

1996

Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past

Lloyd Bonfield

New York Law School, lloyd.bonfield@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Tulane Law Review , Vol. 70, Issue 6 Part A , pp. 1893-1920

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past

Lloyd Bonfield*

The recent revision of the Uniform Probate Code (1990) accepted the "dispensing power" with respect to will execution, revocation, revival, and alteration. Under section 2-503, a will that has not been executed in conformity with the formalities of will execution should nevertheless be admitted to probate if the probate court finds "by clear and convincing evidence" that the decedent intended the document to stand as a will. This Article reviews the literature supporting the change in wills acts and examines cases that have considered applying remedies for defectively executed wills. It is argued by the proponents of the dispensing power that the doctrines of undue influence and fraud will afford the protection that will execution formalities are supposed to serve. By surveying modern cases of undue influence as well as late seventeenth century will contests in England, this Article questions whether "undue influence" can support a greater burden.

I.	INTRODUCTION	1894
II.	THE "LANGBEIN REVOLUTION" IN DUE EXECUTION REQUIREMENTS	1896
III.	THE CURIOUS HISTORY OF THE DOCTRINE OF SUBSTANTIAL COMPLIANCE.....	1900
IV.	POSSIBLE CONSEQUENCES OF THE ADOPTION OF SECTION 2-503	1906
V.	LESSONS FROM THE PAST: THE ENACTMENT OF THE STATUTE OF FRAUDS.....	1910
VI.	LESSONS FROM THE PAST: UNDUE INFLUENCE AS A BACKSTOP	1915
VII.	A PLEA FOR FORMALISM.....	1917
VIII.	CONCLUSION	1920

* Professor of Law and Director, European Legal Practice Program. B.A. University of Massachusetts at Amherst; M.A. J.D. University of Iowa; Ph.D. University of Cambridge. Professor Peter Stein, a frequent visitor to the Tulane Law School, read and commented upon an earlier version of this Article. Enthusiastic student assistants, Claudia Hugill, Karla Hyatt, Jennifer Phillips, and Lance Robinson, contributed their research skills; and a generation of Tulane Law students patiently and politely listened to the reservations which I passionately aired regarding the reformation of the Statute of Frauds and the Statute of Wills. Copyright © 1996 Lloyd Bonfield.

I. INTRODUCTION

Among the well-worn adages foisted upon history undergraduates as justification for their toils in the musty past, none ranks higher than that of George Santayana who wrote: "Those who cannot remember the past are condemned to repeat it."¹ Given the burgeoning interest exhibited by modern legal scholars in the development of law and of legal doctrine in America, our society seems hardly likely to fall afoul of Santayana's admonition. Indeed, much, if not most, historical inquiry undertaken by academic lawyers is not pursued for its own sake. Rather, delving into the past, distant or recent, is usually a prologue to opining on what the law should be or what the future course that law should take, a decidedly Santayanian view of the value of history to be sure.²

Thus, legal history and law reform, law in the past and what law should dictate in the future, seem inexorably linked, at least in the minds of American law professors. Arguably, the nexus between legal history and law reform advocacy might have the tendency to produce scholarship that takes a dark view of the rules of the past.³ For if the goal of historical inquiry by academic lawyers is to justify innovation, present law (frequently a product of the logic of the past) must be found wanting. After all, if rules of law work well, why change them? By its very nature, then, modern American legal discourse, the cult of law reform and law reformers, suggests that there may well be a better way of conducting business than presently obtains.

It is not my intention in this Article to suggest that another well-worn adage should be discarded, this one penned by Justice Holmes,

1. 1 GEORGE SANTAYANA, *LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 284 (1905).

2. One of the incentives for writing for a "dedication issue" is that the usual law review citation policy of footnoting the obvious is waived. In my contribution, I shall take full advantage of the dispensation granted. However, if the reader peruses each of the articles cited below, the point suggested in the text here is amply supported. See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 70-76 (1990) (examining past practice and proposing new practices); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489-91 (1975) (reviewing the history of the Wills Act to support a proposal of the adoption of use of the substantial compliance doctrine); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547-56 (1990) (reviewing attestation requirement's history to support proposal to abolish it).

3. No one seems to have much good to say about the Statute of Wills, 1837, 7 Will. 4 & 1 Vict., ch. 26 (Eng.). For a discussion of its flaws, and in particular some of the reasons why certain of its formalities are outdated, see Lindgren, *supra* note 2, at 548-50.

that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."⁴ Reform of law there must be, and even cursory inquiry into the history of rules may be a useful entry point into understanding the logic of a particular rule of law under observation. Yet one may be struck by the failure of zealous law reformers to appreciate a simple proposition: that what appears to the modern eye as archaic law may well have been (and likely was) the law reform of a previous generation. As such, something can be learned by modern law reformers by an investigation into the problems that led earlier lawyers down the road to the legal change now regarded as antiquated, lest the redrafting of law lead to a resurrection of problems hitherto laid to rest.

Having raised cosmic issues touching the value of historical inquiry and the use of history by lawyers, I must concede that my focus in this Article will be far more modest. I wish to consider a specific area of reform embodied in the 1990 changes in the Uniform Probate Code, the so-called "dispensing power" that may be applied to wills that do not meet the requirements of due execution, revocation, alteration, and revival specified in the Code to allow them to be admitted to probate (or revoked or revived).⁵ In large measure, the adoption of the dispensing power by the drafters of the Code and the proffered transmutation of the contract concept of "substantial compliance" into the law of wills reverse the reform of earlier will-making practice, often regarded by modern wills scholars as "formalistic,"⁶ embodied in the English Statute of Frauds of 1677⁷ and the Statute of Wills of 1837.⁸ The former was received into the law of American jurisdictions as part of the statutory law of England, and the latter was widely imitated in the nineteenth century by individual state legislatures.⁹

4. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

5. U.P.C. § 2-503 (1993).

6. Lindgren, *supra* note 2, at 548.

7. Statute for the Prevention of Fraud and Perjuries, 1676, 29 Car. 2, ch. 3 (Eng.).

8. Statute of Wills, 1837, 7 Will. 4 & 1 Vict., ch. 26 (Eng.).

9. For some reason, the rather cursory treatment of the question of why American jurisdictions adopted the Wills Act in THOMAS E. ATKINSON, *HANDBOOK ON THE LAW OF WILLS* (2d ed. 1953) is cited as authority by some modern scholars. See, e.g., Lindgren, *supra* note 2, at 548.

Although I am skeptical of this reform, it is not my intention in this Article to hark back to the bad old days when formalism reigned unchallenged in the law of wills and trusts—when, so it would appear, probate courts took great delight in reversing the testamentary desires of the decedent in the name of conformance to arcane requirements.¹⁰ Rather, I wish to suggest only that some of the law reform in the past (and in particular the due execution statutes) was not without purpose; second, that some of the rules in their day made sense; and finally, that we may be inviting back, in the name of law reform, those ills our forebearers cured by reforming their own reform of due execution and revocation of wills.

