremely limited harmless error rule was, in fact, never invoked in the study's sampled cases. This lack of use is partly due to the fact that the vast majority of the wills that were submitted to probate in Hamilton County strictly complied with the prescribed formalities.[261] For example, as explained above, all testators who signed a will in the study's sample did so at the end of the document,

257. *See* Horton, *supra* note 150, at 2063 ("California's partial harmless error rule limits lawsuits by excluding defects related to the signature prong of the Wills Act.").

258. *See id.* at 2050.

259. *Id.* at 2063.

260. *See supra* Section III.B.1.

261. The few exceptions are the cases in which signatures appear on a self-proving affidavit rather than the will itself. The wills in these cases were nonetheless treated as if they strictly complied. *See infra* notes 282-91 and accompanying text.

thereby satisfying Ohio's subscription requirement.[262] As the Hamilton County data suggest, by severely limiting the scope of the harmless error rule, state legislatures run the risk of undermining the goal of error costs minimization. Moreover, this risk is exacerbated by the lack of information regarding the types and frequency of the will-execution errors that actually occur.

In addition to state legislatures' lack of information regarding decedents' behavior and the types and frequency of will-execution errors that they make, state legislatures also lack information regarding how probate courts react to will-execution errors when they occur.[263] While the traditional law ostensibly requires strict compliance with prescribed formalities,[264] probate courts have been known to unilaterally relax the traditional law's insistence on strict compliance with particular technicalities in some cases.[265] However, as explained above, the published case law cannot provide state legislatures a complete picture of precisely how probate courts apply the law,[266] and without this information, incremental reform might be narrower in scope than it appears on its face. Because incremental will-execution reforms tend to focus on the situations that most clearly generate error costs, these situations are also prime targets for probate courts to address through judicial action. If state legislatures take action to address issues that probate courts have already tackled, then incremental reform is ineffective in reducing error costs.

This judicial relaxation of the traditional law can undermine the effectiveness of both types of incremental reform. Consider, for example, the subscription requirement of witnesses, which on its face, mandates that the attesting witnesses sign at the end of the will.[267] Under traditional law, a will that is signed by the witnesses but not at the end of the document would seem to be wholly or partially invalid. However, legislatures in many states have taken incremental reform steps to ensure that truly genuine wills are validated even if the witnesses sign somewhere other than at the end of the document. Some states have addressed this issue by amending the will-execution statute to

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262. *See supra* note 255 and accompanying text.

263. *See* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1101 (2015) ("[I]t is hard to assess the sagacity of the harmless error rule without data on how often strict compliance jurisdictions reject near-miss wills.").

264. *See supra* Section I.B.

265. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 163 ("To avoid . . . harsh result[s], some courts have occasionally excused or corrected one or another innocuous defect in execution."); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 554 (2000) ("Unwilling to wait for superior intervention, [some] courts have added their own creative glosses onto the statutes in order to save technically-defective wills."); *see generally* Peter W. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337 (2017).

266. *See supra* notes 248-50 and accompanying text.

267. *See supra* Section I.A.

require that the witnesses merely sign, rather than subscribe, the will,[268] and others have maintained the traditional statutory reference to subscription but have enacted a harmless error rule that would seem to apply to the subscription technicality.[269] Under both approaches, state policymakers have identified errors with the subscription requirement for witnesses as producing an unnecessary risk of false-negative outcomes that can be reduced through reform.

Virginia's legislature, for instance, has taken the latter incremental reform strategy.[270] As explained previously, Virginia's will-execution statute requires that the attesting witnesses "*subscribe* the will in the presence of the testator,"[271] thereby mirroring the language of the traditional law as found in the Statute of Frauds and Wills Act.[272] Although Virginia's legislature has maintained this traditional subscription language, it enacted a partial harmless error rule that applies to all attestation errors, including ostensibly the subscription requirement.[273] The way in which Virginia's courts have interpreted the subscription requirement, however, has rendered its harmless error rule inapplicable to subscription errors.

Although Virginia's will-execution statute expressly includes the word "subscribe,"[274] Virginia's courts have interpreted the statute as not requiring that the witnesses sign at the end of the document.[275] For instance, in a case in which a witness wrote her name in the body of a will, the Supreme Court of Virginia explained that "the statute mandates no specific form nor particular place on the document for the witness' signature."[276] Thus, while Virginia's harmless error rule is narrow on its face because it expressly does not allow probate courts to excuse all types of signature errors,[277] the lax interpretation that

268. *See supra* notes 116-18 and accompanying text.

269. *See supra* Section III.B.

270. *See supra* Section III.B.4.

271. VA. CODE ANN. § 64.2-403(C) (2021) (emphasis added).

272. *See supra* Section I.A.

273. VA. CODE ANN. § 64.2-404 (2021).

274. *Id.* § 64.2-403(C).

275. *See* Peake v. Jenkins, 80 Va. 293, 296 (Va. 1885) ("The statute requires the attestation of two subscribing witnesses . . . [but] no form or particular place on the paper is required . . . .").

276. Robinson v. Ward, 387 S.E.2d 735, 738 (Va. 1990) (adding that "there is no statutory guidance for what constitutes a sufficient subscription of a will"); *see also* Draper v. Pauley, 480 S.E.2d 495, 496-97 (Va. 1997) (relying upon *Robinson* to validate a will under similar circumstances). Although Virginia's courts do not interpret the subscription language as requiring the signature to appear at the end of the document, other courts could plausibly interpret the language to require that the signature appear at the end. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 stat. n.4 (AM. L. INST. 1999) (suggesting that "subscribed" is "a word that could be interpreted as requiring the signature to appear at the end of the will"); Rees, *supra* note 19, at 619 (suggesting that, when a will execution includes the word "subscribed," the "inference is possible that a signing at the end is meant").

277. *See* VA. CODE ANN. § 64.2-404(B) (2021).

Virginia's courts have given the subscription language further limits the rule's applicability. In this way, judicial action can reduce the need for legislative reforms in reducing the error costs of the wills adjudication process.

Although Virginia's legislature enacted a partial harmless error rule that seemingly should apply to will-execution errors related to the witness subscription requirement, other states have addressed this issue through piecemeal formality refinement.[278] If Virginia had taken this alternative approach and simply changed the language in its will-execution statute from "subscribed" by witnesses to "signed" by witnesses,[279] the same inefficacy of legislative reform would result. To be sure, such incremental reform would bring the will-execution statute into line with how courts apply the law, but it would not reduce error costs because judicial action has already done so.

Because the case law in which Virginia's courts relaxed the subscription requirement for witnesses is published,[280] the Virginia legislature arguably was aware, or at least should have been aware, that the partial harmless error rule that it enacted would not reduce error costs associated with the subscription requirement. In some instances, however, policymakers might not have the opportunity to be acquainted with how probate courts apply their state's will-execution statute because most probate matters do not generate published opinions.[281] State legislators consequently could justifiably be unaware of exactly how narrow their reform efforts are.

Consider, for example, Ohio's incremental reform effort. As explained previously,[282] Ohio has a rather stringent will-execution statute that maintains many of the traditional technicalities.[283] For instance, the Ohio legislature has not adopted the UPC provision that treats signatures on self-proving affidavits as if they appear on the will,[284] and unlike Virginia's case law that relaxes the subscription requirement,[285] there are no reported cases in Ohio that treat a signature

278. *See supra* notes 116-18 and accompanying text.

279. *Compare* VA. CODE ANN. § 64.2-403(C) (2021) (specifying subscription), *with* UNIF. PROB. CODE § 2-502(a)(3)(A) (UNIF. L. COMM'N 2019) (specifying signature).

280. *See supra* notes 275-76.

281. *See supra* notes 248-50 and accompanying text.

282. *See supra* notes 141-44 and accompanying text.

283. *See* OHIO REV. CODE ANN. § 2107.03 (West 2022); *see also* Horton, *supra* note 150, at 2043 n.138 ("Ohio's Wills Act is strict . . . .").

