IN THEIR OWN HAND:
AN ANALYSIS OF HOLOGRAPHIC WILLS AND HOMEMADE WILLMAKING

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Editors' Synopsis: This Article addresses the common conception that holographic wills are a constant source of imprecise, ambiguous, and vague language inviting forgery, fraud, and deception that ultimately corrupts testators' final wishes and leads to unnecessary post-mortem litigation. The author conducted a systematic study of wills filed in the government archives for Allegheny County, Pennsylvania and concluded that the concerns about holographic wills largely are misplaced. The Article suggests that legislatures should allow the probate of holographic wills and relax traditional will formalities that discourage would-be testators and lead to the frustration of their final wishes.

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I. ABSTRACT

Holographic wills—wills that are handwritten and unwitnessed—are thought of traditionally as a risky, do it yourself brand of estate planning. In the author’s view, this is wrong. Using two years of probate records from Pittsburgh, Pennsylvania, this Article demonstrates that holographs are an indispensable tool for testators who are either unwilling or unable to commission a traditional will. Homemade testaments provide a low-cost alternative to intestacy, increase willmaking, function as a safety net for testators who fall suddenly ill, and rarely result in litigation. The triumph of holographic wills also suggests, strongly, that state legislatures should consider reducing the number of requirements necessary to create a formal, attorney-authored will.

II. INTRODUCTION

A strong consensus exists regarding the value and importance of estate planning.\(^1\) Nonetheless, only 30% of Americans bother to execute a will.\(^2\) The excuses are familiar; the prospect of thinking about death,\(^3\)

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\(^1\) For an unorthodox take on the importance of willmaking, see WILLIAM SHAKESPEARE, RICHARD II act 3, sc. 2 ("[F]or what can we bequeath [s]ave our deposed bodies to the ground? And nothing can we call our own but death [a]nd that small model of earth [w]hich serves as paste and cover to our bones."). But see A. Wigfall Green, Shakespeare’s Will, 20 GEO. L.J. 273 (1932). Shakespeare left the majority of his estate to Susanna Hall, his oldest daughter. He also left a substantial sum of money to his younger daughter, Judith Quiney. See id. at 276–77, 283–84. Oddly, Shakespeare made no devise or bequest to his wife in the initial draft of his will. It was not until he revised his final testament that he mentioned his wife. The bequest appears in an interpolated line between lines 8 and 9 of the third and last page and reads: “Item, I gyve unto my wief my second best bed with the furniture;” See id. at 284. A copy of the will is available online at: http://www.nationalarchives.gov.uk/documentsonline/PROB1wills.asp. (last visited June 3, 2008).

\(^2\) See, e.g., JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 62 (2d ed. 2003) (“Most Americans die without wills.”); James N. Zartman, The Legacy of Cruzan, 5 PROB. & PROP., May-June 1991, at 13, 16 (observing that although “[t]he importance of wills is continually publicized. . . .70% of all Americans die without a will”); Isn’t It Time You Wrote a Will?, 50 CONSUMER REP., Feb. 1985, at 103, 103 ("[M]ore than two-thirds of all adult Americans die without wills.”); Where There’s a Will, There’s a Way, YOUR LAW, Spring 1988, at 3 (reporting that 70% of individuals do not have wills). See generally 1 PAGE ON THE LAW OF WILLS § 1.6 (2003) (discussing studies and surveys demonstrating high percentage of intestate deaths).

\(^3\) See Gerry W. Beyer, Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence, 94 DICK. L. REV. 231, 238–39 (1990) (arguing that individuals put off the estate planning as a defense against admitting their mortality); Thomas L. Shaffer, The “Estate Planning” Counselor and Values Destroyed by Death, 55
paying attorneys’ fees, and disclosing sensitive financial information discourage potential testators from memorializing their final wishes. In an effort to increase the number of people who die with a valid testament, states have undertaken a number of reforms during the last two decades. Some jurisdictions, like New Jersey and Colorado, have adopted laws that excuse simple execution errors in otherwise valid wills. A handful of others have charted a more daring course, encouraging testators to craft their own homemade estate plans. States like Maine and Wisconsin, for

IOWA L. REV. 376, 377 (1969) ("[P]ersonal death is a thought modern man will do almost anything to avoid."); Denise Spellman, Encouragement Is Not Enough: The Benefits of Instituting a Mandated Choice Organ Procurement System, 56 SYRACUSE L. REV. 353, 376 (2006) (stating that the fact "that eighty percent of Americans die without [executing] a will . . . suggest[s] that even when there are compensating personal benefits, we are reluctant to come to grips with our own mortality") (quoting Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Future Market, 58 GEO. WASH. L. REV. 1, 11 (1989)).

Executing a comprehensive estate plan can be an expensive process. Although some lawyers draft simple wills for less than a hundred dollars, the fees for complicated estates may escalate into thousands of dollars. Such costs place professional willmaking out of the reach of many people and "increase the reluctance of those with sufficient resources to incur the cost of obtaining wills." Beyer, supra note 3, at 237.

See Judith A. Frank, The Human Legacy: Using Ethical Wills to Enhance Estate Planning, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65, 73 (2003) (arguing that people feel they lose their privacy when disclosing financial information to estate planners); Harry Hibschman, Whimsies of Will Makers, 66 U.S. L. REV. 362, 365–66 (1932) (showing that some testators have executed holographs specifically to avoid involving an attorney in their estate planning). Some sources indicate that privacy concerns and the ability to craft a will at home may have special resonance in the gay and lesbian community. See Christine A. Hammerle, Note, Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union, 104 MICH. L. REV. 1763, 1770 (2006) ("Gay and lesbian couples may favor home-drawn wills because the partners are closeted or prefer not to publicly consult with an attorney about sensitive relationship matters.").


See In re Will of Ranney, 589 A.2d 1339 (N.J. 1991) (adopting substantial compliance doctrine). Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah have all adopted the dispensing power. See JESSE DUKE MINIER ET AL., WILLS, TRUSTS, AND ESTATES 234 (7th ed. 2005). One commentator differentiates the two doctrines in this way: "[S]ubstantial compliance looks to whether formal compliance, though deficient, is sufficient to serve the policies of formalities. The dispensing doctrine looks instead to whether a defect or absence of a particular formality may be completely excused if the court is certain that the document was intended to be a will." James Lindgren, The Fall of Formalism, 55 ALB. L. REV. 1009, 1014 (1992).
example, have promulgated government approved "fill-in-the-blank" will forms.\(^8\) This Article focuses on a less noticed, and little studied, trend: the growing number of states that allow the probate of holographic wills.

A holographic will—a will that is *handwritten* and *unwitnessed*—is the most basic testamentary form.\(^9\) Without hiring a lawyer or involving witnesses, testators in some jurisdictions easily can put pen to paper, secure in the knowledge that the law must honor their final wishes.\(^10\) The heartbreaking case of Cecil George Harris captures the principle in full. On June 8, 1948, Harris, a Canadian farmer, inadvertently put his tractor into reverse, pinning his left leg under the wheel. Fearing the worst, Harris used a small knife to scratch a will into the vehicle’s fender. His etching read, “In case I die in this mess, I leave all to my wife. Cecil Geo. Harris.”\(^11\) Harris’s family removed the etching from the tractor and successfully submitted the fender to probate under Saskatchewan’s holographic will statute.\(^12\)

The simple notion that people can author their own wills without assistance has sparked a debate among legal academics and practitioners. On one side, observers argue that make-your-own wills amount to a form of “consumer fraud.”\(^13\) In the eyes of these critics, people need professional help and legal protection when crafting a final will and testament.\(^14\)

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\(^9\) The word holograph comes from the Greek “holo,” meaning whole, and “graphos,” meaning written. The variant “ologygraph” shows up in older cases. See, e.g., Bowe v. Bowe’s Adm’r, 86 S.E. 856, 856 (Va. 1915). Note also that the holograph achieved no distinction at common law and remains entirely a creature of statute. That is, in absence of explicit legislative decree, the fact that a will is entirely in the testator’s handwriting has no special significance.

\(^10\) See Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 160 (1988) (arguing that legislatures authorize holographic wills as a means of convenience to testators, “enabling those who are either unable or unwilling to obtain legal assistance to make a valid will in their own handwriting”).


\(^12\) See id.


\(^14\) See, e.g., Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 126–27 (2006) (arguing for the repeal of holographic will statutes). Satirical tales also accompany the growing popularity of the holographic wills. For example:

Ye lawyers who live upon litigants’ fees, And who need a good many
to live at your ease, Grave or gay, wise or witty, whate’er your
On the other side, a minority of scholars suggests that the law should continue to empower those who are either unable or unwilling to hire a lawyer. Although testators may not always grasp the full complexity of the law, they usually know what they want and how to express it.

In response to the ongoing controversy over handwritten wills, this Article attempts to determine empirically whether people can forge thoughtful estate plans without outside assistance. To accomplish this goal, I examined the probate records from the area surrounding Pittsburgh, Pennsylvania to establish how holographic willmakers succeed and fail in their attempts to pass property at death. Rather than relying on figures scratched together from appellate level court decisions, this Article constitutes the first attempt to examine the probate of holographic wills on a ground level, decision-by-decision basis. My research scrutinizes every holographic testament submitted to the Allegheny County Register of Wills over a two-year period, tracking the details of the testamentary scheme, whether the will resulted in litigation, the age of the testator at death, and the size of the estate transferred through the will.

Armed with data, this Article sets out to investigate a number of unresolved questions swirling around holographic wills. Do the makers of such wills understand basic estate planning principles? Do holographs expose testators and their loved ones to an unacceptable risk of litigation and high legal bills? Who are the primary authors of holographic wills? Does the fate of the handwritten testament suggest that state legislatures should alter their will statutes? The results are surprising. This study, at its core, found that the benefits of homemade wills far outweigh their poten-

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degree, Plain stuff or Queen's Counsel, take counsel of me: When a festive occasion your spirit unbends, You should never forget the profession's best friends; So we'll send round the wine, and a light bumper fill, To the jolly testator who makes his own will.


15 See, e.g., Captain Theresa A. Bruno, The Deployment Will, 47 A.F. L. REV. 211, 242 (1999) (concluding that holographic wills are a useful estate planning tool in the military in emergency situations); Adam J. Hirsch, Inheritance and Inconsistency, 57 Ohio St. L.J. 1057, 1074-75 (1996) (contending that holographs increase estate planning among those with modest financial means); James Lindgren, Abolishing the Attestation Requirement for Wills, 68 N.C. L. REV. 541, 545-46 (1990) (arguing that, by proliferating unneeded formalities, states are forgetting the purpose of the system of wills); Natale, supra note 10, at 160 ("Holographic wills are a viable alternative to formally attested wills since they perform the same functions.").

