
Do-It-Yourself Wills

David Horton*

Although most testators hire lawyers, others draft their own wills. Some try to comply with the Wills Act, which requires testamentary instruments to be signed by the testator and by two witnesses. Some create holographic wills, which are valid in about half of American states, and must be in the testator's handwriting rather than attested. Some purchase fill-in-the-blank forms. And some have started using online will-making software sold by companies like Nolo Press, LegalZoom, and Rocket Lawyer.

These do-it-yourself ("DIY") testamentary instruments are controversial. Proponents argue that they empower people who are too poor or too sick to consult an attorney, but critics assail them as a fertile source of litigation. Nevertheless, there is no hard data about how homemade wills compare to their professionally drafted counterparts.

This contribution to the American College of Trusts and Estates Counsel and UC Davis Law Review Symposium improves our understanding of these issues by analyzing 1,133 recently-probated estates from Alameda and San Francisco Counties in California. The Article reaches three main conclusions. First, it is unclear whether people who create their own wills are less wealthy than those who hire lawyers. Second, there is some evidence that DIY devices are particularly useful for testators who fall gravely ill. Third, even controlling for the impact of other variables through a regression analysis, holographs in Alameda County and self-made and attested wills in San Francisco County are correlated with a statistically significant increase in the odds of litigation. Accordingly, the Article provides qualified support to both sides in this debate.

TABLE OF CONTENTS

INTRODUCTION	2359
I. DIY WILLS	2365

* Copyright © 2020 David Horton. Professor of Law and Chancellor's Fellow, University of California, Davis, School of Law. Thanks to Alex Boni-Saenz, Menesh Patel, Reid Kress Weisbord, and participants at the American College of Trusts and Estates Counsel/UC Davis Law Review Symposium for helpful comments.

A.	<i>Homemade and Attested</i>	2366
B.	<i>Holographic Wills</i>	2369
C.	<i>Form Wills</i>	2373
D.	<i>Software Wills</i>	2377
II.	EVIDENCE ABOUT DIY WILLS	2380
A.	<i>Research Methodology and Caveats</i>	2380
B.	<i>Results</i>	2384
1.	Access to Justice	2386
a.	<i>Wealth</i>	2386
b.	<i>Timing</i>	2387
2.	Litigation	2391
	CONCLUSION.....	2395

INTRODUCTION

In January 2009, an Oakland resident named Tom Von Gogh faced a dilemma. Von Gogh — who was disabled, terminally ill, and not wealthy — wanted his brother Randy to inherit his property.¹ But Von Gogh had not made a will, and California’s intestacy statute would give his entire estate to his son, Lois.² Thus, rather than spending the time and money to hire a lawyer, Von Gogh dictated his last wishes to a friend, who typed them up:

This is Tom’s will which he can’t write himself because of limited use of his hands and arms He wants all his possessions . . . to be left to his brother, Randy Von Gogh [Tom is] of sound mind and questionable body. This will is being typed for [him] on January 12, 2009.³

Von Gogh signed the document with an “X” in front of three witnesses, who added their own signatures.⁴ Eight days later, he died.⁵

¹ See Petition for Probate of Will and for Letters Testamentary at 2, 5, Estate of Von Gogh, No. RP0943629 (Cal. Super. Ct. Feb. 17, 2009) [hereinafter Von Gogh Petition] (noting that Von Gogh was a quadriplegic, had just been discharged from the hospital, and had a net worth of \$111,000).

² See CAL. PROB. CODE § 6402(a)-(c) (2019) (providing that a decedent’s children take to the exclusion of the decedent’s siblings); Von Gogh Petition, *supra* note 1, at 6 (mentioning Lois).

³ Von Gogh Petition, *supra* note 1, at 5.

⁴ *Id.*

⁵ See *id.* at 1.

Figure 1. Tom Von Gogh's Will

1/12/2009

This is Tom's will which he can't write himself because of limited use of his hands and arms due to being a quadriplegic. He wants all his possessions, assets, the money in his checking and bank accounts, his house and the houses' contents to be left to his brother, Randy Von Gogh. This will is being created with Tom in Randy's house, where Tom has been living since leaving the Kaiser Rehabilitation facility. I want my brother, Randy, to take charge of the distribution of my money and possessions. After settling my debts he can keep anything he wants. I am of sound mind and questionable body. This will is being typed for me on January 12, 2009. It is being witnessed by Linda, Joel and Andrea.

X

	1/12/09
	1/12/09
Andrea Soto	1/12/09

Five years later, Lafayette Jenkins, who lived in San Francisco, found himself in a similar position. Jenkins downloaded a preprinted form will from the California bar website, filled it out by hand, signed it, and obtained the signatures of two witnesses.⁶ About a month later, he passed away.⁷ But as the probate process began, a bizarre fact came to light: Jenkins, apparently confused by the will's instructions, had named *himself* as the sole beneficiary.⁸ Soon his estate was consumed by litigation over the legal significance of this circular bequest.⁹

⁶ See Petition for Probate of Will and for Letters Testamentary at 7-12, Estate of Jenkins, No. PES-15-298554 (Cal. Super. Ct. Feb. 24, 2015) [hereinafter Jenkins Petition]. The will that Jenkins used can be found at *California Statutory Will: California Probate Code, Section 6240*, CAL. BAR ASS'N, <https://www.calbar.ca.gov/Portals/0/documents/publications/Will-Form.pdf> (last visited Feb. 12, 2020) [<https://perma.cc/F6MZ-558D>].

⁷ See Jenkins Petition, *supra* note 6, at 1-2 (noting that Jenkins executed his will on June 29, 2014 and died on August 3, 2014).

⁸ See *id.* at 6.

⁹ See Objection to Petition for Probate of Will at 1-2, Estate of Jenkins, No. PES-15-298554 (Cal. Super. Ct. Mar. 25, 2015).

Figure 2. Lafayette Jenkins's Will

California Statutory Will
California Probate Code, Section 6240

INSTRUCTIONS

1. **READ THE WILL.** Read the whole Will first. If you do not understand something, ask a lawyer to explain it to you.
2. **FILL IN THE BLANKS.** Fill in the blanks. Follow the instructions in the form carefully. Do not add any words to the Will (except for filling in blanks) or cross out any words.
3. **DATE AND SIGN THE WILL AND HAVE TWO WITNESSES SIGN IT.** Date and sign the Will and have two witnesses sign it. You and the witnesses should read and follow the Notice to Witnesses found at the end of this Will.

CALIFORNIA STATUTORY WILL OF

Print Your Full Name
LAFAYETTE JENKINS

1. Will. This is my Will. I revoke all prior Wills and codicils.
2. **Specific Gift of Personal Residence.** (Optional-use only if you want to give your personal residence to a different person or persons than you give the balance of your assets to under paragraph 5 below.) I give my interest in my principal personal residence at the time of my death (subject to mortgages and liens) as follows:

(Select one choice only and sign in the box after your choice.)
 - a. Choice One: All to my spouse or domestic partner, registered with the California Secretary of State, if my spouse or domestic partner, registered with the California Secretary of State, survives me; otherwise to my descendants (my children and the descendants of my children) who survive me.
 - b. Choice Two: Nothing to my spouse or domestic partner, registered with the California Secretary of State; all to my descendants (my children and the descendants of my children) who survive me.
 - c. Choice Three: All to the following person if he or she survives me (insert the name of the person).
Lafayette Jenkins

These cases illustrate rival sides of an old debate. Most people hire a lawyer to guide them through the will-making process. Attorneys know how to navigate the maze of the Wills Act, which requires posthumous dispositions of property to be signed or acknowledged by the testator in front of two witnesses who were present at the same time.¹⁰ Likewise, lawyers speak the exotic language of estate planning: “executor,” “per stirpes,” “residuary clause.” However, for centuries, other property

¹⁰ See Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26 (Eng.); JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 147-49 (9th ed. 2013) (explaining how the Wills Act applies in the United States).

owners have tried to make their own wills. In 1751, Virginia became the first American colony to recognize holographic wills: those that are not witnessed, but are handwritten and signed by the testator.¹¹ Similarly, since the 1800s, stationery stores have sold fill-in-the-blank will forms.¹² These self-help mechanisms have long been polarizing. Some commentators argue that do-it-yourself (“DIY”) wills provide an elegant shortcut for individuals who cannot afford to pay a professional or unexpectedly confront their own mortality.¹³ For instance, by seizing the initiative, Tom Von Gogh overcame the physical and financial hurdles that prevented him from seeing a lawyer. However, skeptics contend that amateur will-making breeds litigation.¹⁴ For this cohort, too many DIY wills are as flawed as Lafayette Jenkins’s.