284. *See supra* notes 141-45 and accompanying text. The failure to enact the UPC's provision that treats signatures on a self-proving affidavit as if they appear on a will is unsurprising given that Ohio is one of the few states that does not authorize self-proving wills. *See* Betsy Dupree-Kyle, Comment, *Michigan Self-Proved Wills: What Are They and How Do They Work?*, 2000 L. REV. MICH. ST. U. DET. C.L. 829, 830 n.2. As this Article's empirical study suggests, however, some testators in Ohio use self-proving affidavits despite the state's lack of recognition of self-proving wills.

285. *See supra* notes 275-76.

on a self-proving affidavit as satisfying the signature requirement. Consequently, a will that is not signed but is accompanied by a signed self-proving affidavit would appear not to be in strict compliance with Ohio's will-execution statute.

The Ohio legislature has, however, enacted an extremely narrow, partial harmless error rule, which on its face seems to apply to the self-proving affidavit cases.[286] Nonetheless, this Article's empirical study of Hamilton County probate records raises doubts regarding the efficacy of Ohio's partial harmless error rule in reducing the error costs associated with these cases. Of the 424 wills in the study's sample, twenty-six include a self-proving affidavit,[287] and of those twenty-six, three appear to be signed by the testator or the witnesses only on the affidavit rather than on the will itself.[288] Despite these deficiencies, all of these wills were admitted to probate without resort to the harmless error rule.[289] These findings suggest that, while there are no published opinions holding that signatures on self-proving affidavits strictly comply with the requirements of the will-execution statute,[290] at least some of Ohio's probate courts consider these signatures to be sufficient.[291] Although this unreported judicial relaxation of the traditional law likely results in correct determinations of a will's authenticity, it reduces the expected impact of Ohio's partial harmless error rule in minimizing error costs.

Similar to the previously discussed situation in Virginia involving the subscription requirement for witnesses,[292] the Ohio legislature

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286. *See supra* Section III.B.1.

287. The infrequent use of self-proving affidavits is perhaps unsurprising because Ohio is one of the few states that does not recognize self-proving wills. *See supra* note 284.

288. The three estates are Estate of Brissie, No. 2014000303 (Ohio Prob. Ct. Hamilton Co.); Estate of Tolles, No. 2014000269 (Ohio Prob. Ct. Hamilton Co.); and Estate of Tometich, No. 2014000529 (Ohio Prob. Ct. Hamilton Co.). The testator in Brissie clearly signed the will and also signed a self-proving affidavit that was attached to the end of the will. The witnesses, however, only signed the affidavit ostensibly because no signature block appears after the attestation clause. Similarly, the testator in Tolles clearly signed both the will and the self-proving affidavit, but the witnesses signed only the affidavit. The will in Tolles lacked both an attestation clause and a signature block for witnesses. Both the testator and the witnesses in Tometich appear to have signed only a separate document labeled "Affidavit." Although this "Affidavit" contains two sets of signatures, one set that appears under traditional attestation language and another set that appears under self-proving language, a will-execution checklist that is attached to the will and "Affidavit" and that is initialed by the testator clearly contemplates the will and the "Affidavit" to be separate documents.

289. *See* Entry Admitting Will to Probate, *In re* Estate of Brissie, No. 2014000303 (Ohio Prob. Ct. Hamilton Co. Jan. 24, 2014); Entry Admitting Will to Probate, *In re* Estate of Tolles, No. 2014000269 (Ohio Prob. Ct. Hamilton Co. Jan. 23, 2014); Entry Admitting Will to Probate, *In re* Estate of Tometich, No. 2014000529 (Ohio Prob. Ct. Hamilton Co. Feb. 10, 2014).

290. Although there are no Ohio cases holding as such, published opinions from other jurisdictions have done so. *See, e.g.*, Matter of Petty's Estate, 608 P.2d 987 (Kan. 1980); *In re* Cutsinger's Estate, 445 P.2d 778 (Okla. 1968).

291. It is possible that probate courts in other counties in Ohio treat signatures on a self-proving affidavit differently than those in Hamilton County.

292. *See supra* notes 267-79 and accompanying text.

seemingly chose to address the self-proving affidavit cases through a relaxed compliance strategy.[293] However, had it chosen to address these cases through a refined formality strategy, the same questions regarding the reform's effect in reducing error costs would arise. Indeed, if the Ohio legislature had enacted the UPC provision that treats signatures on a self-proving affidavit as if they appear on the will itself,[294] the state's statutory law would be brought into line with judicial practice, at least in Hamilton County and perhaps in other parts of the state, but the incremental reform strategy would not reduce error costs. Thus, as exemplified by the experience in Virginia and Ohio, judicial relaxation of the traditional law can diminish the expected benefit of incremental reforms under both the refined formality and relaxed compliance strategies.

In sum, while the primary goal of reform is to reduce error costs by making the wills adjudication process more accurate, whether policymakers have sufficient information to craft incremental reforms that successfully achieve this goal is doubtful. Under the UPC's comprehensive reform proposal, the technicalities of will execution are dramatically reduced, and probate courts are granted broad discretion to validate noncompliant wills.[295] Through this blanket approach to reform, the drafters of the UPC seek to address both large and small sources of error costs. Under an incremental reform strategy, by contrast, state legislatures must choose which problems to tackle, and whether they have sufficient information to effectively do so is uncertain. This potentially minimal effect in reducing error costs does not, however, necessarily mean that the traditional law is preferable to incremental reform. Indeed, any reduction in error costs is beneficial, but only as long as the increased accuracy is not accompanied by offsetting decision costs or transition costs.

B. Decision Costs

Although error costs minimization through increased accuracy is a primary goal of reform, decision theory suggests that it should not be the sole consideration in crafting a wills adjudication process.[296] Instead, decision theory recognizes that the benefit of increased accuracy could come with the added costs associated with making better decisions, as probate courts might need additional information to make more accurate authenticity determinations.[297] In turn, the litigants and the court itself must expend time, money, and effort producing and evaluating the additional information that drives better

293. *See supra* Section III.B.1.

294. *See* UNIF. PROB. CODE § 2-504(a) (UNIF. L. COMM'N 2019).

295. *See supra* Part II.

296. *See* Beckner & Salop, *supra* note 212, at 46-47; Bone, *supra* note 213, at 910-11.

297. *See* Beckner & Salop, *supra* note 212, at 46-47; Owens, *supra* note 218, at 1380-81.

decisionmaking.[298] As explained above, these costs are referred to as decision costs,[299] and decision theory suggests that reform should occur only if the marginal benefit of making better decisions is greater than the marginal cost of making those decisions.[300]

The potential for increased decision costs is a primary factor in state policymakers' wariness to fully adopt the UPC's comprehensive reform proposal. As Horton explains: "The root of this reluctance is intuitive: Lawmakers are afraid that testamentary informality encourages will contests. Strictly interpreting the Wills Act may sometimes thwart decedents' intent, but it also serves the salutary purpose of making it abundantly clear whether a document qualifies for probate."[301] Put simply, the traditional law makes the probate court's job of assessing the validity of wills relatively straightforward.[302] The court need not consider the underlying issue of the decedent's intent and need not gather and evaluate extrinsic evidence of that intent.[303] In this way, the traditional law minimizes decision costs.[304]

If state policymakers change the traditional law in some way, the probate court's task might become difficult and litigation over the validity of wills might become more prevalent. Consequently, state policymakers might pursue incremental change, as opposed to comprehensive reform, in an effort to minimize the potential increase in decision

298. *See* Beckner & Salop, *supra* note 212, at 46-47; Owens, *supra* note 218, at 1380-81.

299. *See supra* note 219 and accompanying text.

300. *See* Wendel, *supra* note 265, at 384-85 ("An economic analysis focuses on *marginal* costs and benefits. Whether one should enter into a proposed transaction, or adopt a proposed law, depends on whether the marginal benefits of the proposed transaction or law exceed the marginal costs of the proposed transaction or law. The proposed transaction/law is efficient if the marginal benefits exceed the marginal costs."); *see also* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) ("Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.").

