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FORMALIZING GRATUITOUS AND CONTRACTUAL TRANSFERS: A SITUATIONAL THEORY

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ABSTRACT

By tradition, gifts, wills, and contracts are formalized according to protocols established within each legal category. This Article examines the policies that underlie these "formalizing rules" and concludes that the utility of those rules depends fundamentally on the background conditions under which a gift, will, or contract occurs. Those background conditions, rather than the category into which the transfer falls, dictate the optimal formalizing rule for a transfer. In light of this observation, this Article proposes an integrated approach to formalizing rules that varies the required formalities for a transfer on the basis of situational criteria rather than the prevailing categorical ones.

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INTRODUCTION

An owner who intends to transfer property into the hands of another must employ a legal vehicle suitable to the occasion. When a transfer occurs during the owner's lifetime, and is made without material compensation, the transfer takes the form of a *gift*. The same gratuitous transfer, when planned to take effect at death, instead comes about via a *will*. Finally, a transfer of ownership made in exchange for ownership of different property occurs by virtue of a *contract*. These represent the three voluntary carriages of property.[1] And each is formalized—that is to say, rendered legally operative—according to its own, unique requirements: gifts are formalized classically by delivery of the gift corpus; wills, by a writing and an execution ceremony, conducted in the presence of witnesses; contracts, in many instances, by a mere parol agreement

1. We could also conceptualize the trust as an instrument of transfer, although it is more exact to say that a trust is *created* by gift or by will. We shall address the problem of formalizing trusts below in Parts II and V.

between the parties.[2] Considered structurally, the "formalizing rules" for transfers, as we shall call them, thus vary by legal category.[3] In theory, those categories have defined boundaries and cover mutually exclusive sets of transfers.

This Article proposes a different organizing principle for formalizing rules. It assays prior discussions of the jurisprudence of legal formalities and distills from them various situational criteria that dictate the need, *vel non*, for particular aspects of formality in any given instance. As we shall see, those situational variations cut across the traditional categorical lines. My thesis is that formalizing rules for transfers would better serve their purposes if lawmakers broke down the rules not by legal category, but by other characteristics of the transfers in question. Transfers that share the same situational characteristics should be treated alike from the standpoint of formalizing rules, irrespective of whether those transfers fall under the rubric of gifts, wills, or contracts. In the process, we could unify the three categories of transfer, at least insofar as formalizing rules are concerned.[4]

We may rate this reorientation as particularly useful in those instances where categories of transfer have become distorted. Lawmakers have seen fit to permit certain types of transfers to masquerade as different ones—allowing these transfers to operate, so to say, under assumed names. Formalizing rules divided by legal category may be suboptimal in general; those tied to *nominal* classifications become arbitrary and dysfunctional in particular. A new framework for formalizing rules based upon a transfer's objective characteristics would avoid such arbitrariness, a considerable fringe benefit when categories of transfer have become corrupted by fiction.

As usual, the analysis shall progress in stages. In Part I, we lay our theoretical foundation by rehearsing and examining the accepted (and not-

2. Other modes of formalization have come and gone. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.3 cmt. b (2003); *infra* text accompanying notes 191–92. For an ancient formalizing rule for gifts, developed before even the invention of papyrus, see THE HAMMURABI CODE: AND THE SINAITIC LEGISLATION § 165, at 32 (Chilperic Edwards ed., 3d ed. 1921) (c. 2084–81 BC) ("seal[ing] . . . a tablet").

3. Formalizing rules are not confined to the law of transfers but also pertain to the formation of other sorts of relationships and statuses, such as an agency or a marriage. *See, e.g.*, UNIF. DURABLE POWER OF ATTORNEY ACT § 1 (amended 1984), 8A U.L.A. 233, 246 (2003). The instant discussion focuses exclusively on the formalization of transfers of property.

4. In prior work, I have offered a unified analysis of default rules for transfers, *see* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004) [hereinafter Hirsch, *Default Rules*], and of mandatory rules setting the boundaries of freedom to make transfers, *see* Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180 (2011) [hereinafter Hirsch, *Freedom*]. The instant discussion extends this program of categorical unification.

so-well accepted) visions of the functions of formalizing rules. The next three parts explore how formalizing rules operate in a variety of settings that might affect the benefits that various modes of formalization bring to the table. Part II looks at transfers that occur hard on the decision to make them. Part III addresses transfers that take place, by contrast, only after an interval of time has passed. Part IV completes the trio by considering transfers that again unfold rapidly, but near the death of the transferor. Finally, in Part V, we turn to the special problem of formalizing transfers that are not what they seem—transfers whose properties belie the legal category to which they are conventionally assigned.

I. THEORETICAL PROLOGUE

A. The Progenitors

The problem of formalizing rules has attracted a modicum of scholarly attention over the years and inspired two articles widely recognized as classics in their respective fields. Both appeared, coincidentally, in the same year—1941—and as a consequence neither cites to the other. These are Dean Ashbel Gulliver and Catherine Tilson's *Classification of Gratuitous Transfers*, focusing on wills,[5] and Professor Lon Fuller's *Consideration and Form*, focusing on contracts.[6] A comparative reading reveals that these two sets of scholars, working independently, had been thinking along similar, if not quite parallel, lines—and in one instance even lighted on the same nomenclature.

As Gulliver and Tilson emphasized from the outset—and Fuller surely agreed—formalities "should not be revered as ends in themselves."[7] Because a failure to meet formalities can invalidate transfers and hence frustrate intent, they require substantive justification. Gulliver and Tilson identified, first of all, what they called the "ritual function" of formality.[8] "Casual language, whether oral or written, is not intended to be legally operative," and lawmakers would thwart intent if they gave language merely contemplating a transfer greater effect.[9] By requiring transferors to

5. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

6. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

7. Gulliver & Tilson, *supra* note 5, at 3. *See also* Fuller, *supra* note 6, at 805 ("Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end . . . [and] support the use of a form if a form is needed . . . .").

8. Gulliver & Tilson, *supra* note 5, at 4.

9. *Id.* at 3.

engage in "some ceremonial" in order to render a transfer effective, lawmakers help to clarify transferors' "finality of intention."[10] Calling this instead the "channeling function," Fuller elaborated the point: Formality both "signalize[s]" and "canalize[s]" intent to render a transfer enforceable, furnishing "a simple and external test of enforceability," as well as an indication of the kind of transfer intended.[11] Formalities serve not only to clarify intent to a court, Fuller pointed out, but also afford parties a simple means of making their intentions known to each other, thereby facilitating agreements "out of court," without the need for a state proceeding to ratify transfers.[12] Translated into economic jargon, formality reduces *error costs* in the understanding and adjudication of what sort of transfer, if any, the transferor sought to make, while simultaneously offering him or her an *efficient* means of clarifying intention.

The other principal purpose of formality is to provide reliable proof of a transfer's authenticity and substantive terms, thereby again conducing to adjudicative accuracy when a court sets about reconstructing those terms. Both Gulliver and Tilson, and Fuller dubbed this purpose the "evidentiary function" of formality, and both in common acknowledged its centrality.[13]

Beyond that, the authors parted company. Gulliver and Tilson identified what they called the protective function of formality—that is, protecting a party from undue influence or duress by ensuring that other persons witness the transfer.[14] Gulliver and Tilson deemed this function significant only for dying transferors, whose "normal judgment and . . . resistance to improper influences may be seriously affected by a decrepit physical condition, [or] a weakened mentality."[15] Others subjected to

10. *Id.* at 3–4. For a judicial recognition, see for example *Estate of Utterback*, 521 A.2d 1184, 1188 (Me. 1987) (observing that will formalities serve "to provide a reliable source of the testator's intent expressed under circumstances where the testator fully understands the significance and permanence of [his or her] statements").

11. Fuller, *supra* note 6, at 801–02.

12. *Id.* at 801–02. Compare the formalization of marriage, where tradition demands a proceeding of some sort to ratify the change of status.

13. Gulliver & Tilson, *supra* note 5, at 6–9; Fuller, *supra* note 6, at 800. For a judicial recognition, see for example *Estate of Charitou*, 595 N.Y.S.2d 308, 311 (Sur. Ct. 1993) (indicating that will formalities function "to protect a decedent's estate, preserve the integrity of a testator's plan for the distribution of his assets, and to close the door as far as possible to the obvious temptations of fraud, perjury, and collusion").

14. Gulliver & Tilson, *supra* note 5, at 9–10. For a judicial recognition, see for example *Bell v. Timmins*, 58 S.E.2d 55, 59 (Va. 1950) (remarking that will formalities operate "to prevent forgery and imposition").

15. Gulliver & Tilson, *supra* note 5, at 10.

momentary influence or duress retain the power to challenge (or, in the case of wills, simply to revoke) the transfer ex post facto.[16]

Undue influence and duress likewise constitute grounds for overturning a contract.[17] Nevertheless, Fuller ignored the protective function altogether. Instead, he brought up another purpose of formality that, for their part, Gulliver and Tilson had failed to identify. By infusing transfers with symbols of "weightiness," formalities cause transferors to take heed and thereby "act[] as a check against inconsiderate action."[18] Fuller termed this the "cautionary function" of formality, serving to produce the degree of "circumspecti[on] . . . appropriate in one pledging his future."[19] Again translated into modern jargon, Fuller here accepted that formalities can serve *paternalistic* ends, protecting a transferor against the hazards of subsequent regret. Fuller did not, however, take the occasion to advocate any mandatory regulation of the behavior of transferors. Formalizing rules operate, in Fuller's conception, simply to cause transferors to think twice. In this connection, he became an early advocate of what we would today call libertarian paternalism.[20]

B. The Successors

These two treatments of the problem of formalities appeared over seventy years ago. Nothing lasts forever, of course, but some intellectual fashions wear better than others. Both Gulliver and Tilson's, and Fuller's studies remain widely cited to this day.[21] Nevertheless, a number of subsequent scholars have expanded on, or reacted to, these works, offering up an assortment of analyses that merit consideration.

In unison, Professors Lawrence Friedman, John Langbein, and Bruce Mann, all focusing on wills, identify another virtue of formalizing rules in their potential to promote standardization: "Compliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity

16. *Id.* at 9–10.
17. RESTATEMENT (SECOND) OF CONTRACTS §§ 174–77 (1981).
18. Fuller, *supra* note 6, at 800.
19. *Id.*
20. For a discussion, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). For a criticism, see Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005). *See also infra* note 178.
21. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. c & reporter's note; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. a & reporter's note 1 (1998); *In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991). For a modern discussion elaborating on Fuller, see Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974).

in the organization, language, and content of most wills."[22] On first sight, the suggestion seems surprising; after all, the manner in which a transfer is executed has no direct bearing on its content. In theory, uniformity of execution could be accompanied by a cacophony of expression. But in practice, laypersons often recognize that formalizing rules exist without fully comprehending how to satisfy them. Their desire to meet the requirements leads them to seek professional counsel, and that counsel knows how to structure a transfer (and express an intention).[23] At least one court made the same supposition years before any of these scholars did.[24]

To be sure, this molding of expression comes at a price. Ordinarily, we achieve efficiency by reducing transaction costs; encouraging professional intervention instead causes those costs to increase. But transaction costs here are tied to, and function to diminish, the eventual administrative costs of implementing transfers judicially—a cost that the state traditionally subsidizes.[25] In this context, the immediate cost borne by parties is, by hypothesis, more than made up for by subsequent savings to the state. It would appear that courts, which bear the burden, agree with this assessment. Homemade wills are notorious litigation breeders,[26] and courts can be found (wearily) complaining about them between the lines of their opinions.[27]

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22. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493–94 (1975) (quotation at 494); *see also* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 367–68; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036, 1048 (1994). Inspired by Fuller, Professor Langbein confusingly labels this the "channeling function," *see* Langbein, *supra*, at 493, although what he means by this term differs from what Fuller had meant by it.

23. *See* Friedman, *supra* note 22, at 367–68; Langbein, *supra* note 22, at 493–94.

24. Said the New Jersey Supreme Court:

> [One] not [professionally] advised may easily trip in the execution of [will] formalities, and it would rather seem that the Legislature may have intended him therefore to look to counsel for assistance. The Legislature may have deemed—and with reason—that the interposition of a person schooled in those formalities and draftsmanship would serve, in part, to prevent mistakes in drafting the will.

In re Taylor's Estate, 100 A.2d 346, 348 (N.J. 1953).

25. *See, e.g.*, Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 899 (2013) ("Courts provide a service . . . heavily subsidized by tax dollars, as only a portion of courts' costs are covered by fees paid by litigants.").

26. For a recent discussion, see Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 120–26 (2006). *But cf.* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 38–43, 59–61 (2008) (finding no empirical evidence that homemade wills are more prone to litigation than executed wills, and criticizing prior empirical findings to the contrary).

27. *See, e.g.*, Anthony v. Harris, 100 A.2d 229, 230 (Del. Ch. 1953) ("The court is confronted once again with the difficult problem of determining the meaning of an apparently 'home made'

In economic terms, then, we can justify the imposition of expensive formalities on parties as functioning to avoid spillover costs—internalizing the negative externality created by state-supported construction proceedings for transfers formulated in ambiguous ways. Given the inefficiency of spillover costs, lawmakers might go a step further and require either professional drafting or the use of statutory forms (currently made available for will-drafting as an option in a number of states[28]). Alternatively, lawmakers could eliminate spillover costs by discontinuing the subsidy for construction proceedings.[29] Either move would comprise a major break with tradition, however, and would entail significant transition costs.[30] By merely encouraging standardization indirectly, lawmakers avoid those costs.

Professor Mark Glover suggests a quite different purpose served by will formalities, at odds with the functions addressed so far, and implicitly distinguishing formalizing rules for wills from those applicable to other transfers: namely, to obstruct rather than to facilitate testation.[31] In Glover's analysis, formalities serve as "barriers" to will execution, by making the process more tedious, time consuming, and costly.[32] In "making the exercise of testamentary power difficult," Glover asserts, "the formal execution process serves a family-protection policy,"[33] because only the surviving spouse and blood relatives take as intestate heirs. Glover contrasts the elaborate requirements for executing a will with the simple rules for revoking one, achieved by nothing more than the physical act of destroying or cancelling the document with intent thereby to render it ineffective. The law makes formal execution relatively difficult and

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will."); *In re* Estate of Weiss, 279 A.2d 189, 192 n.2 (Pa. 1971) ("This is another case of a holographic will[,] which is sometimes disheartening.").

28. Statutory will forms are intended to guide testators who write their own wills toward a more standardized, less litigation-prone product. Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 782 (1993).

29. *See supra* note 25.

30. For an economic discussion of the general problem of legal transitions, see Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003).

31. Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411 (2009). *Cf.* Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 167–79 (1989) (questioning more fundamentally the functional explanations for formalities as premised on false assumptions about human nature).

32. Glover, *supra* note 31, at 432–33.

33. *Id.* at 453. *Cf.* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–38, 258–68 (1996) (arguing that courts have manipulated formalizing rules to invalidate wills that fail to provide for a testator's family members). Glover distinguishes his thesis from Leslie's: "Instead of protecting family interests by merely providing courts a means to invalidate wills to nonfamily members, will formalities promote family protection by their very operation." Glover, *supra* note 31, at 413.

revocation relatively easy, Glover submits, in order to render intestacy the path of least resistance—and lawmakers have "designed"[34] these rules with this bias in mind.

The perversity of Glover's analysis is readily apparent. His suggestion that formalities function to discourage effective will-making contradicts the longstanding ideology of inheritance law, whose central tenet is freedom of testation.[35] Lawmakers and courts at least purport to view formality as a sort of necessary evil intended to realize freedom of testation by ensuring that only the testator's true wishes are put into operation, while recognizing that some testators will nevertheless trip over the formalities and forfeit that freedom. At times, lawmakers may have failed to get the balance right. Remarking on an English act of 1677 which required at least three attesting witnesses for a will devising land, Lord Mansfield observed—hardly approvingly—that "many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it."[36] At the same time, Mansfield maintained, Parliament "did not mean to restrain testamentary dispositions of land" but rather had "thought [the rules of attestation] would soon be universally known, and might very easily be complied with."[37] The act's effect was unforeseen. More recent courts likewise object to formalities that serve, in Mansfield's words, to "spread a snare."[38] "The philosophy underlying the provisions on execution of wills . . . is to allow every citizen the right and privilege of disposing of his property as he sees fit," one court insists, and "[t]his absolute right would be a solemn mockery, if any mere arbitrary rules were suffered to frustrate and defeat that intention."[39] Other courts echo this sentiment, claiming that the formal requirements "are not intended to restrain or abridge the power of a testator to dispose of his property. . . . [They] are not designed to make the execution of wills a mere trap and pitfall . . . ."[40]

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34. Glover, *supra* note 31, at 453.

35. *E.g.*, Whaley v. Avery (*In re* Wilkins' Estate), 211 N.W. 652, 653 (Wis. 1927) ("This sacred right to make a will rests entirely with the testator, who under our law can dispose of his property in accordance with his volition . . . ."); Ball v. Boston (*In re* Ball's Estate), 141 N.W. 8, 10 (Wis. 1913) ("As often, and not too often, said, the testamentary right is one of the most important of the inherent incidents of human existence.").

36. Windham v. Chetwynd, 97 Eng. Rep. 377, 381 (K.B. 1757).

37. *Id.*

38. *Id.*

39. Wich v. Fleming, 652 S.W.2d 353, 357 (Tex. 1983) (Robertson, J., dissenting) (quoting Paul v. Ball, 31 Tex. 10, 13 (1868)) (internal quotation marks omitted).

40. Robinson v. Ward, 387 S.E.2d 735, 738 (Va. 1990) (quoting French v. Beville, 62 S.E.2d 883, 885 (Va. 1951) and Bell v. Timmins, 58 S.E.2d 55, 59 (Va. 1950)) (internal quotation marks

To the extent that he is right, then, Glover has identified a policy that lawmakers pursue surreptitiously. That need not make it any less real. When confronted with legal principles that they wish to override, some lawmakers might be tempted to tackle those principles covertly, as Karl Llewellyn noticed long ago in connection with encroachments on freedom of contract.[41] To turn around an old adage, some things are easier *done* than *said*. But Glover's interpretation fails to account for the modern statutory trend in favor of rolling back testamentary formalities that appear superfluous.[42] Nowadays, as the Uniform Law Commissioners observe, "formalities for a . . . will are kept to a minimum," in order "to validate wills whenever possible."[43] Under Glover's model, superfluity should comprise a virtue, and the formalities of execution should remain thick and robust.

The asymmetry between will formalization and revocation that Glover finds so telling in fact conforms to a more widespread pattern identified earlier by Fuller: "There is in our law a noticeable, though not consistently expressed tendency to treat the surrender of rights differently from the creation of rights. . . . In general it may be said that it is easier to give up a right than to create one."[44] Fuller surmised that a lower threshold of formality can often accomplish its purposes in connection with the surrender of rights,[45] and that, in fact, appears to be the case here: Revocation by act involves an action that the testator performs upon an executed will, one that lay culture recognizes as imbued with symbolism, and which bespeaks finality without the need for a ceremony, expressing the withdrawal of intent to make whatever distribution the will specified.

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omitted); *see also In re* Fouche's Estate, 23 A. 547, 548 (Pa. 1892) (suggesting that it would be "cruel" to testators to add to existing will formalities).

41.

> Our courts are loath indeed to throw out a contract clause under the plain justification that it is contrary to public policy, that it is such a clause as "private" parties *cannot* make legally effective . . . . But . . . we have developed a whole series of semi-covert techniques for somewhat balancing these bargains.

K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)) (emphasis in original). For modern jurisprudential discussions, see Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

42. For a discussion and references, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1067–68 (1996).

43. UNIF. PROBATE CODE art. 2, pt. 5, gen. cmt. (amended 2010) (pre-1990 art. 2), 8 pt. 1 U.L.A. 491 (2013).

44. Fuller, *supra* note 6, at 820.

45. *See id.* at 820–21.

The testator can perform no comparable action initially to express intent to make any one of an infinite number of alternative distributions by will. He or she can only do so by using words—words that then require solemnization in some more elaborate way.

As a prescriptive model, even putting aside the propriety of legal subterfuge, Glover's analysis stands vulnerable to criticism. At a functional level, freedom of testation and protection of the family are not incompatible policies. On the contrary, one of the accepted virtues of freedom of testation is that it exploits the comparative advantage of testators to craft estate plans benefitting successors, taking into account the unique circumstances of each family; by comparison, intestacy law operates mechanically and inflexibly.[46] At another level, the pattern of inertia that would result if lawmakers placed needless obstacles in the way of testation invites criticism. In economic terms, formalities make intestacy law a so-called "sticky" default rule[47]—but the burden falls disproportionately on testators of lesser means, for they are more apt to be deterred by, or to fall prey to, punctilious formalities. We can question the equity of a system of succession that discriminates along socioeconomic lines, defeating the intent of the poor while giving free rein to the preferences of well-heeled testators.[48] Only mandatory rules, applicable to all, can afford equal protection for the families of testators.[49]

We should therefore reject this account of formalizing rules as unsound, both descriptively and prescriptively.[50] The public policy in favor of protection of the family fails to justify any difference between the specification of will formalities and other transfer formalities.

In another provocative critique, shifting back to the contracts side, Professor Eric Posner argues that most of the functions of formality

46. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992); *see also* Langbein, *supra* note 22, at 499–501 (anticipating Glover's critique).

47. *E.g.*, Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 S.M.U. L. REV. 383 *passim* (2007).

48. For a further discussion, see Hirsch, *Default Rules*, *supra* note 4, at 1051–52.

49. The fact remains that no regime of testation can wholly escape discrimination as an epiphenomenon, because transaction costs never drop to zero, even in the absence of *any* required formalities. Professor Ian Ayres calls this limitation "the iron law of default inertia." Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1598 (1999).