With this agenda in mind, I shall consider the reasons why the English Statute of Frauds may have been enacted, particularly insofar as it applied to wills of personal property. My own contribution will be a preliminary report on an on-going study of later seventeenth-century probate litigation, disputes which I believe may have contributed to Parliamentary intervention. Secondly, I shall cover some results of another ongoing study, that of modern undue influence cases. Finally, I shall consider, on the basis of my historical and contemporary research, what aspects of probate law may be in need of attention. Let us first however consider that which the drafters of the 1990 Uniform Probate Code have wrought with respect to formality of execution.

II. THE “LANGBEIN REVOLUTION” IN DUE EXECUTION REQUIREMENTS

The 1990 revision of the Uniform Probate Code makes only modest alterations in the requirements for due execution of written wills.¹¹ Accordingly, wills in writing must be signed by the testator or another in the testator’s “conscious presence,” rather than in his mere “presence”;¹² and instead of remaining silent as to the interval between when the witness observes the testator’s signature or acknowledgment and his signing, the Code requires that witness to sign “within a reasonable time” after so viewing.¹³

10. Lindgren, *supra* note 2, at 547-50.

11. U.P.C. § 2-502 (1993).

12. *Id.* § 2-502(a)(2).

13. *Id.* § 2-502(a)(3).

Yet lurking in the subsequent section of the Uniform Probate Code is revision in will execution that is nothing short of insurrection.¹⁴ For the drafters of the Code have succumbed to Professor John Langbein's fascination with the remedy for defective execution of wills known as the "dispensing power."¹⁵ Under the mandate of section 2-503, if a court is satisfied that "a document . . . not executed in compliance with section 2-502" (due execution) represents the testamentary intentions of the decedent, the court should admit the nonconforming document to probate.¹⁶

Perhaps it bears repetition to explain precisely why the dispensing power is so revolutionary a concept in the otherwise dour law of wills: It is simply because conformity to fixed formalities in the execution of wills was hitherto calculated to demonstrate that the decedent actually wanted the document so executed to stand as his will. The notion, then, that a nonconforming document could be intended as a will would be regarded by previous generations of probate lawyers as nonsense. If one intended a document to be a will, one executed it in conformity with the statute; if one did not so execute, then it was conclusively presumed that one could not have intended the writing to stand as a will.

It is not difficult to discover from where the impetus for law reform sprang. Cases arose in which the "nonsense," as I have called it, could be disproved.¹⁷ We all make mistakes, testators included. Kindhearted judges shuddered at the notion of relegating to the dustbin wills that were clearly intended to be effective, but ran afoul of one or more of the execution formalities. How could a judge in good conscience actually write that he was persuaded that the will

14. See *id.* § 2-503 (1993) (allowing court to excuse "harmless error" through use of dispensing power).

15. See, e.g., 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 (1987). Although I may disagree with Professor Langbein's desire to remedy defectively executed wills, I am impressed with the strength of conviction in his argument. All teachers of trusts and estates are indebted to him for having provided an interesting context for discussing the otherwise tedious subject of due execution of wills.

16. U.P.C. § 2-503 (1993). In fact, the section goes further than due execution of wills, and applies the dispensing power to revocation, modification, and revival.

17. See, e.g., *In re Fernandez' Estate*, 413 A.2d 998, 1000-01 (N.J. Super. Ct. Law Div. 1980) (upholding admission to probate where witnesses hostile to inheritors denied knowledge that they were witnessing signing of will); Langbein, *supra* note 2, at 498-503; Lindgren, *supra* note 2, at 548-49.

articulated the decedent's testamentary desires and then find it invalid merely because one of the witnesses was walking out of an unheated dining room when the other ("somewhat cumbrous in his movements") was walking in?¹⁸ More lenient courts fashioned remedies either by stretching the obvious dictates of statute, or by recognizing unexceptional exceptions to clear provisions of law, or by simply looking the other way. All these horrors were created in the name of a perceived good—the implementation of testators' estate plans.¹⁹

One cannot but agree that there was something sinister about this remedial jurisprudence. In the first place, there was a certain incongruence in judicial intervention: remedies were haphazardly applied. Some wills that seemed to fall afoul of the formalities mandated by statute passed muster; others in arguably similar circumstances did not. And second, and perhaps more importantly, there was a degree of dishonesty, or at the very least disingenuity, in the decisions rendered by some courts. After all, courts either should follow the law or admit that they will not; when they bend law, they ought to be decent enough to admit their indiscretion. This allows the legislator to have the final word by altering common law by statute, a proposition to which even the most avid common lawyer like Sir Edward Coke would ascribe.²⁰ Moreover, dishonesty or disingenuity produces case law with logic expressed by judges supporting their decisions that is jurisprudentially unsatisfying. Hard cases make awkward law.

The gruesome alternative faced by probate courts in cases in which the testator or his scrivener ran afoul of the rules, either by judicial subversion of legislative mandate or magisterial disdain for the testamentary desires of the property owner, troubled academic lawyers, most notably, Professor John Langbein.²¹ The dilemma of a piecemeal, capricious remedy or the thwarting of expressed testamentary desires inspired him to urge the application of the contract doctrine of substantial compliance to the law of wills. In his seminal article, Langbein argued that modern probate courts continue to require blindly strict compliance to archaic rules of due execution

18. *In re Groffman*, 2 All E.R. 108, 111-12 (1969).

19. Langbein, *supra* note 2, at 500.

20. *Heydon's Case*, 76 Eng. Rep. 637, 638-41 (K.B. 1584).

21. Langbein, *supra* note 2, at 498-99.

even though the purposes which the rules once served are no longer relevant or even satisfied by the requirement. Langbein attacked the rule of literal compliance to due execution statutes as a "snare for the ignorant and ill-advised," and "a needless hangover from a time when the law of proof was in its infancy."²² Moreover, he noted the tendency towards premortem intergenerational transfer in post-war America,²³ a movement which he has subsequently called a "revolution in family wealth transmission."²⁴ If much or most wealth now passes between the generations by documents and acts which do not and need not conform to the requirements of due execution, why then retain, Langbein queried, the hoary formalities of due execution with respect to wills?²⁵

Among its many virtues and modest drawbacks, one argument in favor of the utilization of the doctrine of substantial compliance was ease of application.²⁶ All a court has to do to implement the doctrine of substantial compliance in a particular case is to survey the testator's actual behavior to determine whether it approximated the dictates of the formalities of due execution articulated in the Wills Act. If the testator's conduct is close enough to prescribed formality to satisfy the functions that the breached rule or rules were calculated to serve, then the will should be admitted to probate regardless of its technical imperfection.²⁷

Moreover, the application of substantial compliance to the law of wills had another virtue, the familiar ring which the concept had in the minds of modern lawyers. Lawyers and judges had already had the doctrine of substantial performance and its logic drummed into their consciousness in the sales class offered in the first year of law school. Why not extend its ambit into other areas of the law?

Although the adaptation of the concept of substantial compliance from contract to will was recognizable, the fit was not theoretically perfect. Some lawyers might regard "substantial compliance" as more appropriate in the jurisprudence which spawned it, contract law. In contract law, substantial performance is an interpretive tool to gauge

22. *Id.* at 531.

23. *Id.* at 497.

24. *Id.*; see Ascher, *supra* note 2, at 107-08.