301. *See* Horton, *supra* note 150, at 2043.

302. *See* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 630 (2014) ("By providing courts a mechanical method of judging the validity of wills based upon the testator's compliance with the prescribed formalities, . . . the channeling function of strict compliance promotes the efficiency of the probate system."); Langbein, *supra* note 2, 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"); Lindgren, *supra* note 23, 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.").

303. *See* Hirsch, *supra* note 300, at 296 ("By calling on courts to judge a testator's volitional state of mind, we would impose on courts an evidentiary burden that raises their decision costs. By barring such evidence, we would lessen those costs.").

304. *See* Hirsch, *supra* note 134, at 804 ("In economic terms, . . . we can justify the imposition of expensive formalities on parties as functioning to avoid spillover costs–internalizing the negative externality created by the state-supported construction proceedings for transfers formulated in ambiguous ways."); Horton, *supra* note 136, at 577 ("[T]he need to prevent spillover costs—not the desire to carry out the decedent's intent—furnishes the most forceful reasons to take the Wills Act at its letter.").

costs and, in turn, to ensure that the marginal benefit of reform outweighs its marginal cost. If this is the case, then the question becomes how does incremental reform affect the decision costs of the wills adjudication process? The answer to this question differs depending upon which avenue of reform state policymakers pursue.

Consider first the effect that a refined formality strategy has on the decision costs of the wills adjudication process. Under this reform avenue, the technicalities of will execution are eliminated or modified to make the process of making a will easier.[305] But refinement of will-execution formalities does not just remove potential stumbling blocks for prospective testators; it also reduces the number of issues that could be litigated in a will contest. Recall, for instance, the presence requirement that was at issue in *Stevens v. Casdorph*.[306] As explained previously, the presence technicality requires that the testator and the attesting witnesses be in each other's presence at the time they sign the will,[307] and in *Stevens*, the contestants challenged the validity of a will based upon the argument that the presence requirement was not satisfied even though the testator and witnesses were in the same room when the will was signed.[308] Ultimately, the contestants successfully invalidated the will, but the dissent lamented the incorrect authenticity decision that the traditional law produced.[309]

If the West Virginia legislature had taken the incremental reform step of simply eliminating the presence requirement, the will in *Stevens* would have been valid because it would have been in strict compliance with the refined set of formalities. The validity of the will would have avoided the harsh result that troubled the dissent, and it would likely have resulted in an accurate authenticity decision.[310] However, incremental reform through the elimination of the traditional presence requirement would not just increase the accuracy of the will-authentication process. In addition to reducing error costs, reform of this kind might also reduce decision costs because there would be no need to litigate the issue of formal compliance.[311] With the thorny issue of presence removed from a potential will contest, wills, like those in *Stevens* and similar cases,[312] might not be challenged at all.[313]

305. *See supra* Section III.A.

306. *See* Stevens v. Casdorph, 508 S.E.2d 610, 612 (W. Va. 1998); *see also supra* notes 33-42 and accompanying text.

307. *See supra* Section I.A.

308. *See* 508 S.E.2d at 613.

309. *See id.* (Workman, J., dissenting).

310. *See id.* at 614 (Workman, J., dissenting).

311. *See* Roger W. Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 67 (1994) ("To avoid litigation . . . the [UPC] eliminated the presence requirement . . . .").

312. Stevens v. Casdorph, 508 S.E.2d 610, (W. Va. 1998); *see, e.g.*, *In re* Groffman, [1968] 1 WLR (P) at 733 (Eng.).

313. *See* Langbein, *supra* note 47, at 6 ("[A] case like *Groffman* would not arise under the UPC, because the presence requirement has been abolished.").

While the presence requirement is likely one of the most frequently litigated formal compliance issues,[314] other formalities also generate will contests, and their elimination might therefore reduce the decision costs associated with wills adjudication. For instance, cases have been reported in which the court had to decide what constitutes the end of a will in order to evaluate whether the subscription requirement is satisfied,[315] and courts have also had to decide whether a self-proving affidavit is part of a will or a separate document.[316] Like the elimination of the presence requirement, elimination of the subscription requirement and adoption of the UPC provision that treats signatures on a self-proving affidavit as if they appear on the will itself would all likely reduce the number of will contests because litigation regarding these issues would not be needed to determine the validity of wills.

While incremental reform through piecemeal formality refinement might reduce the decision costs of will authentication, incremental reform through enactment of a partial harmless error rule might increase decision costs. Decision costs could increase through the adoption of either the UPC's harmless error rule or one of the partial variations simply because the number of will contests might increase. Under the traditional law of strict compliance, proponents of noncompliant wills might decide not to submit these purported wills to probate because of the high likelihood of their invalidity. But once the harmless error rule provides an opportunity for the proponents of noncompliant wills to argue that they should be valid despite their noncompliance, proponents might be less likely to withhold these wills from

314. *See* Lindgren, *supra* note 23, at 543 ("[I]n thousands of appellate cases, the elaborate formalities of the witness requirement have been botched by the testator or his lawyer. For example, courts often strike down wills because one witness signed out of the presence or line of sight of the other witness or the testator."); Wendel, *supra* note 4, at 415 ("Trust & Estate casebooks are replete with examples of 'near miss' will execution cases where a court strictly applies the 'presence' requirement to invalidate a will."). *But see* Horton, *supra* note 263, at 1130-31 ("I uncovered no evidence that the presence prong regularly impedes decedents' intent. . . . Judging from the attention lavished on this detail in casebooks and law journal articles, one would expect it to be a wellspring of litigation. But . . . few cases in my spreadsheet even feature allegations that a document fails to satisfy the Wills Act. . . . And critically, none of these cases hinged on the meaning of presence.").

315. *See, e.g.*, *In re* Proley's Estate, 422 A.2d 136 (Pa. 1980); Sears v. Sears, 82 N.E. 1067 (Ohio 1907); *In re* Young's Estate, 36 Misc. 2d 718 (N.Y. Surr. Ct. 1962).

316. *See, e.g.*, *In re* Estate of Chastain, 401 S.W.3d 612 (Tenn. 2012); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966); *In re* Estate of Ricketts, 773 P.2d 93 (Wash. Ct. App. 1989). Similarly, courts have had to determine whether the testator's words or conduct satisfied the publication requirement. *See, e.g.*, Howard v. Smith's Estate, 344 P.2d 260 (Okla. 1959); *In re* Hale's Will, 121 A.2d 511 (N.J. 1956); *In re* Kennedy's Estate, 23 N.W.2d 797 (S.D. 1946).

probate.[317] Because this new population of purported wills must be validated via the harmless error rule, the court must expend time and effort assessing evidence of the decedent's intent.

To curb this potential influx of noncompliant wills into probate, state policymakers might prefer to implement a partial harmless error rule rather than the UPC's broader rule.[318] If some formal defects cannot be cured by a harmless error rule, then proponents of wills might still withhold a subset of noncompliant wills from probate. For instance, under all of the partial harmless error rules now in effect, most signature defects are excluded from the rule's scope.[319] Proponents of unsigned wills in these jurisdictions therefore have no greater incentive to submit unsigned wills to probate than they did under the traditional rule of strict compliance. As described above, the two empirical studies of partial harmless error jurisdictions suggest that the incremental nature of the reform keeps the number of cases in which the rule is invoked to a minimum. Indeed, Horton found only five cases that involved California's partial harmless error rule,[320] and this Article's study of Ohio's partial harmless error rule found no cases in which the rule was invoked.[321] These studies suggest that the adoption of a partial harmless error rule does not necessarily result in a flood of noncompliant wills into probate.