Recently, technology has given this issue a modern spin. The rise of the internet has triggered “a boom in homegrown estate planning.”¹⁵

¹¹ See An Act Directing the Manner of Granting Probats of Wills, and Administration of Intestates Estates (1748), ch. V, in 5 HENING’S STATUTES AT LARGE (1819), at 454, 456.

¹² See *infra* text accompanying note 71.

¹³ See, e.g., Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 369-70 (2018) (arguing that “mak[ing] it easier to execute a will without an attorney” could reduce the impact of social and economic disparities within inheritance law); Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 31-32 (2008) (“[H]olographs provide testators with a low-cost and effective alternative to dying intestate.”); Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 951-52 (2016) (connecting “the do-it-yourself will” to the broader “movement to broaden the scope and otherwise facilitate pro se representation in civil law matters”); Emily Robey-Phillips, *Reducing Litigation Costs for Holographic Wills*, 30 QUINNIPIAC PROB. L.J. 314, 315 (2017) (“[T]he home-drawn will is more affordable, achievable, and democratic than the attested will.”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt out of Intestacy*, 53 B.C. L. REV. 877, 879-81 (2012) (arguing that policymakers should use self-help devices to ensure “universal access to the will-making process”).

¹⁴ See Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 632 (1981) (“California’s make-your-own-will statute is a species of consumer fraud.”); Richard Lewis Brown, *The Holograph Problem — The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 100 (2006) (claiming that holographs are “notoriously prone to challenge”).

¹⁵ Christine Larson, *A Need for a Will? Often, There’s an Online Way*, N.Y. TIMES (Oct. 14, 2007), <https://www.nytimes.com/2007/10/14/business/yourmoney/14wills.html> [<https://perma.cc/2H9G-5SZ6>]. Since the 1980s, the number of American households that own a computer has increased almost tenfold. See CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016, at 1 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf> [<https://perma.cc/3QEN-H7QT>]. Likewise, in 1997, only one in five households subscribed to the internet, whereas today that figure is eight out of ten. See *id.* at 3.

Legal service providers like Nolo Press, LegalZoom, and Rocket Lawyer, have sold hundreds of thousands of DIY wills online.¹⁶ Although many legal academics welcome this development, estate planners see it as an existential threat.¹⁷ In newspapers and journals, they ridicule software will-making as being akin to “perform[ing] surgery on yourself,”¹⁸ and “pulling your own tooth with a pair of pliers instead of going to the dentist.”¹⁹

Despite this sharp split of opinion, there is virtually no hard data about DIY wills. As Stephen Clowney noted more than a decade ago in the context of holographs, “[t]he most fundamental question remains unanswered: [w]hat does [the] empirical evidence show?”²⁰ Similarly, as Emily Poppe recently observed, discussions about internet wills revolve around anecdotes.²¹ To date, no study has been able to compare lawyer-made wills with their DIY counterparts. Accordingly, we do not know whether DIY testators tend to be impoverished or in need of an “emergency room” will. Likewise, we can only guess about whether homemade testamentary instruments generate more than their fair share of conflict.

This contribution to the American College of Trusts and Estates Counsel and *UC Davis Law Review* Symposium on Empirical Analysis of Wealth Transfer Law tackles these questions. It analyzes two datasets — 457 wills that were filed in Alameda County, California, between 2007 and 2009 and 676 wills from San Francisco County between 2014 and 2016 — and reaches three main conclusions.

¹⁶ Geoff Williams, *Where You Can Go Wrong with a Do-it-Yourself Will*, CHI. TRIB. (Jan. 17, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-01-17-sns-rt-us-retirement-willsbre90g0wi-20130117-story.html> [https://perma.cc/A7W2-6WJ4] (reporting that Rocket Lawyer sold 913,000 online wills in 2012 and LegalZoom sold 100,000 online wills in 2011).

¹⁷ See *infra* text accompanying notes 99–102.

¹⁸ Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011) (quoting *Last Will and Testament*, ROBERTS & ROBERTS, LLP, <http://www.robertslegalfirm.com/estwills.html> (last visited May 7, 2020)).

¹⁹ Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sept. 7, 2010, 9:50 AM), <http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html> [https://perma.cc/HZD7-BVUN] (quoting an Indiana lawyer); cf. Williams, *supra* note 16 (“It would be like me doing a tune-up on my car when I’m not a mechanic. . . .” (quoting a California attorney)).

²⁰ Clowney, *supra* note 13, at 38.

²¹ See Emily S. Taylor Poppe, *The Future Is Bright Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 206 (2019) (“[T]here is reason to suspect that technological interventions may not yield estate plans that meet testators’ needs, but empirical evidence on this point is limited.”).

First, it is unclear whether individuals who draft their own wills are less affluent than those who hire lawyers. Although the average value of assets governed by DIY wills tends to be less than the mean amount of property controlled by conventional testamentary instruments, these differences are not statistically significant. Moreover, because vast sums pass from the dead to the living outside of the court system, a decedent's *probate* estate — the only variable to which I have access — is a flawed measure of her true net worth.

Second, there is more support for the proposition that DIY devices allow people who become suddenly ill to engage in testation. In both Alameda and San Francisco Counties, the mean number of days between execution and death is shorter by a statistically meaningful margin for most kinds of self-created wills than for lawyer-written instruments. And although true deathbed wills are rare, some testators do make their own wills just before the proverbial clock strikes midnight.

Third, the conventional wisdom that self-drafted wills beget lawsuits appears to be partially true. The Article attacks this issue by performing a logistic regression, which controls for the effect of other variables, including the testator's gender and marital status, whether an estate contains land, the existence of language expressly disinheriting a particular individual, the execution of a codicil, and whether a will divides property unequally among similarly-situated family members. It discovers that holographs in Alameda County and homemade and witnessed wills in San Francisco County are correlated with a statistically significant increase in the odds of litigation relative to the reference group of lawyer-drafted documents.

The Article contains two parts. Part I explores the history of DIY wills and articulates the arguments made by their supporters and skeptics. Part II uses my dataset to evaluate these dueling claims.

I. DIY WILLS

This Part provides background on DIY wills. It sorts them into four groups: those that are homemade and attested, holographic, on preprinted forms, and created by software. It then explains that the fierce debate over these devices has taken place in the absence of empirical evidence.

A. Homemade and Attested

Some people create a will from scratch and then have it attested. For example, Tom Von Gogh's will, which I mentioned in the Introduction, fits this mold.²²

Homemade and attested wills have deep roots. In 1540, Parliament passed the Statute of Wills, which required posthumous dispositions of land to be in writing.²³ Because literacy rates were low,²⁴ testators paid educated laymen from their community (called "scribes") to memorialize their last wishes.²⁵ These early testamentary instruments were unique. They were written by professionals who were not lawyers.²⁶ They featured a mix of language spoken by the decedent and inserted by the drafter.²⁷ And although the law did not require them to be attested, they usually boasted the signatures (or at least the names) of witnesses.²⁸

²² See *supra* Figure 1 and text accompanying notes 1–5.

²³ See Statute of Wills, 32 Hen. 8 c. 1 (Eng.).

²⁴ See DAVID CRESSY, *LITERACY AND THE SOCIAL ORDER: READING AND WRITING IN TUDOR AND STUART ENGLAND* 75 (1980) (reporting that literacy rates rarely exceeded 40% in various British regions in the mid-1600s).

²⁵ See Margaret Spufford, *The Scribes of Villagers' Wills in the Sixteenth and Seventeenth Centuries and Their Influence*, 7 *LOC. POP. STUD.* 28, 41 (1971) (explaining that scribes "range[d] from the Lord or lessee of the manor . . . to the schoolmaster [and] shopkeeper"). Testators often waited until the last minute to send for a scribe. In fact according to a common superstition, anyone who planned for succession while in good health would "not live long after." HENRIE SWINBURN, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* 25 (1590).