50. In another recent work, Professor Glover suggests that legal formalities also have psychological consequences for testators, although it remains unclear how those consequences are distinct from the psychological consequences of estate planning per se. *See* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012). *Cf.* Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012). If formalities served primarily to afford testators peace of mind that their wills would be put into practice, then those formalities would not have to be mandatory.

identified by Fuller fail to withstand analysis.[51] Relating formalizing rules to the mandatory and default rule paradigm, Posner argues that formalizing rules should become mandatory (as they traditionally are) only when they serve some clear economic purpose—otherwise, parties should retain the right to bargain around them, avoiding the transaction costs that they impose. Although the principal functions of formality that Fuller lighted on aid and abet contracting parties, "they do not explain why the Statute of Frauds and other formalities should [be] . . . immutable."[52]

Hence, in respect of the need to signal the finality of a contract, "there is no reason that the use of a writing should *necessarily* count as a signal."[53] Parties to a contract "could send such a signal by simply stating orally whether they desire legal enforcement or not. If they want to increase the likelihood of the result they desire, they might write it down."[54] No interests other than those of the contracting parties are implicated. Likewise, if they could decide for themselves whether or not to undertake the expense of memorializing their agreement in order to reduce evidentiary error costs, parties would make the choice that better served their interests in any given instance.[55] The one component of the evidentiary function that Posner acknowledges as justifying a mandatory rule is the avoidance of fabricated agreements, which harm innocent third parties.[56] Accordingly, "[t]he optimal formality is a rule that prescribes an act that is cheap for a promisor to engage in but costly for a wrongdoer to mimic."[57]

Posner makes a valuable contribution when he points out how the market itself could, in theory, sort out optimal levels of formalization. In some respects, the process might efficiently regulate itself, at least among sophisticated parties who understand the costs and benefits. But for those who do not—including many gratuitous transferors—information costs would create an imperfect market for formalities, again justifying state intervention in the shape of mandatory formalizing rules.[58] What is more,

51. *See* Eric A. Posner, *Norms, Formalities, and the Statute of Frauds: A Comment*, 144 U. PA. L. REV. 1971, 1980–86 (1996).

52. *Id.* at 1981–84 (quotation at 1983–84).

53. *Id.* at 1984 (emphasis in original).

54. *Id.*

55. *See id.* at 1984–85.

56. *See id.* at 1982–83, 1986.

57. *Id.* at 1983.

58. Although Posner focuses exclusively on the formalization of contracts, he notes in passing the question whether his critique also applies to, or confronts "some crucial distinction" with respect to, the formalization of wills. *Id.* at 1984 n.18. *See also id.* at 1985 (raising and responding to another potential objection to his thesis).

Posner fails to perceive the difficulties inherent in finalizing transfers without a mandatory formalizing rule. Words alone fail to denote finality unless we already have some external, accepted means of distinguishing what the philosopher J.L. Austin called "performative" words from communicative ones.[59] A formalizing rule creates such a bright dividing line. If parties sought merely to say when their words were final, in the absence of a required formality, the finality of those assertions *about* finality would remain ambiguous, leading to an infinite regress.[60] In connection with transactions, like contracts, that parties engage in frequently, social customs might nevertheless crystalize in the absence of legal rules to permit parties unambiguously to finalize deals. In the United States, the proverbial handshake, when coupled with words, would appear to operate in this capacity as an "informal" formalizing rule.

C. Analysis

What conclusions can we draw from this overview of formalizing rules? Individual modes of formality (such as witnessing) can serve multiple purposes simultaneously, and those purposes also appear complementary. Hence, we have no need to introduce balancing tests here. Furthermore, and crucially for purposes of our analysis, the uses of formality appear *contextual*. Whether any given formality will prove efficacious, in light of its ends, depends on the circumstances. Fuller was first to propound the idea: "The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by

59. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 6 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975). For words to become unambiguously performative "[t]here must exist an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances." *Id.* at 26.

60. Once parties have finalized a transfer via legally accepted formalities, the agreement or instrument of transfer might create its own formalizing rules for any *subsequent* modifications of the transfer. Here, at least, any such variation from the formalizing rules that would otherwise apply will have been ratified by the original agreement or instrument which *did* comply with the applicable formalizing rules. Hence, the parties' intent to abide by the variation is unambiguous. In some instances, lawmakers expressly allow this sort of ex post revision of the formalizing rules for transfers. *See* UNIF. TRUST CODE § 602(c)(1) (amended 2010), 7C U.L.A. 546 (2006) (allowing the settlor of a trust to specify the means of its subsequent revocation or amendment). But in other instances, lawmakers expressly disallow such ex post revisions, a doubtful policy judgment. *See* UNIF. PROBATE CODE § 2-512 (amended 2010), 8 pt. 1 U.L.A. 231 (2013) (codifying the common-law acts of independent significance doctrine, which forbids testators from specifying in a will purely formal acts that will operate thereafter to modify the will). For a criticism of the doctrine of acts of independent significance, see Hirsch, *supra* note 42, at 1083–89.

forces native to the situation out of which the transaction arises . . . ."[61] Examining the problem inter-categorically, we can expand on Fuller's insight. The need for, or superfluity of, any given formality depends more fundamentally on "forces native to the situation"[62] than on the type of transfer at issue. Put otherwise, the category into which a transfer falls does not, in and of itself, alter the circumstances in consequential ways, although certain types of transfers may be statistically associated with particular circumstances that, in turn, either augment or diminish the utility of a given formalizing rule.

Consider again the principal functions of formality. Lawmakers can clarify the finality of intent by introducing a ritual or action of some sort to accompany, or even to substitute for, words expressing a transfer. Such a ritual or action serves to distinguish the final word from preliminary contemplations as concerns *any* variety of transfer. But at the same time, the events leading up to, or attending, a transfer could already function to draw the desired distinction, producing what Fuller called "natural formality."[63] In the presence of natural formality, the artificial sort becomes redundant and therefore unnecessary for lawmakers to require.[64]

More concrete variables present themselves in connection with other aims of formalizing rules. As Gulliver and Tilson observed, the need to protect testators from duress or undue influence depends upon their vulnerability.[65] Those in good health with a strong will are, we might say by analogy, "naturally protected." Likewise, the benefit of lawyer-generated standardization varies with the complexity of the terms of a transfer.[66] A simple transfer is "naturally standardized." And in respect of both variables, the type of transfer at issue again appears irrelevant. Complex wills, gifts, and contracts all profit from professional drafting; simple ones, not much.

Lastly, the value of the evidence generated by a formality—be it a writing, or the presence of witnesses—also depends on several factors:

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61. Fuller, *supra* note 6, at 805 (emphasis omitted).

62. *Id.*

63. *Id.* at 815.

64. Fuller made the same observation in connection with his proposed cautionary function: "Whether there is any need . . . to set up a formality designed to induce deliberation will depend upon the degree to which the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind." *Id.* at 805; *see also supra* text accompanying notes 18–19.

65. *See supra* text accompanying notes 14–16.

66. For a brief recognition of the relevance of complexity as a situational variable, see RESTATEMENT (SECOND) OF CONTRACTS ch. 5, statutory note (1981). For an early recognition, see JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 6 THE WORKS OF JEREMY BENTHAM 189, 525 (John Bowring ed., 1962) (1827).

(1) the availability of the parties themselves to substantiate the relevant facts about a transfer, (2) the space of time that elapses before such a factual reconstruction becomes necessary, and (3) the complexity of the terms that require reconstruction. Because "forgery may be more difficult to achieve than perjury,"[67] and certainly requires greater effort, writings provide a bulwark against fraud. And they also protect against lapses of memory concerning complicated or bygone facts.

This last point, however, we should not accept too hastily. The popular notion that memory decays over time, like a radioactive isotope, was exploded as early as the 1930s.[68] Items of fact may be forgotten at one point in time and then called back to mind at another. The process does not unfold along a constant slope, or even necessarily a continuous line.

That said, psychological studies of memory do raise the concern that temporal distance can endanger the accuracy of recollection. The accumulation of memories of similar episodes interferes with a subject's ability to recall accurately any single one of them.[69] Here, we might expect to find some variation among different sorts of transfers, stemming from their variable frequency. Parties who make or witness wills probably stand at less risk of memory loss caused by episodic interference, because will execution occurs so rarely.[70] By contrast, business persons who make deals for a living, embarking on more contractual transfers than they can count, should have greater difficulty recalling any one of them. Eventually, though, the onset of old age causes organic changes in the brain that can damage long-term memory for every elder, even in the absence of cognitive pathology.[71] Donors, testators, witnesses, and contracting parties alike are bound to become forgetful sooner or later. In addition, the routine experience that complicated data are more difficult to remember than simple data—a function of our limited capacity to process data into memory—is well-accepted today and confirmed by any number

67. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-8, at 112 (6th ed. 2010).

68. For the classic study, see John A. McGeoch, *Forgetting and the Law of Disuse*, 39 PSYCHOL. REV. 352 (1932).

69. For a review, see John T. Wixted, *The Role of Retroactive Interference and Consolidation in Everyday Forgetting*, *in* FORGETTING 285 (Sergio Della Sala ed., 2010).

70. At the same time, personnel within law firms often serve repeatedly as witnesses for wills executed at firm offices.

71. For a recent discussion, see Bryce A. Mander et al., *Prefrontal Atrophy, Disrupted NREM Slow Waves and Impaired Hippocampal-Dependent Memory in Aging*, 16 NATURE NEUROSCIENCE 357 (2013). For a review, see David A. Balota et al., *Memory Changes in Healthy Older Adults*, *in* THE OXFORD HANDBOOK OF MEMORY 395 (Endel Tulving & Fergus I.M. Craik eds., 2000).

of formal studies.[72] Again, this phenomenon relates to every kind of transfer. Finally, and with finality, death erases all trace of a subject's memory.

If we are to pursue a minimalist approach to the formalities of transfer, accepting (to recall Gulliver and Tilson, but *pace* Glover) that they are not ends in themselves,[73] and recognizing that they contribute to transaction costs, we need to take situational variables into account when we fashion formalizing rules.

II. SPOT TRANSFERS

Let us begin with the simplest of all situations: immediate transfers, occurring in the prime of life. Memorialization of a transfer, while always useful, is not vital in this context. Evidentiary confirmation or disconfirmation of a transfer becomes a straightforward process when the transferor and transferee can each testify as to what one did, or did not, communicate to the other, and this information will remain fresh in their minds. If parties' testimony conflicts as to immediate facts, the jury steps in as our lie detector to ferret out fraud. Only if the terms of an immediate transfer are complex, making honest discrepancies of recollection more likely, does memorialization become paramount. The value of standardization likewise rises in direct proportion to complexity. And whereas rituals are not indispensable with respect to spot transfers, given that parties can report whether they intended their words to be legally operative, rituals do serve to signal finality, and thereby to avoid mutual misunderstanding, if no natural or customary rituals already lie at hand.

Under existing doctrine, the formalizing rules applicable to spot transfers have become fragmented, varying by category, and even by sub-category. Although long accepted, the prevailing configuration of these rules merits reexamination.

A. Contracts

In the transactional realm, spot transfers take the form of short-term contracts. Under the statute of frauds, the applicable formalizing rule for a contract depends upon its subject matter. Short-term contracts for services

72. For a classic discussion, see George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81 (1956). For a modern review, see René Marois & Jason Ivanoff, *Capacity Limits of Information Processing in the Brain*, 9 TRENDS COGNITIVE SCI. 296 (2005).

73. *See supra* text accompanying note 7.

fail to come within the statute, and hence parol agreements for those services are binding; no memorialization or ritual of any sort is required.[74] By comparison, the statute of frauds demands a signed writing for contracts covering real property.[75] Finally, with respect to contracts for the sale of personal property, the statute of frauds further distinguishes goods of small and large value. As codified in the Uniform Commercial Code, contracts for goods worth $500 or more require a signed writing; contracts for goods worth less than that do not.[76] Originating in England with the enactment of the first statute of frauds in 1677, this tripartite framework prevailed in the United States for most of its history.[77] The U.C.C. adds a further refinement, distinguishing from the sale of goods contracts for intangible securities, which require no writing.[78] On top of these subject-matter distinctions, several more discrete classes of contract based on the nature of the contractual obligation—specifically, contracts establishing a suretyship and those made in consideration of marriage—require a signed writing, again tracing to the English statute of frauds.[79]

From a policy perspective, distinctions of formality based on the subject matter of (or the nature of an obligation under) a contract appear arbitrary.[80] Contracts covering real or personal property, tangibles or intangibles, and goods or services, pose identical problems of ritual and evidence.[81] Hence, the formalizing rules that apply to them, whatever they may be, ought to operate symmetrically.

Turning to the formalities themselves, the virtues of a writing requirement for short-term transactions, even for contracts involving large sums (which represents a subjective standard), seem doubtful. In the commercial arena, the bargaining table lends a kind of natural solemnity to the occasion, lessening the need for an artificial ritual to clarify parties'

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.").

75. *Id*. §§ 110(1)(d), 125.

76. U.C.C. § 2-201 (amended 2010).

77. For a historical summary, see RESTATEMENT (SECOND) OF CONTRACTS ch. 5, statutory note.

78. *See* U.C.C. §§ 2-105(1), 8-113. Contracts for other intangible rights are not covered by the U.C.C., as revised in 2001. *See id.* § 1-206 legislative note.

79. RESTATEMENT (SECOND) OF CONTRACTS §§ 110(1)(a)–(c) & cmt. a, 111–12, 124.

80. For an early recognition, see Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 430–31 (1928).

81. Although title to real property is recorded, recordation protects third parties and in most states is unnecessary to complete an agreement between the buyer and seller of real property. 11 THOMPSON ON REAL PROPERTY § 92.04(a) (David A. Thomas ed., 3d ed. 2011) [hereinafter THOMPSON]. For an early criticism of the subject-matter distinctions established by the English statute of frauds as applicable to wills prior to 1837, see BENTHAM, *supra* note 66, at 533, 543–45.

intent to be bound.[82] In any event, those engaged in business, and even lay parties dealing with commercial actors, have evolved customary gestures for signaling agreement, enabling parties unambiguously to cement a deal.[83] As for evidence, the parties themselves can bear witness to their dealings. Memorialization and standardization become important only insofar as the terms of a contract are complex, likewise complicating their reconstruction and interpretation. But the parties to business contracts already know all of that, and lawmakers can count on them to bring in the typists and the lawyers when they serve a purpose. As Posner perceived,[84] formalization becomes a self-regulated process when sophisticated actors are involved.

The only other arguable merit of a writing requirement is to diminish the risk of fraudulent evidence.[85] But when parties can defend themselves in court, submitting sworn testimony and threatening cross-examination, and when criminal penalties operate concurrently to deter fraud, we may rate this risk as relatively small. It was not always thus. In the period when the statute of frauds first came into effect, and continuing until the second half of the nineteenth century, rules of evidence barred interested parties from testifying in open court.[86] From an evidentiary perspective, that made spot transactions (as of then) indistinguishable from those (as of now) where parties have *died*, thus again precluding their testimony—which presents a different situational problem, with a greater risk of evidentiary error and fraud, that we shall return to later on.[87] The demise of the old common law of evidence changed the nature of the problem, but the statute of frauds failed to change along with it.[88]

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82. For a discussion of the ritual element of dickering, see BROMLEY KNIVETON, THE PSYCHOLOGY OF BARGAINING 47–57 (1989); *see also supra* notes 63–64 and accompanying text.

83. *See supra* text following note 60.

84. *See supra* text accompanying note 55.

85. *See supra* text accompanying notes 56–57.

86. England was first to abolish this rule in mid-century, and American states followed suit one by one over the next several decades. 1 MCCORMICK ON EVIDENCE § 65, at 313–14 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter MCCORMICK].

87. *See infra* Parts III & IV.

88. Or rather, the American statute failed to change. England's Parliament abolished the statute of frauds as it applied to the sale of goods in 1954. The first draft of the revised Article 2 of the U.C.C., circulated in 1990, would have done the same, but the provision was restored within subsequent drafts. As finally proposed in 2003, the revised Article 2 would have retained the statute of frauds for the sale of goods but would have raised the value threshold from $500 to $5,000. In any event, the Uniform Law Commission withdrew the revised Article 2 in 2011. U.C.C. § 2-201, 1D U.L.A. 28 (2012) (amendments proposed in 2003); *see* WHITE & SUMMERS, *supra* note 67, § 3-1, at 88, § 3-8, at 113.

In sum, laborious formalities attached to short-term contracts implicate unnecessary costs, hindering and delaying transacting parties who hold time dear. Time is money, and parties themselves can decide whether formalizing a spot transaction is, so to say, time well spent. All else being equal, lawmakers should build this carriage of property for speed.

B. Gifts

Meanwhile, in the gratuitous realm, spot transfers take the form of inter vivos gifts made by parties who may lack commercial actors' professional sophistication. Again, the formalizing rules for gifts have splintered along lines similar to the ones discovered within the law of contracts. Once more, one finds little evidence that these rules have evolved methodically.

Under the common law, gifts of all forms of personal property are formalized by delivery and—in contradistinction to contracts—no contemporaneous (or, for that matter, non-contemporaneous) communication is required to render the gift complete, although the transferor must *intend* the transfer to comprise a gift for it to take effect as one.[89] Under the traditional view, delivery must be "manual," a literal movement of the gift corpus into the hands of the donee (or the donee's agent), unless manual delivery is impossible or impractical.[90] In that event, the donor can substitute an alternative form of delivery—either constructive delivery of something (such as a key) that opens up access to the gift, or delivery of a writing describing the gift.[91] The modern view, acknowledged nowadays by many courts, permits these alternative forms of delivery irrespective of the ease of manual delivery.[92]

At the same time, and for no substantial reason, gratuitous transfers of services are excluded from the law of gifts.[93] Hence, a donor can only

89. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 6.1(a), 6.2 (2003).

90. Impossibility or impracticality may stem from the character of the gift corpus (which might be unwieldy or intangible) or because of logistical impediments.

91. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 & cmts. c, g, & h; RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY §§ 7.5–.6, 7.10 (Walter B. Raushenbush ed., 3d ed. 1975).

92. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. c & reporter's note 4; *see, e.g.*, Carey v. Jackson, 603 P.2d 868, 869–76 (Wyo. 1979) (giving effect to a gift via delivery of a writing, without manual delivery, even though the gift corpus was easily portable and the donor and donee lived next door to each other). For a discussion of the older cases, noting the deterioration of the limitation, see BROWN, *supra* note 91, §§ 7.5, at 93–94, 7.6, at 94–96.

93. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. a & reporter's note 1 (failing to explain the exclusion); *see also* RICHARD HYLAND, GIFTS: A STUDY IN COMPARATIVE LAW ¶¶ 317, 353 (2009) (explaining the exclusion as stemming from the abstract

finalize a gratuitous transfer of personal services by performing them, not by formalizing them as gifts.[94] In at least one respect, the substantive rules of these two subcategories also diverge.[95] But when we turn to gifts of services that a donor undertakes to supply but that a different party will perform, the law of contracts becomes implicated. A donor can formalize such a donative third-party beneficiary contract by mere parol agreement with the service provider, and the donor can simultaneously finalize the gift by disallowing discharge or modification under the terms of the contract.[96]

Finally, the statute of frauds again distinguishes gifts of real property, which a donor can only effect by preparing a written deed of gift, coupled (at a minimum, depending on the state) with a signature, and "delivery" of the deed.[97] But in the context of gifts of real property, as one commentator observes, delivery becomes a term of art: "the definition . . . , as applied to deeds, is not the same as the 'traditional' concept of delivery. The touchstone for delivery in deed cases is the intent of the grantor . . . ."[98] Physical transfer of the deed to the donee need not occur, although such a transfer can suffice to manifest intent.[99] Essentially, in the context of real property, lawmakers have traded one formality—the writing

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distinction that "delivery is a requisite of an effective gift . . . [but] is generally not thought to encompass the performance of services") (footnote omitted).

94. A gratuitous promise to perform services is of course unenforceable, as it lacks consideration. *See infra* note 168 and accompanying text.

95. Whereas the common law makes a rebuttable presumption that services performed between family members are gratuitous, no analogous presumption attaches to transfers of personal property between family members. *Compare, e.g.*, Plowman v. King (*In re* Pauly's Estate), 156 N.W. 355, 356 (Iowa 1916) (making the presumption for services); Andrews v. Div. of Med. Assistance, 861 N.E.2d 483, 486 (Mass. App. Ct. 2007) (same), *with* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. a ("[D]elivery [of personal property] is an ambiguous act," although "the relationship between the owner and deliveree," inter alia, is "relevant" to the inquiry); Sihler v. Sihler, 376 So. 2d 941, 942 (Fla. Dist. Ct. App. 1979) (finding evidence of spouse's intent to make a gift of personal property he had delivered on the basis of evidence other than the parties' relationship). Perhaps the justification lies in the fact that, whereas personal property might be bailed, services can only be provided either gratuitously or for hire.

96. RESTATEMENT (SECOND) OF CONTRACTS §§ 304, 311(1) (1981); *see also* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.8 (3d ed. 2004); *supra* text accompanying note 74.

97. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.3 & cmts. b–d & reporter's note 1.

98. 9 THOMPSON, *supra* note 81, § 83.03(b), at 745 (ch. by Ronald R. Volkmer). By "traditional" the author means to refer to the traditional concept of delivery under civil law which "emphasizes a transfer of possession." *Id.* § 83.03(b) at 744.

99. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.3 & cmt. d & reporter's note 2; 9 THOMPSON, *supra* note 81, § 83.03(b). Thus, "The term 'delivery' . . . is ill-suited to describe the essence of what is involved . . . ." *Id.* § 83.03(b), at 746; *see also, e.g.*, Howell v. Herald, 197 S.W.3d 505, 509, 511 (Ky. 2006) (giving effect to an executed but undelivered deed of gift).

requirement—for another.[100] Yet, no attribute unique to real property justifies its distinction from personal property in this regard.[101]

In fact, no one argues that a gift's subject matter matters as concerns the public policy of formalizing rules. Like the analogous distinctions within the realm of contract law, those discovered within the law of gifts answer no material purpose—although they do serve as a reminder, if one were needed, of the universality of Justice Holmes's legal equation that "a page of history is worth a volume of logic."[102]

Not only are the formalizing rules for gifts internally inconsistent, but in several instances they are also inconsistent with their counterparts within the law of contracts. Whereas contracts for tangible goods may be made by parol agreement below a value threshold, and above that threshold only by a signed writing, gifts of tangible goods are formalized by delivery in all instances.[103] Whereas contracts for intangible securities are effective by parol agreement irrespective of their value, gifts of intangible securities require delivery of either the share certificates themselves or a writing describing the securities.[104] Parties can formalize contracts for services by parol agreement but cannot formalize gifts of personal services at all.[105] And while contracts in consideration of marriage come within the statute of frauds, gifts in anticipation of marriage do not; hence, gifts in anticipation of marriage are formalized no differently from other gifts.[106] The statute of frauds has operated to consolidate only the formalizing rules for contracts and gifts of real property, and for suretyships, which ordinarily operate as enforceable

100. Formalities for a deed of gift are traditionally more rigorous than those applicable to writings delivering a gift of personal property. *Cf. infra* notes 186, 188 and accompanying text.

101. *See supra* note 81 and accompanying text.

102. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.3 cmt. b (summarizing the historical background of the statute of frauds).

103. *See supra* notes 76, 89 and accompanying text. In addition, special formalizing rules may operate by state statute for the contractual sale of registered tangible property, such as automobiles and boats. Cases conflict, however, over whether the same formalizing rules apply to gifts of registered tangibles. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. i & reporter's note 10; HYLAND, *supra* note 93, ¶ 874.