25. Langbein, *supra* note 2, at 512-13; see Ascher, *supra* note 2, at 107-08.

26. Langbein, *supra* note 2, at 513.

27. *Id.*

performance of obligations under an agreement, a sphere of human activity in which commitments incurred are not clearly defined, and therefore more subject to disputes in interpretation;²⁸ it is not a doctrine adopted by courts to vary a legislative directive that is clear on its face.²⁹

At least in America, the widespread adoption by courts of substantial compliance was not to be. In a number of jurisdictions, courts prior to 1990 were invited to apply it, but it has been argued that all courts which considered the Langbein brief ultimately declined.³⁰ Rather than admit that courts had the ability to craft a separate generic remedy for all forms of noncompliance under the rubric of "substantial compliance," courts continued their practice of selectively admitting to probate wills with particular defects by employing other remedies on the ad-hoc basis that so troubled Langbein.³¹

III. THE CURIOUS HISTORY OF THE DOCTRINE OF SUBSTANTIAL COMPLIANCE

Or did they? Two points should be noted before concluding that substantial compliance as a doctrine has been rejected in the context of wills. The first is that even prior to Langbein's article, some courts were not unsympathetic to arguments of "substantial compliance." And second, there is indeed one jurisdiction that seems to be rather avid in its support for its application. Interestingly, the most enthusiastic support for the application of the doctrine of substantial compliance to the interpretation of due execution requirements came from a rather odd quarter: Louisiana.

Turning to the first point, courts even prior to Langbein's article occasionally admitted a will that imperfectly conformed to due

28. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 5.11-.18(b) (3d ed. 1987) (defining substantial performance); 2 E. ALLAN FARNSWORTH, *CONTRACTS* § 8.12 (1990) (explaining substantial performance).

29. Langbein, *supra* note 2, at 530.

30. See, e.g., *In re Estate of Lahr*, 744 P.2d 1267, 1270-71 (Okla. 1987) (rejecting use of substantial compliance); *Succession of King*, 595 So. 2d 805, 808-09 (La. Ct. App. 2d Cir.) (finding substantial compliance insufficient), *writ denied*, 598 So. 2d 357 (La. 1992); *Hopkins v. Hopkins*, 708 S.W.2d 31, 32 (Tex. Ct. App. 1986) (rejecting substantial compliance doctrine). For a detailed discussion, see C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 308-11 (1991) (examining Langbein's concept in American courts).

31. Langbein, *supra* note 2, at 504-09.

execution requirements to probate by considering that the document substantially complied with the relevant Wills Act. Some courts did so explicitly, others by implication. For example, the Oklahoma Supreme Court twice in the late 1960s and early 1970s affirmed the prior adoption of the principle of substantial compliance (and the express use of the term) with the formalities prescribed by the state's will execution statute.³² Likewise, the California Supreme Court required only "substantial compliance" with due execution formalities as early as 1905.³³ Adherence to the doctrine of substantial compliance was reaffirmed with respect to attested wills in 1944,³⁴ and applied to holographs in 1963.³⁵

Other courts prior to Langbein's article admitted nonconforming wills to probate by employing the spirit of substantial compliance, if not by borrowing the actual term. For example, as early as 1892, the California Supreme Court admitted a will to probate in which an illiterate testator made her mark as permitted by statute.³⁶ The Civil Code required a witness to the will to write the name of the testator "near" the mark. This was not done; the testatrix's name appeared only in the body of the will. The court admitted the will to probate considering that the name was "near enough . . . to satisfy the requirement of section 14 of the Civil Code."³⁷ Other cases from different jurisdictions took a similar approach: allowing wills that do not conform to the letter of due execution statutes by considering the will to have approximated the dictates of their Wills Act.³⁸

Having illustrated the history of the doctrine of substantial compliance "before Langbein," we may now turn to the Louisiana experience. For the purposes of due execution of wills, the law of Louisiana varies little from what is referred to here as "the common law." Indeed, according to the Supreme Court of Louisiana, the legislature "adopted the statutory will from the common law in order

32. *Hobbs v. Mahoney*, 478 P.2d 956, 958 (Okla. 1970); *In re Cutsinger's Estate*, 445 P.2d 778, 782 (Okla. 1968).

33. *In re Seaman's Estate*, 80 P. 700, 702 (Cal. 1905).

34. *In re Simmons' Estate*, 151 P.2d 8, 10 (Cal. Ct. App. 1944).

35. *In re Baker's Estate*, 381 P.2d 913, 916 (Cal. 1963).

36. *In re Guilfoyle's Will*, 31 P. 553, 553-54 (Cal. 1892).

37. *Id.* at 553.

38. See, e.g., *Hanel v. Springle*, 372 S.W.2d 822, 824 (Ark. 1963); *In re Keifer's Will*, 356 N.Y.S.2d 520, 522-23 (N.Y. Sur. 1974).

to avoid the rigid formal requirements" of the civil-law will.³⁹ The legislature, however, adopted the "common law will" with a vengeance. The formalities of will execution of statutory wills in Louisiana incorporates the niceties of the 1837 Wills Act, and adds some wrinkles of its own.⁴⁰ For example, a statutory will must be notarized, and each separate page of the instrument must be signed by the testator.⁴¹ Moreover, the legislation creates a signing process for physically infirmed testators who cannot write their names.⁴² A further separate section sets forth requirements of due execution of wills of the "sight impaired."⁴³

With these rather exacting requirements for the due execution of a will on the books, it should come as no surprise that cases arose in which testators failed to observe strictly the requirements set out by statute. In a recent case, for example, the testator initialed rather than signed the first page of his will.⁴⁴ The Louisiana Third Circuit Court of Appeal admitted the will to probate, noting that substantial compliance with the statute was all that was required. According to the court, "slight departures from form" should be permitted if there is no "increased likelihood that fraud may have been perpetrated."⁴⁵

In applying the doctrine of substantial compliance to a case in which the letter of the requirements for due execution was not observed, the *Squires* court followed the jurisprudence of the Louisiana Supreme Court. The most unambiguous support for the need for only substantial compliance for a will to be admitted to probate was articulated in *Succession of Guezuraga*.⁴⁶ Here, the court was faced with the offer for probate of a two-page will in which only the first page was signed.⁴⁷ The first page consisted of the dispositive provisions, followed by the testatrix's signature, and then the beginning of the attestation clause; the following unsigned page

39. *Succession of Guezuraga*, 512 So. 2d 366, 368 (La. 1987). The statutory will is the nonholographic will executed with preserved formalities.

40. *See* LA. REV. STAT. ANN. § 9:2442 (West 1991).

41. *Id.*

42. *Id.* § 9:2442(c)(1).

43. *Id.* § 9:2443 (West 1991).

44. *Succession of Squires*, 640 So. 2d 813, 813 (La. Ct. App. 3d Cir.), *writ denied*, 642 So. 2d 199 (La. 1994).

45. *Id.* at 815.

46. 512 So. 2d 366 (La. 1987).