Although the overall rate of litigation from these studies indicates that adoption of a partial harmless error rule does not significantly increase decision costs, it might actually overstate the marginal impact of this type of incremental reform. In some instances, harmless error litigation regarding the decedent's intent might be a substitute for litigation over formal compliance.[322] If incremental reform simply results in one type of litigation replacing another, then decision costs might not increase at all. Consider again the case of *Stevens v. Casdorph*, which was appealed all the way to the West Virginia

317. *See* Simmons, *supra* note 250, at 362 ("Functionalists predicted that allowing imperfectly executed wills when a heightened burden of proof was met would result in a flood of litigation."); *see also* Kelly, *supra* note 177, at 878-79 ("In theory, adopting harmless error . . . could affect the incentives of a testator or the testator's attorney. For example, if a testator knows a court can apply the harmless error rule to correct a mistake, the testator might exercise a lower level of care in executing the will. By this logic, strict compliance may provide a greater incentive to ensure the formalities are satisfied.").

318. *See* Horton, *supra* note 150, at 2043.

319. *See supra* Section III.B.

320. *See* Horton, *supra* note 150, at 2050.

321. *See supra* notes 260-62 and accompanying text.

322. *See* Langbein, *supra* note 2, at 526 ("By substituting a purposive analysis for a formal one, the substantial compliance doctrine would actually decrease litigation about the formalities. The standard would be more predictable, and contestants would lose their present incentive to prove up harmless defects . . . . 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 irrationally and sometimes dishonestly under the rule of literal compliance.").

Supreme Court.[323] If the West Virginia legislature had adopted a partial harmless error rule that allows the court to validate a will that was signed by the testator outside the presence of witnesses, then the will in *Stevens* likely would have been valid.[324] Moreover, no additional litigation likely would have been generated because, instead of litigating the presence issue, the parties would have argued over the issue of the decedent's intent. If this type of substitute litigation is prevalent in the cases decided under a partial harmless error rule, then the marginal cost of incremental reform of this type might not be significant.

In sum, decision theory suggests that the costs of making more accurate decisions should be considered alongside the benefits of making better decisions.[325] State policymakers might choose to implement incremental, rather than comprehensive, reform in an effort to minimize the increase in decision costs that reform might cause.[326] As just discussed, however, different avenues of incremental reform might affect decision costs differently. Piecemeal formality refinement likely does not increase decision costs, and such a reform strategy might actually decrease them.[327] By contrast, adoption of a partial harmless error rule might increase decision costs, albeit such an increase could be slight.[328]

C. Transition Costs

In addition to considering how reform affects error costs and decision costs, policymakers should also consider the costs that the mere act of changing the law might produce. As explained previously, these costs are referred to as transition costs,[329] and while these costs come in a variety of forms,[330] two particular types of transition costs are especially relevant to an evaluation of incremental reform in the context of wills adjudication.

1. Formulation Errors

The first type is costs that are generated by the legislature's erroneous formulation of new laws.[331] Formulation errors occur when the legislature drafts laws that are vague or ambiguous,[332] and the costs

323. Stevens v. Casdorph, 508 S.E.2d 610, 610 (W. Va. 1998); *see also supra* notes 33-42 and accompanying text.

324. For example, if West Virginia had adopted California's partial harmless error rule, the court would be able to excuse will-execution errors related to the presence requirement. *See supra* Section III.B.2.

325. *See* Beckner & Salop, *supra* note 212, at 46; Owens, *supra* note 218, at 1380-81.

326. *See supra* notes 296-304 and accompanying text.

327. *See supra* notes 305-16 and accompanying text.

328. *See supra* notes 318-24 and accompanying text.

329. *See supra* note 219 and accompanying text.

330. *See* Van Alstine, *supra* note 222, at 816-52.

331. *See id.* at 845-47.

332. *See id.*

associated with this type of formulation error include the doctrinal uncertainty that flows from ambiguous laws and the expense of clarifying this uncertainty through either litigation or the enactment of additional legislation.[333] Formulation errors also occur when new laws are incomplete or overbroad,[334] and the costs of this type of error include the ineffectiveness of reform efforts and the expense of correcting the drafting errors through subsequent legislation.

For an example of a formulation error that occurred due to ambiguous drafting, consider Colorado's partial harmless error rule, which allows the probate court to excuse attestation errors but "only if the document is *signed or acknowledged* by the decedent as his or her will."[335] While this statutory language clearly indicates that the testator's signature is sufficient to trigger the applicability of the harmless error rule, it also suggests that the testator's signature is not necessary as long as the testator acknowledges the document as her will.[336] What constitutes the testator's acknowledgement in this context, however, is not clear.

Attempting to provide some clarity, Horton has proposed one scenario in which a testator does not sign a will but might acknowledge it within the meaning of Colorado's harmless error rule. Specifically, he suggests that, in cases in which "[t]he decedent subscribed a separate affidavit attached to the will rather than the actual testamentary instrument[,] . . . it is possible that the document had been 'acknowledged by the decedent' within the meaning of the statute."[337] Although Horton's suggestion that the acknowledgment provision of Colorado's harmless error rule is applicable when the testator signs a self-proving affidavit rather than the will itself is reasonable, one consideration weighs heavily against the statute's applicability to self-proving affidavit cases, namely that Colorado has adopted the UPC provision that treats signatures on a self-proving affidavit as though they appear on the will itself.[338] Thus, under Horton's scenario, Colorado courts should consider the purported will signed by the decedent rather than acknowledged by the decedent.

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333. *See* Michael P. Van Alstine, *Treaty Law and Legal Transition Costs*, 77 CHI-KENT L. REV. 1303, 1311-12 (2002) ("[S]ubsequent legislative review and amendment can cure mistakes in the articulation of new legal norms . . . . Active judicial examination of background and context likewise can make sense of otherwise faulty legislative signals . . . . [E]rror correction [however] involves costs. In addition to the public resources necessary to review and correct the error, there will be increased public and private dispute resolution costs as the erroneous signals foment avoidable litigation.").

334. *See* Van Alstine, *supra* note 222, at 846.

335. COLO. REV. STAT. § 15-11-503 (2022) (emphasis added).

336. *See* Horton, *supra* note 16, at 1656 n.233 ("Arguably, the conjunction 'or' suggests that decedents can *either* sign *or* 'acknowledge' the instrument . . . .").

337. Horton, *supra* note 263, at 1145 n.309.

338. *See* COLO. REV. STAT. § 15-11-504(3) (2022).

Another possible scenario in which the testator does not sign the will herself but might acknowledge the document occurs when someone else signs the will for the testator. The UPC and the law of most states authorize another individual to sign for the testator if certain protocols are followed.[339] For example, Colorado's will-execution statute requires that a will be "[s]igned by the testator, or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction."[340] If a decedent follows this procedure, then the will is not literally signed "by the decedent,"[341] as specified by Colorado's harmless error rule, but it is instead signed by "some other individual."[342] However, the decedent's act of requesting another individual to sign her will could constitute her acknowledgement of the will. Regardless of which, if either, of these scenarios the Colorado legislature intended the state's partial harmless error to be applicable to, the doctrinal uncertainty that the "signed or acknowledged" language produces is clear, and it will persist until Colorado's courts or legislature intervene.

While Colorado's harmless error rule is ambiguous regarding whether attestation errors can be excused when someone other than the testator signs the will in the testator's presence and at her direction, the harmless error rules in effect in California and Ohio are expressly limited in applicability to situations in which the testator herself signs the will. Specifically, California's statute limits the rule's applicability to situations in which the "testator signed the will,"[343] and Ohio's limits the rule's applicability to situations in which the "decedent signed" the will.[344] Neither of these statutes refers to acknowledgment by the testator, as does Colorado's,[345] but just because policymakers in California and Ohio avoided uncertainty in this regard does not mean that they accurately articulated their intent regarding the appropriate scope of the harmless error rule. In fact, there is good reason to suspect that policymakers in at least one of these states did not intend to exclude situations in which someone other than the testator signed on her behalf.