16 See Lindgren, supra note 7, at 1009.
tial for mischief. Of critical importance, holographs provide testators with a low-cost and effective alternative to dying intestate. My analysis also casts doubt upon any charge that holographic wills impose unreasonable or excessive probate costs on testators or their families. Contrary to popular belief, the data show that holographic wills generate very few courtroom battles. From this empirical base, I make a plea for legal reform. The success of holographic wills strongly suggests that all states should simplify their Wills Acts. At the very least, all legislatures should adopt a holographic will statute in order to expand the amount and quality of willmaking among groups that traditionally have resisted estate planning. The data gathered here also suggest that states should drop the witnessing requirement for formal attorney-authored wills, not just holographs. As the record shows, attestation plays little role in preventing fraud and may undermine the intent of unsophisticated testators.

Part III of this Article provides background information on the law of wills and the current criticisms of homemade willmaking. Part IV discusses the methodology used in this study. Part V describes the empirical findings of my examination of handwritten wills. Part VI raises questions about the future of formalities and formalism in the law of wills.

III. BACKGROUND

A. The History of Holographs

Holographic wills have deep roots in the Western legal tradition. Historical sources indicate that homemade testaments first appeared during the reign of Julius Caesar. Caesar, under pressure from his legionaries, allowed Roman soldiers to forge unwitnessed wills composed in their own hand.\(^\text{17}\) The theory underlying these military testaments was simple: the testator’s handwriting provided adequate proof of the docu-

\(^{17}\) See R.H. Helmholz, *The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills*, 20 SYRACUSE J. INT'L L. & COM. 147, 148 (1994); Holographs were admitted in limited circumstances in ancient Roman law. See R.H. Helmholz, *The Origin of Holographic Wills in English Law*, 15 J. LEGAL HIST. 97, 97–98 (1994); Reginald Parker, *History of the Holographic Testament in the Civil Law*, 3 JURIST 1, 1–5 (1943). J. INST. 2.11.1 (Peter Birks & Grant McLeod trans., Cornell University Press 1987); Dig. 29.1.1 (Ulpian, Edict. 45) (Alan Watson ed., trans., Univ. of Pennsylvania Press 1998) ("The deified Julius Caesar was in fact the first to concede unrestricted testamenti facio to soldiers . . . Nerva conferred the fullest indulgence on soldiers; and Trajan followed this, and thenceforth such a chapter came to be inserted in [imperial] mandates.").
ment's authenticity. Handwriting, in effect, assumed the role witnesses normally served.

From Rome, the use of the holograph spread across the Mediterranean, establishing a toehold in the barbarian kingdoms of Italy, France, and Spain. In the seventh century, for example, the Visigoths of Spain allowed any testator to pass property with a handwritten will, so long as the document was signed and correctly dated. Refusing to sink gracefully into the tar pits of history, the holograph also surfaced in the customary law of France and the ecclesiastic courts of England during the fifteenth and sixteenth centuries. From there, lawyers and legislatures transmitted the holograph to the colonies of the New World, where it achieved early prominence in Louisiana and Virginia. The handwritten will later found a home in western states that embraced the civil law tradition. California, for example, adopted a holographic will statute loosely based on the Code Napoleon. Other large eastern states like Pennsylvania and Michigan—spurred on by the Uniform Probate Code—also allow holographs.

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18 See Parker, supra note 17, at 5–7.
19 The Visigoths codified an important anthology of Roman-based law that liberalized the use of holographs and adopted modern probate-like rules. They required that heirs authenticate the handwriting and signature to confirm that the instrument represented the testator's last true wishes. See Parker, supra note 17, at 8 n.35. See also Bird, supra note 13, at 606.
20 See Parker, supra note 17, at 13–15.
21 See An Act Directing the Manner of Granting Probate[s] of Wills, and Administration of Intestates Estates (1748), in 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 454, 456 § 7 (William W. Hening ed., 1819) (“[A]ll devises and bequests of any lands, or tenements . . . shall be attested . . . by two or more credible witnesses, or shall be wholly writ by the said devisor[ ’]s own hand, or else they shall be void and of no effect.”). Some commentators have argued the holograph first appeared on the shores of America in Louisiana's statute of 1808 modeled after the Napoleonic Code of 1804. See, e.g., Bird, supra note 13, at 606–07. Predating the Napoleonic Code by 50 years, the Virginia statute “may have drawn its inspiration from civil customary law.” Hirsch, supra note 15, at 1072 n.44. However, no one has bothered to investigate the legislative history of the Virginia statute.
Yet, the march of the holographic will has stalled. Despite a pedigree that dates to Rome and acceptance in a diverse mix of jurisdictions, approximately half of the states—including New York—still fail to recognize holographs. This is a puzzle. Why, 2000 years after the holograph first appeared, is there no consensus on handwritten wills?

B. The Controversy over Holographic Wills

Perhaps it is not surprising that many jurisdictions remain skeptical of holographic wills. Holographs have long been subject to criticism. Even the Romans, who invented the form, noted that handwritten wills left by soldiers were often “open to dispute if regard were had to the diligent observance of the laws.” Modern observers seem to agree. In law reviews, treatises, and practice manuals, holographic wills universally are condemned as a risky do-it-yourself brand of estate planning.

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27 See, e.g., ALEXANDER A. BOVE, JR., THE COMPLETE BOOK OF WILLS ESTATES & TRUSTS 28 (2005) (“There are many special and important provisions that should be in a will that are practically never in a holographic will.”); DENNIS CLIFFORD, NOLO’S SIMPLE WILL BOOK § 2/5 (2005) (stating “it may be very difficult to prove to the court’s satisfaction that the document is actually in the deceased person’s handwriting, and was intended as his will”); STATE BAR OF TEXAS, HOW TO LIVE-AND DIE-WITH TEXAS PROBATE 81 (Charles A. Saunders ed., 6th ed. 1990) (critiquing holographic wills); Jacque W. Best, Note, Holographic Wills in Montana—Problems in Probate, 24 MONT. L. REV. 148, 159-60 (1963) (suggesting repeal of holographs); Brown, supra note 14, at 126-27 (arguing for the repeal of holographic will statutes); Robert P. Kirk, Jr., Comment, The New Holographic Will in California: Has It Outlived Its Usefulness?, 20 CAL. W. L. REV. 258, 274 (1984) (suggesting repeal of holographs); James Lindgren, Abolishing the Attestation Requirement for Wills, 68 N.C. L. REV. 541, 558 (1990) (suggesting that
porary criticisms of these homemade testaments break into three categories.

First, critics of holographs maintain that any will prepared in the absence of witnesses invites accusations of fraud. The gist of this argument is that any arm-twisting crook can force a testator to compose a phony holograph, and no amount of handwriting analysis could ever reveal the dubious circumstances surrounding the execution of such a document. As Gulliver and Tilson noted, “A holographic will is obtainable by compulsion as easily as a ransom note.” Allegations of forgery also plague holographs. In one notorious dispute, the family of Howard Hughes vigorously attacked the authenticity of a homemade testament found after the billionaire’s death. A Las Vegas probate court conducted a seven-month trial, ultimately concluding that a local gas station attendant had forged the document. One commentator, frustrated by his experience with probating handwritten wills, distilled the essential complaint: “Most bogus wills are holographic.”

holographic wills offer testators few protections); Sean P. Milligan, Comment, The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court, 36 St. Mary’s L.J. 787, 808 (2005).

28 See Bruno, supra note 15, at 214–15 (“[H]olographic wills have carried with them the Statute of Frauds stigma of fraud and forgery.”).

29 Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 14 (1941).

30 See Natale, supra note 10, at 161 n.12 (“[L]itigation [levels] arise[ ] due to the fact that, unlike the case of a formal will, a court cannot be certain that the decedent actually executed the will.”).


32 Melvin Dummar claims that in December 1967 he found a dazed and lost Howard Hughes wandering along a desolate road in the Nevada desert. Dummar contends that he then gave Hughes a ride to a Las Vegas hotel. Nine years later, after Hughes’s death, a handwritten will was discovered in the headquarters of The Church of Jesus Christ of Latter-Day Saints in Salt Lake City, Utah. The holograph, known as the “Mormon Will,” left “Melvin DuMar” one-sixteenth of Hughes’ $2.5 billion estate. The will was declared a forgery in 1978. Dummar, however, continues his quest to attain part of the Hughes’ fortune. On June 12, 2006, he filed suit in federal court against two of Hughes’ close companions, claiming that they had conspired to defraud Dummar out of his rightful share of the estate by presenting perjured testimony in the 1978 trial. Dummar’s complaint demanded the $156 million that he would have received from the estate, plus punitive damages and interest. See id.; Martin Kasindorf, Judge to Rule on Hughes Estate Claims, USA Today, Nov. 6, 2006, at 3A; Linda Thomson, Dummar Loses a Battle Over Hughes’ Will, Deseret Morning News, June 1, 2007, at B5.

33 John J. Harris, Genuine—or Forged?, 32 Cal. St. B.J. 658, 660 (1957) (stating that holographic wills are more susceptible to forgery than formal wills). See also Natale,
Second, a substantial body of criticism suggests that potential heirs routinely attempt to probate handwritten documents that were never intended as wills. A Michigan court found itself tasked with deciding if a note stating "I want to donate $150,000 to God in order to build a church" constituted a valid testamentary gift to the Korean New Hope Assembly of God. Judges frequently must determine whether such documents reveal the intent necessary to fashion a will. Commentators worry that any casual or offhand writing—a greeting card, a love letter, a few sentences scribbled on hotel stationary—can be construed inappropriately as a will. In the eyes of these critics, probate courts need formal protections to separate the legal wheat from the chaff and keep testators from accidentally giving away their property.

Finally, observers generally agree that do-it-yourself willmakers lack basic training in the principles of estate planning. One law professor quipped that holographs—typically authored by uneducated testators with little knowledge of the law—amount to a form of "trailer-park" estate planning. The State Bar of Texas makes a similar point through more refined language; it refers to homemade wills as a "prolific source of litigation with resulting family disputes and greatly increased costs of probate." The main insight of these critics is that sorting through an

supra note 10, at 160–61 n.12 (observing that homemade wills are notorious for breeding an intense amount of litigation because probate courts are not always sure whether the decedent executed the will).

See Brown, supra note 14, at 100 (arguing that holographs are contested because they "simply do not meet the more basic requirements of any will, holographic or attested, particularly the requirement that a will evidence testamentary intent"); Stanley R. Langley, Note, Proof of Testamentary Intent in Holographic Codicils, 25 ARK. L. REV. 376, 376–77 (1971) (discussing the "formidable" problem of determining testamentary intent in handwritten documents); J.M. Robinette, Note, Wills—Holographic Wills and Testamentary Intent—Extrinsic Evidence Is Inadmissible to Prove Testamentary Intent for Holographic Wills Lacking Words of Disposition, 27 U. ARK. LITTLE ROCK L. REV. 545, 553 (2005).


See Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 804 (1941).

See generally Bird, supra note 13, at 632; Brown, supra note 14, at 116–20 (providing numerous examples of poor drafting in modern holographic wills).


STATE BAR OF TEXAS, HOW TO LIVE-AND DIE-WITH TEXAS PROBATE 81 (Charles A. Saunders ed., 6th ed. 1990). See also Beyer, supra note 3, at 238–39 (pointing out that
incomplete and ill-designed estate forces a testator’s family to incur unnecessary legal expenses and adverse tax penalties.\textsuperscript{41} Thus, it is unsurprising that commentators often cite holographs as the touchstone example of poor estate planning.

An opposing set of academics suggests that we should approach such alarmist claims with caution. They point out that, despite criticism, homemade testaments have grown in popularity in states and towns across the country.\textsuperscript{42} We can attribute this boom in do-it-yourself willmaking to three related factors. To start, holographs receive support from libertarians who resent the prying questions of witnesses and attorneys.\textsuperscript{43} Commentators also promote holographic wills because they enable testators to compose their final wishes quickly and with minimal effort, greatly reducing the overall cost of estate planning.\textsuperscript{44} Such features are crucial for individuals who lack the resources to commission a traditional will or who cannot find the time to execute a formal document with the required number of witnesses. In certain cases, holographs may be the only tool available to testators who fall seriously ill and wish to execute a will

homemade wills are often considered “litigation-producing”).


\textsuperscript{42} See Natale, \textit{supra} note 10, at 161 (“While holographic wills have been the subject of much criticism, with some commentators even calling for their abolition, a gradual trend has emerged toward recognizing their validity.”). At mid-century, only 19 states allowed holographic wills. See Victor R. Hansen, \textit{Holographic Wills}, 95 TR. & EST. 875, 875 (1956). Today, 27 jurisdictions authorize holographic wills. See statutes cited \textit{supra} note 25 and accompanying text. According to Professor Langbein, the number of states recognizing holographic wills should continue to increase as states adopt the Uniform Probate Code provisions that make liberal allowance for holographs. See Langbein, \textit{supra} note 36, at 491.

\textsuperscript{43} See \textit{supra} note 5.

\textsuperscript{44} See Bird, \textit{supra} note 13, at 605 (putting forth that the holograph’s “chief virtue is convenience”); Natale, \textit{supra} note 10, at 160 (noting that holographic wills are for the convenience of the testator); Michael G. Rogers, Note, \textit{Put on Your Blinders and Get Your Earplugs: The Nebraska Supreme Court’s Construction of the Nebraska Holographic Will Statute Excludes Evidence of Testator Intent in Estate of Foxley v. Hogan}, 254 Neb. 204, 575 N.W. 2d 150 (1998), 78 NEB. L. REV. 147 (1999) (arguing that holographs play an important role for testators that lack time to complete a traditional will).
before death.\textsuperscript{45} Finally, scholars concerned about conserving judicial resources champion holographs because they allow probate courts to accept more instruments as valid final testaments.\textsuperscript{46} The thinking behind this rationale is that any concrete documentation of a testator’s intent reduces conflict between potential donees, which ultimately leads to fewer courtroom battles.\textsuperscript{47} Underlying all of these pro-holograph arguments is the belief that allowing a testator to craft a will by hand is better than allowing him to die without expressing his final wishes.

In determining the value of holographic wills, the theoretical arguments of academics take us only so far. The most fundamental question remains unanswered: What does the empirical evidence show? Unfortunately, modern trust and estate scholarship provides few answers.

C. Previous Studies of Homemade Wills

In the legal literature, a handful of studies are cited regularly in the battle over do-it-yourself testaments. Professor Gerry Beyer of Texas Tech University conducted the most well-known study. Beyer asked 51 volunteers to fashion homemade wills using state-approved will forms. He found that nearly 70\% of participants included at least one ambiguously worded bequest in their testaments, and nearly 20\% of the willmakers introduced an error that invalidated a significant portion of the document.\textsuperscript{48} Although these figures undermine the claim that people can author their own testaments, Beyer’s analysis suffers from several critical deficiencies. First, the study’s small sample size calls into question the validity of its findings. Beyer also failed to select the participants for the survey randomly.\textsuperscript{49} The project did not include people of all educational

\textsuperscript{45} See Hirsch, \textit{supra} note 15, at 1074 n.51.

\textsuperscript{46} See Beyer, \textit{supra} note 6, at 782 (discussing this principle in relation to statutory will forms).

\textsuperscript{47} When a person dies without a will, state intestacy laws may distribute the person’s property in a manner inconsistent with his expressed wishes or the circumstances of his life. Inter-family disputes commonly follow. The ability to execute a holographic will can reduce these heated confrontations by providing a practical means for persons to record their intent in a legally binding manner. A decline in pointless litigation would save society and the probate system time, sweat, and money.

\textsuperscript{48} See Beyer, \textit{supra} note 6, at 810. Beyer examined statutory fill-in will forms, not holographs.

\textsuperscript{49} Beyer admitted that the participants were volunteers who knew that the study involved statutory wills, and that statutory wills were used in some states to reduce the cost of estate planning. This may have led individuals to volunteer because
backgrounds.\textsuperscript{50} No less significant, the volunteers knew they were participating in a study and that the documents they produced had no binding legal effect.\textsuperscript{51} As Beyer acknowledges, "some individuals chose to skip portions of the form they did not understand or completed them the best they could, knowing that they would suffer no legal detriment for doing something wrong."\textsuperscript{52} Such evidence does not support the conclusion that people systematically introduce fatal flaws into handwritten wills or that this alleged problem should be remedied by outlawing holographs.

The second regularly cited piece of evidence comes from Kevin Natale, a researcher at Hofstra University.\textsuperscript{53} Natale examined holographic will statutes in five states and briefly discussed two or three cases from each jurisdiction. He suggests that unsophisticated testators regularly make drafting and execution errors that inadvertantly invalidate their wills.\textsuperscript{54} Although Natale's survey remains an excellent resource in the study of holographs, such impressionistic observations fail to prove whether handwritten testaments expose testators to unacceptable levels of risk.

Other legal academics have gathered information on holographic wills from appellate court rulings in California,\textsuperscript{55} Virginia,\textsuperscript{56} and Arkansas.\textsuperscript{57} These inquiries attempt to sketch a rough picture of how judges interpret handwritten testaments. Unfortunately, these scholarly works draw no definitive conclusions on the value of holographs. Some, like Gail Bird's article on holographs in California, fervently insist that homemade wills remain more litigation prone than witnessed testaments.\textsuperscript{58} Others see value

\begin{enumerate}
\item They were interested in estate planning and may have inadvertantly created a participant bias in favor of a low cost self-help legal tool.
\item \textit{Id.} at 811. This pool, however, may mirror those who often use holographs.
\item See \textit{id.} at 810.
\item See \textit{id.} at 811.
\item \textit{Id.}
\item See Natale, \textit{supra} note 10.
\item See \textit{id.} (discussing how testator's intent frequently is defeated by inexact drafting and poor execution).
\item See Kirk, \textit{supra} note 27, at 258-59 & nn.1-2; Bird, \textit{supra} note 13.
\item See Jodi M. Graves, \textit{Incorporation by Reference, Integration, and Holographic Wills in Gifford v. Estate of Gifford}, 46 ARK. L. REV. 1013 (1994); Robinette, \textit{supra} note 34, at 553.
\item See Bird, \textit{supra} note 13, at 610, 632.
\end{enumerate}
in promoting freedom and flexibility in testation "by expanding the range of documents potentially enforceable as wills." The major failing of these academic studies is that they are based on data from appellate-level court decisions. Accordingly, the figures and facts presented do not necessarily reflect the scope of lawsuits heard at the trial level or wills filed with municipal will registries. Even more problematic, the data underlying these pieces, by and large, have gone stale. Bird's work, for example, draws on figures from the late seventies, statistics that most certainly do not reflect the recent rise of internet self-help websites or commercially available willmaking kits.

All in all, it seems that the current literature on holographic wills in the United States provides few meaningful insights on the trade-off between freedom of testation and protection of unsophisticated will-makers. No scholar has yet turned an empirical lens on the problem of holographic wills. What percentage of holographic wills actually are contested? Do holographic wills expose testators and their loved ones to unneeded legal bills? Are holographs authored only by the most impoverished and uneducated testators? Does the fate of the typical holograph suggest that state legislatures should alter their will statutes? This Article hopes to answer these queries.

IV. DATA AND METHODS

In an effort to explain better how willmakers navigate the pitfalls of crafting their own testaments, my research scrutinizes the probate records of Allegheny County, Pennsylvania. The greater Pittsburgh area offers several advantages for a study of this type. First, Pennsylvania has, perhaps, the most liberal holographic will statute in the country—the state allows testators to authorize third parties to handwrite their wills. Under


60 See, e.g., Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 LAW & SOC'Y REV. 869, 889 (1999) (discussing how the "small proportion of cases that produce published opinions renders the representativeness of published opinions suspect"). In Pittsburgh, for example, testators left behind almost 150 holographic wills during 1990 and 1995, but only two decisions were appealed in state courts. Any conclusions drawn from these unrepresentative cases would do violence to the mix of testaments filed with the Register of Wills.

such a legal regime, we should expect to find ample evidence of fraud, forgery, and deceit. Second, the region’s demographics render it an excellent test case for scholars concerned about the fate of holographs. Allegheny County has a heterogeneous mix of residents that roughly parallels the distribution of racial, ethnic, economic, and religious groups at the national level. It is therefore unlikely that any observed patterns of testation can be attributed to specific cultural characteristics of individual groups. Third, and equally important, Western Pennsylvania remains home to a heavy number of older Americans, making it likely that the Register of Wills Office in Allegheny County probated as many (or more) final testaments as any other county in the country during this


63 The Register of Wills Office is a department of the county government that determines whether a document offered for probate constitutes a last will and testament pursuant to Pennsylvania law. If a decedent fails to name an executor, the Register decides who shall administer the estate. The Office also hears testimony in regard to any document that is challenged on the grounds of forgery or lack of mental capacity. See 20 PA. CONS. STAT. ANN. § 3158; In re McMurray’s Estate, 100 A. 798, 799 (Pa. 1917) (showing it is the duty of the Register of Wills to grant letters of administration); In re Schulz’ Estate, 139 A.2d 560 (Pa. 1958) (showing that a Registrar of Wills may appoint an administrator). See also 20 PA. CONS. STAT. ANN. §§ 901, 903; In re Estate of Vanoni, 798 A.2d 203 (Pa. Super. Ct. 2002) (demonstrating that Registrars hear testimony on myriad issues before determining probate).
time. Such a large sample of recorded wills should allow us to draw useful conclusions about the essential value of holographs.