104. *See supra* text accompanying note 78; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. h; HYLAND, *supra* note 93, ¶¶ 914–15, 917.

105. *See supra* text accompanying notes 74, 93–94.

106. *See supra* text accompanying note 79. Gifts in anticipation of marriage are subject to special rules of construction, but not formalizing rules. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmts. l–m.

contracts, even when they are gratuitous,[107] all of which require a signed writing.[108]

Should the formalizing rules for gifts correspond with those applicable to classical contracts? Should a gift, in other words, become enforceable via an objective offer ("I hereby give you my Porsche"[109]) and acceptance ("Thank you!"[110]) by donor and donee? If necessary, parties can testify as to what they said, or failed to say, irrespective of whether the transfer at issue is a gift or a contract. In an early study of gift formalities, predating by a decade and a half the contributions of both Gulliver and Tilson, and Fuller,[111] Professor Philip Mechem defended the delivery requirement for gifts as corresponding with the "ordinary experience and the fundamental habits of the human mind."[112] By virtue of its "normality," delivery clarifies that the donor intended an enforceable gift and avoids misunderstanding by the donee.[113] Put into the theoretical context of Mechem's successors, delivery provides an unambiguous ritual for finalizing gifts.[114] Mechem observed that a delivery requirement also provides evidence helpful in forestalling fraud, "it [being] easier to fabricate a story than to abstract the property."[115] Finally, Mechem anticipated what Fuller went on to call the cautionary function,[116] insofar as it related to the delivery requirement for gifts, which "forces upon the most thoughtless and hasty at least a moment's acute consideration of the effects of what he is proposing to do."[117]

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107. RESTATEMENT (SECOND) OF CONTRACTS §§ 88 & cmts., 112 cmt. a (1981).

108. *See supra* text accompanying notes 75, 79, 97–100.

109. Such language of immediate gift is distinct from a promise to make a gift, addressed below in Part III.B.

110. Acceptance of a gift is presumed in the absence of affirmative refusal. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1(2) & cmt. i. Likewise, silence can create a presumption of acceptance of a contract offer under some circumstances. For a discussion, see Michael Ansaldi, *The Do-Nothing Offeree: Some Comparative Reflections*, 1 J. TRANSNAT'L L. & POLICY 43 (1992).

111. *See supra* notes 5–6.

112. Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments* (pt. 1), 21 ILL. L. REV. 341, 346 (1926).

113. *Id.* at 348 (asserting that delivery clarifies "what [the donor] means, or (which is perhaps even more important) what he is understood to mean"). For judicial recognitions, see, for example, *Scherer v. Hyland*, 380 A.2d 698, 700 (N.J. 1977) and *Elmira Coll. v. Fid. Union Trust Co.* (*In re* Dodge), 234 A.2d 65, 78 (N.J. 1967).

114. *See supra* text accompanying notes 10–11.

115. Mechem, *supra* note 112, at 349. For a judicial recognition, see *Scherer*, 380 A.2d at 700.

116. *See supra* text accompanying notes 18–19.

117. Mechem, *supra* note 112, at 348–49.

None of these points is overwhelmingly persuasive. Just as negotiations provide natural formality for contractual agreements,[118] the context of gift declarations can also imbue them with ritual significance. When verbalized on traditional gift-giving days—such as birthdays, Valentine's Day, certain religious holidays, and graduation days—gift declarations come with a natural solemnity indicative of finality. Even when made on other occasions, gifts ordinarily are accompanied by some gesture of affection, analogous to the contractual handshake, that, when made along with a declaration of gift, should suffice to distinguish it from a careless remark.[119] Arguably, current law is more callous to the risk of misunderstanding, in that delivery suffices to formalize a gift without any accompanying communication.[120] Lawmakers apparently consider delivery itself an adequate form of expression—an action that speaks as loudly as words. Still, one can point to instances where deliverees have allegedly misconstrued deliverors' intent, leading to litigation.[121] Actions may be loud, but they are not always clear. A declaration requirement for gifts would help to clarify intent to make a donative transfer, as opposed to a loan or a bailment. But, of course, neither requirement (even if combined) offers complete immunity from ambiguity.[122]

As far as evidence is concerned, as in connection with contracts, parties' testimony can overcome fraud. If fear of fraud were paramount, then a writing requirement for all gifts, expanding on the statute of frauds, might do more good than a delivery requirement.[123] Nor does a delivery requirement force parties to think twice before making an uncompensated transfer. People can either speak *or act* on impulse, and handing something over takes only a trifle longer than blurting out words. Again, a writing requirement would appear to serve the cautionary function more assuredly.

Under existing doctrine, lawmakers allow donors to formalize gifts by virtue of an objective declaration, without any act of delivery—in other words, in a contract-like manner—under some circumstances. Suppose the

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118. *See supra* text accompanying note 82.

119. *See supra* text following note 60.

120. *See supra* text accompanying note 89.

121. *E.g.*, Sihler v. Sihler, 376 So. 2d 941, 941–42 (Fla. Dist. Ct. App. 1979); Cecil v. Smith, 821 S.W.2d 375, 378 (Tex. Ct. App. 1991). *But cf.* Mechem, *supra* note 112, at 349 ("If [a party] hands over the property, he has done an act that will settle many doubts, an act perhaps capable of more than one interpretation, yet readily and naturally susceptible of but one.").

122. *See* HYLAND, *supra* note 93, ¶ 894 (noting litigation generated by ostensible written declarations of gift expressing donative intent ambiguously).

123. *See supra* text accompanying note 67.

corpus of a gift already lies in the donee's possession as a bailment. The donor now wishes to make a gift of that item to the donee. How can the donor accomplish the transfer? Physical delivery of an object to someone who already possesses it is impossible. Under these conditions, we might expect delivery of a writing or manual *re*delivery to serve as the operative formality. The law requires neither: rather, a donor can make the gift by oral declaration to the donee.[124] Mechem defended this exception as corresponding with ordinary social practice and so producing "a minimum of friction [with] the mechanism of ordinary life."[125] Furthermore,

> where the res is already in the hands of the donee, the significance of his . . . words will be emphasized to the donor, and he will be a little less prone to an ill-advised donative expression than in the case where the res is safely in his hands.[126]

As Fuller would have put it, a declaration of gift under these circumstances implicates "natural formality,"[127] although not uniquely so. The fact that lawmakers are prepared to carve out this exception suggests at least the plausibility of its generalization.

At the same time, another existing exception to the delivery requirement appears problematic within its situational context. Whereas the donor (or "settlor") of a gift in trust must ordinarily deliver the trust property to the trustee to complete the gift, such an act becomes meaningless when the settlor *is* the trustee. Here again, lawmakers have waived the delivery requirement without substituting another ritual, allowing the settlor to create an enforceable trust by mere verbal declaration—to anybody.[128] In this connection, though, some risk exists that a layperson will fail to appreciate the potential significance of his or her words. Declarations of trust are *not* typically made on gift-giving days and, because they need not be declared to the beneficiary, they might go unaccompanied by any gestures of affection.[129]

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124. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. d & illus. 3 (2003); BROWN, *supra* note 91, § 7.8; *cf. infra* note 244.

125. Mechem, *supra* note 112, at 365.

126. *Id.*

127. *See supra* text accompanying note 63.

128. *See* UNIF. TRUST CODE § 401(2) (amended 2010), 7C U.L.A. 478 (2006); RESTATEMENT (THIRD) OF TRUSTS §§ 10(c) & cmt. e, 14 & cmt. c (2003).

129. Professor Mechem criticized the anomaly, adding that "were such transactions to become common, difficulties might be felt, and courts and legislatures moved to impose some limitation." Mechem, *supra* note 112, at 353. For additional observations, see BROWN, *supra* note 91, § 7.21, at 150; HYLAND, *supra* note 93, ¶ 961; Gulliver & Tilson, *supra* note 5, at 16–17; C.B. Labatt, Note, *The Inconsistencies of the Laws of Gifts*, 29 AM. L. REV. 361 (1895). Perhaps in response, courts have

But the problem goes deeper than that. By its nature, any inter vivos trust, including one for which a third party serves as trustee, could feature more complex terms than apply to basic gifts. The trustee (and even settlors themselves) might have difficulty recalling the mass of those terms if communicated orally. Complex trusts call for memorialization, as well as standardization. Yet, unlike sophisticated actors, lay settlors might know no better than to do it all themselves. Here, a writing requirement, coupled perhaps with more arcane formalizing rules to encourage professional drafting, hold a certain appeal.

The traditional rule, endorsed both by the Uniform Law Commissioners and the *Restatement*, draws no distinction between the formalization of simple gifts and complex trusts: Whether or not a settlor doubles as trustee, and hence whether or not coupled with delivery, inter vivos trusts are valid even when their terms are communicated orally. Only nine states today subject inter vivos trusts to more exacting formalization requirements.[130] Such requirements, we should note, need not distinguish gifts from inter vivos trusts, if organized situationally. The element that would typically complexify a traditional inter vivos trust is the inclusion of future interests, which carry trusts out of the sphere of

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rejected "[c]hance[,] casual or hasty remarks or letters" as declarations of trust. BROWN, *supra* note 91, § 7.21, at 147. The fact that a trustee has fiduciary duties to perform once a trust takes effect also helps to clarify the finality of a settlor's intent to create a trust formalized by a declaration. *Compare* Hatch v. Lallo, No. 20642, 2002 WL 462862, at **2–4 (Ohio Ct. App. Mar. 27, 2002) (finding that the settlor's segregation of trust assets following a declaration of a trust under which the settlor served as trustee demonstrated intent to create the trust), *with* Ambrosius v. Ambrosius, 239 F. 473, 475–76 (2d Cir. 1917) (finding no intent to create a trust, despite a declaration of trust, where the settlor failed to account to the beneficiary or to segregate the corpus from his own assets, adding that the court "cannot believe that [the settlor] would have acted with such bad faith if he had supposed himself to be a trustee"), *and* Bank One of Milford v. Bardes, No. CA87-04-008, 1987 WL 32744, at *1–3 (Ohio Ct. App. Dec. 31, 1987) (also finding no intent to create a trust, despite a declaration of trust, where the settlor continued to act "as if he owned [the trust property] in fee simple"). At the same time, courts sometimes look upon actions by a settlor-*qua*-trustee that are inconsistent with fiduciary duties following a trust declaration as indicative of a breach of trust. *See, e.g.*, Knagenhjelm v. R.I. Hosp. Trust Co., 114 A. 5, 7–8 (R.I. 1921).

130. UNIF. TRUST CODE § 407 (amended 2010), 7C U.L.A. 489 (2006); RESTATEMENT (THIRD) OF TRUSTS §§ 10(b), 20. State statutes of frauds, however, require a writing to formalize a trust whose corpus includes real property. *Id.* § 22 & cmt. a. The nine exceptional states have adopted statutes to override judicial doctrine. ALASKA STAT. § 09.25.010(9) (2012) (requiring a signed writing); GA. CODE ANN. § 53-12-20(a) (2012) (same); IND. CODE § 30-4-2-1(a) (2010) (same); LA. REV. STAT. ANN. § 9:1752 (2005) (requiring a witnessed writing); MONT. CODE ANN. § 72-38-407 (West Supp. 2013) (requiring a signed writing); N.Y. EST. POWERS & TRUSTS LAW § 7-1.17(a) (McKinney Supp. 2013) (requiring either a witnessed or recorded writing); 20 PA. CONS. STAT. ANN. § 7737 (West Supp. 2013) (requiring a writing); TEX. PROP. CODE ANN. § 112.004 (West Supp. 2013) (requiring a signed writing); W.V. CODE ANN. § 44D-4-407 (West Supp. 2013) (requiring a writing). In two additional states, Delaware and Florida, only revocable inter vivos trusts are subject to special formalizing rules. *See infra* note 330 and accompanying text.

spot transfers and into the sphere that we shall call anticipatory transfers—an area demanding greater formality for additional reasons, as we shall presently see.[131]

A final trend in the law of gifts of personal property merits noting. Many modern (and even some early) courts have put forward what is best described as a remedial doctrine of gift formality, holding gifts valid where donors have died before they could complete delivery, at least if evidence of donative intent appears unequivocal. Courts have accomplished this outcome by stretching to find an effective delivery where none exists, or (more rarely) by misconstruing the attempted gift as a declaration of trust.[132]

The public policy of waiving delivery in this context is complicated by another situational variable: The absence of the donor when the issue goes to court. It is this factor that creates pressure for remediation, since the donor has missed the chance to take the necessary steps to effect the gift. But the very same factor also heightens the risk of error and fraud, even when the court is convinced otherwise.[133] However we ultimately weigh these competing considerations, we ought to resolve the tension consistently. A similar problem arises in connection with gifts of real property where the would-be donor failed during his or her lifetime to observe scrupulously the statute-of-frauds formalities. This issue is not exactly analogous, because the risk of fraud presented by a defective deed could differ from the risk of fraud posed by a defective delivery, a distinction lawmakers need to weigh in the balance.[134] At any rate,

131. *See infra* Part III. In addition, revocable inter vivos trusts may be complex because, unlike irrevocable ones, they typically cover the entire estate of the settlor. And these, too, we would situationally classify as anticipatory transfers. *See infra* text accompanying notes 328–29.

132. *See, e.g.*, Scherer v. Hyland, 380 A.2d 698, 701–02 (N.J. 1977) (misapplying the doctrine of constructive delivery and hinting at the legal fiction). For early cases, *see infra* note 138. For trust cases, most of which have eschewed recourse to a fictional declaration of trust, see 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 5.1, at 232–35 & n.17 (5th ed. 2006). For academic observations, noting the doctrinal trend toward watering down the delivery requirement without indicating its confinement to cases where donors have died prior to the litigation, perhaps because that limitation is implicit, see BROWN, *supra* note 91, § 7.2, at 79; HYLAND, *supra* note 93, ¶¶ 885–87; Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 REAL PROP. PROB. & TR. J. 357 (1996). For a commentary advocating the use of fictional declarations of trust in instances where a would-be donor dies before completing delivery, see Sarajane Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309 (1978–79).

133. I will argue that in those situations where they can anticipate the impossibility or unlikelihood of testimony by the donor of a gift, lawmakers should strengthen rather than weaken formalizing rules. *See infra* Parts III.B & IV.A.

134. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. yy (2003) (analogizing a doctrine giving effect to improperly delivered gifts with a harmless error

curative statutes do exist for certain violations of the statute of frauds applicable to transfers of real property, although they vary in scope from state to state.[135]

In sum, a case can be made for consolidating the formalizing rules for gifts and contracts, both intra- and inter-categorically. The latest iteration of the *Restatement* proposes judicial steps in both directions. It suggests that written declarations of gift for personal property, like deeds of gift for real property, should require no delivery.[136] And the *Restatement* also suggests that in those cases where evidence of donative intent is clear and convincing, that evidence alone should suffice to give effect to a gift of personal property, despite a lack of delivery, even (apparently) where the donor remains alive and might wish to change his or her mind after expressing a gift, a rule reminiscent of the common law of contracts.[137] Both of these moves merit consideration, but both remain aspirational; neither one "restates" existing law.[138]

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doctrine for improperly formalized wills, discussed *infra* notes 157–58, 160 and accompanying text).

135. 9 THOMPSON, *supra* note 81, § 82.08(e)(1). *Compare* Grabarz v. Waleski, 499 A.2d 433, 434 (Conn. App. Ct. 1985) (per curiam) (giving effect to a defective deed of gift by virtue of a curative statute), *with* Greenlee v. Mitchell, 607 So. 2d 97, 106 (Miss. 1992) (holding the curative statute inapplicable to the defect that appeared in a deed of gift). *See supra* text accompanying note 97.

136. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmts. p & u; *cf. id.* § 6.3 cmt. d.

137. "[T]his Restatement adopts the position that a gift of personal property can be perfected on the basis of donative intent alone if the donor's intent to make a gift is established by clear and convincing evidence." *Id.* § 6.2 cmt. yy. The *Restatement* illustrates this rule with a hypothetical in which a donor expresses a gift but delivers neither the gift corpus—a block of lottery tickets—nor a writing to the beneficiary, without limiting the hypothetical to instances in which the donor dies before delivery occurs. *See id.* § 6.2 illus. 25. And the *Restatement* analogizes this rule, inter alia, to the rule allowing settlors who double as trustees to formalize trusts by mere oral declaration. *See id.* § 6.2 cmt. yy. Strictly speaking, though, the *Restatement* rule appears to judge the validity of the gift on the basis of subjective intent rather than an objective (contractual) standard. And, it must be added, the *Restatement* does not expressly authorize suits on gifts declared and then retracted by living donors—the distinction between pre- and postmortem litigation goes without mention in the *Restatement*. *See id.*

138. On the delivery requirement for writings declaring gifts of personal property, see BROWN, *supra* note 91, § 7.10, at 110; HYLAND, *supra* note 93, ¶ 893. On waiver of the delivery requirement where intent to make a gift is assured, the one case on point cited in the *Restatement* involved a suit on an undelivered gift that followed the death of the donor. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 reporter's note 21 (citing Ellis v. Secor, 31 Mich. 185 (1875)). The hypothetical illustrating the *Restatement* rule on waiver of the delivery requirement, *see id.* § 6.2 illus. 25, appears loosely based on another old case, Grangiac v. Arden, 10 Johns. 293, 293–94, 296 (N.Y. Sup. Ct. 1813), although it goes uncited in the *Restatement*. In that case as well, the litigation followed the death of the donor. *Id.*

III. ANTICIPATORY TRANSFERS

The mirror image of a spot transfer is one that parties render legally operative in advance of its maturity. A transferor may preconceive a planned transfer—or an inevitable one—and seek to formalize it long before the transferor intends it to become possessory. Nowadays, of course, that is the standard practice for making a will. The transferor executes the will at an early or middle age, anticipating by years or even decades the time when the transfer eventually, but ineluctably, comes to fruition.

Here, the evidentiary problems so easily dismissed in connection with most spot transfers grow more formidable. An extended period of latency raises the specter that the star witness in any trial over a transfer's authenticity, finality, terms, or construction will prove unavailable to testify. When a transferor schedules a transfer to occur at death, his or her disappearance becomes a condition precedent, and not merely a risk. Under these circumstances, we need some substitute for the transferor's testimony. And note well: this problem crops up *in connection with every conceivable sort of anticipatory transfer*, not just with regard to wills.

A. Wills

Lawmakers demand greater formalities for a will than apply either to garden-variety gifts or contracts. State statutes of wills require testators to commit their wills to writing.[139] And (with an intriguing exception in some states that we shall address presently[140]), the statutes require testators to execute their wills in front of witnesses.[141]

The writing and witnessing requirements for wills serve as substitutes for the testator's testimony. Witnesses alone could not do the job; if a testator verbally declared his or her will years before it matured, witnesses' recollections in old age of what a testator had (or had not) said might have dimmed, and in any event a will's complexities might tax anyone's memory. At the same time, a writing without witnesses would

139. But compare the exceptions addressed below in Part IV.B.

140. *See infra* text accompanying notes 152–55.

141. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (1998). The practice of witnessing wills originated in the ancient world. *See In re* Zaiac's Will, 295 N.Y.S. 286, 293–94 (Sur. Ct. 1937) (remarking a witnessed will dating to the reign of Amenemhat III in Egypt, c. 2000 B.C.). For a comparative anthology exploring will formalities in other nations, see COMPARATIVE SUCCESSION LAW: VOLUME I: TESTAMENTARY FORMALITIES (Kenneth G.C. Reid et al. eds., 2011).

suffer from its own deficiencies. The authenticity of the document could be called into question. And, with no ceremony surrounding the document's execution, fact finders could not know for sure whether the testator considered the document as final and legally operative, as opposed to merely a preliminary draft.[142] Like trusts, wills are not traditionally made on holidays—hence, no natural solemnity attaches to the words of wills.[143]

Even so, the statute-of-wills formalities are not fool-proof. Over a protracted space of time, a written will can become lost. By the same token, witnesses may vanish, or they may perish. Historically, lawmakers have not required both, or even either, to survive. If necessary, beneficiaries can prove a lost will with other evidence, and they can also substitute other evidence for unavailable witnesses.[144] Yet, lawmakers could easily enough impose a regime of formalizing rules designed more stringently to protect against the loss of documents and witnesses. Testators could be obliged to file a will with the probate court for safekeeping, for example—now merely an option made available to testators in many states.[145]

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142. In four jurisdictions, however, probate can occur during the lifetime of the testator. *See* ALASKA STAT. § 13.12.555 (2012); ARK. CODE ANN. §§ 28-40-202 to -203 (2013); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2010); OHIO REV. CODE ANN. §§ 2107.081 to -.084 (West Supp. 2013). In that event, the testator *is* available to testify, and formalities of will execution become unnecessary—or, we might say, the probate proceeding itself serves to furnish the ritual, guard the evidence, and protect the testator, which the formalities of will execution out of court otherwise function to do. The statutes permitting antemortem probate do not technically waive any of the formalities of will execution, however.

143. *Cf. supra* text accompanying notes 119, 129 and *infra* text accompanying note 285.

144. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. k; 3 PAGE ON THE LAW OF WILLS §§ 27.2 to -.3, 29.11, 29.156 to -.161 (William J. Bowe & Douglas H. Parker eds., rev. ed. 2005, & Jeffrey A. Schoenblum ed., Supp. 2012) [hereinafter PAGE]; *see also, e.g.*, UNIF. PROBATE CODE §§ 3-402(a), 3-405 (amended 2010), 8 pt. 2 U.L.A. 83, 91 (2013) (allowing probate of lost wills and permitting "other evidence or affidavit" as a substitute for unavailable witnesses). Some states demand a higher standard or special types of proof for lost wills, however. *See, e.g.*, FLA. STAT. ANN. § 733.207 (West 2010) (requiring testimony of *disinterested* witnesses). For a recent case holding that a will could be admitted to probate, despite the fact that both witnesses invoked their Fifth Amendment rights against self-incrimination and refused to testify, see *In re* Estate of Buchting, 975 N.Y.S.2d 794, 797 (App. Div. 2013) (observing that "no negative inference may be drawn from such an invocation").

145. *E.g.*, UNIF. PROBATE CODE § 2-515 (amended 2010), 8 pt. 1 U.L.A. 234 (2013); TEX. EST. CODE ANN. §§ 252.001 to -.153 (West 2014). The practice has deep roots, although the institution charged with this responsibility has evolved. In ancient Rome, the Vestal Virgins undertook the function of safekeeping wills. MOSES A. DROPSIE, THE ROMAN LAW OF TESTAMENTS, CODICILS, AND GIFTS IN THE EVENT OF DEATH (MORTIS CAUSA DONATIONES) 23 (1892); *see also* MICHAEL GRANT, CLEOPATRA 192–93 (1972) (discussing the will of Mark Antony, which Octavian—the future Augustus Caesar—stole from the Virgins and publicized during Antony's lifetime).