Consider first California's partial harmless error rule, which probate courts can use to excuse all types of attestation errors.[346] Because, under this type of harmless error rule, the court could be tasked with deciding whether a decedent intended a will to be legally effective in

339. *See* UNIF. PROB. CODE § 2-502(a)(2) (UNIF. L. COMM'N 2019); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. n (AM. L. INST. 1999).

340. COLO. REV. STAT. § 15-11-502(1)(b) (2022).

341. *Id.* § 15-11-503.

342. *Id.* § 15-11-502(1)(b).

343. CAL. PROB. CODE § 6110(c)(2) (West 2021).

344. OHIO REV. CODE ANN. § 2107.24 (West 2022).

345. *See* COLO. REV. STAT. § 15-11-503 (2022).

346. *See* CAL. PROB. CODE § 6110(c)(2) (West 2021).

the complete absence of the involvement of witnesses in the execution ceremony,[347] the legislature's decision to expressly require the testator's signature seems reasonable and deliberate. After all, in the absence of witnesses, a court would have no assurance that the decedent actually instructed another individual to sign the document on her behalf. The requirement of California's harmless error rule that the decedent actually sign the will, therefore, reduces the risk of a fraudulent will being admitted to probate.

While California's requirement that the testator sign a will in order to trigger the applicability of the harmless error rule could be founded upon the rationale of reducing the risk of fraud, Ohio's requirement cannot. Unlike California's, Ohio's harmless error rule requires the presence of witnesses in the will-execution ceremony.[348] Consequently, Ohio's probate courts can excuse the witnesses' failure to sign the will, but they cannot excuse the absence of witnesses.[349]

Because the presence of witnesses is required, there is no reason to limit the applicability of the harmless error rule to situations in which the testator signs the will. If an individual other than the decedent signs a purported will, the witnesses can provide assurance that the signature was made at the request and in the presence of the decedent. Consequently, the concerns that might have driven the California legislature to prohibit a will that is signed by an individual other than the decedent to be validated under the harmless error rule should not have influenced the Ohio legislature. It therefore appears that a court's inability to validate a noncompliant will when another individual signs the document on behalf of the testator under Ohio's harmless error rule is the result of a formulation error in the drafting process rather than an intentional policy decision. This is an example of a formulation error that occurs, not because of ambiguity, but because of incompleteness, and the cost associated with this type of error is the extent to which the policy goals of reform are undermined and the expense of changing new laws to correct the error.

In addition to formulation errors regarding the issue of whether another individual can sign on behalf of the testator, state legislatures have made errors surrounding the issue of whether a partial harmless error rule applies when the testator acknowledges her existing signature. Under most will-execution statutes, the attesting witnesses can either witness the testator's signing of the will or her acknowledgement of an existing signature.[350] Because the UPC's broad harmless

347. *See supra* Section III.B.2.

348. *See* OHIO REV. CODE ANN. § 2107.24 (West 2022).

349. *See supra* Section III.B.1.

350. *See* UNIF. PROB. CODE § 2-502(a)(3) (UNIF. L. COMM'N 2019) (requiring that a will be signed by witnesses after the witnesses "witnessed either the signing of the will . . . or the testator's acknowledgment of that signature"); RESTATEMENT (THIRD) OF PROP.:

error rule authorizes a probate court to excuse the complete absence of the testator's signature,[351] the distinction between the scenarios in which a decedent signs and in which she acknowledges an existing signature is inconsequential. However, under a partial harmless error rule that expressly requires the decedent signature, this distinction can be significant.

For example, as explained previously, Ohio's partial error rule does not authorize probate courts to excuse the absence of the testator's signature.[352] Instead, the rule expressly requires that "[t]he decedent *sign*[] the document . . . in the conscious presence of two or more witnesses."[353] Thus, Ohio's partial harmless error rule can be used to excuse the absence of the witnesses' signatures but not the absence of the witnesses themselves. Noticeably absent from Ohio's harmless error statute is the testator's ability to acknowledge an existing signature before two witnesses. Because the Ohio harmless error statute expressly requires witnesses, it makes no difference from a policy perspective whether the testator signs in the witnesses' presence or acknowledges an existing signature in the witnesses' presence. The Ohio legislature's failure to allow a probate court to apply the harmless error rule in situations in which the testator acknowledges an existing signature in the presence of witnesses therefore seems to be a formulation error rather than an intentional policy decision.

California's partial harmless error rule suffers from a slightly different formulation error related to the testator's inability to acknowledge an existing signature. Unlike Ohio's, California's rule authorizes probate courts to excuse the complete lack of witnesses in the will-execution process.[354] It would therefore seem that the decedent's acknowledgment of an existing signature would have no significance to California's harmless error statute. Indeed, if a noncompliant document contains the decedent's signature and is accompanied by evidence that the decedent intended the document to be a legally effective will, then a California court should validate the document as a will. By contrast, if a purported will lacks the decedent's signature, then a California court should not recognize the document as a legally effective will. The way in which the California legislature formulated its partial harmless error rule, however, renders the analysis more complicated.

The precise language of California's harmless error rule states that a court can validate a noncompliant document "if the proponent of the will establishes by clear and convincing evidence that, *at the time the*

WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. m (AM. L. INST. 1999) ("Non-UPC statutes modeled on the English Wills Act commonly require that the testator's signature 'be made or acknowledged by the testator in the presence of' the witnesses.").

351. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019).

352. *See* OHIO REV. CODE ANN. § 2107.24 (West 2022).

353. *Id.* (emphasis added).

354. *See* CAL. PROB. CODE § 6110(c)(2) (West 2021).

testator signed the will, the testator intended the will to constitute the testator's will."[355] By expressly providing that the decedent's intent should be assessed "at the time" the decedent signs the document, California's harmless error rule includes, in the words of Professor Peter Wendel, a unique "temporal component."[356] This temporal component seemingly excludes from the rule's scope situations in which the testator signs a noncompliant document at a time when she does not intend the document to constitute a legally effective will but then acknowledges the existing signature at a later date when she does intend the document to be a legally effective will.[357] Because under this scenario the decedent did not intend the will to be effective when she signed, California's harmless error rule would seem to be inapplicable.

Wendel points out that the apparent exclusion of this scenario from the rule's scope raises interesting questions. For instance, he questions "whether the [legislature's] failure to reference [a] failed acknowledgment ceremony was intentional or accidental."[358] To answer this question, Wendel turned to the legislative history of California's partial harmless error rule and found that the temporal component drew little attention from the state's legislators.[359] Wendel then questioned whether a policy rationale justifies the structure of California's partial harmless error rule,[360] and ultimately he concluded that no policy consideration did so.[361]

These examples illustrate that partial harmless error rules are susceptible to formulation errors. These errors and their associated costs occur because state legislatures that pursue this type of incremental will-execution reform must substantially rewrite the UPC's broad harmless error proposal. When drafting these unique incremental reforms without sufficient precedent or guidance, state policymakers understandably struggle to successfully formulate statutory language that clearly articulates and accurately implements the intended changes to the law.

2. Implementation Errors

In contrast to formulation errors, which occur when a legislature erroneously drafts new laws, implementation errors occur when courts erroneously apply new laws.[362] Even when a new law does not suffer

355. *Id.* (emphasis added).

356. Wendel, *supra* note 4, at 422.

357. *See id.* at 426-29.

358. *Id.* at 429.

359. *See id.* at 423-24.

360. *See* Wendel, *supra* note 4, at 427-31.

361. *See id.* at 429 (suggesting reform of the language of California's partial harmless error rule).