Luckily for the purposes of this study, the government of Allegheny County also has maintained a remarkable set of files on every probate application submitted since 1789. These dossiers include estate inventories, court records of contested testaments, copies of all supporting documents (such as affidavits affirming the handwriting of the testator), heir notification letters, death certificates, tabulations of lawyers’ fees, and the original wills.

In an effort to gather empirical evidence regarding holographic testaments, the author gathered every document submitted for probate during the years 1990 and 1995 and recorded and reviewed each holographic will and codicil submitted in those years. In all, this study found that approximately 10,000 estates submitted an application for probate during 1990 and 1995 collectively. Of these, 145 contained holographic testaments. Several pieces of information were recorded from each of the handwritten wills—including the name of the decedent, the size of their estate, the particulars of the testamentary scheme, whether the Register of Wills granted the request for probate, and the details of any will contests. The statistics sketch a clear picture of the average do-it-yourself testator, help explain why holographic willmakers choose to forge their own testaments, and demonstrate how such testators distribute their assets. At their

64 Allegheny County remains one of the largest and most elderly counties in the country. See U.S. Census Bureau, 100 Largest Counties, http://www.census.gov/popest/counties/CO-EST2006-07.html (last visited Feb. 18, 2008); James O’Toole, Studies Show How the Over-50s Exert Such Great Influence, PITTSBURGH POST-GAZETTE, May 7, 2006, available at http://www.post-gazette.com/pg/06127/688152-103.stm. The greater Pittsburgh area is currently home to more residents over the age of 65 than all but 12 other regions. The counties with the largest number of older residents are: Los Angeles, CA (926,673); Cook, IL (630,265); Maricopa, AZ (358,979); San Diego, CA (313,750); Miami-Dade, FL (300,552); Queens, NY (283,042); Kings, NY (282,658); Orange, CA (280,763); Palm Beach, FL (262,076); Broward, FL (261,109); Harris, TX (252,895); Wayne, MI (248,982); and Allegheny, PA (228,416). See United States Census, Counties Ranked by Percent of Population Over 65 (2000), http://www.censusscope.org/us/s42/rank_age_percent_over_65_2000.html (last visited Feb. 18, 2008). Again, the demograhic of Allegheny County has not changed much since 1990. See supra note 62.

65 Prior to 1996, the Register of Wills maintained estate records in a comprehensive series of “will books.” In 1996, the county moved to a computerized system of record-keeping that reduces storage space but makes large scale searches of the probate records unwieldy, proving yet again that “to err is human, but to really foul things up requires a computer.” FARMERS’ ALMANAC (1978). This study chose to examine two random years between 1990 and 1995—the most recent records still in physical form.
core, the findings of this study present a new and more accurate impression of the extent to which people succeed and fail at crafting their own wills.

V. EMPIRICAL FINDINGS

A. Holographic Willmakers

As mentioned above, laymen generally prepare holographic wills, working without the supervision of a trained attorney. Unsurprisingly, these documents occasionally provide a touch of levity in an otherwise dark area of the law. Take, for example, the widely circulated will of John Brugger. Among other things, Brugger describes his wife as "get[ting] older and a little fleshy," stipulates that his daughter receive only $100 because she married a scoundrel, and hopes that this wife "will not be a Fool and mar[r]y again."66

The wills from the Pittsburgh area include a share of similarly light-hearted moments. Ralph Reilly instructed, "When I kick the bucket, that is to decease, No longer living to Die or Died, Death, my daughter . . . Trudy J. Reilly . . . is to get everything I have . . . . [If she] dies before me or with me, my relatives . . . is not to get one cents."67 Another testator disinherited her son on the grounds that "he called me a very bad name and talked in a screaming voice . . . ."68 The appeal of these anecdotes is undeniable. They offer a rare glimpse at the largely anonymous human relationships that undergird the law. Unfortunately, however, the proliferation of stories has damaged the reputation of do-it-yourself willmakers.

Both scholarly publications and the popular press routinely portray the authors of homemade testaments as uneducated, stubborn, and intent on improvidently giving away their property. Textbooks, for example, often cite cases like In re Kimmel’s Estate69 to imply that holographic will-writers lack the sophistication to forge valid legal documents.70 The will in Kimmel’s Estate reads simply:

67 Will of Trudy J. Reilly (on file with author).
68 Will of Dolores Wycoff (on file with author).
69 123 A. 405 (Pa. 1924).
I received you kind & welcome letter from Geo & Irvin all OK glad you poot your Pork down in Pickle it is the true way to keep meet every piece gets the same, now always poot it down that way . . . & you will have good pork fore smoking you can keep it from butchern to butchern the hole year round. . . . [I]f enny thing hapens all the scock money in the 3 Bank liberty lones Post office stamps and my home on Horner St goes to George Darl & Irvin Kepp this letter lock it up it may help you out.

The picture that emerges from these anecdotes is unflattering at best, and, at worst, suggests that prohibiting holographs would protect society's most vulnerable members.

The data from Allegheny County suggest that the traditional portrayal of do-it-yourself willmakers needs revision. Perhaps most surprisingly, this study found that women authored an overwhelming majority of the handwritten testaments submitted for probate. In total, women composed more than 65% of the holographic wills and codicils. What causes this gender gap? Demographics alone do not provide an answer. According to the 1990 U.S. census, the population of Allegheny County was almost evenly divided between men (48%) and women (52%). The stubborn realities of aging may offer the best explanation. Despite the best efforts of modern medicine, husbands typically die before their wives, leaving widows with the burden of deciding how to distribute a couple's property. It is also possible that women of this generation were less sophisticated in financial affairs and less comfortable around attorneys, perhaps leading them to execute a higher percentage of holographs.

This study also found that the authors of handwritten wills came from an unexpected variety of socio-economic backgrounds. In the two years

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71 In re Kimmel's Estate, 123 A. at 405.
72 Wills reviewed by author.
75 See id. at 1470.
of the study, American households had a median net worth of roughly $34,076, yet almost one in six holographic testators (14%) left behind more than $100,000 in property.76 Holographic willmakers in Allegheny County, on average, died at the age of 75 with $70,290 in net probate assets.77 Most surprisingly, Vera Brown—a multi-millionaire—elected to distribute portions of her estate with an informal handwritten codicil.78 Despite the remarkable wealth of a few, careful examination of the record reveals that many of the very poorest willmakers also gravitate toward holographs. Over 20% of testators in this study died with less than $10,000 in net probate assets. All in all, it seems that while holographs have become an essential tool for testators with modest assets, the claim that handmade testaments amount to "trailer park wills" still carries some water.

A final note about the authors of handwritten wills: they write well. While no scholar would confuse a holograph with one of Shakespeare’s sonnets, most testators composed their wills in crisp, clear language that would be difficult to misconstrue or misinterpret. The will of Kathleen Ney exemplifies the no-nonsense style: 79

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77 Wills reviewed by author. Although the mean was $70,290, holographic willmakers in Allegheny County died with only a median of $26,000 net probate assets.
78 See Will of Vera Brown (on file with author).
79 See Will of Kathleen Ney (on file with author).
The underlying truth is that scholars who base their opinion of holographs on a patchwork of humorous anecdotes and appellate level court decisions miss the rich diversity of testaments filed with the Register of Wills. The average person who chooses to execute a homemade will does not deserve to be lumped in with the occasional testator who is barely literate or takes the job less than seriously. The authors of holographic wills are not foolish or feeble or unreliable.80 Whether through hard work

80 See Gulliver & Tilson, supra note 29, at 9 ("[T]he makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and
or luck, the testators in this study generally managed to scrape together sizeable assets and then chose to distribute those assets with well-written documents of their own making. This instinct to convey property to loved ones arguably should be applauded, not the subject of derision.

Notice, too, that relying on a handful of unrepresentative cases does not provide answers to the fundamental empirical questions that hang over the debate about handwritten wills. Do holographic wills expose testators and their families to an unacceptable amount of risk? To settle this question we must turn to the wills themselves.

B. The Problem with Holographic Wills

When testators decide to author holographic wills, how do they fare? Skeptics suggest that laymen need help navigating the details of local estate law. The wills uncovered in Allegheny County provide brick and mortar support for this position. Without question, homemade testaments betray their authors’ lack of familiarity with basic tenets of professional estate planning. The data show that laymen routinely craft flawed legal documents.

Most worrying, 43% of the wills in this study failed to name an executor.81

81 Wills reviewed by author.
Traditionally, executors guide an estate through probate, pay debts, distribute property to heirs, and enforce the decedent’s last wishes. If a testator dies without authorizing someone to serve as executor, a probate court must appoint a person or institution to the post—a process that can be expensive, time consuming, and contentious. The family of Sergio

82 See, e.g., In re Estate of Frey, 693 A.2d 1349, 1353 (Pa. Super. Ct. 1997) (“One’s appointment as an estate executor confers honor and trust and, commensurately, the duty to oversee the administration with competence so as to avoid compromising the probity of the estate.”).

83 If a will does not name an executor, Pennsylvania courts appoint an administrator “cum testamento annexo” (literally, with the will annexed) to guide the estate through probate. See Estate of Osborne, 525 A.2d 788, 794 n.7 (Pa. Super. Ct. 1987). Anyone interested in the estate may object to the appointment of an administrator. Battles over the right to serve as administrator seem fairly common in the Pennsylvania court system. For two prominent examples see, Appeal of Frick, 6 A. 363 (Pa. 1886) and Brokans v. Melnick 569 A.2d 1373 (Pa. 1989). The battle over the estate of noted philanthropist, Dr. Arthur Sackler, illustrates the danger of naming too many executors. When Sackler died, he left behind three former wives (one 30 years his junior), four children, and seven grandchildren. During his lifetime, his strong personality and famous generosity enforced detente among the members of the extended family. Unfortunately, in his will Dr. Sackler named seven executors: his third wife, his first wife, two children of his first marriage, two children of his second marriage, and his lawyer. It will surprise no one that things ran afoul. Years of litigation ensued and, at one point, nearly every executor had separate
Bonani discovered this the hard way. Bonani, an Italian immigrant, authored a holographic codicil that fundamentally reshaped his original will. Instead of splitting his estate between his son and daughter, Bonani left his house and jewels—the bulk of his assets—to his daughter’s children.⁸⁴ Despite Bonani’s hope that everyone would remain “happy and satisfied” and that his wishes would “be respected by both sides without any argument” a nasty fight erupted over who should, ---- executor of the estate.⁸⁵ The record suggests that Bonani’s son, Vincenzo, attempted to recover some of his “lost” inheritance by claiming the executor’s fee.⁸⁶ Although naming an executor might not have avoided all litigation over this estate, a nod toward the disfavored son may have calmed the waters. Failure to research and understand this fundamental principle of estate planning bolsters arguments that people should not be allowed to author their own wills.