47. *Id.* at 367; *see* LA. REV. STAT. ANN. § 9:2442(b)(1) (West 1991) (requiring "each separate page of the instrument" to be signed).

contained the remainder of the attestation clause. Mindful that no fraud was alleged, the court found that the legislature intended that the statute be construed "maintaining the validity of the will if at all possible, as long as it is in substantial compliance with the statute."⁴⁸

Two other Louisiana cases apply the doctrine of substantial compliance to the due execution of wills of "sight impaired testators." In the earlier case, *Succession of Harvey*, the Louisiana Second Circuit Court of Appeal admitted a will to probate where a witness to the will rather than the notary, as required by the statute, read the will to the testator because the latter was suffering from "an allergy and asthma condition."⁴⁹ Likewise, substantial compliance was found with the statute and a will was admitted to probate in *Succession of Rogers* even though the attestation clause did not indicate that the will had been read to the testator by the notary.⁵⁰ The court noted that even though the statement that the will was read to the testator by the notary was required by statute, it really did not matter who read the will aloud so long as witnesses agreed that the will had been so read.

Yet even in Louisiana, the doctrine of substantial compliance has been applied sparingly. Perhaps a will without an attestation clause, as in *Succession of English*,⁵¹ though witnessed and notarized, does not meet the threshold level of conformity with the statute to begin a consideration of whether compliance was substantial and fraud absent as the Louisiana Supreme Court prescribed in *Succession of Guezuraga*. Thus, the failure to find substantial compliance in *English* may be defensible.

Yet it is more difficult to explain why substantial compliance was not applied to rescue a faulty attestation clause in *Succession of Chabert v. Laborde*.⁵² Here, the attestation clause was a declaration by the notary (but not the notary *and* witnesses as required by statute) that the will was read and signed on each page by the testator (but not that the testator also declared the document to be his will and that the testator, witnesses, and notary all signed in the presence of each other).⁵³ According to the court, the errors in the attestation clause

48. *Succession of Guezuraga*, 512 So. 2d at 368.

49. 573 So. 2d 1304, 1309 (La. Ct. App. 2d Cir. 1991).

50. 494 So. 2d 546, 549-50 (La. Ct. App. 1st Cir.), *writ denied*, 495 So. 2d 290 (La. 1986).

51. 508 So. 2d 631 (La. Ct. App. 2d Cir. 1987).

52. 507 So. 2d 848 (La. Ct. App. 5th Cir.), *writ denied*, 508 So. 2d 825 (La. 1987).

53. *Id.* at 849.

(though not apparently in the ceremony of execution) "so far depart[] from the requirements of the statute, that to recognize it as a valid will would be tantamount to our ignoring these requirements."⁵⁴

Still unconvinced that Louisiana courts are reluctant to apply substantial compliance? Consider *Succession of Holloway*.⁵⁵ The only requirement to which the attestation clause in this case did not conform was that it failed to relate the date of the month. Someone, presumably the notary, had forgotten to insert the day of the month at the time the attestation clause was notarized. The court affirmed the lower court's refusal to admit the will to probate on the grounds that the date was a mandatory requirement and that to admit the will would be "to rewrite judicially the statute."⁵⁶ Or ponder *Succession of Eddy*.⁵⁷ In this case, a form will ("E-Z Legal Form" to be exact), consisting of a single sheet of paper, was offered for probate. The will had its dispositive provisions on the front of the form and an attestation clause on the back duly signed by the testatrix and her witnesses. Unhappily, however, she did not sign on the front of the form. The will was declared invalid, "on the sole ground that the front sheet did not bear the signature of the testatrix," and therefore did not comply with the statute of due execution.⁵⁸

Perhaps this litany of Louisiana cases confirms the difficulty that we might find in the application of substantial compliance to the context of probate law. How does a court draw the line between insufficient and sufficient proximation of the statutory requirements of due execution? Precisely when is compliance "substantial"? When did the last will and testament get "close enough" to meeting the statutory requirements?

In fact, after due consideration of foreign case law, Langbein abandoned substantial compliance, and switched his allegiance to another vehicle to implement defectively executed wills, that of the dispensing power.⁵⁹ Under the dispensing power as it applied to nonconforming wills, a court may admit a will with some defect in the formalities of due execution mandated by statute to probate if the

54. *Id.*

55. 511 So. 2d 1274 (La. Ct. App. 2d Cir.), *aff'd*, 531 So. 2d 825 (La. 1987).

56. *Id.* at 1277.

57. 664 So. 2d 853 (La. Ct. App. 3d Cir. 1995).

58. LA. REV. STAT. ANN. § 9:2442(b)(1) (West 1991) (requiring "each separate page of the instrument" to be signed).

59. See Langbein, *supra* note 15, at 1, 7.

proponent of the will demonstrates nevertheless that the decedent intended the document to be her will.⁶⁰ Thus, the inquiry of the court in determining whether to apply the dispensing power varies modestly from the investigation undertaken in applying the remedy of substantial compliance. Theoretically, in the latter, the court should examine whether the actual execution formalities observed sufficiently approximate the dictates of statute; while in the former, the court's concern should be whether, regardless of the formalities observed, the will represents the testamentary desires of the decedent.⁶¹ Although articulated in different terms, arguably, the two separate inquiries in applying substantial compliance and the dispensing power should be imagined as close kin: A court should determine that a will represents the testamentary desires of the decedent (dispensing power logic) precisely because it was executed in near conformity (though not perfectly so) with the appropriate statute of due execution (substantial compliance logic).

Yet, as Langbein's empirical studies indicated, the application of the two doctrines in separate states in Australia seemed to achieve varied results.⁶² In his view, Australian courts were better able to fashion remedies for failure to conform to the letter of will execution by use of the dispensing power than through the doctrine of substantial compliance. By adopting the narrowest of definitions of "substantial" in applying the doctrine, courts in Queensland, according to Langbein, subverted the intention of the principle. The only cases in which compliance was regarded as substantial were cases in which compliance was literal. Thus, the acceptance of the doctrine of substantial compliance had insubstantial effect.⁶³ On the other hand, even a narrow application of the dispensing power in South Australia (narrow because the proponent of a noncomplying will was required to demonstrate that the decedent desired a document to stand as her will "beyond a reasonable doubt") resulted in a higher proportion of noncomplying wills being admitted to probate than in Queensland.⁶⁴

No doubt influenced by Langbein's conversion experience, the Uniform Probate Code (U.P.C.) accepted the dispensing power in its

60. *Id.* at 6-7.

61. *Id.*

62. *Id.* at 41.

63. *Id.* at 51-54.

64. *Id.* at 53.

1990 revisions. Unlike South Australia, however, the U.P.C. adopted an evidentiary burden that is more appropriate to civil matters than the Queensland benchmark. The proponent of the will that does not conform perfectly to the requirements of due execution embodied in statute must prove testamentary desire "by clear and convincing evidence."⁶⁵

The battle for the hearts and minds of the academic elite has been won; it now remains to be seen how legislatures and courts will respond to section 2-503. If they are guided by the academic community, we might expect to see adoption of the dispensing power. Although, as discussed above,⁶⁶ American courts had given Langbein's plea for adopting substantial compliance a cool reception,⁶⁷ academic commentators are nearly uniform in their support for a broad remedy for validating wills that do not conform to the letter of will execution statutes.⁶⁸ Indeed, retaining a policy of strict compliance with legislatively mandated formalities has found almost no support among scholars.⁶⁹ Commentators may be rightly accused of attempting to outdo each other in decrying judicial formalism and disparaging the hoary requirements of the old Statute of Frauds and Statute of Wills. One iconoclastically minded scholar went even further than did advocates of substantial compliance and the dispensing power, and urged the abandonment of the attestation requirement altogether.⁷⁰ Where might all this abandonment of formalism end?