362. *See* Van Alstine, *supra* note 222, at 847-50.

from a formulation error, courts may implement the new law in flawed ways. When this occurs, transition costs might occur because the policy goals of the new law might be undermined, doctrinal uncertainty might result, and the error might need to be corrected by either judicial or legislative action.[363]

For example, consider again Colorado's partial harmless error rule, which requires that a purported will be "signed or acknowledged by the decedent as his or her will."[364] Although there is ambiguity regarding what constitutes a decedent's acknowledgment of a will in this context,[365] the Colorado legislature clearly provided two alternative requirements by using disjunctive language.[366] In particular, Colorado's harmless error rule is expressly applicable if the decedent *either* signs the will *or* acknowledges it.[367] Nonetheless, in one of the first reported appellate decisions in which a court applied Colorado's partial harmless error rule, the trial court "ruled the phrase 'signed or acknowledged' must be read in the conjunctive," and consequently a purported will that was signed by the decedent could not be admitted to probate under the harmless error rule because the decedent did not also acknowledge the document as his will.[368]

Relying on the plain language of the statute, the appellate court corrected an obvious implementation error by finding that the lower "court's interpretation was erroneous."[369] The potential cost of implementation errors, however, is not simply the effort expended in correcting them but is also the doctrinal confusion that persists prior to their correction. For instance, the lower court's justification of its interpretation of Colorado's harmless error rule not only strayed from the statute's plain language but also undermined the harmless error rule's purpose of making a will's validity less dependent on formality. In particular, the lower court supported its flawed interpretation by suggesting that, in order for the harmless error rule to be applicable, a testator must expressly "say 'this is my will.' "[370] This interpretation essentially added a formal requirement to the harmless error analysis.[371] However, recognizing this additional formality's incongruity with the purpose of the harmless error rule, the appellate court

363. *See id.* at 848 ("The correction of interpretive error . . . involves costs. Similar to formulation errors, these costs will include the public and private costs associated with correction itself.").

364. COLO. REV. STAT. § 15-11-503 (2022).

365. *See supra* notes 335-42 and accompanying text.

366. *See* COLO. REV. STAT. § 15-11-503 (2022).

367. *Id.*

368. *In re* Estate of Wiltfong, 148 P.3d 465, 468 (Colo. App. 2006).

369. *Id.*

370. *Id.* at 469.

371. This requirement is essentially the publication requirement that is found in some state will-execution statutes. *See supra* note 25.

rejected the proposition that Colorado law "require[s] a decedent to announce, 'This is my will.' "[372] Thus, although appellate courts may eventually correct these types of implementation errors, until they do, these errors can create doctrinal uncertainty that undermines the goals of the legislature's reform efforts.

Another example of an implementation error committed by a court applying a partial harmless error rule occurred in Ohio. In *In re Estate of Castro*, a probate court was presented with the issue of whether a purported will that was written and signed by the decedent and three witnesses on an electronic tablet but that contained no attestation clause could be admitted to probate as a valid will.[373] An attestation clause is simply a statement preceding the witnesses' signatures that declares that the witnesses observed the proper execution of the will.[374] The court in *Castro* ruled that the lack of an attestation clause on the purported will did not prevent its admission to probate because, under the harmless error rule, there was clear and convincing evidence that the decedent intended the will to be legally effective.[375]

By validating the purported will via the harmless error rule, the court suggested that a will lacking an attestation clause is not in strict compliance with the general attestation requirement.[376] However, as Professor Robert Sitkoff explains: "This interpretation of the attestation requirement was almost certainly wrong. Attestation is normally understood to mean that the witnesses must sign the will, thereby attesting to the testator's signature, but not also to require an attestation clause."[377] Because of this faulty understanding of the attestation requirement, the court resorted to the harmless error rule when it did not need to. This unnecessary analytical step creates doctrinal confusion. Relying on the *Castro* decision, other Ohio courts might misconstrue the attestation requirement, and this doctrinal uncertainty will persist until an Ohio appellate court corrects the implementation error that the *Castro* court committed. In sum, as this example illustrates, incremental change of the law can generate transition costs that should be considered alongside error costs and decision costs when state policymakers contemplate reform of the wills adjudication process.

372. 148 P.3d at 469 (adding that "[t]he trial court's interpretation added a restriction not present in the statute").

373. *See In re:* Estate of Castro, Deceased (Electronic Will), 27 QUINNIPIAC PROB. L.J. 412, 412 (2014) [hereinafter *Estate of Castro*].

374. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 148.

375. *See Estate of Castro*, *supra* note 373, at 417-18.

376. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 195.

377. *Id.*

V. OPTIMIZING INCREMENTAL REFORM

While the preceding analysis of how incremental change affects error costs, decision costs, and transition costs provides detailed guidance for navigating the reform process, state policymakers should pay particular attention to two major considerations. First, if policymakers prefer incremental change to comprehensive reform, then they should first pursue a refined formality reform strategy.[378] Second, a partial harmless error strategy can be beneficial but only if such a reform is carefully formulated and thoughtfully implemented.[379]

A. The Advantages of Piecemeal Formality Refinement

When one considers the foregoing cost-benefit analysis as a whole, piecemeal formality refinement emerges as a better incremental reform strategy than the implementation of a partial harmless error rule. Because state policymakers face significant difficulty in obtaining the information required to successfully craft narrow changes to the wills adjudication process, neither type of incremental change necessarily reduces error costs. Indeed, without a clear picture of the types of will-execution errors that decedents make and how probate courts respond when these errors occur, there is no guarantee that incremental change will increase the accuracy of the wills adjudication process.[380] Nevertheless, a formality refinement strategy has obvious advantages in reducing decision costs and transition costs.

Consider first decision costs, which, as explained previously, are the costs associated with gathering and evaluating information to make decisions.[381] A refined formality strategy inherently produces fewer decision costs than a harmless error strategy because evidence of the decedent's intent need not be gathered and evaluated. For example, a state legislature that believes wills that are signed outside the presence of witnesses should not necessarily be invalid can either eliminate the presence requirement or enact a harmless error rule that allows a court to excuse a presence error.[382]

If policymakers choose to eliminate the presence requirement, the fact that the decedent signed outside the witnesses' presence is irrelevant; the will strictly complies with the refined set of formalities and is therefore valid. By contrast, if policymakers choose to enact a harmless error rule that allows courts to excuse the decedent's act of signing outside the presence of witnesses, the analysis is not so straightforward. Instead, the presence error triggers a presumption of invalidity, and the will's proponent must then gather and present evidence that

378. *See infra* Section V.A.

379. *See infra* Section V.B.

380. *See supra* Section IV.A.

381. *See supra* notes 218-21 and accompanying text.

382. *See supra* Parts III-IV.

the decedent intended the formally defective will to be legally effective. Either reform strategy, therefore, creates the possibility that a will that the decedent signed outside the presence of witnesses can be legally effective. However, a harmless error approach necessarily entails the expenditure of greater resources to reach such a result.

Consider also transition costs, which are the costs generated when policymakers change the law.[383] The costs occur either when a state legislature errs in formulating new laws or when a court errs in implementing new laws.[384] Piecemeal formality refinement has advantages over partial harmless error in both contexts. First, incremental reform through piecemeal formality refinement is less susceptible to formulation errors than through the adoption of a partial harmless error rule because state legislatures need not draft substantially new statutory language from scratch.

When crafting a partial harmless error rule, state policymakers must either significantly revise the UPC's proposal or draft an entirely new provision.[385] By contrast, when implementing a piecemeal formality refinement strategy, state legislatures must simply select which formality refinement proposals to adopt and which to reject. For example, Colorado and North Dakota, the two states that have authorized notarized wills, have enacted the exact statutory language suggested by the drafters of the UPC.[386] Similarly, of the states that treat signatures on a self-proving affidavit as if they appear on a will, the vast majority have simply enacted the UPC's provision.[387] Because, as these examples suggest, a piecemeal formality refinement strategy generally does not involve a state legislature drafting statutory language that significantly departs from the UPC's suggested language, such an incremental reform strategy presents less risk of formulation errors than a partial harmless error reform strategy.

Second, piecemeal formality refinement is likely less susceptible to implementation errors because probate courts need not significantly depart from the method of wills adjudication with which they are familiar. Harmless error analysis is a significant departure from the

383. *See* Van Alstine, *supra* note 222, at 816-52.