²⁶ See R.C. Richardson, *Wills and Will-Makers in the Sixteenth and Seventeenth Centuries: Some Lancashire Evidence*, 9 *LOC. POP. STUD.* 33, 35-36 (1972) (explaining that some scribes "had a profitable sideline in drawing up wills"). Clerics also wrote many wills, leaving a slim minority of work for attorneys. See Malcolm A. Moore, *The Joseph Trachtman Lecture — The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 *ACTEC L.J.* 159, 163 (2006) (tracing the influence of the Church on the contents of wills); Richardson, *supra* note 26, at 36 (estimating that about ten percent of wills were drafted by lawyers).

²⁷ See Spufford, *supra* note 25, at 30, 33-35 (detailing how scribes solicited information about bequests from testators but also included provisions that reflected the scribe's religious beliefs).

²⁸ See Richardson, *supra* note 26, at 35 (describing the use of witnesses). This practice may trace its origins to the ancient "nuncupative" will, which testators spoke on their deathbed and their beneficiaries then "proved by the testimony of witnesses." 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 539 (3d ed. 1923). Even in the era of scribes, nuncupative wills were common during times of plague. For example, in 1647, a shoemaker named George Hulton was forced to make his own will because "the extremitie of the contagion being so violent . . . he could not p(ro)cure anyone to come to him to make his will in writing." Richardson, *supra* note 26, at 41 n.9.

Gradually, attorneys muscled in on this terrain.²⁹ This shift may have stemmed from the fact that some celebrated judges began to disparage lay wills.³⁰ In addition, scribes became less helpful as lawmakers ramped up the formalities for executing a valid will. In 1677, the Statute of Frauds mandated that devises of real property be reduced to a signed and witnessed writing.³¹ In 1837, the Wills Act extended these rules to all testamentary instruments and added the element that the witnesses be “present at the same time” when the testator signed or acknowledged the document.³² Increasingly, testators asked counsel to shepherd them through the execution ceremony.³³ Will-making changed from a kind of deathbed confession to a ritual preformed “in the prime of life and in the presence of attorneys.”³⁴

American states inherited both the Wills Act and skepticism of DIY wills. Opinions from the late nineteenth and early twentieth centuries are full of tart remarks about self-authored estate plans.³⁵ For instance,

²⁹ This shift may have begun just before the dawn of the eighteenth century. See WILLIAM ASSHETON, *A THEOLOGICAL DI[S]COUR[S]E OF LAST WILLS AND TESTAMENTS* 2 (1696) (calling “Wills and Testaments . . . chiefly the Lawyer’s Province”).

³⁰ For example, in 1591, Lord Coke implored testators to hire lawyers:

[M]y advice to all who have lands, is, that you take care by the advice of learned counsel, by act executed, to make assurances of your lands according to your true intent, in full health and memory; to which assurances you may add such conditions or provisoes of revocation as you please. For I find great doubts and controversies daily arise on devises made by last wills . . . [due to their use of] obscure and insensible words, and repugnant sentences . . .

Butler and Baker’s Case (1591) 76 Eng. Rep. 684, 709; 3 Co. Rep. 25 a, 36 b (KB).

³¹ See Statute of Frauds 1677, 29 Cha. 2 c. 3 (Eng.).

³² Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26 (Eng.).

³³ See STEWART E. STERK ET AL., *ESTATES AND TRUSTS* 228 (4th ed. 2011) (“[T]he mysteries created by the formalities channel testators to lawyers, who are trained in . . . preparing wills. . .”).

³⁴ Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 *YALE L.J.* 1, 10 (1941).

³⁵ See, e.g., *Philbrook v. Randall*, 96 A. 725, 726 (Me. 1916) (“[T]he testator, in attempting to write his own will, inaptly expressed himself, not an infrequent occurrence in that class of wills.”). Other judges could not contain their frustration:

This will illustrates anew the mischief of the hurtful and expensive attempts of testators, unfamiliar with testamentary law, to economize by drawing their own wills. It is difficult to understand how persons of good business capacity and experience, with abundant means, and residing accessible to competent legal talent, will attempt to prepare their own wills, regardless of the difficulties they undertake and the responsibilities they thereby assume. Such persons, failing to recognize the importance of the undertaking, many times

as the Pennsylvania Court of Common Pleas observed in 1890, one DIY will had been mired in litigation for more than sixty years:

Jacques Jean Patient Mazurie was the lawyer's friend. He wrote his own will, with the usual result. The interpretation of that will, and the settlement of the rights of the persons claiming under it, have caused disputes and litigation, engaging the services of lawyers and the attention of judges from the date of the probate of the will, in 1822, down to the present time.³⁶

Likewise, in 1925, the Wisconsin Supreme Court confronted a testator who had unsuccessfully tried to satisfy the Wills Act himself.³⁷ Although he had secured two witnesses, they had not subscribed the document "in the presence of each other."³⁸ The state high court refused to enforce the instrument and admonished testators not to engage in self-help:

It is doubtful whether it is ever advisable for a testator to either draw or to personally assume the responsibility of the execution of his own will. When a testator makes a will he performs one of the most important functions arising during his lifetime The drafting of a will and the execution of such a document come within the proper functions and sphere of an attorney at law.³⁹

But despite horror stories like these, homemade and attested wills have never been seen as a discrete phenomenon. To my knowledge, no legislation or article has ever addressed these instruments. Likewise, the only regulation of self-made and witnessed wills has been indirect. In the mid and late twentieth century, a wave of opinions held that non-lawyers who prepared estate plans for third parties — modern descendants of scribes — had committed the unauthorized practice of

inflict upon the courts difficult questions and subject their estates to troublesome and expensive litigation.

In re Townley's Will, 144 N.Y.S. 750, 751 (Sur. Ct. 1913), *aff'd*, 164 A.D. 919 (App. Div. 1914).

³⁶ Appeal of Mazurie, 19 A. 29, 29 (Pa. 1890) (quoting an earlier decision from the Court of Common Pleas).

³⁷ *In re Foxen's Will*, 203 N.W. 328, 329 (Wis. 1925).

³⁸ *Id.* at 329. Ironically, the decedent — a businessman, insurance agent, and notary — was so beloved and respected in his hometown that "many of the leading citizens [e]ntrusted to him the important function of drawing their last wills and testaments." *Id.*

³⁹ *Id.* at 329-30.

law.⁴⁰ Otherwise, homemade and attested wills have been eclipsed by a more fraught species of DIY testamentary instrument: the holograph.

B. Holographic Wills

When people think about DIY wills, they usually picture holographs. As noted above, holographs need not be witnessed but must be handwritten by the testator.⁴¹ The theory behind this dilution of the Wills Act is that the testator's penmanship provides concrete evidence of authenticity.⁴²

The legal system has long been ambivalent about holographs. In Rome, where holographs emerged, the law fluctuated between narrowly allowing soldiers and sailors to inscribe their own wills and broadly deeming "any testament written by the testator's hand [to be] valid."⁴³ Today, Austria, Canada, France, Germany, Italy, and Spain enforce holographs, but Australia, England, Ireland, Scotland, and Wales do not.⁴⁴ America is almost perfectly divided. Including the District of Columbia and Puerto Rico, twenty-eight of fifty-two jurisdictions recognize holographs.⁴⁵ However, even holograph-friendly states

⁴⁰ See, e.g., *In re Estate of Margow*, 390 A.2d 591, 595 (N.J. 1978) (collecting authority).

⁴¹ See *supra* text accompanying note 11.

⁴² See, e.g., *Adams' Ex'x v. Beaumont*, 10 S.W.2d 1106, 1108 (Ky. 1928) ("[I]t is a well known fact that each individual . . . acquires a style of writing, a certain mannerism in the formation of letters and words, absolutely peculiar to himself, and which, almost without exception, renders his handwriting easily distinguishable from that of others . . ."); *Clowney*, *supra* note 13, at 33 ("Handwriting, in effect, assume[s] the role witnesses normally serve[.]").

⁴³ Reginald Parker, *History of the Holographic Testament in the Civil Law*, 3 JURIST 1, 4-5 (1943) (detailing how Roman lawmakers endorsed holographs in 446 B.C.); see also R.H. Helmholz, *The Origin of Holographic Wills in English Law*, 15 J. LEGAL HIST. 97, 102 (1994) (discussing how Roman law exempted "[t]he soldier's and sailor's will" from "the law's formalities, including that of attestation").