Lawmakers could also enact a statute of limitations for the probate of wills, as applies to many other sorts of claims. Statutes of limitations operate to protect against the risks of adjudicative error that arise when parties postpone a cause of action until a time when "evidence has been lost, memories have faded, and witnesses have disappeared," as Justice Jackson once put the matter generally.[146] In fact, many states have adopted such a rule for wills. Under the Uniform Probate Code, beneficiaries can submit a will for probate only within three years of the testator's death; otherwise, they can only petition for intestacy.[147] States that have adopted statutes of limitations for wills have invariably structured them in this way, although the period of time within which probate of a will must occur varies from jurisdiction to jurisdiction—in one state, the deadline is so strict as to require probate within six months of the date of death.[148]

That lawmakers have chosen to start the clock on the date of death is understandable. Statutes of limitations for other causes of action—breach of contract, for instance—begin to run when the claim arises. Modern statutes of limitations for wills conform to this pattern.[149] The difference, though, is that little time typically separates contract formation from breach, making them functionally simultaneous events. Not so in the case of wills; will execution and maturity are, in all probability, distinct events. The quality of the evidence of a will's authenticity hinges on when it was executed, not on when the testator died. Authenticating a half-century old will that parties promptly submit for probate represents a far thornier task than authenticating one executed shortly before death, even if beneficiaries delay probate for a number of years. Under late Roman law, wills became ineffective if they failed to take effect within ten years *of their execution*.[150] Some sort of similar rule, making execution the trigger for a statute of limitations, and hence requiring periodic *re-execution* of wills, would better suit the purpose of ensuring a will's evidentiary integrity, although such an innovation (its radicalness aside[151]) would add to the transaction cost of will making.

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146. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

147. UNIF. PROBATE CODE § 3-108(a)(5) (amended 2010), 8 pt. 2 U.L.A. 40 (2013).

148. KAN. STAT. ANN. §§ 59-617, 59-619 (2005).

149. *But cf. infra* notes 266, 273, 287 and accompanying text.

150. THE THEODOSIAN CODE § 4.4.6, at 84 (Clyde Pharr trans., 1952) (418 A.D.). This limit disappeared under Justinian's Code of 529 A.D. THE INSTITUTES OF JUSTINIAN 206 (Thomas Collett Sandars ed. & trans., 7th ed., photo. reprint 1970) (1922) [hereinafter INSTITUTES].

151. The costs of effecting the legal transition would greatly diminish the practicality of this sort of statute of limitations. *See supra* note 30.

An exception to the witnessing requirement appears in the twenty-seven states that allow holographic wills in lieu of executed ones.[152] In these states, if a testator writes out the substantive provisions of a will in longhand and signs the document, it can be probated even without witnesses. In concept, holographic wills function to simplify, and to cheapen, the process of will execution without sacrificing evidentiary integrity. Here, witnesses become unnecessary as a means of authentication "by virtue of the recognized difficulty of forging an entire handwritten instrument,"[153] as opposed to a mere signature. At the same time, holographic wills can present courts with other evidentiary challenges. In the absence of professional drafting and standardization, these lay documents often require construction proceedings to clarify their meaning. And in the absence of a ritual will execution ceremony, much litigation has also revolved around whether an alleged holographic will was intended to be a final, legally operative document.[154]

Yet, in the twenty-first century, all of this may be about to change. Once upon a time, people corresponded by posted letter, often written out longhand. Expert witnesses could compare the handwriting found in a holographic will with other documents shown to have been penned in the testator's hand. In an age of e-mail and telephonic texting, however, the handwriting that appears in a holograph could lose its probative value—the testator might leave behind few other samples of his or her handwriting with which the holograph can be compared. Meanwhile, ironically, the very emergence of this problem could ease the second evidentiary task of establishing the finality of a holograph. When handwritten documents turn into anachronisms, they could take on a ritual value that they lacked heretofore. A will laboriously drawn out in longhand could then become as exceptional as an executed will. In short, technological and social change could well stand the evidentiary attributes of holographic wills on their head.

At any rate, holographic wills are probably doomed to extinction in this century for another reason: most Americans will lose the ability to handwrite documents altogether. In the wake of modern information

152. *E.g.*, UNIF. PROBATE CODE § 2-502(b) (amended 2010), 8 pt. 1 U.L.A. 209 (2013). The statutes are tabulated in RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 statutory note (1998); *see also* MASS. GEN. LAWS ANN. ch. 190B, § 2-502(b) (West 2012) (enacted after the *Restatement* was published). On the history of holographic will statutes, see Hirsch, *supra* note 42, at 1071–73.

153. Bouch v. Rombotis (*In re* Estate of Black), 641 P.2d 754, 756 (Cal. 1982).

154. For a discussion and further references, see Hirsch, *supra* note 42, at 1073–78. For more recent scholarly treatments and assessments pro and con, see *supra* note 26.

technology, schools in the United States no longer make more than a token effort to teach cursive handwriting, and it is fast becoming a lost art.[155] Today's rising generation is destined to regard holographic wills as a historical curiosity.

When testators fail to formalize their wills properly, a court may still have power to give effect to them in many states today under either of two remedial doctrines. In some jurisdictions, the judicially-developed substantial compliance doctrine allows courts to waive minor, technical failures to comply with the statute of wills.[156] In several other jurisdictions, a statutory harmless error power grants courts leave to waive failures of formality altogether, where parties can produce clear and convincing evidence of donative intent.[157] (The *Restatement* endorses the harmless error power but, in a bizarre oversight, fails to identify it as an exclusively statutory doctrine.[158]) Nevertheless, a fair number of states continue to

155. For a discussion of the declining use, and reduced teaching, of cursive handwriting, noting the heightened risk of forgery that has resulted, see Katie Zezima, *Can You Read This? It's Cursive*, N.Y. TIMES, Apr. 28, 2011, at A15.

156. For a recent example, see *In re* Succession of Arceneaux, No. 2012 CA 1624, 2013 WL 2393093, at **2–5 (La. Ct. App. May 31, 2013). For earlier case law, see 2 PAGE, *supra* note 144, § 19.4, at 14–15.

157. *See* UNIF. PROBATE CODE § 2-503 (amended 2010), 8 pt. 1 U.L.A. 215 (2013). This statutory power is broader than the judicial substantial compliance doctrine. *See, e.g.*, Kirkeby v. Covenant House (*In re* Estate of Kirkeby), 970 P.2d 241, 247 (Or. Ct. App. 1998) (observing that "'substantial compliance' does not mean noncompliance"); Draper v. Pauley, 480 S.E.2d 495, 496 (Va. 1997) (requiring "rigid" conformity with the substantial compliance standard) (quoting Robinson v. Ward, 387 S.E.2d 735, 738 (Va. 1990) (internal quotation marks omitted); Brown v. Fluharty, 748 S.E.2d 809, 813 (W. Va. 2013) ("This Court cannot find substantial compliance . . . where there was no compliance whatsoever.") (citation omitted). Still, the harmless error power does not allow courts to give effect to a will that a testator neglected to put in writing (*viz.*, oral or "nuncupative" wills), discussed below in Part IV.B. *See* UNIF. PROBATE CODE § 2-503 (amended 2010), 8 pt. 1 U.L.A. 215 (2013) ("Although a *document* . . . was not executed in compliance with [the statute of wills]. . . .") (emphasis added). Query whether this restriction is appropriate for a harmless error doctrine, given that courts have authority to probate lost wills. *See supra* note 144 and accompanying text. Thus far, only six states have enacted the harmless error doctrine as set out in the Uniform Probate Code. HAW. REV. STAT. ANN. § 560:2-503 (Lexis Nexis 2010); MICH. COMP. LAWS ANN. § 700.2503 (West 2000); MONT. CODE ANN. § 72-2-523 (2013); N.J. STAT. ANN. § 3B:3-3 (West 2007); S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (West 1993). Four additional states have enacted more limited versions of the harmless error doctrine that differ only marginally from a codified substantial compliance doctrine. *See* CAL. PROB. CODE § 6110(c)(2) (West 2009); COLO. REV. STAT. ANN. § 15-11-503 (West 2011); OHIO REV. CODE ANN. § 2107.24 (West 2008); VA. CODE § 64.2-404 (2004). When Massachusetts adopted the Uniform Probate Code in 2012, the state pointedly omitted the harmless error doctrine from its omnibus enactment. *See* MASS. GEN. LAWS ANN. ch. 190B, § 2-503 (West 2012).

158. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 & cmt. b (1998); *but cf. id.* § 3.3 reporter's note 2 (quoting, and asserting that the *Restatement (Third)* "carries forward the position taken in" RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.1 cmt. g (1992), which had noted the distinction between a judicial substantial compliance doctrine and a statutory harmless error doctrine). *Restatements* ordinarily promulgate model judicial rules; on those

acknowledge neither power,[159] and the virtues of introducing one remain controversial. The harmless error power might tend to encourage carelessness and breed litigation, or open up avenues for fraud.[160] At any

occasions when *Restatements* speak to statutory rules, they expressly recognize them as such. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 2 introductory note, §§ 2.2, 3.1 & cmt. f; *see also* Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 733–34 (2012) (observing that "[i]n some cases, when the UPC adopted specific rules whose implementation seemed beyond the power of the courts and achievable only by statute, I did not think that the Restatement could follow suit, even though I favored the UPC position on the merits," speaking in his capacity as Reporter for the *Restatement (Third)*). The *Restatement (Third)* analogizes a harmless error doctrine for wills to a similar doctrine in the law of gifts. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. yy ("By analogy to those authorities . . . ."); *see also supra* notes 132, 137 and accompanying text. Yet, as a matter of legal process, there is a world of difference between a judicial doctrine creating a right to waive formal requirements *established by the common law* under the law of gifts, and one creating a right to waive formal requirements *established by a statute* under the law of wills. If the *Restatement (Third)* actually intends to advocate a *judicial* harmless error doctrine for wills, going beyond the substantial compliance doctrine, then the *Restatement (Third)* is jurisprudentially unsound. *See* Litevich v. Probate Court, No. NNHCV126031579S, 2013 WL 2945055, at *20–22 (Conn. Super. Ct. May, 17, 2013) (rejecting a party's request that the court establish the harmless error doctrine as a "judicial gloss" on the statute of wills, observing that "[i]t is not for this court to decide to adopt a substantial abrogation of an unambiguous statute"); *Brown*, 748 S.E.2d at 813 (finding invalid a will that did not comply substantially with the statute of wills, on the ground that "[t]o hold otherwise would require us not to construe the statute but to disregard it"); *see also* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 6 (1987) ("The substantial compliance doctrine is the only avenue open to the courts without legislative intervention."); *cf.* Waggoner, *supra*, at 735 n.38 (misdescribing a Canadian case, Sisson v. Park St. Baptist Church, 24 E.T.R.2d 18, 18–22 (Ont. Gen. Div. 1998), as having "adopt[ed] the harmless error rule judicially," when in fact the court in *Sisson* adopted the substantial compliance doctrine judicially).

159. *See, e.g.*, *In re* Estate of Henneghan, 45 A.3d 684, 686–87 (D.C. 2012); *In re* Estate of Chastain, 401 S.W.3d 612, 619–20 (Tenn. 2012); *see also In re* Estate of Holmes, 101 So. 3d 1150, 1152–54 (Miss. 2012) (invalidating a will as improperly formalized over a dissent, without stating whether the court required strict or substantial compliance with the statutory formalities). For earlier case law, see 2 PAGE, *supra* note 144, § 19.4, at 15–16.

160. For an early warning of the risks of "tolerating departures from strict statutory requirements" for wills, see *In re* Jacoby's Estate, 42 A. 1026, 1035–36 (Pa. 1899). In the leading case endorsing substantial compliance, the court anxiously added an apostrophe to attorneys: "A careful practitioner will still observe the formalities surrounding the execution of wills. . . . Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery." *In re* Will of Ranney, 589 A.2d 1339, 1345 (N.J. 1991). For a defense of the harmless error doctrine by its foremost advocate, see Langbein, *supra* note 158, at 3–7, 37–41, 51–54. For other discussions and criticisms, see Mark Glover, Decoupling the Law of Will-Execution, 88 ST. JOHN'S L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2341748; Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 ILL. L. REV. 557, 589-94; Hirsch, *supra* note 42, at 1067 n.33; Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 877–82 (2012); Leslie, *supra* note 33, at 279–90; 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 (2007); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (pt. 2), 43 FLA. L. REV. 599, 704–12 (1991); John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73 (2008); Emily

rate, if lawmakers create such a power, it should with equal logic apply to other sorts of transfers,[161] as Jeremy Bentham once proposed in a critique of English formalizing rules overlooked by modern scholars.[162]

In sum, the formalizing rules for wills respond, at least in a rough-and-ready way, to the situational challenges posed.[163] Whether they respond optimally is difficult to judge, for we must weigh the benefits of formalities against the costs they impose on testators. Viewed broadly, writing and witnessing appear logical requirements when a transfer becomes anticipatory. The fact that lawmakers require neither to comprise an element of proof for a will if it happens to become lost, or if witnesses disappear, or (in some jurisdictions) if a testator bungled the will execution process, hardly justifies scrapping the formal requirements *a priori*.[164]

Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 458–76 (2002).

161. Although courts often strain to avoid strict enforcement of the statute of frauds, *see* 2 FARNSWORTH, *supra* note 96, § 6.1, at 107, few acknowledge a substantial compliance doctrine for the statute, and no state has enacted a harmless error doctrine generally applicable to the statute. *See* Real Flo Props. v. Kelly, No. L-99-1099, 1999 WL 1203751, at *3 (Ohio Ct. App. Dec. 17, 1999) (following a substantial compliance standard for real estate contracts); Shimko v. Marks, 632 N.E.2d 990, 992 (Ohio Ct. App. 1993) (same); *see also supra* note 135 and accompanying text (noting curative statutes for certain violations of the statute of frauds as applicable to transfers of real estate); *cf.* Smith v. Smith, 466 So. 2d 922, 924 (Ala. 1985) ("The prescriptions of the statute of frauds . . . are not to be denied or evaded.") (quoting Smith v. E. Ala. Nat'l Bank, 128 So. 600, 601 (Ala. 1930)); Mut. Dev. Corp. v. Ward Fisher & Co., 47 A.3d 319, 324 (R.I. 2012) (similar statement). In advocating a substantial compliance doctrine for wills, Professor Langbein asserts that courts already apply, with respect to the statute of frauds, a "purposive approach to formal defects . . . . when the purposes of the formal requirements are proved to have been served," by virtue of the part performance and main purpose rules. Langbein, *supra* note 22, at 498–99. Yet, both of those doctrines comprise limited exceptions—neither operates across the board. For discussions of the two doctrines, see 2 FARNSWORTH, *supra* note 96, §§ 6.3., at 123–28, 6.9. The U.C.C. simultaneously prunes back the part performance doctrine and adds another confined, purposive exception to the formal requirements. *See* U.C.C. § 2-201(2), (3)(c) (amended 2010).

162. *See* BENTHAM, *supra* note 66, at 512–51. Bentham urged that violations of formalizing rules for contracts and wills alike should trigger "suspicion" of the transfer, rather than nullify the transfer. *Id.* at 517–21, 523–25, 532–35, 541.

163. One widely ignored situational variable, however, is the testator's physical or educational ability to *read* his or her will. Only one state today establishes special rules for formalizing the will of a blind or illiterate testator, in order to forestall fraud. *See* LA. CIV. CODE ANN. art. 1579 (1997). This doctrinal exception has ancient roots. *See* INSTITUTES, *supra* note 150, at 180 (setting distinct formalizing rules for the wills of blind testators under the Code of Justinian). The Uniform Probate Code ignores this variable. *See* UNIF. PROBATE CODE § 2-502 (amended 2010), 8 pt. 1 U.L.A. 209 (2013). State statutes of frauds applicable to gifts and contracts likewise disregard this variable, although in connection with spot transfers—in contradistinction to wills—the blind or illiterate transferor is able to testify as to what he or she intended a document to provide.

164. *See supra* text accompanying notes 144, 156–57. For a recent case rejecting a constitutional challenge to existing will formalities as a violation of the Equal Protection Clause, see Livetich v. Probate Court, No. NNHCV126031579S, 2013 WL 2945055, at *11–20 (Conn. Super. Ct. May 17, 2013). For another recent case upholding the constitutionality of a state statute barring holographic

B. Gifts

A donor might also frame an anticipatory transfer as a gift, that is, a gift scheduled to come into the donee's possession *in futuro*. Wherein lies the difference? Wills take effect only at *death*, not at other predetermined times, and wills are also *ambulatory*—they remain revocable by the testator, whereas gifts once made become final. The donor cannot rescind a gift.[165]

We may note, preliminarily, that not all anticipatory gifts are allowed as a matter of substantive law. What is worse, the characteristics distinguishing valid gifts from invalid ones are subtle, not to say confused. On the one hand, a gift of a specific, existing tangible or intangible asset with delivery delayed until some future time (*viz*., a future interest) is permissible and enforceable if, and only if, the donor intends to convey a present and irrevocable right to future enjoyment.[166] Likewise, a donor can give away ex ante property that he or she does not yet possess, but which the donor is due to receive by virtue of a vested or contingent future interest created by a third party.[167]

On the other hand, a pledge to make a gift of a specified asset, or of a general sum, at a future time fails as a (mere) donative promise, ordinarily unenforceable at common law.[168] For the same reason, the present "gift" of

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wills but certifying the question to the state supreme court, see Lee v. Estate of Paine, No. 2D12-4411, 2013 WL 5225200, at **4–5 (Fla. Dist. Ct. Sep. 18, 2013). For a recent proposal to offer an alternative means of formalizing wills, see Reid K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012) (proposing to attach optional statutory will forms to state income tax returns). For a criticism of another novel means of formalizing wills, so far valid in only one state, see Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197 (2012). For earlier discussions and proposals, see Baron, *supra* note 31, at 198–99 (suggesting the relaxation of formalizing rules applicable to wills as well as gifts); Hirsch, *supra* note 42, at 1069 n.38 (citing to other analyses).

165. BROWN, *supra* note 91, § 7.13, at 119; *see, e.g.*, *In re* Estate of Monks, 655 N.Y.S.2d 296, 298–99 (Sur. Ct. 1997). Under early Anglo-Saxon law, gifts delayed until death (which Professor Maitland designated "post obit gifts") often took the place of wills, which lacked full effectiveness prior to the ninth century. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 316–17 (2d ed. 1899); Harold D. Hazeltine, *General Preface to* ANGLO-SAXON WILLS, at vii-ix (Dorothy Whitelock ed. & trans., 1930). In feudal times, English law did an about-face: wills became effective and delayed gifts became ineffective. 2 POLLOCK & MAITLAND, *supra*, at 318–36.

166. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 6.1 cmt. f (2003); BROWN, *supra* note 91, § 7.12; *see also, e.g.*, Puetz v. First Nat'l Bank of Skokie (*In re* Estate of Puetz), 521 N.E.2d 1277, 1280 (Ill. App. Ct. 1988); Gruen v. Gruen, 496 N.E.2d 869, 872–74 (N.Y. 1986); Neuschafer v. McHale, 709 P.2d 734, 739 (Or. Ct. App. 1985).

167. *E.g.*, Speelman v. Pascal, 178 N.E.2d 723, 725–26 (N.Y. 1961).

168. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. p; *see, e.g.*, Hocks v. Jeremiah, 759 P.2d 312, 315 (Or. Ct. App. 1988). For exceptions that may apply under state law, see RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

forgiveness of a debt owed in the future, known technically as a release, also fails at common law.[169] Likewise, an anticipatory gift of an expectancy—that is, of property in which the testator owns no existing future interest, but which he or she might acquire later from some identified source—is ineffective, even if the donor wishes to convey irrevocably his or her rights that may later materialize.[170] Hence, for example, the present gift of any bequest the donor might receive under a living person's will is invalid.[171] But at the same time, and with no apparent appreciation of the inconsistency, the common law (overruled by statutory law in some states) gives effect to anticipatory disclaimers of an inheritance from a living person's will.[172] In such a case, the disclaimant does not choose the alternative taker of the expectancy, as a donor would, but the disclaimant nonetheless, by consulting the will, can determine who the alternative taker would be.[173] Hence, a disclaimer represents a form of gratuitous transfer, here treated differently as a matter of substantive law.

Meanwhile, contract law draws none of the nice distinctions that have evolved within the law of gratuitous transfers. Contracts for the sale of future interests, for the release of debts, for the transfer of expectancies, and for the execution of anticipatory disclaimers are all either effective at common law or (alternatively) enforceable in equity, sometimes with an added stipulation that they are valid if made for a fair consideration.[174]

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169. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 273, 284 (noting the effectiveness of releases under some circumstances, and under some state statutes); 13 CORBIN ON CONTRACTS § 67.10 (Sarah H. Jenkins ed., rev. ed. 2003) [hereinafter CORBIN]. At the same time, debts can be released under wills. 6 PAGE, *supra* note 144, § 57.1.

170. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. f.

171. *E.g.*, Mastin v. Marlow, 65 N.C. 695, 703 (1871).

172. *See, e.g.*, *In re* Estate of Heffner, 503 N.Y.S.2d 669, 670 (Sur. Ct. 1986) (holding an anticipatory disclaimer valid at common law); *In re* Estate of Boren, 268 S.W.3d 841, 848–51 (Tex. Ct. App. 2008) (observing in dicta that an anticipatory disclaimer would have been effective had it been properly filed). *But cf. In re* Estate of Baird, 933 P.2d 1031, 1033–35 (Wash. 1997) (en banc) (holding an anticipatory disclaimer invalid under the text of the state's disclaimer statute). The Uniform Disclaimer of Property Interests Act (incorporated into the Uniform Probate Code) is ambiguous on this point. It allows a beneficiary to disclaim "any interest in or power over property." UNIF. PROBATE CODE § 2-1105(a) (amended 2010), 8 pt. 1 U.L.A. 390 (2013). This definition appears to exclude an expectancy: "By all traditional and current concepts of property, expectancies are not property interests." RESTATEMENT (THIRD) OF TRUSTS § 41 cmt. a (2003). Nevertheless, the Uniform Disclaimer of Property Interests Act creates a filing procedure for anticipatory disclaimers. UNIF. PROBATE CODE § 2-1112 (e)(3), (f) (amended 2010), 8 pt. 1 U.L.A. 404 (2013).