Another striking feature of the data gathered in Allegheny County is that 24% of holographic willmakers neglected to assign the residue of their estates.⁸⁷ A residuary clause is, in effect, a “catch-all” that directs the division of property not specifically mentioned in the final testament.⁸⁸ Practitioners and academics generally agree that such a clause is essential to the efficient settlement of estates; property that a testator fails to devise


⁸⁴ See Will of Sergio Bonnai (on file with author).
⁸⁵ Id.
⁸⁶ In Pennsylvania, the compensation of personal representatives is governed by title 20, section 3537 of the Pennsylvania Code, which states: “The court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just; and may calculate such compensation on a graduated percentage.” 20 PA. CONS. STAT. ANN. § 3537 (West 2005). In a series of cases, culminating in In re Wallis’ Estate, 218 A.2d 732 (Pa. 1966), the Pennsylvania Supreme Court approved a general rule that an executor’s fees of 3% of the estate under administration was “prima facie . . . fair and reasonable.” However, the Pennsylvania Supreme Court later pointed out that the rule was not hard and fast. See In re Reed’s Estate, 341 A.2d 108, 110-11 (Pa. 1975). The modern rule puts considerable discretion in the hands of the probate judge. The amount of compensation should reflect the worth to the estate of services rendered. See Estate of Allen, 412 A.2d 833, 488 (Pa. 1980).

⁸⁷ Wills reviewed by author.
⁸⁸ A residuary clause is “[a] testamentary clause that disposes of any estate property remaining after the satisfaction of all other gifts.” BLACK’S LAW DICTIONARY 1336 (8th ed. 2004).
or bequeath through the will is distributed according to the state’s intestate laws—an expensive process that can frustrate a testator’s intent.

The will of Helen Stewart illustrates the consequences of neglecting to incorporate a residuary clause within the four corners of a final testament. Stewart entered her final days childless, without a will, and in possession of a large estate. On her deathbed she managed to scratch out a holographic testament that carefully divided some of her assets—stocks, real property, and $10,000 cash—between two named beneficiaries. The document, however, failed to bequeath specifically a significant portion of her liquid assets. Lacking a residuary clause, the will had no power to control the distribution of the unassigned cash holdings, which ultimately passed to her mother under Pennsylvania’s intestacy law. Although few policymakers would object to the eventual outcome, the terms of the will give no indication that Stewart intended her mother to receive a penny of her estate.

Critics of holographs would also note that the wills from Allegheny County are rife with more colorful, idiosyncratic drafting errors. One testator relied on a visual diagram to direct the distribution of her estate.

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89 See Will of Helen Stewart (on file with author).
90 See id. For another example of the danger of omitting a residuary clause, see Arnold v. Carmichael, 524 So. 2d 464, 465–67 (Fla. Dist. Ct. App. 1988) (explaining that the attorney omitted a residuary clause, resulting in the division of the residuary estate among the testatrix’s 11 heirs rather than the two plaintiffs she intended).
91 See Will of Bridget Burns (on file with author).
Additionally, the findings reveal that testators occasionally fail to specify exactly how their property should be distributed. The final testament of Sally Williams, for example, divides her assets “equally” between her son and the two children of her deceased daughter. Although clearly well-intentioned, Williams’s imprecise language gives no indication whether the administrator of the estate should divide the property according to the traditional per stirpes rule (one half to the son, one quarter to each grandson) or a per capita scheme (one third of the estate to each). Two other testators were even more opaque, commanding their executors to distribute assets according to the “need” of the named beneficiaries. A handful

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92 Will of Sally Williams (on file with author).
93 “Per stirpes” is a Latin phrase that means “by branch.” The term is used in wills to specify that each branch of the decedent’s family receives an equal share of the estate, regardless of how many people are in that branch. Assume, for example, that A and B are the children of the deceased, but B has also died, leaving behind children C, D, and E (the grandchildren of the deceased). Under per stirpes distribution, A would receive one half of the estate and each of B’s three children would receive one-sixth of the estate (essentially, they are dividing B’s half).
94 See Will of Alice Barker (on file with author); Will of Felicia Heasley (on file
of willmakers also signed their testaments with casual terms of endearment, such as “Love, Mother” rather than their full, legal names.95

Dear Molly & Tom,

It is my dying wish that you both be Co-executors of my estate.

Mother

Nov. 11th 1978

The capsule lesson from these documents is that holographic willmakers frequently stumble when executing their final testaments. A variety of indicia—from the failure to include residuary clauses to incorrectly signed documents—reinforce the commonly held belief that non-lawyers should leave estate planning to professionals.

C. The Case for Holographic Wills

As we have just seen, the data from Allegheny County provide critics of do-it-yourself willmaking with more than enough ammunition to hold the Alamo. These missteps and miscues, however, fail to put the final nail in the coffin of the holographic will. Despite the countless small errors embedded in homemade documents, holographs continue to offer unmistakable benefits to testators who are either unable or unwilling to execute a traditional will. First and foremost, holographs offer testators an inexpensive alternative to state intestacy statutes. Second, holographs grant all willmakers a cost-effective way to make small changes to their larger estate plans. Third, the absence of time-consuming procedural requirements allows anyone caught in a life-or-death situation to author a valid final testament. Finally, holographic wills deserve a second look because, as illustrated by this study, they rarely are contested in courtroom pro-

95 Codicil of Gladys Alexander (on file with author).
ceedings; in the overwhelming majority of cases, homemade testaments distribute a decedent’s property without fuss or objections.

1. An Alternative to Intestacy

The primary reason to make a will, any will, is to control the distribution of property and personal effects at death. Those who die without recording a final testament must rely on state intestacy statutes to guide the allocation of their assets. Such legislatively mandated schemes distribute one’s possessions based on the presumed intent of the average person, not the actual desires of any individual decedent. Typically, property passes to persons most closely related to the decedent by blood and marriage. It should come as no surprise then that intestacy statutes often fail to carry out the exact wishes of the departed.

Warts and all, holographs are valuable because they provide willmakers with a useful alternative to the laws of intestacy. Notice that the vast majority of the testators in this study used their holographic testament, whether intentionally or not, to opt out of Pennsylvania’s backstop provisions. More than 68% of the wills included terms facially inconsistent with basic intestacy law principles. In one example among many, William Cameron divided his sizeable estate between his church

96 See Langbein, supra note 36, at 491 (“[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”).

97 See id. at 499 (stating that every Wills Act is supported by an intestacy statute). See also Joel C. Dobris, The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?, 28 REAL PROP. PROB. & TR. J. 393, 397 (1993) (stating that “the intestate succession statute provides a free will for people who do not make a will”).


99 The statute-based plans represent an assumption, undergirded by public policy, that an individual wants to pass his or her property to certain individuals. Evidence to the contrary is almost always inadmissible, and as a result, many decedents’ wishes go unfulfilled. See May Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1190 (1985) (discussing how some intestacy statutes limit the share of a testator’s estate that passes to the spouse when children of a decedent are alive despite the fact that many Americans would not want to limit spouse’s share of the estate in this circumstance).

100 Wills reviewed by author. The percentage of holographic wills that distribute property in a manner inconsistent with the intestacy statutes is almost certainly higher. Unfortunately, the information on file with the Register of Wills often fails to specify the relationship between the decedent and the will beneficiaries.
and grandchildren. Under Pennsylvania law, if Cameron had failed to make a will, all of his property would have passed to his two daughters. In another instance, August Borza, a widow with no children, died with nearly $400,000 in assets. Pursuant to the principles of intestacy, a probate judge would have divided all of Borza's property between his closest living relatives—two nephews. Borza had other ideas. He authored a detailed holograph that spread his wealth and possessions among his church, his friends, his sister-in-law, and a step-nephew who "had been a great help." Other willmakers crafted similar holographs to disinherit siblings, children, uncles, and aunts—all of whom stood to receive a share under Pennsylvania law.

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101 See Will of William Cameroon (on file with the author).
102 See 20 PA. CONS. STAT. ANN. § 2103 (West 2005).
103 Wills reviewed by author.
104 See 20 PA. CONS. STAT. ANN. § 2103 (West 2005).
105 Will of August Borza (on file with author).
106 See, e.g., Will of Frances Spagnolo (on file with author) (disinheriting three siblings in favor of one sister); Will of Charles Nagy (on file with author) (disinheriting son and bequeathing all to daughter and granddaughter); Will of Frances Swihart (on file with author) (leaving son a VCR and an old nightstand, and giving everything else to sister).
Handwritten wills also remain a vitally important cog in estate planning machinery because they allow testators to deviate from intestacy laws without paying costly attorneys' fees. The significance of this argument cannot be overstated. Even the simplest professionally drafted document may cost hundreds of dollars and take weeks to prepare. A testator with an average sized estate may need several appointments with a lawyer to gather relevant documents and authorize the final estate plan. A holograph, on the other hand, can be composed with little fuss in a matter of moments. The overwhelming majority of testators in this study managed to record the entire sweep of their final wishes with less than a page of writing, and a significant minority needed fewer than half-a-
dozen sentences.108 Demonstrating maximum economy, William K. Carnes distributed his entire estate and named an executor with one brush stroke.109 Thus, for citizens who are either unwilling or unable to pay for a formal will, or who cannot find the time to visit a lawyer because of work and family obligations, the holograph remains a valuable option.

2. Cost-Effective Changes to Formal Wills

The convenience of do-it-yourself willmaking benefits the public in other, surprising ways. Impressionistic evidence suggests that as testators age they often seek to change to their initial estate plans. A willmaker may decide to replace his executor, add new grandchildren to an old will, or alter his testamentary scheme to acknowledge personal relationships that blossomed late in life. Many testators use a professionally drafted codicil—an amendment to the will—to make such alterations. The expense of executing such documents, however, ensures that some desired changes go unmade. For example, no rational testator would outlay significant resources to bequeath an inexpensive piece of jewelry.110

Holographs can help willmakers give small but meaningful gifts. This study shows that testators—even those with elaborate formal wills—often use handwritten codicils to make minor changes to their larger estate plans. To illustrate, one Pittsburgher executed a handwritten codicil that gave an electric oven and teakettle to a beloved neighbor.111

108 Wills reviewed by author.
109 The full text of Carnes's will reads: "Being of sound mind, I leave all of my possessions to my daughter Judith Ann Peterson and appoint her my executor to serve without bond." Will of William K. Carnes (on file with author).
110 Some states grant testators the power to specify in their will that nominal personal property is to be distributed pursuant to a "changeable" memo. See Unif. Probate Code § 2-513, 8 U.L.A. 158 (1998).
111 See Codicil of Martha Scribner (on file with author).
Other testators used holographs to give away rings, TVs, china sets, and dolls to relatives and friends who served them well in old age. Many of these touching gifts arrive in tandem with the final expression of a testator’s most tender emotions. As illustrated above, Martha Scribner thanked a friend for the “many, many favors you have given me.” Another testator expressed gratitude to her daughter for the time they spent to-

112 See Codicil of Katherine Gibson (on file with author) (leaving ring, television, and bracelet to niece, and china set to nephew); Codicil of Verlan Butterini (on file with author) (making individual bequests of a diamond ring and a snowblower); Codicil of Anna Sneberger (on file with author) (leaving doll to daughter); Codicil of Verna Pritchard (on file with author) (giving diamond ring and family pictures to granddaughter, and furniture to sister); Codicil of Anna Burkovic (on file with author) (leaving small monetary gift to Meals on Wheels).