⁴⁴ 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, 211-12 (1991) ("The holographic form is not recognized in England or in common law jurisdictions that have a purely English tradition . . ."); Parker, *supra* note 43, at 5-10, 28-31 (describing how holographs migrated from Roman law to civil law regimes). But see R.H. Helmholz, *The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills*, 20 SYRACUSE J. INT'L L. & COM. 147, 157 (1994) (observing that "the holographic will was generally accepted in the English ecclesiastical courts during the late sixteenth and early seventeenth centuries").

⁴⁵ See *Clowney*, *supra* note 13, at 34 n.25 (collecting statutes); Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV.

disagree about how much of the document must be produced manually. Several have “first generation” statutes, which “require[] a holographic will to be *entirely* written, signed, and dated in the testator’s handwriting.”⁴⁶ Others, following the 1969 Uniform Probate Code (“UPC”), enacted “second generation” legislation, which only demands that the “material provisions” be in the testator’s hand.⁴⁷ And still others track the 1990 UPC and have adopted “third generation” laws, which loosen the standard to “material portions.”⁴⁸

Some commentators believe that holographs democratize estate planning. For starters, because anyone can scrawl their wishes on a piece of paper, holographs serve as a “poor man’s will.”⁴⁹ As Adam Hirsch puts it, the device “ensur[es] that a person’s modest financial means do not abridge her legal means”⁵⁰ In addition, holographs can be a safety valve for people who fall suddenly ill or are caught in an

159, 162-69 (1988) (detailing how “particular statutory requirements vary from jurisdiction to jurisdiction”); *see also infra* notes 46–48.

⁴⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 cmt. b (AM. LAW INST. 1999) (emphasis in original); *see* ARK. CODE ANN. § 28-25-104 (2019); KY. REV. STAT. ANN. § 394.040 (2019); LA. CIV. CODE ANN. art. 1575 (2019); MISS. CODE ANN. § 91-5-1 (2019); OKLA. STAT. ANN. tit. 84, § 54 (2019); P.R. LAWS ANN. tit. 31, § 2161 (2019); TEX. EST. CODE ANN. § 251.107 (2019); VA. CODE ANN. § 64.2-403 (2019); W. VA. CODE § 41-1-3 (2019); WYO. STAT. ANN. § 2-6-113 (2019); *cf.* N.C. GEN. STAT. § 31-3.4 (2019) (mandating that the holograph be entirely handwritten with the exception of unimportant “printed matter” and also requiring the document to be “[f]ound after the testator’s death among the testator’s valuable papers or effects, or in a safe-deposit box or other safe place”).

⁴⁷ UNIF. PROB. CODE § 2-503 & cmt. (UNIF. LAW COMM’N 1969) (explaining also that “a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped”); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 cmt. a (AM. LAW INST. 1999); *see* CAL. PROB. CODE § 6111 (2019); IDAHO CODE § 15-2-503 (2019); TENN. CODE ANN. § 32-1-105 (2019); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (repealed 2019).

⁴⁸ UNIF. PROB. CODE § 2-503 (amended 1990); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 cmt. b (AM. LAW INST. 1999) (“The material portion of a dispositive provision — which must be in the testator’s handwriting under the Revised UPC — are the words identifying the property and the devisee.”); *see* ALASKA STAT. § 13.12.502 (2019); COLO. REV. STAT. § 15-11-502 (2019); HAW. REV. STAT. § 560:2-502 (2019); MICH. COMP. LAWS ANN. § 700.2502 (2019); MONT. CODE ANN. § 72-2-522 (2019); N.J. STAT. ANN. § 3B:3-2 (2019); N.D. CENT. CODE § 30.1-08-02; S.D. CODIFIED LAWS § 29A-2-502 (2019); UTAH CODE ANN. § 75-2-502 (2019).

⁴⁹ L.H.H., Jr., Note, *Holographic Wills in Virginia: Problems at Probate*, 45 VA. L. REV. 613, 627 (1959); *see also* Robey-Phillips, *supra* note 13, at 315 (“[H]olographs are more accessible to all.”).

⁵⁰ Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1074 (1996).

unexpected calamity.⁵¹ One of the most infamous stories in the field of decedents' estates seems to bear this out. In 1948, a Canadian farmer named George Cecil Harris became trapped under his tractor and used his penknife to scratch an enforceable holograph into the fender: "In case I die in this mess I leave all to the wife."⁵² Arguably, then, holographs open doors for "persons who are unable or unwilling to secure the assistance of counsel"⁵³

But critics claim that holographs clog the court system with litigation.⁵⁴ First, members of this camp contend that too many testators botch the requirement that the will be entirely or largely handwritten.⁵⁵

⁵¹ See Clowney, *supra* note 13, at 37-38 ("In certain cases, holographs may be the *only* tool available to testators who fall seriously ill and wish to execute a will before death."). This view goes back to the West Roman co-emperor Valentinian III, who declared that handwritten wills should be valid because "it often happens that there are no witnesses available . . . in case of an emergency" Parker, *supra* note 43, at 4-5.

⁵² Geoff Ellwand, *An Analysis of Canada's Most Famous Holograph Will: How A Saskatchewan Farmer Scratched His Way into Legal History*, 77 SASK. L. REV. 1, 1, 3 (2014).

⁵³ *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982); see also Succession of Bacot, 502 So. 2d 1118, 1121-22 (La. Ct. App. 1987) ("The principal value of an olographic testament is simplicity. It can be confected by a layman without the assistance of legal counsel."). Or as the UPC puts it (in a less than ringing endorsement): "For persons unable to obtain legal assistance, the holographic will may be adequate." UNIF. PROB. CODE § 2-503 cmt. (UNIF. LAW COMM'N amended 1990).

⁵⁴ See Brown, *supra* note 14, at 95 ("Because they are invariably homemade, holographic wills present a range of chronic and unnecessary problems."). Perhaps the most famous expression of this sentiment is Lord Charles Neaves's poem *The Jolly Testator Who Makes His Own Will*:

Ye Lawyers who live upon litigants' fees,
And who need a good many to live at your ease;
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me.
When a festive occasion your spirit unbends,
You should never forget the Profession's best friends;
So we'll send round the wine and a bright bumper fill
To the jolly Testator who makes his own Will.

LORD CHARLES NEAVES, SONGS AND VERSES: SOCIAL AND SCIENTIFIC 106 (5th ed. 1879). Even a century and a half later, Neaves's work still appears in contemporary discussions of DIY will-making. See, e.g., Scott Powers & Orlando Sentinel, *Need a Will or Prenup? Web Can Be a Low-Cost Option*, ORLANDO SENTINEL (Nov. 28, 2010), <https://www.orlandosentinel.com/features/os-xpm-2010-11-28-os-law-and-you-legal-software-20101123-story.html> [<https://perma.cc/BZ7S-ADT3>] (quoting the poem).

⁵⁵ See, e.g., *In re Brown*, No. CL12-1429, 2012 WL 9737561, at *3 (Va. Cir. Ct. Aug. 21, 2012) (refusing to enforce a typewritten "holograph" and rejecting the proponent's argument that because the testator "'typed everything,' typing could be considered her handwriting").

Reportedly, there is “a large and ugly case law voiding wills which contain[] some innocuous printed matter.”⁵⁶ Second, because holographs lack the safeguard of witnesses, they supposedly encourage fraud, duress, forgery, and undue influence. As Ashbel Gulliver and Catherine J. Tilson famously quipped, “[a] holographic will is obtainable by compulsion as easily as a ransom note.”⁵⁷ Third, because holographs can be so casual, they allegedly raise questions about testamentary intent: whether a decedent meant a handwritten statement about death and property to be a stream-of-consciousness musing or a full-fledged will.⁵⁸ Finally, because lay testators mangle terms of art, holographs are said to be “rife with difficult issues of interpretation.”⁵⁹

Unfortunately, there is almost no empirical evidence about holographs. One exception is Stephen Clowney’s survey of 145 such wills that were filed in Allegheny County, Pennsylvania, in 1990 and 1995.⁶⁰ Clowney found that holograph authors “came from an unexpected variety of socio-economic backgrounds”: 14% had estates of more than \$100,000, but 20% owned less than \$10,000.⁶¹ In addition, Clowney unearthed some evidence that holographs can function as emergency room wills.⁶² Specifically, 10% of holographs were “deathbed wills,” and an additional 11% were executed within a year of the testator’s demise.⁶³ Finally, Clowney discovered that only six holographs (4%) led to a dispute.⁶⁴ He observed that other researchers

⁵⁶ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 519 (1975). At the turn of the twentieth century — the heyday of first generation holograph statutes — courts routinely denied probate when a putative holograph contained only a few printed words or letters. See, e.g., *Estate of Billings*, 1 P. 701, 701 (Cal. 1884) (invalidating purported holograph because the words “Sacramento” and “1880” were not handwritten); *In re Noyes’ Estate*, 105 P. 1017, 1018-21 (Mont. 1909) (refusing to enforce an attempted holograph where “the writing meets all of the requirements, except that the figures ‘190-,’ in the designation of the year in the date, are printed . . .”). According to some contemporary scholars, even despite the UPC’s efforts to shave the sharp edges off these decisions, “[t]he requirement that holographic wills be entirely, wholly, or materially in the handwriting of the testator remains a serious problem.” Brown, *supra* note 14, at 110.