384. *See supra* Section IV.C.

385. *See supra* Section III.B.

386. *See* COLO. REV. STAT. § 15-11-502 (2022); N.D. CENT. CODE § 30.1-08-02(1) (2021).

387. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2504 (2021); HAW. REV. STAT. § 560:2-504 (2021); MASS. GEN. LAWS ch. 190B § 2-504 (2021); MONT. CODE ANN. § 72-2-524 (2021); UTAH CODE ANN. § 75-2-504 (West 2021). A small number of states have enacted non-uniform provisions that appear to be of the same substantive effect as the UPC's provision. *See, e.g.*, IND. CODE § 29-1-5-3.3 (2021); NEB. REV. STAT. § 30-2327 (2021); TEX. EST. CODE ANN. § 251.105 (West 2021); WYO. STAT. ANN. § 2-6-112 (2021). Additionally, a small number of states have enacted provisions that appear narrower in scope than the UPC's provision. *See, e.g.*, KAN. STAT. ANN. § 59-606 (West 2021) (providing that the signatures of witnesses on a self-proving affidavit is sufficient but not the signature of the testator); OR. REV. STAT. § 112.235 (2021) (same); WASH. REV. CODE § 11.12.020 (2022) (same).

analysis under the traditional rule of strict compliance, and consequently, courts must fundamentally change how they evaluate the validity of wills.[388] Some growing pains are to be expected. By contrast, probate courts should be more comfortable with a piecemeal formality refinement strategy because the traditional rule of strict compliance and its familiar and straightforward analysis is maintained. Implementation errors are therefore likely less prevalent than when state legislatures pursue incremental change through a partial harmless error rule. Thus, a reform strategy that pursues piecemeal formality refinement rather than the enactment of a partial harmless error rule would seem to minimize the total costs of incremental change.

B. A Model Partial Harmless Error Rule

As explained above, state policymakers who prefer incremental change to comprehensive reform should begin by implementing a strategy of piecemeal formality refinement.[389] The advantages of this strategy, however, do not render a partial harmless error strategy valueless. To the contrary, a carefully crafted partial harmless error rule can potentially increase the accuracy of the wills adjudication process because such a reform can remedy will-execution errors that current formality refinement proposals cannot.

For instance, although the wholesale elimination of the attestation requirement has been suggested,[390] this proposal has not garnered favor. Policymakers that believe the automatic invalidity of unattested wills generates unnecessary error costs must consequently turn to a harmless error rule. At the same time, however, these policymakers have reasonable grounds to question the merits of following the UPC's lead and allowing courts to validate, not only unattested wills, but also wills that lack the decedent's signature. Because the UPC's broad grant of discretion might generate error costs and decision costs that a narrower harmless error rule would not,[391] some state policymakers might legitimately prefer a partial harmless rule that permits courts to validate unattested wills but not unsigned wills.

However, as illustrated by the experience of the four states that have enacted such a reform,[392] successfully crafting a partial harmless error rule that allows courts to excuse attestation errors but not signature errors has proven difficult. The attempts by policymakers to craft a partial harmless error rule have generated transition costs that

388. *Compare supra* Section I.B. (describing the traditional rule of strict compliance), *with supra* Section II.B. (describing the UPC's harmless error rule).

389. *See supra* Section V.A.

390. *See generally* Lindgren, *supra* note 23.

391. *See supra* notes 242-44, 318-24 and accompanying text.

392. *See supra* Section III.B.

threaten to undermine the benefits of this type of incremental change.[393] As such, policymakers in other states that desire to pursue this type of reform lack a suitable example upon which to model a partial harmless error rule.

To fill this void, this Article proposes the following model partial harmless error rule, which simply inserts a requirement that the testator sign the will into the UPC's broad harmless error statute. When modified by the italicized language below, the rule states:

> Although a document [*that is signed by the decedent*] . . . was not executed in compliance with [the prescribed formalities], the document . . . is treated as if it had been executed in compliance . . . if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document . . . to constitute . . . the decedent's will . . . .[394]

Formulating a partial harmless error rule in this way has two primary advantages. First, this formulation reaps the potential benefits that policymakers likely believe a more narrowly tailored harmless error rule provides. In particular, by limiting the probate court's discretion to excuse formal defects to situations in which the decedent left behind a signed writing, this model rule allows courts to validate clearly authentic yet unattested wills but denies courts the discretion to validate wills in the more difficult cases in which the purported will is unsigned.

Second, the model rule avoids the formulation errors that plague current variations of the rule. For example, by eliminating any reference to the time at which the decedent's intent should be assessed, the rule avoids the difficulties associated with the temporal aspect of California's harmless error analysis.[395] Similarly, the model rule lacks the acknowledgment language that has caused confusion surrounding the scope of Colorado's partial harmless error rule.[396] For these reasons, the proposed model partial harmless error rule should serve as a

393. *See supra* Section IV.C.

394. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019). This proposed change is relatively simple and therefore does not address all the issues that state policymakers should consider. For example, the question of whether a partial harmless error that requires the testator's signature should also be applicable when someone else signs on behalf of the testator. *See supra* notes 339-49 and accompanying text.

395. *See supra* notes 354-62 and accompanying text. Wendel similarly proposed reformed harmless error language that was designed to avoid the confusion of California's temporal component. *See* Wendel, *supra* note 4, at 429 (suggesting that the harmless error rule should be applicable if "at the time the testator signed *or acknowledged the testator's signature or the will* the testator intended the will to constitute the testator's will"). This Article's proposal, however, attempts to provide even greater clarity by eliminating all reference to time.

396. *See supra* notes 335-42 and accompanying text.

template for state policymakers who have already refined the formalities of will execution and who find it prudent to further reform the wills adjudication process to an extent that comes short of the UPC's comprehensive reform proposal.

CONCLUSION

State policymakers clearly prefer incremental change to comprehensive reform in the context of wills adjudication. On one hand, no state has yet to fully adopt the UPC's comprehensive reform proposal. On the other hand, few states still cling wholeheartedly to the traditional law. To one degree or another, most states have taken incremental steps in reforming the wills adjudication process. But despite the ubiquity of incremental change, no uniformity has emerged in how states have implemented this more modest reform strategy. Some states have selectively refined the formalities of will execution; some have enacted a partial harmless error rule; and still others have simultaneously pursued both avenues of incremental reform.[397] With variation being the common characteristic of incremental change in wills adjudication, questions linger regarding how states should pursue this reform strategy.

This Article strives to answers these questions. In particular, a systematic analysis of the costs and benefits of both types of incremental change suggests that states should first implement a refined formality reform strategy and delay enacting a partial harmless error rule. While selectively eliminating will-execution formalities does not necessarily produce greater benefits than the implementation of a partial harmless error rule,[398] such a strategy likely generates fewer costs. Indeed, a refined formality strategy is easier both for courts to successfully and efficiently apply and for legislatures to effectively craft. A refined formality reform strategy therefore likely produces fewer decision costs and transition costs than a partial harmless error strategy.[399] In sum, state policymakers have long preferred incremental change, but they have lacked clear direction on how to implement such change. State policymakers now have guidance.

397. *See infra* Table I.

398. *See supra* Section IV.A.

399. *See supra* Part V.