173. On this feature of disclaimers, see Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 608 (1989).

174. *See, e.g.*, Greene v. Rosin (*In re* Rosin), 248 B.R. 625, 633–34 (Bankr. M.D. Fla. 1998) (giving effect to the assignment of an heir's expectancy "provided the assignment was fairly obtained and based on sufficient consideration"); Rector v. Tatham, 196 P.3d 364, 367–69 (Kan. 2008) (same); Johnson *ex rel.* Lackey v. Schick, 882 P.2d 1059, 1060–62 (Okla. 1994) (same); Scott v. First Nat'l Bank of Baltimore, 168 A.2d 349, 351 (Md. 1961) (same); Badouh v. Hale, 22 S.W.3d 392, 396 (Tex.

No announced policy explains these distinctions. Volumes of the *Restatement* set out the rules but fail to articulate a rationale for any of them.[175] Professor Allan Farnsworth suggests that the doctrines derive, implicitly and unsystematically, from lawmakers' paternalistic instincts: "It is an appealing notion that we are more competent in ordering our present actions than our future ones," Farnsworth posits; "[i]f . . . we are less able to protect ourselves against the possibility of 'second thoughts' in cases of promises to make gifts than in cases of present gifts, paternalism may seem more justifiable in cases of promises."[176]

Of course, the problem of paternalism in law—here, hard paternalism, not merely the soft variety reflected in Fuller's cautionary function of formalities[177]—and the extent to which civil government can legitimately protect persons from their own misjudgments is a large subject.[178] What makes Farnsworth's analysis noteworthy is his projection of the problem from the transactional realm into the world of gratuity—from buyer's remorse to *donor's* remorse. It is a natural extension. Either variant of regret can stem from the tendency of persons to trade present for future utility, a phenomenon which the psychologists call myopia, and the economists (who sometimes venture the same ideas but speak a different language) usually style as hyperbolic discounting. We often indulge our present selves by overspending or overborrowing for current consumption. By the same token, when we care about others and have interdependent utilities with them (translating once more into the economists' obscure

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2000) (enforcing the assignment by preventing the assignor from executing a disclaimer). For a case enforcing a contractual pooling of expectancies, see Ferguson v. Carnes, 38 FLA. L. WEEKLY D741, 2013 WL 1316345 (Fla. Dist. Ct. App. 2013). For cases giving effect to contractual, anticipatory disclaimers, see for example *McCarthy v. McCarthy*, 133 N.E.2d 763, 767–68 (Ill. App. Ct. 1956) and *Stewart v. McDade*, 124 S.E.2d 822, 825–27 (N.C. 1962). For contractual releases, for which there appear few if any cases on point, see RESTATEMENT (SECOND) OF CONTRACTS § 273(a); 13 CORBIN, *supra* note 169, § 67.10, at 100–01.

175. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 2.6 cmt. j, 6.1 cmts. f & p, 6.2 cmt. w; RESTATEMENT (THIRD) OF TRUSTS § 41 & cmts. a–d. The *Restatement (Third) of Trusts* offers one truism that hardly passes for a policy: "By all traditional and current concepts of property, expectancies are not property interests." RESTATEMENT (THIRD) OF TRUSTS § 41 cmt. a. For an early discussion of the distinction between a promise to make a future gift and a gift of a future interest, see THOMAS HOBBES, LEVIATHAN 194 (C.B. Macpherson ed., 1982) (1651).

176. E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 398 (2000).

177. *See supra* text accompanying notes 18–20.

178. For recent, scattered contributions to the debate, see PATERNALISM: THEORY AND PRACTICE (Christian Coons & Michael Weber eds., 2013); Jeremy A. Blumenthal, *Expert Paternalism*, 64 FLA. L. REV. 721 (2012); Tom Ginsburg et al., *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014); Jayson L. Lusk et al., *The Paternalist Meets His Match*, 36 APPLIED ECON. PERSP. & POL'Y 61 (2013); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826 (2013).

dialect), we might similarly incline toward *overgenerosity*, either with what we have now or will (or might) acquire later on, again at the cost of our own future welfare.[179]

If that were their focus of concern, though, lawmakers have at their disposal a less invasive solution to the problem. Lawmakers could accommodate the remorseful donor by rendering anticipatory gifts voidable until they become possessory, rather than wholly void. By making anticipatory gifts (be they future interests, expectancies, or promises) mandatorily revocable, lawmakers could avoid regret and also give effect to gifts of future assets by those who never experience regret, but who die before the assets change hands.[180] Lawmakers have employed similar expedients within the other primary categories of transfer. In the realm of contracts, mandatory cooling-off periods sometimes operate to protect parties from failures of judgment.[181] By even closer analogy, wills making future transfers also function in this way. Bequests under wills are revocable *and cannot be made irrevocable*, which is why the cautionary function of formality applies just indirectly to wills.[182] Only if they are not revoked during the testator's lifetime do wills become effective. Anticipatory gifts could be treated in like manner. Oddly, though, under

179. Farnsworth's intuition that it is easier (or too easy) to give away future, as opposed to present, assets, *see supra* text accompanying note 176, might also implicate another psychological phenomenon known as the endowment effect: Some evidence suggests that persons tend subjectively to value property that they own above its objective worth. But preliminary evidence also suggests that the endowment effect does not come into play until property becomes possessory:

> The impression gained from informal pilot experiments is that the act of giving the participant physical possession of the good results in a more consistent endowment effect. Assigning subjects a chance to receive a good, or a property right to a good to be received at a later time, seemed to produce weaker effects.

Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342 n.7 (1990). If that is true, then donors' rights to future interests and expectancies may hold less subjective value, making them readier objects of donors' generosity, or overgenerosity. At the same time, recent experimental studies have called into question the endowment effect. For a review, see Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 30–53 (2013).

180. For a proposal to make gift promises effective so long as they are not repudiated, see Mary Louise Fellows, *Donative Promises Redux*, *in* PROPERTY LAW AND LEGAL EDUCATION 27, 33–37 (Peter Hay & Michael H. Hoeflich eds., 1988). For a proposal to offer all donors of inter vivos gifts (not confined to anticipatory ones) the option of making their gifts revocable, see John L. Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute*, 16 CATH. U. L. REV. 119 (1966).

181. *See* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786–97 (1983).

182. *See* Hoffman v. Krueger (*In re* Salzwedel's Estate), 177 N.W. 586, 587–88 (Wis. 1920) (holding ineffective as "purely testamentary" an attempted inter vivos transfer of a future interest in "all our personal property which we may possess at our death"). If the cautionary function applies to wills, it does so only because procrastination and transaction costs impede their amendment. *Cf. supra* text accompanying notes 18–20.

current law the opposite is true: all valid anticipatory gifts are irrevocable *and cannot be made revocable*.[183]

In point of fact, litigation over anticipatory gifts has arisen almost invariably in instances where death arrives before possession, and where there is no evidence that the donors ever wished to retract their gifts.[184] Paternalistic considerations fail to figure into such cases.

But there remains another element to consider here. If a hiatus separates the time when a gift is created and the time when it becomes possessory, then the risk arises that the donor will not live long enough to substantiate his or her intent to make a gift at all. The longer the delay, the greater the risk; and if a gift is timed to take effect only upon the donor's death, then the risk grows to a certainty. Here, witnesses (to ensure authenticity) and a writing (to protect against lapses of memory) would both serve evidentiary needs presented by the circumstances. Notice in this regard that if lawmakers were to change the law of gifts to make anticipatory gifts revocable, then an anticipatory gift programmed to take effect upon the donor's death would become indistinguishable from a will, which of course requires full execution under the statute of wills.[185] Yet, the feature of revocability—or irrevocability—has no impact whatsoever upon a fact finder's ability to recover evidence of a given gratuitous transfer.

Under current law, anticipatory gifts are formalized like any other gift: all they require is delivery. Because manual delivery of an abstract future right is impossible, a donor must instead deliver a written description of the gift to the donee.[186] Given the donor's possible (or certain) unavailability to testify, a writing provides a fact finder with valuable evidence—it is better than nothing.[187] Nonetheless, the writing in question

183. *See supra* note 165 and accompanying text. That is not true of trusts, however, which a settlor can make revocable. *See infra* Part V.

184. *See, e.g.*, Unthank v. Rippstein, 386 S.W.2d 134, 134–35 (Tex. 1964) (concerning an ostensible, anticipatory gift of a five-year income stream made three days before the donor's death).

185. *See supra* Part III.A.

186. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 6.2 cmts. g, h, t & w (2003); *see also, e.g.*, Gruen v. Gruen, 496 N.E.2d 869, 874 (N.Y. 1986); *In re* Estate of Monks, 655 N.Y.S.2d 296, 299–300 (Sur. Ct. 1997).

187. *See Gruen*, 496 N.E.2d at 874 (observing that, in the absence of witnesses, a written instrument provides better evidence of an anticipatory gift than a ritual of manual delivery of the gift corpus to the donee followed by its immediate return to the donor would provide); *see also* Rogers v. Rogers, 319 A.2d 119, 121 (Md. 1974) (recognizing the risk of fraud where an alleged donee claimed to have made a bailment of the gift corpus back to an alleged donor and then sued for the return of the corpus after the donor's death).

need not be witnessed, nor even signed by the donor.[188] We cannot dismiss the danger of fraud in such cases.

In short, evidentiary concerns bulk as large if not larger than paternalistic ones in connection with anticipatory gifts. But, once again, we can answer those concerns with small difficulty. Lawmakers could validate anticipatory gifts of all sorts (including ones now held ineffective) *but require donors to formalize them exactly like wills.*

Such an approach would hardly appear revolutionary. We need not dip too far back into the past to encounter historical precedents. At least one early court ruled that a charitable subscription—a form of gift promise that is enforceable in some states[189]—if postponed until death must be executed in conformity with the statute of wills, because "the gift . . . is testamentary in its character."[190] In former times, a donor could make other gift promises, or a gift of an expectancy—transfers that today are ineffective—valid and enforceable by recourse to the seal. A promise under seal involved a writing, delivery, and in lieu of witnesses a waxen image of the donor's signet ring, which was difficult to counterfeit.[191] These formalities bore some resemblance to those demanded by the statute of wills. By the dawn of the twentieth century, though, the seal had deteriorated into a standard wafer or form, more susceptible to fraud, and it was applied pro forma by parties, losing its ritual significance.[192]

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188. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 32.1 (1992) (requiring that the document, if unsigned, merely be "identified in some way as coming from the donor"); BROWN, *supra* note 91, § 7.10, at 109–110. The third *Restatement* adds a signature requirement. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. s. Nevertheless, as the reporter concedes, there are contrary precedents. *Id.* § 6.2 reporter's note 18.

189. The *Restatement* endorses the doctrine. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981).

190. Am. Univ. v. Conover, 180 A. 830, 832 (N.J. 1935). The charitable subscription at issue had been "duly signed and witnessed," but apparently not in compliance with the statute of wills. *Id.* at 831. The court acknowledged that its ruling conflicted with prior decisions from other jurisdictions. *Id.*

191. Under the French Civil Code, a gift promise must be notarized, and hence in effect witnessed, to become enforceable, although in practice today parties often circumvent this requirement. *See* JOHN P. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED 68–69, 82 (1980).

192. Professor Williston made the point in defense of the Uniform Written Obligations Act of 1925, for which he had served as Reporter: "[W]hen a man has signed a document, a gratuitous promise, and given it to another, it is pretty easy for that other to lick a wafer and put it after the signature. That's a fraud that might be difficult to prove." Uniform Written Obligations Act, Proceedings of the Committee of the Whole, *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 193, 197 (1925); *see also* UNIF. WRITTEN OBLIGATIONS ACT cmt., *reprinted in id.* at 584, 585. This Act required donors to certify a gift promise by including an express statement that they intended to be legally bound to carry out the promise. The only formal requirements specified in the Act were a writing and a signature by the donor. *Id.* § 1. The sufficiency of this procedure is open to doubt. *See supra* text accompanying notes 59–60.

Legislation abolishing the seal soon spread among the states to the point where the seal today has virtually disappeared as a legal formality.[193] With its demise has gone the opportunity to make anticipatory gifts that are more rigorously formalized than ordinary gifts. Hence, in structural terms, the demise of the seal also sealed the end of a situational exception from the formalizing rules for gifts in favor of categorical homogeneity.

C. Contracts

Although most contracts have short life spans, that is not invariably true. Some "relational" contracts continue to bind parties over longer terms. Others call for delayed performance, or performance at death—often taking the form of "contracts to make wills." These may require payment under the will for some service performed inter vivos, or they may comprise agreements not to revoke reciprocal wills under which the parties provide either for each other, or for the same third-party beneficiaries, or both.

At several levels, though, the notion of a contract to make a will appears misguided, at least as currently conceived and applied. Considered in the abstract, the very idea of a will contract—a *bound gratuity*—appears oxymoronic. Suppose, by analogy, a party were to agree to perform some service in contractual exchange for a *gift* of a sum certain. Any court would view this nuance as a solecism: in truth, the contract would exchange a service for the *transfer* of a sum certain. Courts ought likewise to view contracts to make wills as agreements to make a transfer *at the indeterminate moment of a party's death*. Some contracts do take that form expressly, although they turn up less frequently in the law reports.[194] By conceiving of will contracts as agreements performed literally by acts of testation, courts have sometimes gone astray, penalizing parties for breaches that are in truth illusory (or, even within the traditional framework of contract law, not material).[195]

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193. For a thorough discussion of promises under seal and a proposal for their revival in a new, fraud-resistant form, see Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617 (1993).

194. *See infra* note 225 and accompanying text.

195. *See, e.g.*, *In re* Estate of Cohen, 629 N.E.2d 1356, 1357–60 (N.Y. 1994) (finding that where two spouses entered into a contract not to revoke their wills bequeathing to each other for life, with a remainder to members of each of their families, and where the husband (who died first) revoked his will by implication of its disappearance, in violation of the contract, the wife was thereby freed to bequeath to whomever she liked, despite the fact that she still inherited her husband's estate *by intestacy*, instead of by the contractual will).

At the same time, for reasons that for too long have gone unexplained, most courts hold that a will contract remains unenforceable until one side has performed. If one party repudiates the contract, the other party cannot sue for the benefit of the bargain. Rather, the other party mitigates by not performing in turn, and mitigation is conclusively presumed to be complete.[196]

In other words, on reflection, a so-called contract to make a will fails to function as a true contract at all. Rather than create an executory contract, the parties' agreement gives rise to a compound of two unilateral contract offers. Only after one side accepts by performing, thereby producing an executed contract, does the other side become bound.[197]

Despite this distinction of substantive doctrine, the formalizing rules for contracts to make wills coincided historically with those that applied to other contracts. Hence, parties could create a contract to make a will by mere parol agreement, unless the subject matter of the contract brought it within the statute of frauds.[198] Yet, notice the special circumstances that prevail here: The parties to the contract typically will be laypersons, not business persons. The contract is not formed in a typical business environment, and the parties may have a poorer understanding of what their declarations connote to one another. Here, a legal ritual indicating finality holds greater value than it would for professional contractors.[199] Such a contract may also take effect long after the parties strike their bargain. What is more, no cause of action on the contract typically arises until after one party to the contract has died; only then does a will that might breach the contract become operative.[200] Indeed, if the contract takes the common form of mutual promises not to revoke a will, and one

196. *See* WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS § 4.9, at 247–48 (4th ed. 2010); 1 PAGE, *supra* note 144, § 10.2; *cf.* BERTEL M. SPARKS, CONTRACTS TO MAKE WILLS: LEGAL RELATIONS ARISING OUT OF CONTRACTS TO DEVISE OR BEQUEATH 110–23 (1956) (asserting that most statements of this rule comprise dicta). Professor McGovern and his collaborators speculate: "[B]ecause contracts to make wills are usually between family members, courts may feel that the parties did not intend them to be enforceable to the same extent as a commercial contract." MCGOVERN ET AL., *supra*, § 4.9, at 248.

197. In this respect, contracts to make wills operate today in most states in the same way that ordinary business contracts did prior to the seventeenth century, when only executed contracts were enforceable. For a discussion of the history, see 1 FARNSWORTH, *supra* note 96, § 1.6.

198. *See, e.g.*, Dean v. Morris, 756 S.E.2d 430, 432–33 (Va. 2014). For discussions of the case law applying the statute of frauds to will contracts, see THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 48, at 213–15 (2d ed. 1953); MCGOVERN ET AL., *supra* note 196, § 4.9, at 245–47; 1 PAGE, *supra* note 144, § 10.11; SPARKS, *supra* note 196, at 39–49; Merrill I. Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds*, 24 MICH. L. REV. 749 (1926).

199. *See supra* text accompanying notes 82–83.

200. 1 PAGE, *supra* note 144, § 10.38, at 554–55.

party dies in compliance with the promise, no suit will become possible until *both* parties have died; only at the death of the second party might a breach occur allowing third-party beneficiaries to sue on the contract. Once again, the value of a writing, and of witnesses to verify its authenticity, stands out in this context.[201]

Of course, the general idea that prolonged or delayed agreements require extraordinary evidence already informs contract law. The statute of frauds includes a provision premised on this notion, however poorly the provision achieves its end.[202] Famously, the statute of frauds requires parties to commit to writing any contract that cannot be performed within one year.[203] Because the moment when a living party will die is indeterminate, and could be immediate, contracts to make wills fail to come within the statute's purview.[204] In twenty-three states today, parties can continue to formalize a will contract with nothing more than an exchange of oral declarations, offering and accepting the terms of the agreement.[205]

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201. The problem has aroused surprisingly little discussion by commentators. For a brief early appraisal, criticizing the enforcement of oral contracts to make wills as failing to appreciate "the sound policy" of the Statute of Frauds and the Statute of Wills, see Roscoe Pound, *The Progress of the Law, 1918–1919: Equity* (pt. 3), 33 HARV. L. REV. 929, 933–34 (1920). For an incisive judicial analysis drawing the same conclusion, and analogizing will contracts to wills, see Rubin v. Irving Trust Co., 113 N.E.2d 424, 427–28 (N.Y. 1953). *See also* Orlando v. Prewett, 705 P.2d 593, 598 (Mont. 1985) (expressing suspicion of oral contracts to make wills, and citing prior opinions in accord); Fahringer v. Estate of Strine, 216 A.2d 82, 85 (Pa. 1966) (same); 1 PAGE, *supra* note 144, § 10.10, at 481–82 (advocating legislation to invalidate oral contracts to make wills). By comparison, Professor Fratcher emphasized the importance of the cautionary function in connection with will contracts:

> Contracts affecting succession are rarely desirable as estate planning devices and they are likely to cause much suffering if entered into without competent advice as to their effects. Consequently, it seems desirable to impose [formal] requirements upon the making of such contracts that are so difficult that they cannot be met without the advice of counsel.

William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1081 (1966) (footnotes omitted). Offering still another perspective, Professor Sparks perceived a tension between the situational argument that "every kind of transaction which is intended to affect the distribution of a decedent's property at death should be evidenced by a writing" and the particular circumstance that "contracts to make wills are likely to involve family matters not often reduced to writing and . . . if enforcement is denied great inequity will result." SPARKS, *supra* note 196, at 48.

202. "The design was said to be not to trust to the memory of witnesses for a longer time than one year, but the statutory language was not appropriate to carry out that purpose." RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. a (1981); *see also id.* ch. 5 statutory note. Commentators have agreed with that assessment. *See, e.g.*, 2 FARNSWORTH, *supra* note 96, § 6.4.

203. RESTATEMENT (SECOND) OF CONTRACTS § 130(1).

204. 1 PAGE, *supra* note 144, § 10.11, at 482–83; SPARKS, *supra* note 196, at 40; *see, e.g.*, Appleby v. Noble, 124 A. 717, 718 (Conn. 1924); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. a ("Contracts of uncertain duration are simply excluded; the [statute of frauds] covers only those contracts whose performance cannot possibly be completed within a year.").

205. *See supra* note 198 and accompanying text. In California, this rule is codified. CAL. PROB. CODE § 21700(a)(4) (West 2011). In Iowa, only some will contracts can be created by oral declaration.

The remaining twenty-seven states have enacted formalizing rules for contracts to make wills, either grafted into the statute of frauds or set out in a freestanding statute.[206] But only one state today takes cognizance of the situational similarity to testation by requiring parties to execute will contracts in the same manner as wills.[207] Three other states require either a signed writing or a mere writing, without the need for witnesses.[208] In two states, contradictory statutes have left the formalizing rules for will contracts ambiguous.[209] Finally, under the Uniform Probate Code's provision, codified in twenty-one states, parties who wish to formalize a will contract have several options: (1) the testator can recite the contract within the terms of his or her will, (2) the parties can formalize the contract in a writing signed by the decedent, or (3) the testator can *refer* within the four walls of his or her will to a parol agreement (or to an unsigned writing).[210]

The Uniform Law Commissioners aver that "[t]he purpose of this section is to tighten the methods by which contracts concerning succession may be proved."[211] Yet, the options presented here add up to a curious hodgepodge. If the contract is embedded in an executed will, then we have a ceremony demonstrating finality, durable evidence of content, and protection against fraud. If the contract appears in a signed writing that remains unwitnessed, we continue to have durable evidence of content, but our assurance of finality and authenticity becomes shakier, given either or both parties' unavailability to corroborate the agreement. And if a will

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See IOWA CODE ANN. § 633.270 (West 1992). No statute on point appears in Conn., Del., Haw., Ill., Ind., Kan., La., Md., Miss., Nev., N.H., N.J., N.Y., N.C., Okla., R.I., Vt., Va., Wash., W. Va., or Wyo. In seven of these states, however, dead man's statutes may apply to will contracts: Ind., Md., N.Y., N.C., Vt., Wash., and W. Va. *See infra* notes 296–300 and accompanying text.

206. These states are Alaska, Ala., Ariz., Ark., Colo., Fla., Ga., Idaho, Ky., Me., Mass., Mich., Minn., Mo., Neb., N.M., N.D., Ohio, Or., Pa., S.C., S.D., Tenn., Tex., Utah, Va., and Wis. In addition, one discrete type of will contract requires formalization in Iowa. *See infra* note 207.

207. That state is Florida. FLA. STAT. ANN. § 732.701 (West 2010); *cf.* IOWA CODE ANN. § 633.270 (requiring contracts not to revoke reciprocal wills to be expressly stated within those wills, a formalizing rule that does not apply to other will contracts); Zajec v. Beaver (*In re* Estate of Beaver), 206 N.W.2d 692, 698–99 (Iowa 1973) (giving effect to a will contract formalized by parol agreement). Until 2003, Texas validated only those will contracts set out within the four walls of a will. TEX. PROB. CODE § 59A (amended 2003).

208. *See* GA. CODE ANN. § 53-4-30 (2012) (requiring a signature); OHIO REV. CODE ANN. § 2107.04 (West Supp. 2012) (same); TEX. EST. CODE ANN. § 254.004(a) (West 2014) (superseding the Tex. Prob. Code in 2014) (lacking a signature requirement).