IV. POSSIBLE CONSEQUENCES OF THE ADOPTION OF SECTION 2-503

We may now turn to the likely effects of widespread adoption of the dispensing power by American jurisdictions. Those academic commentators who decry the formalism in the law of wills do not propose to abandon testators and their wills altogether to designs of others who might subvert their testamentary desires.⁷¹ For it must be remembered that the formalities of execution, in particular the

65. U.P.C. § 2-503 (1993).

66. See *supra* note 30 and accompanying text.

67. Perhaps the tide has turned, see *In re Will of Ranney*, 589 A.2d 1339, 1342 (N.J. 1991) and *supra* notes 45-48 and accompanying text.

68. Lindgren, *supra* note 2, at 547-56; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1033 (1994).

69. With the exception of C. Douglas Miller, *supra* note 30.

70. Lindgren, *supra* note 2, at 547-556.

71. Langbein, *supra* note 2, at 491-96; Lindgren, *supra* note 2, at 547-56.

signature and witnessing requirements which probate lawyers and their clients seem so routinely to miff, serve particular functions; they were not merely designed as traps for the unwary.⁷² Let us consider the possible consequences of the adoption of the dispensing power in relation to the functions of formalities.

A detailed outline of the functions of formalities of will execution embodied in the Wills Acts need not detain us here; they have been ably rehearsed by others.⁷³ Suffice it to say that the solemn conclave required by statute at which the signature and attestation of wills must occur serves four separate, though interrelated functions. First, there is a "ritual function"; the gathering of testator and her witnesses is calculated to remind the testatrix that she is up to serious business.⁷⁴ Second, this same assemblage also serves a "protective function," since it is less likely that fraud and deceit, undue influence, and the like can be perpetrated under the gaze of witnesses.⁷⁵ The signatures of the testatrix and her witnesses also serve a third function, an "evidentiary function," allowing the probate court perhaps many years after execution to be certain that this document is the one that manifested the testatrix's testamentary intent.⁷⁶ Finally, there is the "channeling function"; a prescribed method of execution allows for a more efficient process of probate.⁷⁷ If all wills are executed according to a single pattern, courts will spend less time determining whether a document offered for probate was really intended by the decedent to be a will rather than some other writing.

With these functions of formalities of will execution in mind, we may now consider the extent to which the adoption of the dispensing power or the application of substantial compliance to the law of wills impairs their value. Most academic commentators seem undisturbed at the loss the adoption of either remedial doctrine would engender.⁷⁸ In large measure, then, advocates of the adoption of the dispensing

72. The classic rendition of the functions is that of Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941).

73. See, e.g., Langbein, *supra* note 2, at 491-96; Lindgren, *supra* note 2, at 547-54; Mann, *supra* note 68, at 1058-62.

74. Gulliver & Tilson, *supra* note 72, at 5-6.

75. *Id.* at 9-13.

76. *Id.* at 6-9.

77. Langbein, *supra* note 2, at 493-94.

78. Gulliver & Tilson, *supra* note 72, at 10-13; Langbein, *supra* note 2, at 530; Mann, *supra* note 68, at 1061-62.

power believe that the functions of formalities are either irrelevant in modern society or are served in another fashion.⁷⁹ Accordingly, a conclave, solemn or otherwise, is regarded as being unnecessary to bring to the attention of a testator that the moment of the execution of a will is an important one; the law has developed more effective means of authenticating documents than the signature of witnesses; and there is always the possibility of setting aside wills on the grounds of undue influence and fraud.⁸⁰ Thus, the evidentiary function can be served by handwriting analysis; the ability of a contestant of a will to overturn an ill-procured document on the grounds of undue influence or fraud satisfies the protective function.⁸¹ Accordingly, Professor James Lindgren, a forceful opponent of formalism, argues that fraud in the execution of wills is uncommon,⁸² and Lindgren suggests that the protective function is anachronistic because both fraud and undue influence can always be proved to overturn a will.⁸³

I wonder. Such reliance upon the ability of an individual to prove undue influence or fraud is both interesting and curious given the fact that the Code itself does not mention either, save to say that the contestants alleging either have the burden of proof and persuasion in testacy proceedings.⁸⁴ It may not be surprising that the promulgators of the Code have refrained from articulating the elements of undue influence, because they are well-known: susceptibility of a testator to the coercion of another; the opportunity for that person to influence; a motive to do so; and the "substitution" of the will of the procurer for that of the testator.⁸⁵

Yet the ease with which "black letter law" may be recited says nothing about the difficulty that courts have in applying those same rules. The cases in this area of probate law are notoriously hazy. Susceptibility, opportunity, and motive are easy standards to articulate as well as to prove. Substitution of testamentary volition, however, is another matter. It has been and remains particularly difficult for courts

79. Langbein, *supra* note 2, at 496 (citing Gulliver & Tilson, *supra* note 72, at 10).

80. Lindgren, *supra* note 2, at 562.

81. Langbein, *supra* note 2, at 515-18.

82. Lindgren, *supra* note 2, at 555, 562.

83. *Id.* at 562.

84. U.P.C. § 3-407 (1993).

85. The classic formulation of Lord Hannen from which the following summary is derived is reproduced in JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 160-61 (5th ed. 1995).

to draw a precise line between conduct that should be regarded as acceptable encouragement of a testator by an individual who wishes to secure a legacy and what constitutes impermissible coercion when the conduct of those involved in the will execution drama is so individual. Rather like snowflakes, no two undue influence cases are alike. Juries take advantage of such fact-based litigation by not infrequently revising the estate plan of a testatrix when, in their view, she may not have distributed her property to those whom they regard as "natural objects" of her bounty.⁸⁶ Setting aside a will or a part thereof on the ground of undue influence often allows some or all of the testatrix's estate to pass to her intestate heirs. Jurors (perhaps assuming that the testatrix's close kin are more deserving than their own) may find such a result "fairer." Of course, an appellate court may reverse a jury verdict because the evidence of substitution is insufficient, but judges can only do so by substituting their own intuition as to whether coercion has in fact occurred. To borrow Justice Stewart's adage regarding pornography to the law of wills; we know undue influence in a case when we see it.⁸⁷

And we see it often. I have undertaken a comprehensive study of cases of undue influence that have reached appellate courts since 1970, but it is not as yet completed. My primary interest in the investigation is to ascertain the factual variables under which wills contested on the ground of undue influence were executed.⁸⁸ Each year, probate cases appear in American appellate courts in which undue influence plays a substantial role. By substantial I mean that the written opinion addressed in some detail the question of whether a will was procured by undue influence.⁸⁹ In a large proportion of the cases, the will

86. See *infra* note 88.

87. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define [hard-core pornography] . . . But I know it when I see it . . .")

88. In particular, I wanted to know the age of the testator/testatrix, the relationship between the alleged undue influencer and the testator/testatrix, the relationship between the contestant and the testator/testatrix, and the parties to each other, whether the will was drafted by a lawyer, the finder of fact, and the determination of the case.