113 Codicil of Martha Scribner (on file with author).
gether. It seems likely that these largely symbolic gifts would go undone if the law required testators to pay the cost of executing professionally drafted, witnessed codicils. Holographic codicils thus arguably improve the quality—not just the amount—of willmaking by ensuring that the written documents testators leave behind fully reflect their final wishes.

3. Emergency Room Wills

Holographic wills offer another important benefit that scholars largely have overlooked. The lack of time-consuming procedural requirements needed to execute a holograph allows testators caught in life-or-death emergencies to memorialize their final wishes quickly. Indeed, the Romans invented the form to ensure that soldiers marching into battle had a legal mechanism to dispose of their property. Such “trench wills” have become embedded in the lore of trust and estate law. In one famous example, a British soldier fighting in the trenches of World War I composed a will on the back of a photograph of his girlfriend. He wrote, “In event of my death I leave all my effects and money to this young lady.” After the soldier died in combat, the photo was discovered and admitted to probate.

While trench wills are no longer a common feature of modern warfare, the data collected in the Register of Wills demonstrate that people who fall suddenly and dramatically ill continue to call upon do-it-yourself wills in end of life situations. In the emergency room and on the operating table, testators may handwrite their last wishes because they lack the time to find witnesses or discuss things with an attorney. Fully 10% of the holographs discovered in Allegheny County constituted such deathbed wills. An additional 11% were authored within the last year of the testator’s life. Despite concerns that testators become increasingly feeble-

114 See Codicil of Cornelia Derbaum (on file with author).
116 See id.
117 See Bruno, supra note 15, at 211.
118 Wills reviewed by author. Before the late seventeenth century most testators executed their wills in the days or moments before their death. As Matthew Hale described, wills are “many times made in Extremity.” See Mathew HALE, TWO TRACTS ON THE BENEFIT OF REGISTERING DEEDS IN ENGLAND 60 (London 1756). The deathbed testament generally was executed under the watchful eye of a priest, either shortly before or after the testator’s last confession. To prevent unscrupulous clergy from taking advantage of weakened testators, some states passed mortmain statutes, which limit the
minded as the spark of life grows dim, many willmakers, it seems, decide that it is better to forge a last-minute unwitnessed will than no will at all. Arguably, just as not every violinist needs a Stradivarius, not every testator needs a will attested by two witnesses and drafted by a costly attorney.

4. The Phantom Risk of Will Contests

The data on will contests further strengthens the pro-holograph argument. As we have seen, critics of holographs charge that homemade testaments are “chronically problematic” and create unnecessary litigation. This criticism finds no support in the data. Rather, the empirical findings from the study demonstrate that heirs rarely challenge handwritten wills in court. Of the 145 holographic documents submitted for probate in the years of study, only six (4%) resulted in a hearing or objection of any kind. These figures undermine the argument that holographs “are notoriously prone to challenge.” The stark truth is that nearly all holo-

119 Brown, supra note 14, at 126–27.
120 In two cases, heirs argued about who should serve as executor of the estate. See Codicil of Sergio Bonani (on file with author); Codicil of Joseph Breskin (on file with author). Another pair of disputes erupted over whether to divide an estate per stirpes or per capita. See Will of Eugene Rudek (on file with author); Will of Herman Boehm (on file with author). The fifth clash centered on the will of 87 year old testator, Hazel Meyer. Meyer authored a holographic document two years after executing a formal, attested will. A dispute arose out of a perceived tension between the first will, which left everything to Meyer’s son, and the holograph, which requested: “all my possessions including jewelry, furniture, and anything else I possess be equally divided among my daughter-in-law, . . . my granddaughter, . . . and my grandsons’ wives . . . .” The party who brought the suit, one of the granddaughters-in-law, argued that the handwritten testament invalidated the earlier will. The probate judge did not agree. The court determined that Meyer only intended the handwritten note as an informal codicil. With the first will restored, the son retained the bulk of the estate while the parties named in the holograph received the deceased’s personal effects. See Will of Hazel Meyer (on file with author).

The final conflict contains, undoubtedly, the most drama. In July of 1990, John Lesko died in poor health, possessing a modest $50,000 in property. As the estate moved into administration, Lesko’s daughter expected to receive half of her father’s assets pursuant to Pennsylvania’s intestacy law. Yet, to great surprise of the entire family, Lesko’s son announced that he had discovered a will amongst his father’s papers. Written in a faltering and unsteady hand, and dated less than three months before Lesko’s death, the document read simply, “On this day I wish to give all my possessions to my son.” The family contested the will, alleging undue influence in the creation of the holograph. A probate court agreed, finding that Lesko’s son inappropriately induced his father to execute the holograph. See Will of John Lesko (on file with author).

Brown, supra note 14, at 100.
graphs submitted for probate in Allegheny County sailed through the Register of Wills without objection. Of particular note, the record suggests that neither forgery nor deceit poses a significant threat to the integrity of do-it-yourself willmaking; this study found no evidence of counterfeited documents and turned up only one allegation of undue influence.\textsuperscript{122}

The study also failed to uncover any evidence of unscrupulous potential heirs attempting to probate handwritten notes not intended as final testaments. Despite assertions by scholars that lack of testamentary intent is a common problem with holographs,\textsuperscript{123} no document from this study was challenged on the ground that the testator lacked the intent to make a final will. This is no statistical fluke. The records from Allegheny County demonstrate that the authors of holographic wills clearly and consistently express testamentary intent in their homemade documents. Nine times out of ten testators labeled their holographs "Last Will & Testament" or "My Will."\textsuperscript{124} Others invoked the standard mantra: "being-of-sound-mind-I-do-hereby-bequeath-my-property." Even in cases where the documents submitted for probate lacked a proper label, testators typically employed dispositive language, mentioned death, and signed and dated their writings. From this, it is irresistibly tempting to conclude that the formal legal language of the trust and estates lawyer has seeped into the popular imagination. Perhaps more than any other single factor, the holographic testator's clear articulation of testamentary intent narrows the potential scope of lawsuits that an unsatisfied heir can bring.

Critics of holographs, however, would suggest that although the vast majority of homemade wills slip through the probate process uncontested, they still account for a larger \textit{proportionate} share of legal scraps. Although this argument packs some theoretical punch, it too runs aground on the facts. Recent studies have found that between 2\% and 10\% of formal witnessed wills result in a courtroom tussle of some

\textsuperscript{122} Wills reviewed by author.

\textsuperscript{123} See Cynthia J. Artura, \textit{Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law}, 74 WASH. L. REV. 799, 801 n.12 (1999) ("Showing that the testator had testamentary intent is rarely a problem when a lawyer has drafted the will, but it may become an issue when a will is homemade."). Given the quirkiness and relative informality of the wills, the decision to probate a holograph often turns on testamentary intent. See Bruce H. Mann, \textit{Formalities and Formalism in the Uniform Probate Code}, 142 U. PA. L. REV. 1033, 1044 (1994).

\textsuperscript{124} See John H. Langbein & Lawrence W. Waggoner, \textit{Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?}, 130 U. PA. L. REV. 521, 541 (1982) ("When the document is captioned 'Last Will and Testament' and purports to dispose of the estate, there is seldom any objection that it lacks testamentary intent.").
kind—findings abundantly similar to this study’s analysis of holographs. 125 The abiding lesson that emerges is that, holograph or not, will contests are extremely rare events.

In sum, it seems that the undiluted criticism directed at homemade wills largely misses the mark. Even a cursory glance at the evidentiary record reveals that the holograph remains an essential estate planning tool for testators who are either unable or unwilling to commission a formal will. For these citizens, do-it-yourself willmaking provides a low-cost alternative to dying intestate and passing property to undeserving or unfamiliar relatives. And despite the claims of naysayers, nothing in the data supports the claim that holographs subject testators and their families to unacceptable risks of litigation. To the contrary, the evidence shows that the nearly universal experience of heirs attempting to probate a holographic will is one of facilitation rather than roadblock.

VI. THE FUTURE OF FORMALITIES: WHY THE DATA MATTER

Boiled down to its essence, the data from this study have attempted to show that holographic wills are a valuable alternative to attested wills. But a knotty question remains: So what? Even the most vigorous proponent of holographs must concede that they constitute only a small portion of wills submitted for probate. In the Pittsburgh area, for example, holographs accounted for less than 2% of all final testaments. Given the limited numbers of handwritten documents, does this research have any practical long-term significance for lawyers, legislatures, and academics? The answer, I argue, is “yes.” The success of the do-it-yourself style of willmaking in this study does more than just rehabilitate the image of the holographic testament. It also raises fundamental questions about the future of the Wills Acts that govern testate succession. More specifically, the continued and effective use of holographic wills challenges the necessity of the formalities that currently saturate the probate system.

Looking at the fate of handwritten wills in Allegheny County, I contend that the legal community should push for two substantive

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125 See, e.g., Jeffrey P. Rosenfeld, Will Contests: Legacies of Aging and Social Change, in INHERITANCE AND WEALTH IN AMERICA 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (stating that in 1993, 9.9% of wills probated in New York resulted in a hearing or objection); Friedman, Walker & Hernandez-Stern, supra note 74, at 1453 (finding that 2% of wills probated in San Bernardino County during 1964 were contested). But see Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 MD. L. REV. 1093, 1101 (1996) (arguing that only “a fraction of the potential cases arrives at formal legal institutions like courts”).
reforms—reforms that would bring added consistency and fairness to American estate law. First, academics and politicians should advocate for universal acceptance of holographic testaments. Second, the data indicate that legislatures should eliminate the attestation requirement for so-called “formal” wills. Both of these proposals would promote the intent of testators—the lodestar of the Wills Acts—without imposing undue burdens on the judicial system.