209. *See infra* notes 227–28.

210. UNIF. PROBATE CODE § 2-514 (amended 2010), 8 pt. 1 U.L.A. 233 (2013). This provision is reproduced in Ala., Ark., Colo., Idaho, Ky., Me., Mass., Mich., Minn., Mo., Mont., Neb., N.M., N.D., Or., Pa., S.C., S.D., Tenn., Utah, and Wis. *See also infra* notes 227–28 (indicating that Alaska & Ariz. may also fall into this category).

211. *Id.* § 2-514 cmt.

makes reference to a parol agreement, we forfeit even our confidence that the substance of what was said can be reconstructed accurately.

If some principle guided this (seemingly) desultory gathering of alternative formalizing rules, the Commissioners fail to disclose its contours.[212] The last option resembles the doctrine of incorporation by reference, whereby a will can validly refer (and thereby give effect) to extrinsic material—except that the material a testator can incorporate by reference is confined traditionally to *writings*.[213] "The possibility of fraud or error would be too strong" if the doctrine covered oral declarations, Judge Cardozo opined,[214] adding that "[e]ven in courts where incorporation is permitted more liberally than it is with us [in New York], the reference must be to a document or something equivalent thereto."[215] By nevertheless permitting parties to incorporate by reference a parol agreement to make a will, the Commissioners again raise the specter of "fraud or error"[216] when the terms of the contract are established post mortem, possibly from memory.

Even if fact finders could accurately reconstruct an agreement, the parties' intent to make it legally operative might remain uncertain in connection with this formalizing option. Under the doctrine of incorporation by reference, codified elsewhere in the Uniform Probate Code, an extrinsic writing referred to in a will takes effect only if the writing *predates* the will.[217] This requirement ensures the finality of the document to which the will refers. By comparison, the Uniform Probate Code's provision for formalizing will contracts fails to include this caveat. On a textualist reading, the provision allows a testator to anticipate and validate a contract to make a will that he or she might agree to subsequently.[218] Given that possibility, fact finders could not even rest assured that the testator intended a subsequent conversation that he or she

212. *See id.*

213. *See id.* § 2-510 & cmt. (codifying a simplified version of the common-law doctrine); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.6 cmt. a (1998).

214. *In re* Rausch's Will, 179 N.E. 755, 756 (N.Y. 1932).

215. *Id.*

216. *Id. See supra* text accompanying note 214.

217. *See* UNIF. PROBATE CODE § 2-510 (amended 2010), 8 pt. 1 U.L.A. 228 (2013) (allowing a will to incorporate by reference "[a] writing in existence when a will is executed"); *cf. id.* § 2-513 , 8 pt.1 U.L.A. 231 (2013) (allowing a will to incorporate by reference a subsequent writing, but only for the purpose of disposing of tangible personal property, apparently on the assumption that it is typically of small value); Hirsch, *supra* note 42, at 1106 n.142 (discussing the legislative history of this provision); CAL. PROB. CODE § 6132(g) (West 2009) (adding an express value limitation to this provision).

218. *See* UNIF. PROBATE CODE § 2-514, 8 pt. 1 U.L.A. 233 (2013) (allowing a will to make "an express reference . . . to a contract," without qualification).

had about a will contract to bind him or her—and, unlike the usual state-of-affairs for contracts, the testator is unavailable to testify as to whether he or she possessed such an intent.

An early draft of the Uniform Probate Code had included a provision requiring parties to formalize all will contracts "in the manner hereinafter prescribed for the execution of attested written wills."[219] This language disappeared from subsequent drafts.[220] None of the contemporary drafting commentary explains why the provision was dropped.

In other respects, the final language of the Uniform Probate Code's provision covering will contracts is found wanting. This freestanding provision creates ambiguities by failing to explicate its relationship to the separate statute of frauds in effect within a state.[221] Whether circumstances excusing a failure to meet the formal requirements of the statute of frauds apply by analogy to the Code's provision on will contracts remains unclear and has generated conflicting opinions.[222] Whether the Code's provision supplements or supersedes the requirements of the statute of frauds as it might limit by subject matter the formalizing options for a will contract is likewise left up in the air; this issue has yet to arise in a published case.[223]

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219. Unif. Probate Code, pt. 2, § 234 (Reporter's Draft No. 1, August, 1966). This draft provision corresponds with the rule currently found in Florida. *See supra* note 207 and accompanying text.

220. *See* Unif. Probate Code, § 2-701 (Summer 1967 Draft, July 14, 1967).

221. *See* UNIF. PROBATE CODE § 2-514 & cmt. (amended 2010), 8 pt. 1 U.L.A. 233 (2013) (making no reference to the statute of frauds).

222. For example, in some situations part performance can render an oral contract—including an oral will contract—enforceable where the statute of frauds would otherwise invalidate the agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 129 & illus. 10 (1981). For a judicial recognition of the doctrinal conflict over whether this and other excusatory doctrines extend to the Code's provision, see *Brody v. Bock*, 897 P.2d 769, 774 (Colo. 1995) (en banc) (citing to prior case law). For a discussion of the case law, see MCGOVERN ET AL., *supra* note 196, § 4.9, at 246; *see also* Erwin v. Wanda E. Wise Revocable Trust, No. 12CA3501, 2013 WL 1091229, at *3–5 (Ohio Ct. App. Mar. 4, 2013) (construing as not subject to the part performance doctrine or other excusatory doctrines a state statute setting formalizing rules for will contracts analogous to, but different from, the Code's provision).

223. Thus, for example, if a will contract implicates a bequest of real property, could the contract be formalized by a reference in the will to a parol agreement, as allowed by the Code's provision, *see supra* text accompanying note 210, despite the general requirement that all contracts for real property must be placed in writing, *see supra* text accompanying note 75, as established by the statute of frauds? *See* RESTATEMENT (SECOND) OF CONTRACTS § 110 cmt. b ("[O]ne contract may be within more than one clause of the statute [of frauds], and facts which except it from one class may not except it from another."); Moore v. Schwartz (*In re* Estate of Moore), 669 P.2d 609, 612 (Ariz. Ct. App. 1983) (characterizing Arizona's enactment of the Code's provision as "a 'mini-statute of frauds'"). *But cf.* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (asserting generally that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment") (quoting Morton v. Mancari, 417 U.S. 535, 550–51 (1974)).

What is more, the Uniform Probate Code's provision is framed too narrowly. It covers only a "[a]contract to make a will or devise,"[224] not a contract to make a posthumous transfer generally. A contractual obligation to make a payment upon death per se, rather than by will, does *not* fall under the Code's formalization requirements, by its plain language. Hence, for example, a contract to provide a party with a home for the rest of his life in exchange for the sum of $7,000 upon completion of the contract, as found in one case,[225] need not be formalized under the Code's provision for will contracts, at least on a textualist reading of the provision.[226] At the same time (and reinforcing this point of construction), some states have crafted statutory language that is more broadly applicable to the situation at hand. Under Arizona's statute of frauds, "an agreement which by its terms is not to be performed during the lifetime of the promisor, *or* an agreement to devise or bequeath any property, or to make provision for any person by will," must be committed to writing and signed by the charged party.[227] This language covers the field of anticipatory contracts in a way that the Uniform Probate Code does not. Among the fifty states, only Alaska has a similarly inclusive statute of frauds,[228] whereas Pennsylvania achieves the same result by expanding the scope of its statute covering will contracts—based on the Uniform Probate

224. UNIF. PROBATE CODE § 2-514 (amended 2010), 8 pt. 1 U.L.A. 233 (2013).

225. Hagan v. McNary, 148 P. 937, 937 (Cal. 1915). *See also, e.g.*, Gold v. Killeen, 33 P.2d 595, 595–96, 598 (Ariz. 1934) (concerning a contract for services with payment due "at the time of . . . death"); Dailey v. Adams, 319 S.W.2d 34, 36 (Ark. 1959) (amended decision) (concerning a contract for post mortem care of pet animal, with compensation "paid out of my estate"); Roy v. Salisbury, 130 P.2d 706, 707–10 (Cal. 1942) (similar contract); Patterson v. Chapman, 176 P. 37, 37–38 (Cal. 1918) (en banc) (per curiam) (concerning a contract with payment due post mortem from assets "which I may own at the time of my death").

226. *But see* Scottrade, Inc. v. Davenport, 873 F. Supp. 2d 1306, 1320 (D. Mont. 2012) (construing the Code's provision purposively to cover contracts to give property at death by means other than a will, because "the public policy behind the statute is to discourage false post-mortem claims based upon oral promises. . . . If the distinction proposed . . . were applicable, the statute [as enacted in Montana] could be easily evaded by unscrupulous claimants . . . .") (citation omitted).

227. ARIZ. REV. STAT. ANN. § 44-101(8) (2003) (emphasis added). Arizona's formalizing rule for will contracts (but not for other obligations payable at death) remains ambiguous, because Arizona has also adopted a second, contradictory statute confined to will contracts, based on the Uniform Probate Code. *Cf. id.* § 14-2514 (2005). Case law in Arizona assumes that the Code's provision applies to will contracts, but without identifying and addressing the statutory conflict. *See* Lockett v. Lockett (*In re* Estate of Lockett), No. 1CA–CV 10–0812, 2012 WL 1468602, at *3–4 (Ariz. Ct. App. Apr. 26, 2012); Gonzalez v. Satrustegui, 870 P.2d 1188, 1195 (Ariz. Ct. App. 1993); *Moore*, 669 P.2d at 611–12 (Ariz. Ct. App. 1983) (observing only that "the wording of" Arizona's statute based on the Code is "similar to Arizona's general contract statute of frauds").

228. ALASKA STAT. § 09.25.010(a)(2) (2012). Like Arizona, Alaska has adopted a second, contradictory statute based on the Uniform Probate Code. *Cf. id.* § 13.12.514. As in Arizona, case law assumes that this second statute governs will contracts without noticing or addressing the conflict. *See* Cragle v. Gray, 206 P.3d 446, 451 (Alaska 2009).

Code, and imposing the same amalgam of formalizing rules found there—to cover also "an obligation dischargeable only at or after death."[229] Three other states (California, Hawaii, and New York) which require a signed writing for any contract not to be performed during the promisor's lifetime have each *repealed* provisions that had extended this requirement to contracts to make wills.[230] In these states, the text of the applicable formalizing rule is precisely opposed to the one established under the Uniform Probate Code, which applies to contractual wills but *not* to other contracts that operate post mortem.[231]

The textual history of these statutes suggests that lawmakers conceive of contractual wills and contracts for posthumous transfers as raising two distinct problems. From a situational perspective, though, the problems are indistinguishable—and even as a matter of substance, the distinction between them appears theoretically suspect, as earlier explained.[232] For the Uniform Law Commissioners, in turn, to limit their special formalizing rule to will contracts is to perpetuate this pointless and artificial distinction. Why they have chosen to do so is impossible to say. Perhaps the Commissioners assumed that their remit within the Uniform Probate Code begins and ends with wills. If that is so, then we must conclude that the Code's dimensions are arbitrarily defined, leading in this instance to a jagged formalizing rule. But, in fact, no reference to, or discussion of, the problem appears at all within the Code or its commentary, suggesting another possibility—that the Commissioners failed even to appreciate that a contractual transfer at death might occur outside of a will, and that, as a consequence, the formalizing rule they crafted was underinclusive.[233]

IV. ELEVENTH-HOUR TRANSFERS

Still another set of background conditions for transfers changes the equation once again. A transferor may find cause to make a transfer by

229. 20 PA. CONS. STAT. ANN. § 2701(a) (West 2005).

230. *Compare* CAL. CIV. CODE § 1624(a)(5) (West 2011), *with* CAL. CIV. CODE § 1624(6) (repealed 1983). By the amendment of 1983, the two clauses seen in the Arizona statute, *see supra* text accompanying note 227, were severed, and a separate section devoted exclusively to will contracts was added; that section has subsequently been repealed, *see* CAL. PROB. CODE § 150 (repealed 2000); *id.* § 21700 (West 2011). Similar severances occurred in New York, *compare* N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney 2002), *with* N.Y. PERS. PROP. § 31(7) (repealed 1964), and in Hawaii, *see* HAW. REV. STAT. ANN. § 656-1(7) (LexisNexis 2012) (abolishing the special formalizing rule for contracts to make wills created after July 1, 1977, but not for other post mortem contracts).

231. *See supra* note 224 and accompanying text.

232. *See supra* text accompanying notes 194–95.

233. *See* UNIF. PROBATE CODE § 2-514 & cmt. (amended 2010), 8 pt. 1 U.L.A. 233 (2013).

virtue of his or her impending death. Such an eleventh-hour transfer (as we might call it) mixes and matches situational elements we have already encountered. Like an anticipatory transfer, an eleventh-hour transfer occurs under conditions of transferor *absence*, should litigation ensue. But this characteristic combines with *promptness*, like a spot transfer, in that an eleventh-hour transfer is destined to come to fruition in short order, even though it entails obligations or a change of possession scheduled to take place only upon the transferor's demise.

What formalities become expedient when we are presented with this blend of circumstances? For one thing, we have less need for a ritual to clarify finality under these conditions. The shadow of death, creating the urgency to get one's affairs in order, lends natural solemnity to a transfer. And evidence of even a parol declaration will be fresh in mind, creating less need for durable evidence. At the same time, the transferor's absence from any ensuing suit over a transfer makes the presence of third parties all the more important. And witnesses could also play a useful protective role in these circumstances, insulating a transferor rendered more vulnerable by terminal illness to undue influence or duress.

Accordingly, we may hazard that a *witnessed declaration* should suffice to formalize transfers under these conditions. By dispensing with other formalities, we give transferors a greater opportunity to effectuate intent as they near the end of their rope. How, though, are transfers close unto death handled currently under the law?

A. Gifts

One variety of near-death transfer is the deathbed gift. Aware that they have no time left to enjoy their property, donors may give some or all of it away. Donors can thereby make last-minute amendments to their estate plans. And even if the recipients are the same ones who would receive property by intestacy, or under a will, deathbed gifts might give donors the satisfaction of being thanked in person. Or perhaps some donors in extremis seek belatedly to avoid probate. This motive appears to have moved at least one dying donor when she authorized a friend to withdraw all the money from her savings accounts "so that the lawyers would not get hold of it."[234]

234. Gilman v. McArdle, 2 N.E. 464, 464 (N.Y. 1885). Avoiding probate has more recently become a widespread aspiration but is ordinarily achieved in other ways. *See infra* text accompanying notes 313–15.

Deathbed gifts can take either of two forms: an ordinary gift, or a gift causa mortis (which donors are rebuttably presumed to prefer).[235] Gifts causa mortis differ substantively from an ordinary gift, in that they comprise the one type of gift that is revocable.[236] Given this substantive difference, much of the litigation over gifts causa mortis revolves around the nature or extent of the hazard required to trigger the categorical exception—for example, whether a donor can make a revocable gift in anticipation of a self-created peril (*viz*. a planned suicide),[237] and whether the peril has to exist objectively, as opposed to one blown out of proportion by the donor's fears or phobias.[238]

Because they are revocable and take effect on the brink of death, gifts causa mortis are frequently compared to wills.[239] The resemblance has moved courts to import other substantive rules of testation into the law of gifts causa mortis.[240] Nevertheless, as a matter of *formality*, courts draw no distinction between an ordinary gift, an ordinary gift on the deathbed, and a gift causa mortis. All three merely require delivery; no third party need witness delivery.[241] At the eleventh hour, though, the risk of fraud rises by an order of magnitude; given the owner's infirmity, the ostensible donee might take possession of the property without permission, and the owner

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235. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (2003); BROWN, *supra* note 91, § 7.15, at 131.

236. Cases diverge over whether gifts causa mortis are automatically revoked if the donor survives the life-threatening hazard, or whether they remain revocable within a reasonable time thereafter. According to one commentator, the first view "represents the weight of authority." BROWN, *supra* note 91, § 7.19, at 141; *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (taking the second view).

237. *See* ANDREW BORKOWSKI, DEATHBED GIFTS: THE LAW OF DONATIO MORTIS CAUSA 50–51 (1999); BROWN, *supra* note 91, § 7.18, at 139 n.12; *see also, e.g.*, Smith v. Sandt (*In re* Estate of Smith), 694 A.2d 1099, 1102 (Pa. Super. Ct. 1997); *id.* at 1103–06 (Cirillo, J., concurring and dissenting) (debating the issue). For a further discussion, see Adam J. MacLeod, *A Gift Worth Dying for?: Debating the Volitional Nature of Suicide in the Law of Personal Property*, 45 IDAHO L. REV. 93 (2008).

238. *See* BORKOWSKI, *supra* note 237, at 47–48; BROWN, *supra* note 91, § 7.18, at 138; *see also, e.g.*, Welton v. Gallagher, 630 P.2d 1077, 1083 (Haw. Ct. App. 1981); Gonzales v. Zerda, 802 S.W.2d 794, 795–96 (Tex. Ct. App. 1990).

239. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz ("The gift causa mortis resembles a testamentary disposition. . . . "). *See also* BORKOWSKI, *supra* note 237, at 25–26 (citing to discussions of the resemblance in British case law); *infra* notes 246, 257.

240. By analogy to a will beneficiary, the donee of a gift causa mortis must survive the donor in order to keep the gift. *See* BORKOWSKI, *supra* note 237, at 31, 60; BROWN, *supra* note 91, § 7.19, at 143. Case law conflicts on whether an express provision in a will can override a gift causa mortis, as a codicil could override a will. *See* BORKOWSKI, *supra* note 237, at 60–61; BROWN, *supra* note 91, § 7.19, at 143.

241. *E.g.*, Ostheimer v. McNutt (*In re* Collinson's Estate), 93 N.E.2d 207, 209 (Ind. App. Ct. 1950) (en banc). *See also* BORKOWSKI, *supra* note 237, at 39–43.

may have no opportunity to report the theft before being overtaken by death.[242] By the same token, when meeting with a dying owner in private, an ostensible donee can exercise undue influence or duress without restraint. Courts appreciate the dangers, and have voiced their unease for well over a century,[243] but the rule stands unchanged.

Possibly with these risks in mind, courts have limited the effectiveness of gifts causa mortis by subject matter and by type of delivery. Gifts causa mortis in land are traditionally deemed invalid, and some courts also hold that gifts causa mortis cannot be effected by delivery of a writing—thus hindering transfers of personal property not immediately available for manual delivery by the donor.[244] Such limitations hardly serve even to narrow the problem, for a donor in extremis remains free to make ordinary, irrevocable gifts of land or of other property via delivery of an unwitnessed writing.[245] From a situational perspective, however, irrevocable gifts on the deathbed and gifts causa mortis raise identical concerns.

Long ago apprehending the situational ambiguity of gifts causa mortis, the Roman jurists guided their formalization more adroitly: Under the Code of Justinian, gifts causa mortis required multiple witnesses.[246]

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242. For an allegation that baseball legend Joe DiMaggio was victimized in this way by his longtime attorney, who was observed wearing DiMaggio's world series ring at his funeral, see RICHARD BEN CRAMER, JOE DIMAGGIO: THE HERO'S LIFE 508–11 (2000). The attorney, however, is reported to have claimed that the ring was either a deathbed gift or a bailment that he later returned to DiMaggio's estate. *Id.* at 511; MORRIS ENGELBERG & MARV SCHNEIDER, DIMAGGIO: SETTING THE RECORD STRAIGHT 383–84 (2003); Bill Egbert, *DiMaggio Lawyer Swings Back*, N.Y. DAILY NEWS, Oct. 16, 2000, at 5, *available at* 2000 WLNR 9573737.

243. *See, e.g.*, Hatch v. Atkinson, 56 Me. 324, 326–27 (1868); Smith v. Commerce Trust Co. (*In re* Estate of Simms), 423 S.W.2d 758, 763 (Mo. 1968); Parker v. Copland, 64 A. 129, 131 (N.J. 1906); Devlin v. Greenwich Sav. Bank, 26 N.E. 744, 744 (N.Y. 1891); Walsh v. Sexton, 55 Barb. 251, 256 (N.Y. Gen. Term 1869); Renee v. Sanders, 131 N.E.2d 846, 855–56 (Ohio Ct. App. 1956); Fouts v. Nance, 155 P. 610, 612–13 (Okla. 1916) (quoting Keepers v. Fid. Title & Deposit Co., 28 A. 585, 587 (N.J. 1894)); Bessett v. Huson (*In re* Estate of Bessett), 39 P.3d 220, 222 (Or. Ct. App. 2002); *Smith*, 694 A.2d at 1105 (Cirillo, J., concurring and dissenting).

244. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (noting the traditional restrictions but allowing gifts causa mortis of personal property delivered by a writing); ATKINSON, *supra* note 198, § 45, at 201–04; BROWN, *supra* note 91, § 7.16. *But see* Sen v. Headley, [1991] Ch. 425 (C.A.) (holding valid a gift causa mortis in land). In some jurisdictions, if the subject matter of a gift is already in the hands of a bailee, an effective gift causa mortis to the bailee still requires manual redelivery, unlike an ordinary gift. BROWN, *supra* note 91, § 7.8, at 102, *cf. supra* note 124 and accompanying text.

245. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. zz (rebuttably presuming that a gift of personal property delivered by a writing while the donor is in extremis is intended to be irrevocable, contrary to the usual presumption for deathbed gifts; *see supra* note 235 and accompanying text).

246. INSTITUTES, *supra* note 150, at 148. Whereas a gift causa mortis required five witnesses, a will (written or unwritten) required seven. *Id.*, at 148, 167, 172. "It was much doubted by the jurists

Today, only six American jurisdictions treat gifts causa mortis by statute, and three of them establish no statutory formalizing rule,[247] while a fourth expressly codifies the common law.[248] But in two other states, lawmakers have pointed the way toward reform in this area of the law. Under a statute in Georgia, a gift causa mortis requires delivery in the presence of at least one witness.[249] Gifts causa mortis are confined in Georgia to personal property, but the donor can deliver them "symbolic[ally]," making alternatives to manual delivery possible.[250] At the same time, the statute explicitly covers only revocable gifts, not ones intended to be irrevocable,[251] even though they share the same situational characteristics. By contrast, the statute in New Hampshire applies to a "gift [made] in expectation of death, often called *donatio causa mortis*," without expressly confining the act's reach to revocable gifts.[252] Under this statute, the donor must manually deliver the gift in the presence of at least two disinterested witnesses, and the donee must prove the gift upon a petition filed within sixty days of the donor's death—presumably to ensure that the witnesses testify while their memories are fresh.[253] This provision (along with Georgia's) deserves a hearing in other states.