89. Since 1970, 513 cases have discussed in detail issues of undue influence, on average 20.5 per year. A lengthy description of each case is on file with the *Tulane Law Review*.

subject to contest on the ground of undue influence was not set aside, at least not on that account.⁹⁰

Yet even this rather healthy mass of appeals cases is only the tip of a larger litigation iceberg. Since not all contested will probates are the subject of appeals, a larger number of wills must have raised suspicions of undue influence at probate, but went no further up the judicial ladder. Even though the "protective function" embodied in the formalities of execution may operate imperfectly to limit the numbers of cases of undue influence, should more responsibility be foisted on this rather tired concept by adopting the dispensing power or the application of substantial compliance? Could we expect it to shoulder cases which heretofore were resolved by reference to the formalities of execution?

V. LESSONS FROM THE PAST: THE ENACTMENT OF THE STATUTE OF FRAUDS

At this juncture, re-enter Santayana. History, or at least the historical research which I am undertaking, would suggest not. Our time is not the only one in which cases of undue influence are abundant. Over the course of the last couple of years, I have been engaged in an investigation of probate litigation in the Prerogative Court of Canterbury during the second half of the seventeenth century.⁹¹ For the uninitiated, the PCC (as it is frequently referred to) had jurisdiction over the probate of wills and the granting of administrations of intestates' estates for those who left personal property in excess of £5 within boundaries of the province of Canterbury.⁹² While the PCC was only one of hundreds of other jurisdictions in England which held the right to probate wills until the creation of a centralized system of will registers in 1858,⁹³ it was the most prominent. The concern of my research was to ponder (among other things) whether the rather enigmatic sections 18 through 21 of

90. In 170 of the 513 cases (33.1%), the will was overturned on the ground of undue influence; in the remaining 343, the will was sustained.

91. Reference to this work in progress is lightly footnoted. In excess of a thousand documents have been consulted, and when the research has been completed a thoroughly documented version will be presented.

92. That is, England, south of the River Humber.

93. But it was in a sense the court of the rich and famous, and more to the point, from the perspective of the historian, is the fact that its records survive.

the Statute of Frauds,⁹⁴ which governed the validity and probate of nuncupative wills of personal property, were enacted in response to actual problems with their probate as perceived by Parliament.

Let us briefly observe the provisions of the infamous Act for the Prevention of Frauds and Perjuries enacted in 1676 which deal with wills.⁹⁵ Among its other concerns, the Act governed two aspects of will-making. With regard to wills of lands and tenements, the Statute of Frauds required that the document purporting to be the will of a decedent be in writing, signed by the testator, and witnessed by three or more credible witnesses.⁹⁶ The statute also prescribed the means by which such wills were to be revoked.⁹⁷

But the Statute of Frauds went further in the area of probate of wills than merely requiring a writing for a will of land to be effective; it also reformed an area of will-making that had been exclusively the province of the church courts: the nuncupative will of personal property. Although confirming the jurisdiction of the ecclesiastical courts in the probate of wills and the granting of administrations of personalty, Parliament created a set of substantive requirements for the validity of oral wills of personal estates valued in excess of £30. First, the statute required three persons "that the Testator at the time of pronouncing the same, [*e.g.*, his oral will] did bid the persons present, or some of them, bear witness, that such was his Will."⁹⁸ Secondly, the words had to have been spoken in the last illness of the deceased.⁹⁹ Thirdly, there was a "venue" requirement; with regard to nuncupative wills of persons with estates in excess of £30, the words alleged to have been a will had to have been spoken in the decedent's "habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such Will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."¹⁰⁰

The statute also regulated two aspects of procedure in the church courts with regard to the probate of nuncupative wills. Testimony

94. Statute for the Prevention of Fraud and Perjuries, 1676, 29 Car. 2, ch. 3, §§ 18-21 (Eng.).

95. *Id.*

96. *Id.* § 5.

97. *Id.* § 6.

98. *Id.* § 18.

99. *Id.*

100. *Id.*

proving the validity of such wills had to have been received by the court within the period of six months, except if the testimony "or substance thereof" was committed to writing within six days after the making of the will.¹⁰¹ A further section of the Statute required that letters testamentary not be granted by the court until fourteen days after the death of the testator, and that no nuncupative will be proved unless the widow or next of kin be summoned to court to contest the probate of the oral will.¹⁰² Finally, the statute limited the ability to revoke a clause, devise, or bequest in a written will by "word of mouth."¹⁰³ Hereafter, the words spoken that were purported to have revocatory force had to be reduced to writing in the lifetime of the testator, read to him or her, and be assented to by the testator.¹⁰⁴

These sections of the Statute of Frauds are particularly curious for two reasons. In the first place, they appeared to be locked onto a statute whose primary concern lay elsewhere: regularizing the transfer of land.¹⁰⁵ And second, these seven sections of the Statute of Frauds intervened in the process of succession to property to an extent hitherto unknown and governed procedure in the church courts with respect to probate, and the even more rare sphere of legislative intrusion.¹⁰⁶ Taken together, then, the reforms generated by the Statute suggest that there was concern in Parliament over questions of authenticity with respect to nuncupative wills. My inquiry into probate disputes will shed light on the extent to which nuncupative wills may have presented problems to probate courts.

Space constraints do not permit a full exposition on the records of the PCC which I have used for my study of probate litigation, nor its results. Suffice it to say that I have read and transcribed the surviving Allegations, Answers, Interrogatories, Depositions, Cause Papers, and Sentences of a sample of 184 probate cases commenced between 1661 and 1696.¹⁰⁷ The validity of nuncupative wills looms large among the

101. *Id.* § 19.

102. *Id.* § 20.

103. *Id.* § 21.

104. *Id.*

105. Phillip A. Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 L. & HIST. REV. 354 (1983).

106. Statute for the Prevention of Frauds and Perjuries, 1676, 29 Car. 2, ch. 3, §§ 18-24 (Eng.).

107. It remains to describe my data set of late seventeenth-century causes from which my conclusions will be drawn. To construct it, I used a sampling technique that was hardly sophisticated. Each year, the PCC heard in the neighborhood of 150 to 200 contested

issues litigated in the PCC during the period. In twenty-six of the 184 cases (14.1%), the issues of the validity of an oral utterance and of whether the expression amounted to a nuncupative will was litigated.