A. The Future of Holographic Wills

At a minimum, the documents analyzed in Allegheny County demonstrate that all state legislatures should consider adopting statutes that authorize the probate of holographic wills. The findings of the study lend strong empirical support to the notion that the benefits of holographic wills outweigh their costs. As illustrated by the study, handwritten testaments can satisfy the widespread desire to control the distribution of one’s property at death, eliminate the need to pay costly attorneys’ fees, allow for testation in end-of-life emergencies, and improve the quality of willdrafting. Further bolstering the pro-holographic argument, California, Michigan, Texas, and Virginia—large states with diverse populations—have already embraced homemade wills without calamity befalling their probate systems. It also bears mentioning that countries in the Civil Law tradition have allowed holographs since the advent of the Napoleonic Code. With these precepts in view, I contend that states such as New York, Illinois, and Ohio, which currently deny the probate of holographs, should accept the old Roman idea that citizens can author their own wills without the supervision of witnesses or professional estate planners.

Recognizing the validity of holographs in every state would serve two key functions. First, it would eliminate the hardship faced by families who unwittingly attempt to probate otherwise valid holographic wills in jurisdictions that do not allow for them. The inequity of the current system can be seen cases such as Will of Shindell. There, the testator—a resident of New York—authored and signed a holographic will that divided his estate between his brother, sister-in-law, and two friends. At the trial court level, no evidence was introduced questioning the genuine-

126 See statutes cited supra note 25.
127 See id.
129 See id. at 70.
ness of the instrument or testamentary intent of the testator. The Appellate Division of the Supreme Court of New York, however, denied probate because as a domiciliary of New York, his unwitnessed holographic will was invalid. Cases like Shindell strike litigants as so unfair that there are still appellate level cases contesting the issue.

Broader acceptance of holographs could also expand the number of people who die testate. As noted in Part II, the vast majority of Americans die without executing a final estate plan. In the view of most academics, this is tragic. The benefits of willmaking are legion: testators may name a guardian for minor children, customize the distribution of assets to their circumstances, draw psychological benefits from knowing their affairs are well-settled, and reduce post-mortem conflict among loved ones.

Despite the advantages of making a will, the failure to increase the number of people who benefit from estate planning remains a stubborn problem. Many resist willmaking because they believe estate planning is a costly process. Others find confronting the idea of death an emotionally difficult experience. On both fronts, holographs can help. As already discussed, the cost of making a holograph—both in terms of time and money—is nominal. In states that allow holographs, a willmaker can contemplate his final wishes in the privacy of his home and then quickly compose a document that outlines his last desires. All this, without the need to make appointments with lawyers or take time off from work. Holographs also reduce the amount of time that a testator must dwell on difficult issues of mortality. As the examples in this Article demonstrate, most holographs are composed in less than an hour—a far quicker and easier emotional undertaking than the traditional estate planning process. Thus, it seems that holographs have the potential to eliminate two of the classic objections to traditional willmaking.

Despite the handwritten testament’s potential to expand the benefits of testacy, state legislatures and bar associations may worry about the holograph’s effect on the livelihood of estate lawyers. It is certainly true that some attorneys would lose a modicum of business if holographs were made legal in every jurisdiction and advertised as a viable alternative to traditional estate planning. If this concern threatens to overwhelm calls for reform, I would advocate limiting holographs to estates worth less than

130 See id. at 68.
131 See id.
$20,000. Such a measure would curb the threat to estate lawyers while still allowing the poor easy access to do-it-yourself willmaking. Currently, the costs of failing to make a will fall disproportionately on the less fortunate. Studies that examine family income uniformly find "[t]he greater the accumulation of wealth, the less likely that individuals will die intestate." Occupation also correlates with the frequency of testation; professional, white-collar workers are significantly more likely to draft wills than their blue-collar counterparts. Thus, at the very least, all states should allow holographs—the least formal mode of testation—among the groups most likely to be turned-off by the cost and complexity of formal estate planning. While holographic wills are not perfect, this study indicates that is better to die with a holograph than with no will at all.

B. The Future of Formal Wills

The evidence gathered here also sheds light on a long-running debate over the future of "formal" attorney-authored wills. Unlike a holograph, a formal will is subject to a lengthy set of procedural formalities. In every state, our legal tradition demands that (1) the terms of a formal will be in writing, (2) the testator sign the document, and (3) at least two witnesses verify the testator's signature. Some states couple these basic require-

135 Historians routinely credit the English with inventing the formal will, tracing its lineage back to the Statute of Frauds of 1677. Until the late seventeenth century, testators could use an oral declaration to transfer personal property. Wills conveying real estate, however, had to be in writing, but they did not need to be signed or witnessed. This informal system crumbled under the strain of the Black Plague and Fire of 1666. The fire destroyed most of London's land records while the plague simultaneously increased the amount of property changing hands through death and migration. Fraud became epidemic; people sold land they did not own, and those who did own it often sold it more than once. One contemporary observer estimated that two-thirds of all real estate litigation in Westminster Hall involved hidden encumbrances. In response, Parliament passed the Statute of Frauds of 1677. Section 19 of the statute required that testaments conveying personal property be written. Section 5 of the Statute of Frauds required that testators devising land put their wishes in writing and sign the document in the presence of three or four witnesses. The English Wills Act of 1837 also exerted a powerful influence on American law. The act standardized the law of passing real and personal property and
ments with more cumbersome rules. Georgia, for example, mandates that
the witnesses sign in the testator’s line of sight.\textsuperscript{136} Other states have
adopted regulations that govern the exact location of signatures and
directing the testator to indicate by word that the document is his will.\textsuperscript{137}
Judicial insistence that any defect in the formalities automatically and
inevitably voids the entire will further complicates the fate of profession-
ally drafted wills. In such a legal regime, the testator who commits even
the smallest drafting error while fulfilling the most insignificant formality
leaves his final wishes on rocky legal ground.\textsuperscript{138}

Scholars almost unanimously agree that this is an awkward legacy in
need of reform.\textsuperscript{139} The troubles wrought by the traditional legal regime

\textsuperscript{136} Meaning, for example, that if a lamp obstructs the testator’s view, the heirs
cannot probate the will. \textit{See} McCormick \textit{v.} Jeffers, 637 S.E.2d 666, 669 (Ga. 2006)
(“[F]rom the place where the testatrix is situated (such as sitting in a chair or lying in a
bed) when the witnesses sign the will, she must be able to see the witnesses sign the will if
she desired to do so without changing her place.”); Gulliver & Tilson, \textit{supra} note 29, at
10.

\textsuperscript{137} In general, a testator must sign at the “logical end” of his will. However, different
state courts have taken different approaches to the term. \textit{Compare} \textit{In re Field’s Will,} 97
N.E. 881, 884 (N.Y. 1912) (defining “natural end” as the location where the draftsman
“stopped writing in the consecutive order of composition”) \textit{with} \textit{In re Maginn’s Estate,
122 A. 264, 266 (Pa. 1923) (holding that a will must be signed at the sequential end of the
pages or paragraphs as defined by the “logical and internal sense” of the will). For an
example of the publication requirement causing mischief see, \textit{In re Hale’s Will,} 121 A.2d
511 (N.J. 1956). As one commentator noted, “[s]o many formalities are required by one
jurisdiction or another that it can take two pages just to state the rules for a will execution
ceremony valid in all fifty states.” Lindgren, \textit{supra} note 15, at 549.

\textsuperscript{138} \textit{See}, e.g., Langbein, \textit{supra} note 24, at 3-4 (showing that the strict enforcement of
the Wills Act formalities may frustrate the intent of the testator); Mann, \textit{supra} note 123, at
1044.

\textsuperscript{139} No one doubts that legislatures intended these formalities to serve a noble
purpose. If a testator executes a document with the traditional procedures, “a court can be
reasonably certain that it was actually executed by the decedent; that it was seriously
intended as a will; what its contents are; and that the testator was free from at least
immediate duress at the time of its execution.” Bird, \textit{supra} note 13, at 632. Scholars
generally agree that the Wills Act formalities serve four principle functions: (1) evidentiary,
(2) ritual, (3) protective, and (4) channeling. The evidentiary function was
snap into focus in the case of *Smith v. Nelson*. Harvey J. Nelson, of Benton, Arkansas, typed a short will that left all of his personal effects to his “beloved wife.” Nelson set his autograph at the end of the will, had the County Clerk sign it as a witness, and filed the document in the County Clerk’s vault. He then composed two letters to his wife discussing the will and the motivations behind his testamentary scheme. No one questioned that Nelson intended the document as his final testament. The Supreme Court of Arkansas, however, denied probate on the ground that only one person—instead of the required two—had witnessed the will. Every year, probate judges void wills with equally trivial flaws, no matter how robust the evidence that the defect was inconsequential.

Although all agree that a disease plagues the law of wills, commentators have yet to agree on a cure. Led by John Langbein, one cadre of law professors has conducted a relentless campaign against the formalism entrenched in the law of witnessed wills. Langbein and his cohorts have pushed for laws that would end the rigid judicial enforcement of will

the chief reason the English Parliament enacted the original Statute of Frauds. They believed that any document that transferred the ownership of land—including both wills and contracts—needed to be recorded in writing. If a dispute erupted, the written document provided a court with clear evidence of the parties’ intentions. The Wills Act formalities also serve a ritual function. Arguably, the ceremony associated with executing a will cautions testators to carefully consider all of their bequests. Additionally, some scholars argue that the attestation formality serves a protective function, reducing the odds a testator will suffer fraud, duress, or undue influence. Finally, the formalities shoehorn most wills into a similar pattern. This “channeling function” lets well-counseled testators “know what they must do to execute a valid will, reducing administrative costs of determining which documents are wills and thus increasing the reliability of testation.”


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140 299 S.W.2d 645 (Ark. 1957).
141 *Id.* at 646.
142 *See id.*
143 *See id.*
144 *See id.* at 645.
145 *See id.*
146 *See, e.g., Estate of Peters, 526 A.2d 1005, 1010, 1015 (N.J. 1987) (invalidating a final testament because the witness failed to sign within a reasonable time after the testator composed the will as required by statute); Ross v. Taylor, 165 N.W. 1079, 1080 (S.D. 1917) (denying probate on the ground that the testator did not orally declare to witnesses that the document was his will).*

147 *See Langbein, *supra* note 24; Langbein, *supra* note 36, at 522.*
formalities and replace it with a doctrine that would allow judges to forgive harmless execution errors on a case-by-case basis.\textsuperscript{148} Langbein advocates granting judges the equitable authority to overlook any will execution errors if evidence shows that the testator intended the document as his will.\textsuperscript{149} He suggests that such a change would prevent most of the large-scale tearjerking injustices.\textsuperscript{150}

The growing acceptance of this "dispensing power" is, perhaps, the single most revolutionary change in the law of wills in the last hundred years. But does it go far enough? The fundamental problem with any equitable doctrine, including the dispensing power, is that it relies on the goodwill of individual courts to effect justice.\textsuperscript{151} This is especially true in the field of estate litigation; judges are notoriously fickle in their enforcement of Wills Act formalities, often twisting formal requirements to ensure that testators transfer their estates in accordance with prevailing normative views.\textsuperscript{152} In one moment a court may choose to overlook the

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\textsuperscript{148} See Lindgren, supra note 7, at 1014 ("John Langbein has won. Since his seminal article in 1975, Substantial Compliance with the Wills Act, he has been pushing for the adoption of a doctrine that would forgive execution errors when the document is genuine.").