⁵⁷ Gulliver & Tilson, *supra* note 34, at 14 (“A holographic will is obtainable by compulsion as easily as a ransom note.”).

⁵⁸ See Bird, *supra* note 14, at 605 (“[T]estators who write casual letters to a friend, or who nonchalantly scribble changes on the face of a formally attested will, may discover (from beyond the grave) that they have executed a valid holographic will . . .”).

⁵⁹ Brown, *supra* note 14, at 123.

⁶⁰ See Clowney, *supra* note 13, at 40-42.

⁶¹ *Id.* at 44-45.

⁶² See *id.* at 58.

⁶³ *Id.*

⁶⁴ *Id.* at 59.

have uncovered litigation rates of between 2% and 10% for attested wills.⁶⁵ Putting these pieces together, he rejected the oft-voiced argument that holographs “account for a larger *proportionate* share of legal scraps.”⁶⁶

More recently, I examined 332 wills stemming from deaths in 2007 in Alameda County, California.⁶⁷ Most of my conclusions about holographs were qualitative, not quantitative. For example, I noticed that one testator had executed a holograph hours before she died, and another’s will began “[s]ince it is too hard finding willing witnesses to sign my will, I am rewriting the entire will by hand”⁶⁸ However, I also tried to build on Clowney’s analysis in one respect. Because Clowney did not collect information about attested wills, he was forced to juxtapose the litigation rate of holographs from Allegheny County in 1990 and 1995 with statistics about conventional wills from *other* areas and time periods.⁶⁹ This reduces the utility of his findings. After all, if *no* formal wills sparked conflict during his research window, then holographs may not be as benign as he contends. But because I harvested data from both holographic and attested wills, I was able to make an apples-to-apples comparison within Alameda County. When I did so, I determined that holographs accounted for only 10% of the wills in my sample, but generated 23% of all litigation.⁷⁰ Thus, this Article and Clowney’s point in opposite directions on this issue.

C. Form Wills

Yet another genus of DIY testamentary instrument is the preprinted template. Since the nineteenth century, stationery stores and publishers have sold boilerplate forms with spaces for testators to list their assets and name their beneficiaries.⁷¹

⁶⁵ *Id.* at 60.

⁶⁶ *Id.*

⁶⁷ See David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1102, 1134 (2015) [hereinafter *Wills Law*].

⁶⁸ *Id.* at 1137-38 (quoting Will Dated Aug. 13, 2007 at 1, Estate of Wu, No. FP07354780 (Cal. Super. Ct. Dec. 21, 2007)).

⁶⁹ See Clowney, *supra* note 13, at 42, 60-61, 61 n.125 (citing evidence from New York in 1993 and San Bernardino County, California in 1964).

⁷⁰ See Horton, *Wills Law*, *supra* note 67, at 1134. The 23% figure is the litigation rate in testacies and thus excludes intestacies. See *id.*

⁷¹ See *In re Estate of Rand*, 61 Cal. 468, 474 (1882) (involving a will written on “a stationer’s blank”); JOHN G. WELLS, *WELLS’ EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK 7* (1879) (offering preprinted forms that empower “the farmer, the mechanic, the manufacturer . . . to draw up any instrument in writing”); M.H. Hoeflich,

For decades, form wills lurked in the shadow of holographs. Technically, the two instruments are unique: unlike holographs, which need to be (at least) largely handwritten and do not need to be attested, forms are only partially handwritten and must be attested. Often, however, a testator filled in the blanks on a form by hand and then failed to obtain witnesses. This posed the question of whether the handwritten portions of the document could stand on their own as a valid holograph. Some jurisdictions confronted this problem by adopting the “intent” theory, which held that a form was not “entirely handwritten” — and thus failed as a holograph — if the testator had meant to incorporate any of the printed matter into the will.⁷² Others embraced the “surplusage” doctrine, which asked whether the court could ignore the typed material and salvage a coherent will from the handwriting alone.⁷³ But perhaps because of this shared doctrinal heritage, forms were seen as a variation on holographs rather than a unique estate planning tool.⁷⁴

Then, in the last quarter of the twentieth century, form wills suddenly came into vogue. As Norman Dacey’s best-selling *How to Avoid Probate* piqued interest in DIY estate planning,⁷⁵ academics argued that readymade documents could “greatly reduc[e] the cost of obtaining a

Law Blanks & Form Books: A Chapter in the Early History of Document Production, 11 GREEN BAG 2d 189, 195-99 (2008) (describing the “law blank” business).

⁷² See *In re Estate of Rand*, 61 Cal. at 474 (refusing to “omit[] the printed portions”); *In re Wolcott’s Estate*, 180 P. 169, 170 (Utah 1919) (“The printed matter in the instrument offered was just as much a part of its contents as the script written by [the decedent’s] own hand. She adopted the printed matter in order to fully express her intention.”); WILLIAM HERBERT PAGE, A CONCISE TREATISE ON THE LAW OF WILLS 252 (1901) (“A will written on the printed form by filling in blanks is not a good holographic will.”).

⁷³ See *Gooch v. Gooch*, 113 S.E. 873, 876 (Va. 1922) (“[T]he printed portions of the form on which the writing was found . . . may be disregarded, leaving that portion of the writing which is wholly in the handwriting of the testator and signed by him.”). To be clear, the intent and surplusage doctrines applied to all potential wills that featured a blend of handwriting and typewriting (not just to forms). See *In re Lowrance’s Will*, 155 S.E. 876, 878 (N.C. 1930) (applying the surplusage theory to a document that was not preprinted); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.2 cmt. b (AM. LAW INST. 1999) (discussing both rules under the general topic of holographs).

⁷⁴ As with other kinds of homemade wills, form wills sometimes elicited judicial scorn. See, e.g., *In re Bates’ Will*, 274 N.Y.S. 93, 94 (Surr. Ct. 1934) (“The document in question is on the usual legal form, and was obviously prepared without legal advice.”).

⁷⁵ Focusing on trusts, Dacey’s book “told laymen how to set up their own estates without legal counsel.” Edwin McDowell, *Book Notes*, N.Y. TIMES, Mar. 7, 1990, at C23, available at <http://www.nytimes.com/1990/03/07/arts/book-notes-459190.html> [<https://perma.cc/5CUD-8NMY>].

simple will.”⁷⁶ Lawmakers in California, Maine, Michigan, and Wisconsin responded by creating “statutory” form wills: fill-in-the-blank booklets that were free and accessible to the public.⁷⁷ These instruments featured plain English instructions and allowed testators to select off-the-rack dispositions, such as “I give everything . . . I own to my spouse”⁷⁸ or “all to my descendants (my children and the descendants of my children) who survive me.”⁷⁹

But this movement quickly fizzled. Policymakers soon recognized that statutory form wills were not necessarily user-friendly. For example, in *Estate of Smith*, a California trial court refused to enforce such an instrument, calling it “confusing to a lay person” and reasoning

⁷⁶ Harold Marquis, Barbara Croft Hipple & Judith M. Becker, *The Questionnaire Will: A Device to Facilitate Testamentary Freedom for the Less Affluent*, 30 U. FLA. L. REV. 669, 676 (1978); see also Edward C. Halbach, Jr., *Probate and Estate Planning: Reducing Need and Cost Through Change in the Law*, in DEATH, TAXES AND FAMILY PROPERTY 165, 169-70 (1977) (advocating for the use of “standardized” wills).