TABLE I

Jurisdiction	Citations (Current as of February 1, 2020)	Subscription[400]	Presence[401]	Self-Proving[402]	Notarization[403]	Harmless Error[404]
Eng.	7 Wm. 4 & 1 Vict. c. 26 § 9.	**Y**	**Y**	**Y**	**N**	**N**
UPC	UNIF. PROB. CODE §§ 2-502 to -504	N	N	Y	Y	Y
Ala.	ALA. CODE §§ 43-8-131 to -132	N	N	**N**	**N**	**N**
Alaska	ALASKA STAT. §§ 13.12.502 - .504	N	N	Y	**N**	**N**
Ariz.	ARIZ. REV. STAT. ANN. §§ 14-2502, -2504	N	N	Y	**N**	**N**
Ark.	ARK. CODE ANN. §§ 28-25-103, -106	**Y**	**Y**	**N**	**N**	**N**
Cal.	CAL. PROB. CODE §§ 6110 - 6112	N	**Y**	**N**	**N**	**P**
Colo.	COLO. REV. STAT. §§ 15-11-502 to -504	N	N	Y	Y	**P**
Conn.	CONN. GEN. STAT. § 45a-251	**Y**	**Y**	**N**	**N**	**N**
Del.	DEL. CODE ANN. tit. 12 §§ 202, 1305	**Y**	**Y**	**N**	**N**	**N**
Fla.	FLA. STAT. §§ 732.502 - .503	**Y**	**Y**	**N**	**N**	**N**
Ga.	GA. CODE ANN. §§ 53-4-20, -24	**Y**	**Y**	**N**	**N**	**N**

400. "Y" refers to any statutory language that directs the testator and/or witnesses to "subscribe" a will and any statutory language that directs the testator and/or witnesses to sign a will "at the foot" or "at the end" of the document.

401. "Y" refers to any statutory language that directs the testator to sign in the presence of witnesses or directing witnesses to sign in the presence of the testator and/or each other.

402. "Y" refers to any statute modeled on UNIF. PROB. CODE § 2-504(c) and any non-uniform statute that treats signatures of the testator and witnesses on a self-proving affidavit as if they appear on a will. "Y" also refers to any statute that treats only the signatures of witnesses on a self-proving affidavit as if they appear on a will. "Y" does not refer to any statute that limits the provision's applicability to wills that are executed prior to the statute's effective date.

403. "Y" refers to any statute modeled on UNIF. PROB. CODE § 2-502(a)(3)(B).

404. "Y" refers to any statute modeled on UNIF. PROB. CODE § 2-503. "P" refers to any non-uniform statute that provides for a partial harmless error rule.

Jurisdiction	Citations (Current as of February 1, 2020)	Subscription	Presence	Self-Proving	Notarization	Harmless Error
Haw.	HAW. REV. STAT. §§ 560:2-502 to -504	N	N	Y	**N**	Y
Idaho	IDAHO CODE ANN. §§ 15-2-502, -504	N	N	**N**	**N**	**N**
Ill.	755 ILL. COMP. STAT. 5/4-3, 5/6-4	N	**Y**	**N**	**N**	**N**
Ind.	IND. CODE §§ 29-1-5-2 to -3.1	N	**Y**	Y	**N**	**N**
Iowa	IOWA CODE § 633.279	N	**Y**	**N**	**N**	**N**
Kan.	KAN. STAT. ANN. § 59-606	**Y**	**Y**	Y[405]	**N**	**N**
Ky.	KY. REV. STAT. ANN. §§ 394.040, .225	**Y**	**Y**	**N**[406]	**N**	**N**
La.	LA. CIV. CODE art. 1577	**Y**	**Y**	**N**	**N**[407]	**N**
Me.	ME. REV. STAT. tit. 18-C, §§ 2-502 to -503	N	N	Y	**N**	**N**
Md.	MD. CODE ANN., EST. & TRUSTS § 4-102	N	**Y**	**N**	**N**	**N**
Mass.	MASS. GEN. LAWS ch. 190B, §§ 2-502, -504	N	N	Y	**N**	**N**
Mich.	MICH. COMP. LAWS §§ 700.2502 to -2504	N	N	Y	**N**	Y
Minn.	MINN. STAT. §§ 524.2-502 to -504	N	N	Y	**N**	**N**
Miss.	MISS. CODE ANN. §§ 91-5-1, -7-7	N	**Y**	**N**	**N**	**N**
Mo.	MO. REV. STAT. §§ 474.320, .337	**Y**	**Y**	**N**	**N**	**N**
Mont.	MONT. CODE ANN. §§ 72-2-522 to -524	N	N	Y	**N**	Y

405. Kansas's statute treats only the signatures of witnesses on a self-proving affidavit as if they appear on a will.

406. Kentucky's statute treats signatures on a self-proving affidavit as if they appear on a will, but the provision is only applicable to wills that were executed between June 21, 1974 and July 15, 1982.

407. Louisiana's statute requires notarization even when two witnesses sign a will.

Jurisdiction	Citations (Current as of February 1, 2020)	Subscription	Presence	Self-Proving	Notarization	Harmless Error
Neb.	NEB. REV. STAT. §§ 30-2327, -2329	N	N	Y	**N**	**N**
Nev.	NEV. REV. STAT. §§ 133.040, .055	**Y**	**Y**	Y	**N**	**N**
N.H.	N.H. REV. STAT. ANN. §§ 551:2 to :2-a	N	**Y**	**N**	**N**	**N**
N.J.	N.J. STAT. ANN. §§ 3B:3-2 to :3-4	N	N	**N**	**N**	Y
N.M.	N.M. STAT. ANN. §§ 45-2-502, -504	N	**Y**	Y	**N**	**N**
N.Y.	N.Y. EST. POWERS & TRUSTS § 3-2.1	**Y**	**Y**	**N**	**N**	**N**
N.C.	N.C. GEN STAT. §§ 31-3.3, -11.6	N	**Y**	**N**	**N**	**N**
N.D.	N.D. CENT. CODE §§ 30.1-08-02, -05	N	N	Y	Y	**N**
Ohio	OHIO REV. CODE ANN. §§ 2107.03, .24	**Y**	**Y**	**N**	**N**	**P**
Okla.	OKLA. STAT. tit. 84, § 55	**Y**	**Y**	**N**	**N**	**N**
Or.	OR. REV. STAT. §§ 112.235, .238	N	**Y**	Y[408]	**N**	Y
Pa.	20 PA. CONS. STAT. § 2502	**Y**	N[409]	**N**	**N**	**N**
R.I.	R.I. GEN. LAWS §§ 33-5-5, -7-26	**Y**	**Y**	**N**	**N**	**N**
S.C.	S.C. CODE ANN. §§ 62-2-502 to -503	N	N	**N**	**N**	**N**
S.D.	S.D. CODIFIED LAWS §§ 29A-2-502 to -504	N	**Y**	Y	**N**	Y
Tenn.	TENN. CODE ANN. §§ 32-1-103 to -104	N	**Y**	**N**[410]	**N**	**N**

408. Oregon's statute treats only the signatures of witnesses on a self-proving affidavit as if they appear on a will.

409. Pennsylvania's statute requires presence only when the testator signs by mark, rather than by name, or when someone signs on behalf of the testator.

410. Tennessee's statute treats signatures on a self-proving affidavit as if they appear on a will, but the provision is only applicable to wills that were executed prior to July 1, 2016.

Jurisdiction	Citations (Current as of February 1, 2020)	Subscription	Presence	Self-Proving	Notarization	Harmless Error
Tex.	TEX. EST. CODE §§ 251.051, .105	**Y**	**Y**	Y	**N**	**N**
Utah	UTAH CODE ANN. §§ 75-2-502 to -504	N	N	Y	**N**	Y
Vt.	VT. STAT. ANN. tit. 14, § 10	**Y**	**Y**	**N**	**N**	**N**
Va.	VA. CODE ANN. §§ 64.2-403, -404, -452	**Y**	**Y**	**N**	**N**	**P**
Wash.	WASH. REV. CODE § 11.12.020	**Y**	**Y**	Y[411]	**N**	**N**
W. Va.	W. VA. CODE § 41-1-3	**Y**	**Y**	**N**	**N**	**N**
Wis.	WIS. STAT. §§ 853.03, 856.16	N	**Y**	Y	**N**	**N**
Wyo.	WYO. STAT. ANN. §§ 2-6-112, -114	N	N	Y	**N**	**N**

411. Washington's statute treats only the signatures of witnesses on a self-proving affidavit as if they appear on a will.