The validity of oral wills offered for probate by executors or beneficiaries therein was contested because of the somewhat dubious circumstances in which they were made. After all, oral wills were no more than declarations, and both the question of testamentary intent, whether the utterance was intended by the decedent as a will, and the exact dispositive terms could be proved only by the recollections of witnesses. An example from the cases can be provided. Gregory Thorned was a Gentleman of the Chappel Royal and comes down to us by all accounts as rather a hale and hearty fellow. The utterance which was alleged to have been his nuncupative will was made in an alehouse shortly before his demise. The contestant of the will attempted to cast doubt on Gregory's intent not only based upon the venue, but suggested that he often made statements without serious purpose, and that he himself so recognized:

4. If someone flattered him he might say he would give him his estate and if asked the day after Gregory Thorned would smile and say "you know that when I am merry I doe and would bid them not to take any notice of what hee did say."¹⁰⁸

probate causes (though many were pending over two or more years, so the precise number of causes commenced in each year was probably toward the lower end of the scale). Allegations survive for only about one-half of these causes: 75 to 100 per annum. Constraints of time (and patience) would not allow me to scrutinize every cause commenced in the forty years after 1660 for which an allegation has been preserved. I therefore resolved to observe causes at five-year intervals, from 1660-1696, and sample within the selected year. I began with the period 1660-1666, because these years saw relatively few causes, and the Allegations had been placed together by the archivist in the same bundle. Thereafter, I looked at the bundles catalogued for 1671, 1676, 1681, 1686, 1691, and 1696. In each bundle, I included every fifth cause, with the exception of 1676, a year in which I read every cause with an Allegation in the bundle. Because the PCC testamentary causes have a nominal index by decedent, I was able to follow the cause if it continued in subsequent or preceding years; if, for example, there were further allegations submitted by a proponent or contestant in the following year, I was able to find them; and if a cause commenced in 1670 produced an allegation in 1671, I included the cause in the sample and read the earlier allegation.

My efforts produced 184 probate causes. I would estimate that somewhere in the order of 5250 to 7000 (150 x 35 to 200 x 35) causes came before the court during the last forty years of the seventeenth century of which about 1800 to 2300 left surviving allegations, so my sample might range from about 3 to 4% of all causes commenced and about 8 to 10% of the cases initiated for which allegations have survived.

108. Public Records Office [P.R.O.], London PROB 18/3/28 (1676).

In the cases, it was common for contestants of nuncupative wills to challenge both the memory and the honesty of the witnesses to the will through interrogatories. Recollection was tested by asking the witnesses to depose upon specifics of the "ceremony": the exact time that the words were uttered, the precise place (the room in the house), and even how (and with what) the deceased was propped in his bed. Because there was often no other evidence than the bare word of the proponent and her witnesses, their character was often at issue. For example, what began as a fairly straightforward offer to probate a nuncupative will by one Rebecca Sewell was supported by the testimony of Richard Simmons (Simmons was alleged to have been present at the time of its making) was transformed into an investigation through other witnesses of his fame as a receiver of stolen goods.¹⁰⁹ Likewise, a shopkeeper was produced by the contestants of the will to testify that a character witness for Simmons, one Elizabeth Williams, stole some lace from her and that she had identified the same woman at Newgate prison.¹¹⁰

All but two of the controversies over nuncupative wills involved wills uttered prior to 1677. The two post-1677 causes involved the wills of mariners whose wills were exempt from the reform.¹¹¹ The Statute of Frauds had indeed removed from the PCC a particularly troubling genre of probate dispute. Tightening the requirements for the validity of wills decreased the quantity of litigation therein.

Yet, arguably, the reforms embodied in the Statute of Frauds should be regarded as regressive, particularly when measured by the logic of modern academic commentators who are proponents of the dispensing power. After all, Gregory Thorne may have wished to have disposed of his property in that alehouse. Why not allow the proponents of his utterance to demonstrate that he desired the statement to stand as his will by clear and convincing evidence? And, if he so intended the utterance to be his will, but was "merry" or "flattered," let the contestants of his will so prove undue influence or lack of testamentary capacity.

What separates the advocates of the Statute of Frauds and those of the dispensing power is not merely three centuries, but a

109. P.R.O., 24/14, 362.

110. P.R.O., 24/14, 365.

111. Statute for the Prevention of Fraud and Perjuries, 1676, 29 Car. 2, ch. 3, § 22 (Eng.).

fundamental difference on the extent to which the law ought to protect the designs of the eccentric or ill-advised testator. The Uniform Probate Code has moved ever farther in the direction of forbearance with a misplaced reliance on undue influence as a backstop. Indeed, those who regard the law on nuncupative wills to be arcane and irrelevant should consider the latitude given to settlers under the Uniform Testamentary Additions to Trusts Act.¹¹² As Professors Dukeminier and Johanson illustrate in a problem following the discussion of pour-over wills in their casebook, their hypothetical dear Aunt Fanny can make an oral disposition of trust property to take effect after her death if she has reserved the power to do so in the trust instrument.¹¹³

VI. LESSONS FROM THE PAST: UNDUE INFLUENCE AS A BACKSTOP

My argument thus far has been that the tightening of the requirements for the validity of one particularly troublesome type of will, the nuncupative will, decreased the quantity of probate litigation in the past. Admittedly, it did so by requiring a channeling of testamentary behavior in ways in which modern law reformers appear disinclined to accept. That which a previous society regarded as an intolerable drag on the process of probate may well be a burden that modern society wishes probate courts in our day to shoulder. Moreover, demonstrating that tightening the requirements may have eliminated litigation in the past does not of course prove the converse: that relaxing formalities (either in the past or in the present) will increase litigation. Yet it does suggest a link between the prescribed formalities of execution and probate litigation that should serve as a salutary reminder for advocates of the dispensing power and the application of the concept of substantial compliance to the law of wills.

Having delved into the probate litigation of an earlier age, the Santayanian has one further reflection for those who wish to be certain that proposed law reform will not resurrect the problems of the past. Above, it has been noted that the proponents of the adoption of the dispensing power or the application of the principle of substantial compliance to the law of wills believe that the ceremony of execution

112. U.P.C. § 2-511 (1993).

113. DUKEMINIER & JOHANSON, *supra* note 85, at 367.

either provides little "protection" of the testator from the designs of others or that the ability to contest a will on the ground of undue influence affords sufficient protection for the decedent's volition.¹¹⁴ A survey of modern cases of undue influence casts some doubt upon the proposition that the doctrine of undue influence can sustain the additional burden.¹¹⁵

Likewise in the past; or so my inquiry into probate litigation in the PCC in the second half of the seventeenth century would suggest. In fact, more of our will contests raised the problem of undue influence than any other infirmity. In thirty-eight of 184 cases, or 18.5%, the issue of undue influence in the execution of a will was alleged.¹¹⁶

The circumstances surrounding will execution that the contestant in our PCC cases alleged to support an allegation of undue influence varied greatly. Yet the factual patterns are strikingly familiar to the modern student of current probate litigation. At the outset, however, it must be noted that the use of the term "undue influence" should be regarded as perhaps anachronistic because contestants themselves never used the term. Rather, the contestant through his or her allegation, answer, cross-allegation or answer, or interrogatories presented to the proponent's witnesses or to his own (or a combination of the above) attempted to have witnesses testify to dubious conduct on the part of the proponent or another in securing the writing or execution of the will.¹¹⁷

A number of different factual patterns were alleged by contestants in asserting a claim that the decedent's will was a product of undue influence. Space constraints herein do not permit a full exposition of the circumstances alleged in the cases. Control over the testator, a physically weakened state and undue persuasion, however, loom large in the cases. The modern student of the law of wills would be most interested to learn the line between acceptable persuasion and undue influence that obtained in early modern England, still a

114. See *supra* notes 60-80 and accompanying text.

115. See *supra* notes 84-86 and accompanying text.

116. See *supra* note 91.

117. Henry Swinburne sets out in detail the probable procedure in ecclesiastical courts. HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* 224-25 (Garland Reprint ed. 1978) (1590).

boundary hazily drawn by modern courts.¹¹⁸ Unhappily, the specific discussion relating the facts of a case to the legal concept of undue influence does not exist for our testamentary causes; we lack the opinions of the judges that might explain precisely why a claim of undue influence was upheld or denied.