B. Wills

Wills, too, may be executed near death. In the Middle Ages, testators typically made their wills as part of the last confession.[254] Today, testators rarely wait until the eleventh hour to execute their wills, although some

whether [gifts causa mortis] ought to be considered as a gift or as a legacy. . . . We have decided . . . that they shall be in almost every respect reckoned amongst legacies, and shall be made in accordance with the forms our constitution provides." *Id.* at 147–48.

247. *See* MONT. CODE ANN. §§ 70-3-201 to -205 (2013); N.D. CENT. CODE ANN §§ 47-11-09 to -13 (West 1999); S.D. CODIFIED LAWS §§ 43-36-4 to -8 (2004).

248. *See* CAL. PROB. CODE § 5701 (West 2009) (applying to the subject "the general law relating to gifts of personal property"); *see also id.* §§ 5702–5705.

249. GA. CODE ANN. §§ 44-5-100 (a)(4) & (a)(5) (2012).

250. *Id.* §§ 44-5-100 (a)(1) & (a)(4). The statute fails to define "symbolic delivery," but it could include delivery of a written description of the gift. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 6.2 cmts. g–h (2003); BROWN, *supra* note 91, § 7.5, at 92.

251. GA. CODE ANN. § 44-5-100 (a)(3) (2012) (limiting the statute to "gift[s] intended to be absolute only in the event of death").

252. N.H. REV. STAT. ANN. § 551:17 (2007).

253. *Id.*

254. 2 POLLOCK & MAITLAND, *supra* note 165, at 318–20, 340. For American colonial practice, see George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280, 1289 (1942).

procrastinators rush to do so only after they fall seriously ill.[255] A trickle of such cases continues to appear in the law reports.[256]

As already noted, wills functionally resemble gifts causa mortis, and that is especially true of deathbed wills.[257] Both occur under the same conditions and, within a situational theory of formalizing rules, both raise the same concerns. Again, the importance of witnesses looms, given the inability of decedent testators to take the witness stand themselves. At the same time, the need for written evidence diminishes, given the brevity of the interlude between the time when the will is executed and the time when it matures.

Nevertheless, few jurisdictions today subdivide the formal requirements for wills on this basis. Just as they have amalgamated the formalizing rules for gifts causa mortis with ordinary gifts, so have lawmakers in most states consolidated wills causa mortis (so to speak) with ordinary wills. This consolidation cuts two ways. On the one hand, lawmakers fail to relax the writing requirement for wills made in extremis, even though preservation of their terms becomes less crucial in these circumstances. And on the other hand, lawmakers fail to stiffen the formal requirements for a holographic will made in extremis, in jurisdictions that permit them, despite the greater need for someone to witness the making of the will, in order to protect testators rendered vulnerable to external pressures in these circumstances.

Historically, the first special provisions for wills made in extremis trace to the English statute of frauds, enacted in 1677. Prior to that date, testators could make wills confined to personal property by oral declaration (known as "nuncupative" wills), whereas wills devising real property had to be written.[258] The English statute of frauds continued the subject-matter division but added formalities to each category: for the first time, wills disposing of personal property now also required a writing,

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255. For empirical evidence of the decline of deathbed will execution, a trend that appears to have played out over an extended period of time, see Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 611 n.3 (2009).

256. *See, e.g.*, Estate of Becker v. Callahan, 96 P.3d 623, 625–26 (Idaho 2004) (concerning a will executed two days before the testator died); Estate of Dellinger v. 1st Source Bank, 793 N.E.2d 1041, 1042 (Ind. 2003) (concerning a will executed one day before the testator died); *In re* Estate of Robinson, 477 N.Y.S.2d 877, 878 (App. Div. 1984) (concerning a will executed thirty-two minutes before the testator died, subsequently challenged for lack of testamentary capacity).

257. For judicial recognitions, see for example, *Prince v. Hazleton*, 20 Johns. 502, 513–14 (N.Y. Sup. Ct. 1822) (Chancellor Kent) and *Lewis v. Aylott*, 45 Tex. 190, 199 (1876). *See also* James Schouler, *Oral Wills and Death-bed Gifts*, 2 L.Q. REV. 444 (1886); *supra* note 239.

258. Statute of Wills, 1540, 32 Hen. 8, c. 1, § 1 (Eng.); *see also* HENRY SWINBURNE, A BRIEFE TREATISE OF TESTATMENTS AND LAST WILLES pt. 1, §§ 12, 14, pt. 4, § 26 (photo. reprint 1978) (1590).

whereas those devising real property had to be signed by the testator and attested in the presence of three witnesses.[259] But, in addition, the statute carved out a third category, covering wills "made in the time of the last sicknesse of the deceased."[260] A testator could continue to make a nuncupative will under these conditions, but only if he or she met a host of other requirements: (1) the property disposed of under the will could not include realty,[261] (2) the testator had to "bid the persons present or some of them beare wittnesse that such was his Will,"[262] known technically as the *rogatio testium*, similar to the requirement found in some states that a testator "publish" a written will by declaring to witnesses the nature of the document,[263] (3) three witnesses had to be present at the making of the will (the "nuncupation"),[264] (4) the nuncupation had to occur in the testator's dwelling or place of residence for the previous ten days, unless the testator was "surprised or taken sick being [away] from his owne home and dyed before [returning there],"[265] (5) probate had to follow within six months of the nuncupation, unless the witnesses committed the substance of the will to writing within six days,[266] and (6) no nuncupative will could supersede a preexisting written will.[267] Still another provision permitted any "[s]oldier being in actuall Military Service, or any Marriner or Seaman being at Sea" to dispose of personal property "as he . . . [might] have done before the making of this Act"—language effectively allowing servicemen to make nuncupative wills without any of these limitations, albeit under conditions of continual risk to their lives.[268]

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259. Statute of Frauds, 1677, 29 Car. 2, c. 3, §§ 5, 18 (Eng.).

260. *Id.* § 18.

261. *Id.* § 5.

262. *Id.* § 18.

263. For a recent discussion of the formality of publication, see *Brown v. Traylor*, 210 S.W.3d 648, 663–66 (Tex. Ct. App. 2006). Once a common requirement, *see* ATKINSON, *supra* note 198, § 68, the formality of publication has disappeared from most state statutes of wills. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. h (1998).

264. Statute of Frauds § 18.

265. *Id.*

266. *Id.* § 19. But neither could probate proceed within the first fourteen days after the testator's death, nor without notice to the surviving spouse and "kindred to the deceased, to the end they may contest the [nuncupative will] if they please." *Id.* § 20.

267. *Id.* § 21. For an early criticism of the requirements for nuncupative wills set out in the English statute of frauds, see BENTHAM, *supra* note 66, at 545–47.

268. Statute of Frauds § 22. The exception has ancient origins. *See* INSTITUTES, *supra* note 150, at 173-77. *See also* Thomas E. Atkinson, *Soldiers' and Sailors' Wills*, 28 A.B.A. J. 753 (1942). For judicial discussions, see *In re Knight's Estate*, 93 A.2d 359, 362 (N.J. 1952) (linking the exception to "the stress and danger of [the soldier's] situation, which may well subordinate the ordinary legal requirements") and *In re Zaiac's Will*, 295 N.Y.S. 286, 301 (Sur. Ct. 1937) (citing similar statements in the case law).

A century and a half later, the statutory provision for nuncupative wills disappeared in England. Under the English wills act of 1837, only the exception for soldiers and sailors survived.[269] But that space of time proved sufficient for the doctrine to take hold in America, still a mosaic of colonies in 1677, when the English statute of frauds was adopted. Many colonies based their own statutes of wills on this blueprint and carried them forward under the reception statutes that followed independence. By the time England abandoned the model, American states no longer looked to Parliament for statutory guidance, and nuncupative wills continued under American statutes still grounded on former English law.[270]

As of 1960, forty-two American states warranted nuncupative wills.[271] Since then, however, the number has dwindled steadily. As of 2014, nine states permit testators to make nuncupative wills while in extremis, still cabined by limitations and requirements dating back to 1677.[272] An additional six states authorize nuncupative wills for active military personnel only.[273] The model acts have paralleled this trend: whereas the

269. *See* An Act for the Amendment of the Laws with Respect to Wills, 1837, 1 Vict., c. 26, § 11 (Eng.).

270. For a further discussion of the history, see Adam J. Hirsch, *Inheritance: United States Law*, *in* 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 325, 325–26 (Stanley N. Katz ed., 2009).

271. John B. Rees, Jr., *American Wills Statutes:* I, 46 VA. L. REV. 613, 637–38 (1960).

272. *See* IND. CODE ANN. § 29-1-5-4 (West 2010) (limiting the total value of bequests to $1,000, or $10,000 for military personnel, and no realty); KAN. STAT. ANN. § 59-608 (2012) (not limiting value but barring realty); MISS. CODE ANN. §§ 91-5-15, 91-5-17 (2013) (neither limiting value nor barring realty and also allowing unwitnessed nuncupative wills if the total value of bequests is no greater than $100); MO. REV. ANN. STAT. § 474.340 (2012) (limiting the total value of bequests to $500 and no realty); N.H. REV. STAT. ANN. § 551:16 (2007) (neither limiting value nor barring realty and also allowing unwitnessed nuncupative wills, whether or not made in the last illness, if the total value of bequests is no greater than $100 of personal property); N.C. GEN. STAT. ANN. § 31-3.5 (West 2013) (neither limiting value nor barring realty); OHIO REV. CODE ANN. § 2107.60 (West Supp. 2013) (not limiting value but barring realty); TENN. CODE ANN. § 32-1-106 (2013) (limiting the total value of bequests to $1,000, or $10,000 for military personnel, and no realty); VT. STAT. ANN. tit. 14, § 6 (2010) (not confining nuncupative wills to the last illness, but limiting the total value of bequests to $200, and no realty, as construed in *In re* Estate of Cote, 848 A.2d 264, 266–68 (Vt. 2004)). *See also infra* notes 284, 286–87 and accompanying text. Texas was the most recent state to abolish nuncupative wills, as of September 1, 2007. *See* TEX. PROB. CODE ANN. § 65 (repealed 2007).

273. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 2012) (neither limiting value nor barring realty but validating a nuncupative will only if made by military personnel during wartime, and invalidating the will three years after a mariner makes it, or one year after a member of the armed forces leaves the service); OKLA. STAT. ANN. tit. 84, §§ 46, 51 (West 2013) (limiting the total value of bequests to $1,000, and not barring realty, but validating a nuncupative will only if made by military personnel in immediate peril of death); R.I. GEN. LAWS § 33-5-6 (2011) (not limiting value but barring realty); VA. CODE § 64.2-408 (B) (2004) (not limiting value but barring realty); WASH. REV. CODE ANN. § 11.12.025 (West 2012) (limiting the total value of bequests to $1,000, and barring realty, but validating a nuncupative will only if made by military personnel in the last illness, submitted for probate no more than six months after making the will); W. VA. CODE ANN. § 41-1-5 (West 2010) (not

Model Probate Code of 1946 provided for nuncupative wills,[274] the Uniform Probate Code of 1969 fails to allow them under any circumstances.[275] Even the Code's harmless error power, authorizing a court to validate a will that fails to meet one or more of the formal requirements if evidence of testamentary intent and content are clearly and convincingly proved, does *not* apply to the writing requirement, which the testator must meet in all cases.[276]

Legislative hostility to nuncupative wills has stemmed both from sweeping trends and salient episodes. In the Middle Ages, when literacy rates remained low, a requirement that wills take written form would have restricted their number. By the late seventeenth century, however, illiteracy had become rarer in England, making the memorialization of wills a simpler task to accomplish.[277] In addition, a celebrated case of a fraudulent nuncupative will came down in England in 1676, shortly before Parliament enacted the statute of frauds, underscoring to legislators the

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limiting value but barring realty). Two of the nine nuncupative will jurisdictions, *see supra* note 272, also make special provision for the wills of military personnel. N.H. REV. STAT. ANN. § 551:15 (West 2013) (not limiting value but barring realty); VT. STAT. ANN. tit. 14, § 7 (West 2013) (not limiting value but barring realty).

274. LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW: INCLUDING A MODEL PROBATE CODE § 49 (1946).

275. UNIF. PROBATE CODE § 2-502 (amended 2010), 8 pt. 1 U.L.A. 209 (2013). A proposed provision for nuncupative wills appeared in an early draft of the Uniform Probate Code, *see* Unif. Probate Code, art. __ [no number], Execution of Wills, § 6 (First Tentative Draft, Aug. 2–7, 1965), but the provision was omitted from subsequent drafts without explanation. *See* Unif. Probate Code, pt. 2, § 2-237, 2-237A (Reporters' Draft No. 1, Aug., 1966). A commentary by the Reporter for the original version of the Uniform Probate Code suggested that he accepted contemporary criticism of oral wills, remarked *infra* text accompanying notes 280–82. *See* Richard V. Wellman & James W. Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 BYU L. REV. 357, 381 (also suggesting that "the simplicity of UPC formalities involved in the execution of a will, including [a] section . . . which permits holographic wills, militate against a provision permitting oral wills").

276. *See supra* note 157. In a few early instances, oral instructions for the preparation of improperly formalized written wills were given effect as nuncupative wills, *see* Offutt v. Offutt, 42 Ky. (3 B. Mon.) 162, 162–63 (1842); Phœbe v. Boggess, 42 Va. (1 Gratt.) 129, 130, 142 (1844); Mason v. Dunman, 15 Va. (1 Munf.) 456, 456–57, 459–60 (1810), a forgotten antecedent of the harmless error doctrine for eleventh-hour wills. Even though the doctrine relied on a legal fiction, it appears a reasonable extension of the harmless error doctrine, given the special evidentiary circumstances. Nevertheless, other early courts rejected this practice. *See* Dockum v. Robinson, 26 N.H. (6 Fost.) 372, 385–89 (1853); *In re* Male's Will, 24 A. 370, 376–77 (N.J. Prerog. Ct. 1892); Porter's Appeal, 10 Pa. 254, 258–59 (1849); Miller v. Ford, 1 Tenn. App. 618, 625–26 (1925); Brown v. State, 151 P. 81, 81, 83 (Wash. 1915).

277. 2 WILLIAM BLACKSTONE, COMMENTARIES *500. For a judicial recognition, see *Irwin v. Rogers*, 157 P. 690, 691 (Wash. 1916) ("With the growth of learning and progress of letters, the necessity for nuncupative wills ceased to exist.").

evidentiary hazards that attended these wills.[278] An oblique reference to the case appears in the statute itself.[279]

Those few modern commentators who have paused to reflect on nuncupative wills have opposed giving effect to them, irrespective of the circumstances. Oral wills "are subject to the frailties of oral proof"[280] and hence are "not worth the risk they present of fraud and perjury."[281] Their "complete abolition would save disappointment and litigation."[282] Yet they do fill a niche—permitting testators to make abbreviated wills in case of debilitating emergency[283]—and, what is more, the requirements that apply to nuncupative wills suit the narrow field to which these wills are confined, in those jurisdictions that continue to allow them. The *rogatio testium* helps to clarify the testator's intent to make a finalized will,[284] even as the emergency itself brings natural solemnity to the proceedings—for those with one foot in the grave must appreciate the gravity of the situation.[285] The requirement that the testator make a nuncupative will in a

278. Cole v. Mordaunt (unreported, 1676) (described and discussed in Mathews v. Warner, 31 Eng. Rep. 96, 100 (Ch. 1798)). "This is said to be the principal case, which gave rise to the statute of Frauds." *Mathews*, 31 Eng. Rep. at 100 n.2.

279. "Nuncupative Wills[,] which have beene the occasion of much Perjury . . . ." Statute of Frauds, 1677, 29 Car. 2, c. 3, § 18 (Eng.).

280. ATKINSON, *supra* note 198, § 76, at 367; *see also* Thomas E. Atkinson, *The Law of Succession*, 1948 ANN. SURV. AM. L. 749, 759–60.

281. Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 329–30 (1977).

282. Max Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 550 (1948); *see also* Langbein, *supra* note 158, at 22, 52 (averring that nuncupative wills should be ineligible to take effect under a harmless error doctrine because "[f]ailure to give permanence to the terms of your will is not harmless"); *cf. supra* note 157.

283. Cases concerning nuncupative wills continue to appear on occasion, suggesting their continued use in jurisdictions that permit them. *See, e.g.*, *In re* Will of Krantz, 520 S.E.2d 96, 97–99 (N.C. Ct. App. 1999); *In re* Estate of Alexander, 250 S.W.3d 461, 462–67 (Tex. Ct. App. 2008); *In re* Estate of Cote, 848 A.2d 264, 266–68 (Vt. 2004). Blackstone defended nuncupative wills "in the only instance where favour ought to be shewn to [them], when the testator is surprized by sudden and violent sickness." 2 BLACKSTONE, COMMENTARIES *501. A nuncupative will represents a "special indulgence, as a last resort . . . which has no foundation but necessity." Martin v. Rutt (*In re* Rutt's Estate), 50 A. 171, 171 (Pa. 1901) (quoting the opinion below); *see also, e.g.*, Prince v. Hazleton, 20 Johns. 502, 515 (N.Y. Sup. Ct. 1822). Jeremy Bentham argued that the predicate for a nuncupative will needed refining: "There may be sickness . . . and yet no necessity . . . [and t]here may be necessity without sickness." BENTHAM, *supra* note 66, at 545.

284. "[T]he rogatio testium, is doubtless to distinguish between a valid nuncupation and a casual conversation by one in his illness as to his wishes on the subject of his property . . . ." Gwin v. Wright, 27 Tenn. (8 Hum.) 639, 646 (1848) (quoting Baker v. Dodson, 23 Tenn. (4 Hum.) 342 (1843)). For similar observations, see, for example, *Woods v Ridley*, 27 Miss. 119, 146 (1854) and *Dawson's Appeal*, 23 Wis. 69, 88–89 (1868). Among the nine, nuncupative will jurisdictions, *see supra* note 272, this requirement persists in six: Kan., Miss., N.H., N.C., Ohio, and Tenn.

285. This same natural solemnity, in a different context, appears to underlie the traditional rule crediting dying declarations, "for then the solemnity of the occasion is a good security for his speaking

secure location helps to protect him or her, in the one circumstance where the testator benefits from protection.[286] And the requirement that witnesses either rapidly commit to writing the testator's words or soon recount those words in open court—a traditional requirement still found in most of the jurisdictions that permit nuncupative wills—helps to ensure that the absence of a writing won't compromise the court's ability to reconstruct the substance of the estate plan.[287]

To be sure, written evidence remains more reliable than memory. And the reliability of even short-term memory diminishes in proportion to the length of a will. Yet, the setting in which nuncupative wills are made itself offers some assurance of simplicity. Those who seek to verbalize their testamentary preferences on the cusp of death are more or less compelled to streamline.[288] Although one can find among the nuncupative will cases instances in which the memories of auditors conflicted, those conflicts have been minor.[289] In this connection, we might suggest, the *rogatio testium* serves another purpose—namely, to encourage the witnesses to pay attention.[290] As everyday experience and experimental evidence demonstrate, we remember things more accurately when we make an

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the truth, as much so as if he were under . . . oath." State v. Moody, 3 N.C. (2 Hayw.) 31, 31 (1798) (per curiam).

286. 2 BLACKSTONE, COMMENTARIES *501. *See, e.g.*, Miller v. Ford, 1 Tenn. App. 618, 624–25 (1925) (discussing the policy); Nowlin's Adm'r v. Scott, 51 Va. (10 Gratt.) 64, 65–66 (1853) (same). Among the nine nuncupative will jurisdictions, *see supra* note 272, this requirement persists in two: Miss. and N.H.

287. 2 BLACKSTONE, COMMENTARIES *501. *See, e.g.*, Welling v. Owings, 9 Gill 467, 470 (Md. 1851) (observing that the rule requiring witnesses to memorialize the terms of the will while they remain "fresh in their recollection" protects against "the imperfection and frailty of human memory"); *In re* Haygood's Will, 8 S.E. 222, 223–24 (N.C. 1888) (similar observation). Among the nine nuncupative will jurisdictions, *see supra* note 272, this requirement persists in seven: Ind., Kan., Mo., N.H., Ohio, Tenn., and Vt.

288. Professor Friedman expects holographic wills to share the same natural simplicity: "It is far too much trouble to write a long legal document in longhand." Friedman, *supra* note 22, at 354.

289. *See, e.g.*, Owen's Appeal *In re* Pritchard's Will, 37 Wis. 68, 71–72 (1875). *See also In re* Will of Yarnall, 4 Rawle 46, 61, 66 (Pa. 1833) (alleging a disagreement over what the witnesses heard, not elaborated by the court); *cf. Miller*, 1 Tenn. App. at 626 (reporting a minor inconsistency in the testimony of witnesses as to what a testator had stated regarding his desire to make a will, but then adding: "It is remarkable that upon this essential question the three witnesses should give three different version of what was said, and illustrates clearly the danger of depending upon the memory of witnesses to establish an instrument that may so greatly influence the rights . . . of . . . absent parties.").

290. *See* Andrews v. Andrews, 48 Miss. 220, 226 (1873) ("[T]he testator must also use some words indicating his desire or wish that those present . . . should bear witness that such was his will. But here . . . [t]here is nothing to show that he ever expected or wished that any one present remember what he had said, or should ever repeat those declarations . . . ."). *See also In re* Jacoby's Estate, 42 A. 1026, 1036 (Pa. 1899) (observing generally the danger of inattentive witnesses to nuncupative wills).

effort to do so than when we do not.[291] Evolving technology has further eased the corroboration of nuncupative wills. When ubiquitous "smartphones" permit witnesses to video-record a testator's declaration at the drop of a hat, the likelihood that a court will even need to rely on memory for evidence of the substance of an unwritten estate plan diminishes.[292] All in all, courts should have small difficulty reconstructing nuncupative wills nowadays.

C. Contracts

Finally, a party may also find cause to make a contract in anticipation of imminent death. Although the close of one's earthly affairs might seem an awkward moment to bind oneself to fresh knots of agreement, death itself can present parties with a need for new services. Some parties enter into contracts for their own burial, or for the care of their gravesites, preferring not to leave the choice of those arrangements to survivors.[293] Other parties are concerned to ensure that responsibilities they have shouldered during life will continue to be discharged following their deaths. Contracts for the post mortem care of pet animals, for example, are not uncommon, and—like gratuitous transfers—might be left to the last minute. Under the terms of such a contract, payment might come due prior to, at, or after death.[294]

As a general proposition, contracts causa mortis (again speaking by taxonomic analogy) are treated no differently from other contracts, despite the special evidentiary problems that they present, unless they take the form of contracts to make wills.[295] Nevertheless, historically, a rule of

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291. For a recent study confirming the connection between attention and memory, see Betsy Sparrow et al., *Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips*, 333 SCI. 776, 776–77 (2011). For earlier ones, see for example Larry L. Jacoby et al., *Separating Conscious and Unconscious Influences of Memory: Measuring Recollection*, 122 J. EXPERIMENTAL PSYCHOL.: GEN. 139 (1993) and Alan J. Parkin et al., *On the Differential Nature of Implicit and Explicit Memory*, 18 MEMORY & COGNITION 507 (1990).