⁷⁷ See CAL. PROB. CODE §§ 6220-27 (2020); MICH. COMP. LAWS ANN. § 700.2519 (2020); WIS. STAT. ANN. § 853.55 (2020); ME. REV. STAT. ANN. tit. 18-A, § 2-514 (repealed 2019). In addition, in 1984, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Statutory Will Act. See Gerry W. Beyer, *Statutory Will Methodologies — Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231, 244 (1990). Unlike statutory form wills and commercial form wills, which expressly list their provisions, the Act set forth terms that testators could incorporate by reference. See *id.* at 252. Only Massachusetts and New Mexico adopted the Act. See MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (2020); N.M. STAT. ANN. §§ 45-2A-2 to -17 (2020). As a result, “[t]he Uniform Law Commission no longer promotes the Uniform Statutory Will Act as a recommended Act.” RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.1 cmt. 15 (AM. LAW INST. 1999).

⁷⁸ MICH. COMP. LAWS ANN. § 700.2519 (2020).

⁷⁹ CAL. PROB. CODE § 6240 (2020). In addition, lawmakers in the Golden State encouraged testators to use the device by creating a “harmless error”-style safe harbor for unattested statutory form wills:

[A] document executed on a California statutory will form is valid as a will if all of the following requirements are shown to be satisfied by clear and convincing evidence:

- (1) The form is signed by the testator.
- (2) The court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.
- (3) The testamentary intent of the maker as reflected in the document is clear.

PROB. § 6226(c); cf. *Estate of Perry*, 58 Cal. Rptr. 2d 797, 799 (Cal. Ct. App. 1996) (rejecting argument that testator had failed to create a valid statutory form will when a third party had filled out the blanks and reasoning that the legislature had intended to “eas[e], not tighten[], the general requirements for execution of wills on statutory will forms”).

that the testator had filled it out in a way that “makes absolutely no sense.”⁸⁰ Similarly, Gerry Beyer conducted a study in which he asked fifty-one subjects from a variety of educational backgrounds to fill out statutory form wills.⁸¹ His conclusions were sobering: “[l]ess than 30% of all participants were able to complete the statutory will forms without error [and] . . . almost 25% of the wills were partially invalid.”⁸² Accordingly, no jurisdiction has passed statutory form will legislation since the 1980s.⁸³ Moreover, as I discuss next, form wills have now been eclipsed by their futuristic cousin: the online will.

⁸⁰ Estate of Smith, 71 Cal. Rptr. 2d 424, 427 (Cal. Ct. App. 1998) (quoting the trial court). In this case, Belva C. P. Smith executed a holographic will that left her estate to her beloved daughter and granddaughter. *Id.* at 426. Several years later, Smith signed a statutory form will that gave the bulk of her assets to her husband if he survived her, and if not, to a trust for her children who were “under 21 years of age.” *Id.* (emphasis omitted). The trial court credited testimony that Smith was close to her child and grandchild and reasoned that because Smith had no children under twenty-one, she must have signed the will by mistake. *See id.* at 427. The court of appeals reversed on the grounds that a testator’s misunderstanding about what a will says is not sufficient to invalidate the instrument. *See id.* at 431. In addition, the appellate panel was skeptical of the trial court’s logic, noting that the provision for children under twenty-one was irrelevant because Smith’s spouse had outlived her. *See id.* at 432.

⁸¹ See Gerry W. Beyer, *Statutory Fill-in Will Forms — The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 797-98 (1993).

⁸² *Id.* at 810. For a contemporary nightmare involving a form will, see Aldrich v. Basile, 136 So. 3d 530 (Fla. 2014). Ann Aldrich executed an “E-Z Legal Form” will that left her house, car, and some specific financial accounts to her sister as primary beneficiary and her brother as contingent beneficiary. *See id.* at 531. Three years later, Aldrich’s sister died, leaving Aldrich cash and land. *Id.* at 531-32. Aldrich tried to execute a holographic codicil to her will that reiterated her desire that her brother inherit “all [her] worldly possessions.” *Id.* at 533. However because Florida does not recognize holographs, the would-be codicil was invalid. *See id.* Making matters worse, because the E-Z Legal Form did not include a residuary clause, it did not dispose of the property that Aldrich had inherited from her sister. *See id.* at 532-33. The Florida Supreme Court thus ignored Aldrich’s obvious intent and held that these assets passed by intestacy. *See id.* at 535. During the litigation, the Real Property Probate and Trust Law Section of The Florida Bar took the extraordinary step of filing a brief urging the court to enforce the E-Z Legal Form as written. *See Amicus Curiae Brief of Real Property Probate & Trust Law Section of Florida Bar* (supporting the decision under review) at 4, Aldrich v. Basile, 136 So. 3d 530 (Fla. 2014) (No. SC11-2147), 2012 WL 11829245, at *4 (“The Section believes that as a policy matter, courts should not be able to add words and testamentary intent to a will where the testator was silent.”). This position almost certainly stems from the probate bar’s desire to discourage DIY will-making by forcing self-directed testators to live with the consequences of their mistakes.

⁸³ See Beyer, *supra* note 77, at 268 (noting that Michigan, the last jurisdiction to enact such a statute, did so in 1986).

D. Software Wills

Recently, DIY legal service companies have offered a rainbow of cheap will-making options on the internet.⁸⁴ For example, Nolo Press charges \$89.99 for downloads of Quicken WillMaker.⁸⁵ LegalZoom sells a standalone will for about \$90⁸⁶ and a bundle that starts at \$179 that also features a power of attorney, a health care directive, and a year of access to a lawyer.⁸⁷ Rocket Lawyer offers monthly subscriptions for roughly \$40 that permit testators to “mak[e] as many revisions as [they] need.”⁸⁸ Finally, other firms furnish online testamentary instruments for free, making their money from advertising⁸⁹ or by selling data to charities.⁹⁰

These products generally operate the same way. They ask consumers about their family, assets, and wishes, and use the answers to populate the fields of a digital template.⁹¹ The process can take as little as fifteen

⁸⁴ As of 2013, online DIY legal service companies were a \$400 million industry. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3058-59 (2014).

⁸⁵ See *Quicken WillMaker & Trust 2020*, NOLO, <https://store.nolo.com/products/quicken-willmaker-plus-wqp.html> (last visited Mar. 13, 2020) [<https://perma.cc/F983-QZ9T>]. Nolo was founded by two legal aid lawyers in 1971 who self-published DIY guides to divorce, forming a corporation, and executing a will. See *Our History*, NOLO, <https://www.nolo.com/about/history> (last visited Mar. 13, 2020) [<https://perma.cc/42A9-X55Z>]. Nolo recently pivoted from paper to pixels. See Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 *ALB. L. REV.* 553, 569 n.113 (2014).

⁸⁶ See *Estate Planning: Last Will and Testament*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html> (last visited Mar. 13, 2020) [<https://perma.cc/6JRG-3C7F>].

⁸⁷ See *Estate Planning: Estate Plan*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/estate-planning-bundle.html> (last visited Mar. 13, 2020) [<https://perma.cc/FPD6-TZQS>].

⁸⁸ Rebecca Lake, *The 8 Best Online Will Makers of 2020*, BALANCE, <https://www.thebalance.com/best-online-will-makers-4580500> (last updated Nov. 21, 2019) [<https://perma.cc/FA9T-FPT4>].

⁸⁹ See *id.* (describing doyourownwill.com).

⁹⁰ See Paul Sullivan, *Making Wills Easier and Cheaper With Do-It-Yourself Options*, *N.Y. TIMES* (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/your-money/online-wills.html> [<https://perma.cc/SRH8-VCZ5>] (detailing FreeWill, which “costs its users nothing, but . . . makes its money from the charitable institutions that pay a fee for using the . . . service to reach out to donors”). Other online DIY will vendors include Law Depot, Willing, TotalLegal, and U.S. Legal Wills. See Lake, *supra* note 88.