What we do know is that it was difficult to sustain a claim of undue influence or indeed of any other grounds for contesting a will in the PCC. Less than 10% of all the wills contested during my sample years were actually denied probate. It may well have been that to shield themselves against an unmanageable flow of litigation, the judges created their own healthy presumption of validity in favor of wills that on their face appear to have been regularly executed.

VII. A PLEA FOR FORMALISM

I have used my historical evidence to ponder points that might bear consideration before adopting the proposed reform of due execution statutes. The first was to demonstrate that tightening the rules on the due execution of one type of will in 1677, the nuncupative will, did in fact limit litigation thereunder. Second, undue influence was in the past (and perhaps remains) a rather slippery area of the law. Arguably, it can sustain no further burdens, and legislatures and judges should contemplate whether what are presently due execution cases because of adherence to formalities ought to be litigated under the rubric of undue influence.

In my introduction, I threatened to offer my own law reform proposal regarding the due execution of wills to counter that of the framers of the Uniform Probate Code. As the reader may have gathered from the tenor of the argument thus far, I shall swim against the tide, and support even greater formalism in the law of wills than presently obtains. Thus far in my Article, I have touched two jurisprudential bases: the historical and the contemporary American. Let me proceed, albeit briefly, to the comparative to suggest that American probate practice might consider borrowing from continental law to limit the problems that have arisen in the areas of due execution, testamentary capacity, and undue influence.

118. WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 277-82 (1988) (indicating the commonness of a claim of undue influence).

The Statute of Frauds, and even the Statute of Wills, must be regarded as a limited reform of what was previously a rather anarchic pattern of will-making in England, particularly when one contrasts previous English practice with that which obtained on the continent. Historical studies of probate in continental Europe rarely discuss contested wills.¹¹⁹ The absence of litigation may be attributed to the notarial system. By requiring written wills to be drafted by notaries, continental Europeans essentially eliminated the will contest on the grounds of lack of conformity with requirements of due execution, undue influence, and another area which has not been addressed herein, but looms large in my historical inquiry, testamentary capacity.¹²⁰

Then, as now, in continental Europe, the notary's role with respect to testation is to authenticate a will and relieve the courts of the burden placed on our Anglo-American courts in determining, perhaps long after the fact, whether the testator was of unsound mind or unduly influenced or whether the will was the subject of fraud.¹²¹ The notary makes that judgment at the time the will is executed before her.¹²² To some extent, the notary's role is similar to that served by ante-mortem probate, an idea that was advocated by some American commentators, but seems largely to have disappeared.¹²³

To require that all nonholographic wills be executed before a notary who must be satisfied of the testamentary capacity and freedom from undue influence or the like as in continental Europe would run against the tide of law reform in modern America. Indeed, those who decry formalism may lodge substantial arguments against its institution. I shall rehearse a few, albeit briefly.

The first argument against such a requirement may well be its inefficiency. There is the expense of the notary's fee and the cost of the entire transaction. Arguably, both would be higher in America

119. See, e.g., SAMUEL K. COHN, JR., *DEATH AND PROPERTY IN SIENA, 1205-1800* (1988); STEVEN EPSTEIN, *WILLS AND WEALTH IN MEDIEVAL GENOA 1150-1250* (1984).

120. C. CIV. bk. 3, ch. 5, § 1, arts. 971-979 (Fr.); Bürgerliches Gesetzbuch [BGB] bk. 5, arts. 2231-2233, 2247-2249 (F.R.G.); C.C. arts. 603-605 (Italy).

121. MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES* 261 (1985).

122. *Id.*

123. See generally Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1978) (discussing the recent development of ante-mortem probate).

than elsewhere. Continental notaries support themselves by performing a variety of lucrative tasks unknown to their American counterparts, such as the drafting of deeds and contracts.¹²⁴ Their role is not merely the authentication of documents. To establish a position merely to perform the authentication process of wills might be costly in terms of fees, and to that cost we must add that of registration.

A second quarrel with such a proposal concerns the status of notaries in America. Unlike in continental Europe, notaries in the United States, because they really only authenticate signatures, occupy a rather lowly position. Arguably, it is inappropriate to elevate them to assume this important, almost quasi-judicial, role. Should the notary be vested with both crucial and monopolistic powers in the area of testation?

But perhaps the most serious concern might be the danger to what might be called "individualism." If one views the thrust of the reforms embodied in the Uniform Probate Code over time, one must conclude that the drafters seem very much concerned to protect the ability of testators to fashion their own estate plans without the need for lawyers: the "do it yourself" will generated by the testator or a nonprofessional. To that end, the Code, for example, recognizes holograph wills,¹²⁵ unattested form wills where the dispositive provisions have been entered in the hand of the testator,¹²⁶ and partial revocation by physical act.¹²⁷ The underlying philosophy of the Code is that the law should allow the testator to make her will when and how she wishes even if she does so in the midst of a letter advising her children of the proper mode of pickling pork.¹²⁸

Assume for argument sake that such latitude is consistent with American legal culture: We must adopt sections 2-502 and 2-503 to facilitate testation, even against the advice of a Santayanian. Yet such a conclusion, however, does not explain why those who do not wish to shun formality should not have the ability to settle questions of authenticity, testamentary capacity, and undue influence in advance. Even if we decide to retain ease of execution and enact the dispensing

124. GLENDON ET AL., *supra* note 121, at 151-52; see Alexander & Pearson, *supra* note 123, at 121-22 (noting the weak probate process in the United States).

125. U.P.C. § 2-502 (1993).

126. *Id.* § 2-503 (1993).

127. *Id.* §§ 2-503, -507 (1993).

128. See *In re Kimmel's Estate*, 123 A. 405, 405 (Pa. 1924), cited in Langbein, *supra* note 2, at 495.

power or accept the notion of substantial compliance, should we not also adopt a means by which the perfectly executed will can be immunized from the challenge of disgruntled heirs on the ground of undue influence? Is not optional use of the notarial system a sensible compromise?

VIII. CONCLUSION

To conclude, it may not be difficult to understand the logic of the argument in favor of the dispensing power or the application of substantial compliance to the law of wills, and to be persuaded by the powerful arguments against formalism in the will execution. After all, it is the decedent's money and not the court's. If he wishes to dispose of it in his recipes, so be it. Ours is an individualistic and an eccentric society; the law of wills ought to reflect the tolerance of our culture.

Yet this Article has suggested that the legislature or the judges ought to recognize the potential for an increasing quantity of probate litigation raising the issue of undue influence that may follow in the wake of the adoption of the dispensing power. Likewise, we must remember that the law governing undue influence has in the past been less than straightforward, and perhaps no less haphazardly applied than are remedies for want of due execution. Conceding for the sake of argument that the balance should tilt in the direction of informality even at the risk of increased litigation, ought the law not consider a means by which the more risk averse property owners can protect themselves against possible claims of undue influence?