\textsuperscript{149} The dispensing power is currently the law of Israel and parts of Canada and Australia. See Restatement (Third) of Prop.: Wills and Other Donative Transfers § 3.3, statutory note (1999) (collecting dispensing power statutes from New South Wales, Queensland, Tasmania, Northern Territory, Western Australia, Manitoba, Saskatchewan, and Israel). Colorado, Hawaii, Michigan, Montana, South Dakota, New Jersey, Utah, and Virginia have all enacted some form of this rule. See Stephanie Lester, Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule, 42 Real Prop., Prob. & Tr. J. 577, 580 n.12 (2007).

\textsuperscript{150} See Langbein, supra note 24, at 4.

\textsuperscript{151} See John Selden, Table Talk 43 (Frederick Pollock ed., 1927). Selden states:

1. Equity in Law, is [the] same [that the] spirit is in Religion, what ever[y] one pleases to make it. Some times they go[ ] according to conscience some time[s] according to Law some time[s] according to [the] Rule of [the] Court.

2. Equity is A Roguish thing, for Law we[ ] have a measure know what to trust too. Equity is according to [the] conscience of him [that] is Chancellor, and as [that] is larger or narrower so[ ] is equity Tis all one as if they should make [the] Standard for [the] measure we[ ] call A foot, to be [the] Chancellors Foot; what an uncertain measure would this be; One Chancellor [has] a long foot another A short foot a third an indifferent foot; tis [the] same thing in [the] Chancellors Conscien[ce]. Id. (footnotes omitted).

\textsuperscript{152} Compare McElroy v. Rolston, 34 S.E.2d 241 (Va. 1945) with Slate v. Titmus, 385 S.E.2d 590 (Va. 1989). In both cases the decedents had executed handwritten wills but neglected to sign their names at the end of the page. Instead, both wrote their names at
lack of witnesses and, in the next, insist on formal compliance with the attestation requirement, creating a "contradictory, unpredictable and sometimes dishonest case law."¹⁵³

In response to perceived problems with the dispensing power, a small minority of scholars—James Lindgren among them—has put forth a far simpler approach to reforming the probate system: wholesale elimination of most will execution formalities. Professor Lindgren argues that attestation and all of the lesser formalities are historical anachronisms¹⁵⁴ and that the law of wills has fallen out of step with other means of passing property at death.¹⁵⁵ As many scholars note, insurance policies, trusts, pensions, and joint bank accounts only require two formalities: a writing and a signature.¹⁵⁶ The lack of attestation or other procedural checks causes few, if any, problems in administering these post-mortem asset transfers. In the overwhelming majority of cases, for example, life insurance beneficiaries receive payment on time and with little hassle, even though no witnesses observed the promulgation of the original policy.¹⁵⁷ The implication is that legislatures could remove the witnessing requirement from the Wills Acts without disrupting the probate system. After all, if life insurance policies do no need to be attested, why should wills?

The difficulty in accepting Professor Lindgren’s argument, of course, is that wills are not perfectly analogous to life insurance policies, pensions, Totten Trusts, or joint bank accounts. A testator can execute an unwitnessed will without the steadying influence of a life insurance agent, bank manager, pension specialist, or estate professional. In theory, at

the top of the document as a title. See McElroy, 34 S.E. 2d at 242; Slate, 385 S.E.2d at 591. For all intents and purposes the wills were the same and, accordingly, should have been judged in a similar manner. The only relevant legal question was whether the testators wrote their names to authenticate the documents as wills. In McElroy, Alice Wright left the lion’s share of her property to a hospital and only $10 to her family. The court refused to probate the will, reasoning that the testator’s name at the beginning of the document was not inscribed with the intent needed to authenticate the document. See McElroy, 34 S.E.2d at 243–44. The Slate court, however, came to an opposite conclusion. The court upheld the will, which left the bulk of the estate to the testator’s family members, holding that the document was “complete” and that sufficient evidence showed the testator intended to authenticate it. Slate, 385 S.E.2d at 561.

¹⁵³ Langbein, supra note 36, at 525.
¹⁵⁴ See Lindgren, supra note 15, at 550–56. Even Professor Langbein recognizes that attestation serves little purpose. See Langbein, supra note 36, at 496.
¹⁵⁵ See id. at 556–58.

¹⁵²
least, the potentially dubious circumstances surrounding the creation of unwitnessed testaments suggests that witnesses should observe will execution ceremonies.

With all of these principles in view, who gets the better of the debate—Langbein or Lindgren? Should states reduce the amount of formalism or the number of formalities? Although no small-scale study can settle the issue, the success of holographs in this study suggests that Lindgren’s plan to eliminate most Wills Act formalities would increase testamentary freedom at an acceptable administrative cost. Again and again, holographs reveal that willmakers can shape reliable and effective testaments without the benefit of the legal protections that currently govern formal wills. This discovery provides the first concrete evidence that legislatures could eradicate the witnessing and lesser requirements completely, which so often ensnare the ignorant and careless. Eliminating unneeded formalities undoubtedly would reduce the number of inequitable results generated by American probate courts. No longer would courts deny probate to wills signed in the wrong location or signed by the wrong number of witnesses. Supporting a reduction of formalities would have another salient effect on the probate process. Unlike enacting the dispensing power, which ultimately relies on individual judges’ conceptions of equity, revoking Wills Act formalities with a clear legal rule would promote consistency of decision-making within and between jurisdictions.

Abolishing attestation would also erase the strange division that currently exists between holographs and formal wills. After all, if we allow the probate of a signed note scribbled by a person with no legal training,¹⁵⁸ why should a court strike down a signed but unwitnessed will composed by a lawyer at the testator’s request? The latter text almost certainly provides “better context for assessing the validity of a will, the circumstances of execution, [and] the capacity of the testator.”¹⁵⁹

This is not to say that legislatures should abandon every formality. As the holographs demonstrate, writing and signature are still necessary to effectuate the intent of testators. “Writing makes an estate plan concrete. Signature indicates a decision, final unless later revoked, and supplies evidence of genuineness.”¹⁶⁰ The goal, instead, is to eliminate unneeded formalities that cause undue mischief. As Lon Fuller reasoned in his seminal article Consideration and Form, the need for imposing a regula-

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¹⁵⁸ See Will of Mabel Schwartzmiller (on file with author).
¹⁵⁹ Lindgren, supra note 7, at 1021.
¹⁶⁰ Lindgren, supra note 15, at 542.
tion on a particular transaction "will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises." In short, Fuller argued that "[w]here life has already organized itself effectively, there is no need for the law to intervene." The triumph of holographic wills—the most basic form of testation—makes plain that under this standard, attestation and all of the lesser formalities should fall.

VII. CONCLUSION

A well-known author has said, "[A] will may be a man's monument or his folly. Prudence, therefore, demands that the testator plan wisely, and frame his testamentary provisions with great care." In the last three decades, critics of homemade willmaking have insisted that holographs tempt men to set caution aside and stumble toward folly. The handwritten testament, so the story goes, remains a constant source of post-mortem litigation that imposes costs on unsuspecting willmakers and their families. At best, unsophisticated testators make a muck of basic drafting techniques by introducing imprecise, ambiguous, and vague language into their wills. At worst, forgery, fraud, and deception corrupt the holographic testator's final wishes. While this version of events has many adherents, I have tried to show that the prevailing view of do-it-yourself wills was forged in a mist of conjecture, guesswork, and speculation. No critic of holographs ever took the time to roll up their sleeves and conduct a systematic study of wills filed in municipal government archives.

In response to the gap in the literature, this Article examined thousands of local probate records in an attempt to provide a richer, more honest picture of the fate of holographic wills. As a whole, this Article concludes that the concerns about holographic wills largely are misplaced. One significant weakness of the criticism heaped on homemade testaments is that it fails to recognize that the authors of holographic wills are not among society's most vulnerable members. The makers of homemade testaments are not wilting flowers in need of protection. They have accumulated modest assets and know enough about the law to understand that a will is an essential component of a solid estate plan.

161 Fuller, supra note 37, at 805.
162 Id. at 806.
163 VIRGIL M. HARRIS, ANCIENT, CURIOUS, AND FAMOUS WILLS 9 (Little, Brown & Co. 1911) (attributing the quote to a "well-known author on wills").
The scholarly literature has thus far failed to present a balanced and in-depth account of the content of holographic wills. Too often, scholars have dismissed handmade testaments as clumsy and artless attempts to pass property at death. This criticism finds little support in the data and seems based on a handful of unrepresentative testaments. Even granting that holographs often lack the precision of professionally-drafted wills, the authors of handmade testaments deftly fulfill the primary obligation of any willmaker; they explain, clearly, who should receive their property at death. Perhaps more surprisingly, holographic testators consistently imbued their wills with enough formal language to indicate they possessed the quantum of testamentary intent needed to forge a will. Probate court litigation statistics capture the full achievement of holographic willmakers. Contrary to popular belief, the overwhelming majority of handwritten wills sailed through the probate system without challenge. With these facts in mind, we should not be surprised that holographs have been around for over 2000 years. They allow testators to modify the contours of their testamentary scheme without the cost or inconvenience of hiring a lawyer or rounding up witnesses.

Although the findings of one small-scale study can never be determinant, the continued success of holographs also suggests several sweeping policy prescriptions. At the start, I contend that all legislatures should allow the probate of holographic wills. Such a change would increase the number of testaments submitted for probate and grant all willmakers a low-cost alternative to dying intestate. More broadly, the existence of holographs, which require testators to complete few procedural formalities, indicates that states could reduce the number of hurdles needed to probate formal testaments. The current system of judging attorney-drafted wills enforces unneeded formalities, resulting in either stark injustices or reliance on the whim of judges to correct potential wrongs. I argue that a better, more equitable approach would require only the two essential measures demanded of a holograph—writing and signature. The idea of drastically reducing the number of will formalities awaits its first adherents in jurisdictions that follow the common law. Nevertheless, the success of homemade testaments shows that this is an idea whose time has come.