292. *Cf.* Ellen-Marie Elliot, *Court Grants iPhone Will*, COURIER MAIL (Austl.), Nov. 8, 2013, at 13, *available at* 2013 WLNR 27993854 (reporting a decision by the Supreme Court of Brisbane, Australia, giving effect to a will typed into an iPhone, just prior to the testator's suicide, despite the will's failure to comply with the formal requirements of the statute of wills).

293. *See* Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1837 (1996).

294. *See* Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 831 (2011).

295. Parties occasionally enter into contracts to make wills on the deathbed. *E.g.*, Seaver v. Ransom, 168 N.Y.S. 454, 455–57 (App. Div. 1917). Contracts to make wills, as well as contracts payable at death, are subject to special formalizing rules in some states. *See supra* text accompanying notes 206–10, 227–31.

evidence has compelled parties to eleventh-hour contracts to formalize them with more than just a verbal agreement. Under so-called dead man's statutes, a surviving party who contracted with a deceased party was barred from testifying in an action brought against the deceased party's estate.[296] In practice, then, an executory contract for post mortem services became enforceable only if it had either been committed to writing or witnessed by a disinterested party.

These statutes were premised on the hazards of fraudulent evidence. In a much-cited opinion, a judge in West Virginia defended the statutes as serving

> to prevent an undue advantage on the part of the living over the dead, who cannot . . . give his version of the affair, or expose . . . falsehoods of such survivor. . . . Any other view of the subject . . . would make [the estates of the dead] an easy prey for the dishonest and unscrupulous . . . .[297]

This argument mimics the indictment leveled against nuncupative wills.[298] Yet, it is a striking fact that the trend lines of the two doctrines have progressed in opposite directions. At one time, the two doctrines were effectively symmetrical. Witnessed oral wills made in the eleventh hour were widely valid as an exception to the usual writing requirement, whereas oral contracts made in the eleventh hour also widely required witnesses, an exception to the usual rule that contracts needed none. But over the past half century, the doctrines have diverged. Statutes validating nuncupative wills have waned relentlessly, making testamentary transfers near death *more* difficult to formalize. Simultaneously, restrictive dead man's statutes have also waned, making near-death contracts *less* difficult to prove.

Today, only nine states allow witnessed nuncupative wills for any testator near death, typically with a variety of other restrictions,[299] whereas thirty-two states now allow a surviving party to prove even an *un*witnessed contract formed near death, and without *any* additional safeguards.[300] No

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296. For a modern discussion, see Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75 (2005–06).

297. Owens v. Owens's Adm'r, 14 W. Va. 88, 95 (1878) (Haymond, J.). The passage is quoted without citation in MODEL CODE OF EVID. R. 101 cmt. b (1942).

298. *See supra* notes 280–82 and accompanying text.

299. *See supra* notes 272, 284, 286–87 and accompanying text.

300. The latest survey of these statutes appears in Wallis, *supra* note 296, at 82–100. *See also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 reporter's note 7 (2003).

clear pattern connects the doctrines within individual states. Of the nine remaining jurisdictions with relaxed rules for nuncupative wills, four continue to restrict evidence of a contract via some form of dead man's statute.[301] Among the thirty-two states that have repealed the dead man's statute, only five allow nuncupative wills.[302] The Uniform Law Commissioners, in separate products, endorse the contradictory doctrines: the Uniform Probate Code forbids nuncupative wills,[303] even as the Uniform Rules of Evidence abolish the dead man's statute.[304]

The same dissonance is reflected in modern commentary on the two respective doctrines. Earlier, we noted academic criticism of nuncupative wills as inviting "fraud and perjury."[305] With equal vehemence, evidence scholars have condemned the dead man's statute, making arguments on the contracts side that seem directly responsive to criticism on the inheritance side:

> The survivor's temptation to fabricate a claim . . . is evident enough—so obvious indeed that any jury should realize that his story must be evaluated cautiously. In case of fraud, a searching cross-examination will often reveal discrepancies in the 'tangled web' of deception. In any event, the survivor's disqualification is more likely to disadvantage the honest than the dishonest survivor.[306]

And so, witnessing requirements seen as insufficient on one side of the categorical divide are perceived as excessive on the other. Inheritance scholars have deplored nuncupative wills as "obsolescent and outmoded"[307] at the same time as evidence scholars have condemned the dead man's statute as a "relic."[308] Because the alternative forms of transfer are categorically distinct, the contradiction has gone largely unnoticed.[309] Lawmakers are often farseeing, but they have poor peripheral vision.

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301. These are: Ind., N.C., Tenn., and Vt.

302. These are: Kan., Miss., Mo., N.H., and Ohio.

303. *See supra* notes 275–76 and accompanying text.

304. UNIF. RULES OF EVID. ACT R. 601 (1999), 13A U.L.A. 103 (2004).

305. *See supra* notes 280–82 and accompanying text.

306. 1 MCCORMICK, *supra* note 86, § 65, at 316; *see also, e.g.*, 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 578, at 821 (James H. Chadbourn ed., rev. ed. 1979) (offering a similar observation, and relating criticism of the dead man's statute to criticism of the general bar on interested testimony, which was overturned in the nineteenth century).

307. Chaffin, *supra* note 281, at 329–30 (also labeling nuncupative wills "primitive").

308. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A. J. 507, 511 (1938); *see also, e.g.*, Hew v. Aruda, 462 P.2d 476, 479 (Haw. 1969) (characterizing dead man's statutes as "archaic").

309. *But cf.* Langbein, *supra* note 22, at 501–02 (observing the condemnation of dead man's

At another level, though, the doctrinal trends considered here *are* symmetrical. Both have tended in the direction of abolishing exceptions to ordinary will formalities on the one hand, and to contract formalities on the other. In former times, lawmakers operating within both fields discerned that near-death transfers presented a special evidentiary problem, meriting a special rule of formalization and proof. Today, for the most part, lawmakers in both fields (as well as in the field of gifts) disregard the problem's particularity.

V. CATEGORICAL FICTIONS

The infelicities of formality addressed thus far arise in atypical cases. Only occasionally do transfers stray beyond the situational sphere for which their formalizing rules were tailored. There exists, however, another class of transfers where infelicities of formality crop up *systematically*. These are transfers whose substantive characteristics qualify them for one category, but which courts nonetheless insist on assigning to a different category.

This insistence has flowed from hydraulic pressure, welling from below, to accomplish legal outcomes that parties could not achieve otherwise, and that a court could not make available to them otherwise. Consider a historical example: the doctrine of nominal consideration. Parties who wish to create an enforceable gift promise run headlong into the rule that a promise becomes binding only when supported by consideration—a rule of common law, to be sure, but one so hallowed by precedent that no court could overrule it. In response, some parties have sought to finesse the rule by disguising their gift promises as contractual bargains, made in exchange for a peppercorn. For a time, courts played along, presumably because they recognized the legitimacy of the aspiration, and perhaps also because they saw no harm in doing so. Fuller defended the doctrine of nominal consideration on the ground that "the desiderata underlying the use of formalities are here satisfied by the fact that the parties have taken the trouble to cast their transaction in the form of an exchange."[310] In other words, the exchange of the peppercorn for the promise represented an alternative kind of symbolic act, which Fuller compared to a seal,[311] indicating the finality of the gift promise. Modern courts have turned their backs on the doctrine of nominal consideration,

statutes as a justification for a substantial compliance doctrine for will formalities).

310. Fuller, *supra* note 6, at 820.

311. *Id.*

despite its arguable serviceability.[312] But other disguised forms of transfer persist and have even flourished in our era.

These newer, fictional transfers emerged out of the modern enthusiasm to avoid probate. Provoked by popular accounts of the delays and abuses of the probate system, which governs all testamentary transfers by virtue of statutory law, testators have sought to reclassify their bequests as inter vivos gifts, thereby circumventing the jurisdiction of the probate court.[313] Once again, courts have cooperated in this game of make-believe. Revocable inter vivos trusts (commonly known as "living trusts"), life insurance policies with revocable beneficiary designations, bank accounts with revocable pay-on-death designations, and now many other similar devices, take effect today as present transfers, even though in functional terms they remain simulacrums of bequests under wills.[314] Modern jargon acknowledges the fiction: These devices have become known collectively as "will substitutes,"[315] serving in that capacity—as everyone knows—but without the need for a probate proceeding.

Because will substitutes take the guise of inter vivos transfers, they not only avoid probate—as a side-effect, they also escape the reach of the formalizing rules applicable to wills. In most jurisdictions today, settlors who name themselves as trustees of their own living trusts can create them by mere oral declaration, no differently from irrevocable trusts that actually do begin to operate *in præsenti*.[316] The Uniform Law Commissioners defend their failure to modify the formalizing rules applicable to will substitutes:

> [T]he benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named

312. For a discussion of the doctrine and its fall, see 1 FARNSWORTH, *supra* note 96, § 2.11.

313. For a further discussion of the doctrinal evolution of this fiction, see Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 542–46, 567–68, 570–71 (2000).

314. Earlier courts often insisted on a showing that the transferor had given up some present right, no matter how insignificant, so as to distinguish a revocable transfer (if only slightly) from a bequest of property that the transferor continued to own outright, *see, e.g.*, Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955), an exercise which Gulliver and Tilson compared to a "shell game." Gulliver & Tilson, *supra* note 5, at 37. Modern courts have abandoned this pretense. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. b (2003); *see also, e.g.*, Welch v. Crow, 206 P.3d 599, 604–06 (Okla. 2009).

315. *E.g.*, MCGOVERN ET AL., *supra* note 196, § 6.3, at 299.

316. *See* RESTATEMENT (THIRD) OF TRUSTS § 10 & cmt. c & illus. 3, § 25; UNIF. TRUST CODE § 401 & cmt. (amended 2010), 7C U.L.A. 478 (2006). The Uniform Probate Code creates a safe harbor for living trusts committed to writing, while leaving the validity of those created by oral declaration to judicial doctrine. *See* UNIF. PROBATE CODE § 6-101 & cmt. (amended 2010), 8 pt. 3 U.L.A. 354 (2013).

> beneficiaries all demonstrated the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. . . . [B]ecause these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.[317]

This observation, in fact, echoes an earlier assessment by Gulliver and Tilson[318] and likewise corresponds with Fuller's appraisal of nominal consideration.[319] By hypothesis, the creation of a will substitute involves protocols different from, but sufficient to take the place of, those demanded by the statute of wills. Because many will substitutes come into being as a result of a "business transaction"[320] with an insurance company or a bank, for example, the semi-formal act that establishes the relationship to the business entity indicates finality; meanwhile, the entity in question will undertake to preserve evidence of the transaction.

The point is arguable, at least in connection with will substitutes created through financial intermediaries.[321] But the observation ultimately begs the question. Will substitutes, we are told, "*often* are part of a business transaction and are evidenced by a writing."[322] But what if they are not?

That is the problem raised by the popular living trust, if and when one is homemade by a settlor who serves as his or her own trustee. If created by oral declaration, such a living trust becomes the functional equivalent of a nuncupative will—but without requiring multiple witnesses and without confining the declaration to the vicinity of death.[323] At least in connection with other trusts where the settlor acts as trustee, he or she has immediate fiduciary duties to perform. Their performance indicates that the settlor considered the declaration as legally operative.[324] That is not true of living trusts, however. In recognition of the fictional nature of these

317. UNIF. PROBATE CODE § 6-101 cmt. (amended 2010), 8 pt. 3 U.L.A. 354 (2013). For an elaboration by the co-Reporter for this article of the Code, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1130–34 (1984).

318. *See* Gulliver & Tilson, *supra* note 5, at 23–26, 38–39.

319. *See supra* text accompanying notes 310–11.

320. *See supra* text accompanying note 317.

321. For criticisms, see N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509, 557–58 (1970); William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7, 12 (1972).

322. *See supra* text accompanying note 317 (emphasis added).

323. For a recent example of an informal amendment to a living trust, albeit an amendment made in writing, see Rouner v. Wise, No. WD 75305, 2013 WL 3880150, at *1–3 (Mo. Ct. App. July 30, 2013).

324. *See supra* note 129.

transfers, the settlor-*qua*-trustee of a living trust has no enforceable duties to perform,[325] making the finality of any declaration, or even of an unwitnessed writing, that purports to create such a trust all the more uncertain.[326]

In other respects, relaxing the formalizing rules applicable to will substitutes carries special risks in connection with living trusts. Revocable pay-on-death designations are confined to particular items of property, naming the ultimate taker (or takers) of those items. These designations correspond functionally with what the law classifies as "specific" bequests.[327] As such, pay-on-death designations are naturally simple and hence should be relatively easy to remember (so long as they are not subdivided among too many beneficiaries). Also because they are simple, pay-on-death designations are naturally standardized.

By contrast, living trusts can encompass any sum of property up to the whole of a transferor's estate; they function to replace wills, not individual bequests. As such, living trusts may feature complex terms, including a limitless number of bequests, structured and organized according to the whims of the settlor. As with other complex transfers, living trusts cry out for memorialization, to preserve evidence of their provisions, as well as for professional drafting, to render those provisions readily intelligible.[328]

A situational approach to living trusts would treat them as just another variety of anticipatory transfer. Accordingly, along with anticipatory gifts and contracts, living trusts would have to comply with the formalizing rules that apply to wills.[329] Despite this change, lawmakers could continue to maintain the temporal fiction that living trusts comprise inter vivos transfers and hence avoid probate. Situational formalizing rules can operate independently of the substantive rules that regulate individual categories of transfer. Two states have already moved in this direction by

325. *See* RESTATEMENT (THIRD) OF TRUSTS § 74 & cmt. a(1) (2007); UNIF. TRUST CODE § 603(a) & cmt. (amended 2010), 7C U.L.A. 553 (2006); *see also*, *e.g.*, Fulp v. Gilliland, 998 N.E.2d 204, 207–10 (Ind. 2013); *In re* Trust # T-1 of Trimble, 826 N.W.2d 474, 482–90 (Iowa 2013); Ladd v. Ladd, 323 S.W.3d 772, 778–79 (Ky. Ct. App. 2010); Gunther v. Gunther (*In re* Stephen M. Gunther Revocable Living Trust), 350 S.W.3d 44, 46 (Mo. Ct. App. 2011).

326. For an early recognition of the problem, see *Aronian v. Asadoorian*, 52 N.E.2d 397, 398 (Mass. 1943).

327. On the classification of bequests, see MCGOVERN ET AL., *supra* note 196, § 8.1 at 340.

328. In this regard, given that some states have statutory will forms, *see supra* note 28 and accompanying text, shouldn't these be accompanied by statutory trust forms? For an academic proposal, see Gerry W. Beyer, *Simplification of Inter Vivos Trust Instruments—From Incorporation by Reference to the Uniform Custodial Trust Act and Beyond*, 32 S. TEX. L. REV. 203, 238–53 (1991).

329. The same principle could also apply to other will substitutes, in which case the financial intermediaries that market these transfers would doubtless undertake to meet the applicable formalization requirements.

making living trusts subject to formalizing rules similar or identical to those that govern wills.[330] These stabs at reform have yet to attract the attention of commentators.

CONCLUSION

From the beginning, lawmakers have broken down the rules of property transfers into discrete categories. Formalizing rules are framed individually, and operate exclusively, within the respective provinces of gifts, wills, and contracts. The same is true, of course, of substantive rules. In adhering to this configuration, formalizing rules are only running—well—true to form.

Alternative organizational structures are nonetheless possible and plausible. Some other sorts of non-substantive rules—rules of procedure, rules of construction, rules of equity—have risen to transcend categorical barriers or have even become separate, superimposed categories themselves. Lawmakers could distinguish formalizing rules in the same way. The traditional ones took shape to deal with, and are adequately adapted for, their archetypal circumstances. When we vary those circumstances, shifting gifts, let us say, forward to the moment of death, or delaying their maturity, formalizing rules can become maladaptive. And that is true across the board for transfers lawmakers relegate to inappropriate categories as a matter of legal fiction, in order to accomplish other objectives.

The problem has not entirely escaped lawmakers: Historically, as we have seen, formalizing rules in some places and times have included exceptions for atypical situations. Unusually, though, formalizing rules have drifted in the direction of *fewer* exceptions and hence toward greater intra-categorical homogeneity, in defiance of the ordinary pattern whereby rules accumulate exceptions over time.[331] At least in connection with formalization, the traditional dividing lines appear to have become, if anything, increasingly conspicuous and definitive. There exist today more situational exceptions from the substantive rules of the several types of transfers than from the formalizing rules of those same transfers. Why that

330. *See* DEL. CODE ANN. tit. 12, § 3545(a) (2007); FLA. STAT. ANN. § 736.0403(2)(b) (West 2010). In nine additional states, all inter vivos trusts are subject to heightened formalization requirements. *See supra* note 130. Estate planners who professionally draft living trusts often prefer to execute them in the presence of witnesses, even where none are legally required. *See* DOUG H. MOY, LIVING TRUSTS 53 (3d ed. 2003) (recommending the practice).

331. For discussions, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98–100 (1921); Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

is true, and why formalizing rules have continued to consolidate within their respective categories, represents a jurisprudential mystery that we must leave for another day.

This Article proposes a new framework for formalizing rules, founded not on the category of transfer but rather on the setting within which the transfer takes place. Transfers that a party carries out on the spot, or delays with a long fuse, or makes on death's door, call for different formalizing rules, irrespective of the substantive category into which the transfers fall. If lawmakers reframed formalizing rules to vary by situation, rather than by category, they would have no need to carve out any exceptions at all. Transferors would then formalize all manner of transfers with similar situational characteristics in the *same* manner. Meanwhile, hoary *faux*-distinctions between formalizing rules hinging on the subject matter of a property transfer would finally pass from the scene. And with the new lines in place, subsidiary aspects of formalizing rules, including perhaps a *rogatio testium* requirement for witnesses,[332] could all begin to operate meta-categorically.

There remain some arguable drawbacks to this approach, however. For one, it fails to "canalize" transfers, in Fuller's terminology,[333] by keying each discrete formalizing rule to a particular kind of transfer. If, for instance, lawmakers required transferors to formalize wills, living trusts, and gifts that become possessory at death in exactly the same way, then courts might have a harder time distinguishing which one a transferor intended to implement as a matter of substance—and, of course, the substantive attributes of each differ. But precisely because of those differences, the words setting out the terms of a transfer should help to clarify which kind a transferor had in mind.[334] At the same time, the current distinctions between formalizing rules fail to clarify intent with assurance, since transferors sometimes over-formalize their transfers. It is not unusual for settlors to formalize living trusts like wills, for example.[335] At the end of the day, this consideration appears secondary, at best.

Another concern is that situational distinctions are less clear-cut than categorical ones, creating uncertainty for transferors ex ante and possibly

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332. *See supra* text accompanying notes 262–63, 284, 290–91 (discussing the virtues of this formality, currently confined within the realm of deathbed transfers to nuncupative wills).

333. *See supra* text accompanying note 11.

334. *See In re* Catanio, 703 A.2d 988, 992–93 (N.J. Super. Ct. App. Div. 1997) (holding a document labelled a trust to comprise instead a codicil, because the document "by its own terms provides that it will become effective upon the settlor's death," while also noting that the document had been executed in compliance with the statute of wills).

335. *See supra* note 330.

prompting litigation ex post.[336] Whereas transfers postponed "until death" have characteristics that are sharply defined, transfers occurring "near death" occupy a fuzzier range, rendering less clear which formalizing rule applies.[337] But the cost of using situational criteria here is again likely to be slight. Courts have already amassed a substantial body of case law to elaborate the meaning of nearness to death in the context of gifts causa mortis,[338] mitigating if not foreclosing uncertainty, which lawmakers could incorporate by reference into any broader application of this variable. And transferors can assure themselves that their transfers are valid in close cases by (again) over-formalizing them, assuming they have the time and opportunity to do so.

If lawmakers nonetheless deem a reorganization of formalizing rules too radical to contemplate, they could in the alternative retain the current categories while carving out symmetrical situational exceptions from each of them. The difference is largely cosmetic—but not entirely so. Without reconfiguring the categories, each one would remain technically isolated, so that rulings on, say, the meaning of a "near death" transfer within the law of gifts causa mortis would fail to pertain to nuncupative wills.[339] In order fully to glean the benefits of situational consolidation, lawmakers would have to incorporate a unified situational definition into each category and state that rulings within one category become precedents applicable to all—a situational framework in all but name.

The larger point merits restating. The substantive rules of transfers are category-specific because those transfers serve different functions.[340] Formalizing rules, in turn, are less closely connected to functional differences between transfers. Time does its work, parol evidence carries

336. Clarity of rules—even at the cost of fairness—is generally considered a virtue within the law of transfers of all sorts. *See* Hirsch, *Default Rules*, *supra* note 4, at 1065–66.

337. One way to ameliorate this problem would be to define nearness to death in distinct units of time. One of the substantive rules in the Uniform Probate Code is structured in this way. *See* UNIF. PROBATE CODE §§ 2-205(3) (amended 2010), 8 pt. 1 U.L.A. 158 (2013). Although that would clarify matters from the standpoint of courts, assaying a transfer after the fact, a transferor aiming to validate a transfer before the fact would still face uncertainty about when death might ensue and hence about which formalizing rule was operative.

338. *See* BORKOWSKI, *supra* note 237, at 45–53; BROWN, *supra* note 91, § 7.18.

339. Historically, those meaning have remaining distinct, and courts have judged the extent of infirmity required for gifts causa mortis and for nuncupative wills according to separate standards. *See* Irish v. Nutting, 47 Barb. 370, 387 (N.Y. Gen. Term 1867) ("[I]n order to constitute a good *donatio mortis causa*, it was not necessary that the donor should be in such extremity as is required to give effect to a nuncupative will.").

340. Even this point may be something of an overstatement. I have argued elsewhere that, as concerns substantive doctrine, the different varieties of transfer raise kindred problems that at a minimum call for comparative analysis and, at least in some respects, justify doctrinal consolidation. *See* Hirsch, *Freedom*, *supra* note 4.

risks, irrespective of the legal carriage that parties use to move property. In respect of formalizing rules, the shape of the carriage matters less—far less—than the condition of the road.

Or, to put the case more whimsically: just as Dean Jonathan Swift's Gulliver looked quite different and out of place when cast into one environment or another, so today can we say the same of Dean Ashbel Gulliver's formalizing rules.