⁹¹ See Lynnette Khalfani-Cox, *Cost-Effective Wills*, AARP, <https://www.aarp.org/money/estate-planning/info-03-2011/cost-effective-wills.html> (last visited Mar. 13, 2020) [<https://perma.cc/PA7L-5EVS>] (“When you create a will online, you are walked step-by-step through a series of questions to help you create the will.”); Sullivan, *supra*

minutes.⁹² Some companies allow testators to print the completed draft immediately,⁹³ whereas others require a few business days (presumably to review the instrument).⁹⁴ Ultimately, as with both homemade and attested wills and form wills, testators must sign the document and have it witnessed in compliance with the Wills Act.⁹⁵

Some scholars applaud these developments. For example, Iris Goodwin heralds “the advent of the computer-assisted, lay-created will” as “momentous, portending the transformation of this area of the law from an elite universe to one by and for everyone.”⁹⁶ Likewise, in an excellent article, Reid Weisbord urges lawmakers to create a statutory form will for the twenty-first century.⁹⁷ To fight the plague of widespread intestacy, Weisbord proposes that states create a “testamentary schedule”: a simple will “attached to the state individual income tax return that could be filed and updated electronically.”⁹⁸

In sharp contrast, internet wills are anathema to probate lawyers. For instance, the American Bar Association Section of Real Property Trust

note 90 (displaying screenshots from FreeWill and Rocket Lawyer’s will-making software).

⁹² See *Estate Planning: Last Will and Testament*, *supra* note 86 (“Many people finish in 15 minutes.”); *cf.* Sullivan, *supra* note 90 (describing a DIY testator whose “finished her will in less than an hour”).

⁹³ See *Form: Last Will and Testament*, ROCKET LAWYER, <https://www.rocketlawyer.com/form/last-will-and-testament.rl#/> (last visited Mar. 13, 2020) [<https://perma.cc/7DJT-DPKQ>] (“Download and print anytime.”); *Printing & Exporting Willmaker Documents*, NOLO, <https://www.nolo.com/technical-support-main/willmaker-printing-exporting-willmaker-documents.html#2> (last visited Mar. 13, 2020) [<https://perma.cc/PAT3-WAW8>] (explaining that users only need to finish the “interview” before printing).

⁹⁴ *Estate Planning: Last Will and Testament*, *supra* note 86 (explaining that users can download wills after two to seven business days).

⁹⁵ See Khalfani-Cox, *supra* note 91 (noting that online wills must be attested); Sullivan, *supra* note 90 (explaining that one testator who made a will online “had it signed by three witnesses and notarized”).

⁹⁶ Goodwin, *supra* note 13, at 951. Goodwin notes that some courts are especially forgiving when interpreting the terms of a holographic will. See *id.* at 965-67. She argues that judges should apply the same leniency to online DIY wills:

What matters is not whether the online, do-it-yourself will is attested. What matters is that it is prepared without assistance of legal counsel. In this way, it bears a significant feature in common with the holographic will and should get the benefit of the relief often shown the handwritten, unwitnessed will.

Id. at 969.

⁹⁷ See Weisbord, *supra* note 13, at 920.

⁹⁸ *Id.* at 880.

and Estate Law has taken the position that software wills are almost always a bad idea:

[I]f a person has modest assets in his name alone, and desires to leave them to his closest surviving relative, it may be appropriate and cost-effective to use an online service. But for individuals with even slightly more complicated circumstances, creating a Will online creates risk — risk in an area that will have lasting consequences.⁹⁹

Likewise, legal blogs contain dark predictions that “the proliferation of [online] DIY Wills will almost certainly increase the volume of estate litigation in the future.”¹⁰⁰ Finally, attorneys interviewed by journalists call these instruments a fount of “expensive and unpleasant state planning mistakes,”¹⁰¹ and say that they are suitable only if “you are single and have absolutely no money.”¹⁰²

Nevertheless, we know even less about how software wills fare than we know about other types of self-made testamentary instruments. As Goodwin observes, there are no known judicial opinions involving internet wills:

Th[e] hue and cry notwithstanding, there is to date precious little case law with which to establish that the public is ill-served by the online, do-it-yourself will. Where the law of wills is concerned, no case law has emanated from a probate or a construction proceeding that would validate particular expressed concerns. Indeed, at this point, the most powerful evidence against these wills is largely anecdotal¹⁰³

⁹⁹ *Do It Yourself Estate Planning*, AM. BAR ASS'N, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/diy_estate_planning/ (last visited Mar. 13, 2020) [<https://perma.cc/EB9T-WXFY>].

¹⁰⁰ Will Sleeth, *Do It Yourself Wills: Will They Lead to More Litigation?*, LEXOLOGY (Nov. 7, 2016), <https://www.lexology.com/library/detail.aspx?g=65595926-abc9-4be5-b31e-ff314cd91a9d> [<https://perma.cc/4A5J-PSZJ>].

¹⁰¹ Marguerite C. Lorenz, *The Problems with Do-It-Yourself Online Wills*, FORBES (Mar. 29, 2019, 3:06 PM), <https://www.forbes.com/sites/nextavenue/2019/03/29/the-problems-with-do-it-yourself-online-wills/#25a0f20822b8> [<https://perma.cc/CRA7-4UNE>].

¹⁰² Kimberly Palmer, *The Dangers of DIY Estate Planning*, BARRON, ROSENBERG, MAYORAS & MAYORAS P.C. (Sept. 20, 2016), <https://www.brmmlaw.com/blog/2016/september/the-dangers-of-diy-estate-planning/> [<https://perma.cc/UVA7-B3YL>] (quoting a New York attorney).

¹⁰³ Goodwin, *supra* note 13, at 957.

In sum, although technology has rekindled interest in the debate over DIY wills, both sides cannot support their claims with data. The next Part takes a first step toward filling this gap.

II. EVIDENCE ABOUT DIY WILLS

This Part explains what my research reveals about self-made wills. It starts by describing my methodology. It then uses evidence from probate court to shed light on three issues that inform discussions about DIY wills: whether these instruments allow low-income people to engage in testation, facilitate emergency room estate planning, and lead to litigation.

A. Research Methodology and Caveats

I based my analysis of DIY wills on two datasets. The first is from Alameda County, California: an economically and culturally diverse region in the eastern Bay Area. Using the website Domainweb, I gathered about fifty variables from every estate that both stemmed from deaths in 2007 and appeared on the docket between January 1, 2008 and March 1, 2009.¹⁰⁴ I later expanded this universe of cases to include all testacies that passed through the system in March and April 2009.¹⁰⁵ The second group of matters is from San Francisco County. Using the San Francisco Superior Court's online "search by date" function, research assistants pulled every case that appeared on the docket between January 1, 2014 and December 31, 2016.¹⁰⁶ I then cut

¹⁰⁴ I have used this information to inflict several articles on readers over the years, including David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 626 (2015) [hereinafter *In Partial Defense of Probate*] and Horton, *Wills Law*, *supra* note 67, at 1121. I also built it out by harvesting about ten data points from cases that were heard between March 1, 2009 and December 31, 2010. See David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 IOWA L. REV. 2027, 2046 (2018) [hereinafter *Partial Harmless Error for Wills*] (studying 2,453 of these estates); see also David Horton, *Borrowing in the Shadow of Death: Another Look at Probate Lending*, 59 WM. & MARY L. REV. 2447, 2477 (2018) [hereinafter *Borrowing in the Shadow of Death*] (analyzing 2,100 of these cases). I was unable to expand my research further because Domainweb began charging for downloads. See *How This Site Works*, SUPERIOR CT. CAL.-COUNTY ALAMEDA, <https://publicrecords.alameda.courts.ca.gov/PRS/Home/HowThisSiteWorks> (last visited Mar. 13, 2020) [<https://perma.cc/Z3VP-6YF6>].

¹⁰⁵ See David Horton & Reid K. Weisbord, *Boilerplate No Contest Clauses*, 83 L. & CONTEMP. PROBS. (forthcoming 2020) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385504.

¹⁰⁶ See *Case Calendar*, SUPERIOR CT. CAL.-COUNTY S.F., <https://sfsuperiorcourt.org/> (under tab "Online Services," follow "Case Calendar," then in tab "Search By Date,"

intestacies and collected roughly thirty variables from each remaining administration.

Admittedly, my research is imperfect in a few ways. First, neither Alameda nor San Francisco County are nationally representative. Both have larger median household incomes, higher median home values, lower poverty levels, and slightly greater access to technology than the larger United States.¹⁰⁷ Because decedents in these regions are comparatively wealthy, they might be more willing to pay for a lawyer-drafted estate plan. Alternatively, their technological fluency could make them particularly comfortable with software wills.

Second, California's status as a community property jurisdiction distorts the demographics of my data. When a husband or wife dies, the survivor can claim their share of the estate outside of probate by filing a spousal property petition.¹⁰⁸ In turn, because the first member of a married couple will not show up in the files, my research oversamples single people. Indeed, just 45 of the 457 testators (9.9%) in Alameda County and 100 of the 676 (14.8%) testators in San Francisco County were married at death.¹⁰⁹

Third, my analysis depends on a coding rubric that is partially subjective. I sorted every will into one of five categories: lawyer-drafted, homemade and attested, holographic, form, or produced by software. Holographs and forms are easy to spot.¹¹⁰ Likewise, I was able to obtain samples of wills from Nolo Press, LegalZoom, Rocket Lawyer, U.S. Legal

input in the field "Court Date" each date between January 1, 2014 and December 31, 2016) (last visited May 7, 2020) [<https://perma.cc/KK62-R49Z>].

¹⁰⁷ *Compare QuickFacts: Alameda County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/alamedacountycalifornia> (last visited Mar. 13, 2020) [<https://perma.cc/9GTM-BRYM>] (listing Alameda County's median household income as \$92,574, median owner-occupied housing value as \$707,800, poverty rate as 9.0%, and percentage of homes with computers as 93.6%), and *QuickFacts: San Francisco County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/sanfranciscocountycalifornia> (last visited Mar. 13, 2020) [<https://perma.cc/JD8Q-G7KX>] (calculating San Francisco County's median household income as \$104,552, median owner-occupied housing value as \$1,009,500, poverty rate as 10.1%, and percentage of homes with computers as 91.9%), with *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Jan. 17, 2020) [<https://perma.cc/HVQ6-QS4H>] (noting that the United States has a median household income of \$60,293, a median owner-occupied housing value of \$204,900, a poverty rate of 11.8%, and percentage of homes with computers as 88.8%).

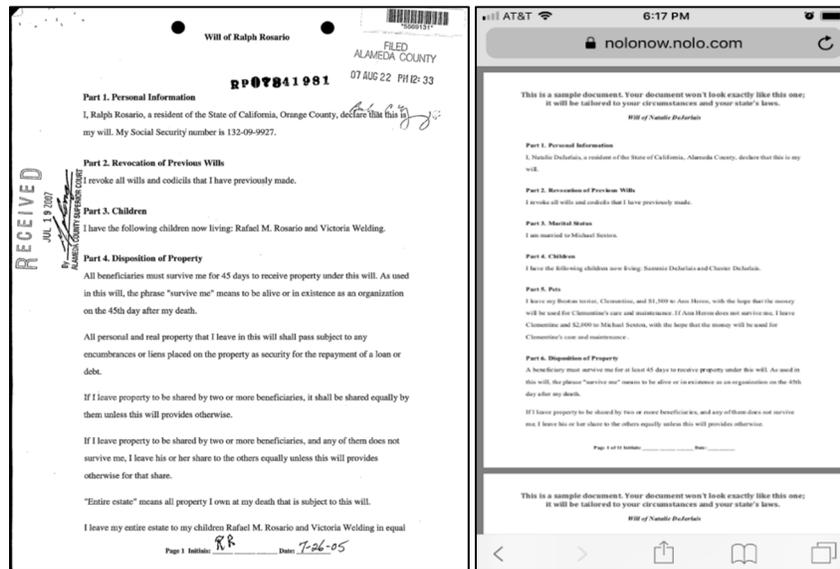
¹⁰⁸ See CAL. PROB. CODE § 13500 (2020).

¹⁰⁹ Conversely, 118 of 457 testators (26%) in Alameda County and 187 of the 675 testators (27.7%) on which I have information in San Francisco County were married when they executed their wills.

¹¹⁰ I labelled a will as "holographic" if it was handwritten and *unwitnessed*. On the other hand, I treated a handwritten and *witnessed* will as "homemade and attested."

Wills, LawDepot, and doyourownwill.com and use them to identify software wills in Alameda and San Francisco Counties.¹¹¹ Yet it is possible that a less-prominent vendor's software will fell through the cracks. Similarly, I could not always tell whether a particular document was written by a lawyer or by the testator. Although I was often able to ferret out the truth by reading the record, about a half dozen cases boiled down to my intuition.

Figures 3, 4, & 5. Software Wills in My Data Compared to Exemplars

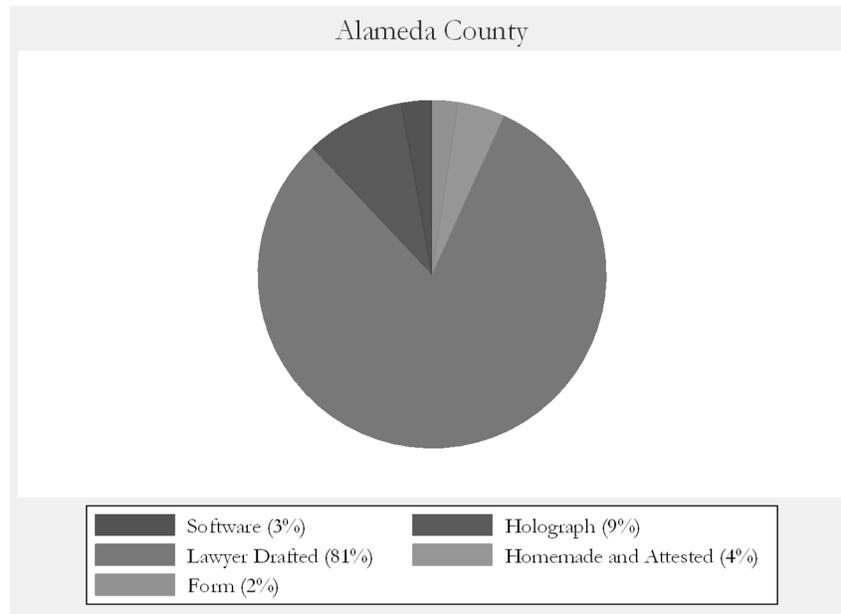


¹¹¹ See *infra* Figures 3-5 (presenting software wills found in my data side-by-side with exemplars found on these websites).

B. Results

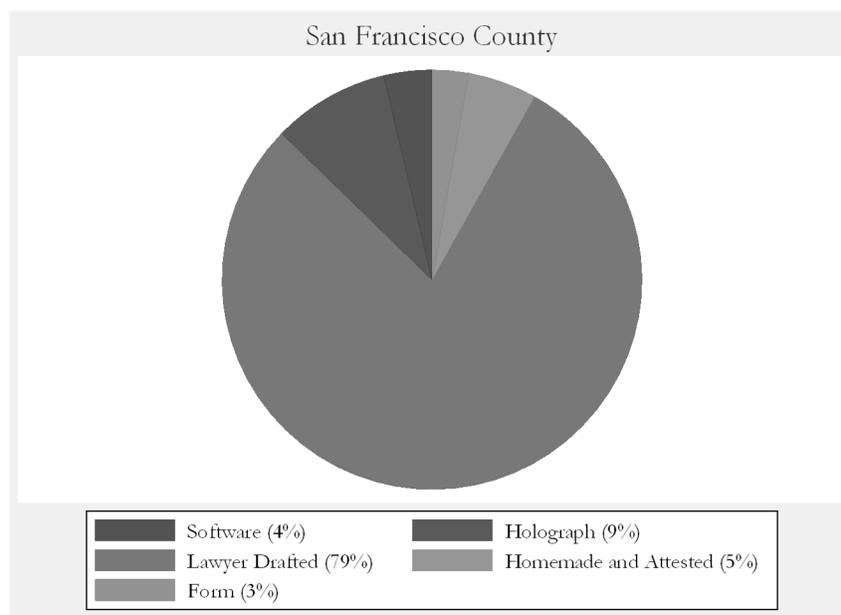
Both groups of files had nearly identical ratios of DIY wills. In Alameda County, 86 of the 457 instruments (19%) were self-made, including twenty homemade and attested wills, forty-two holographs, eleven forms,¹¹² and thirteen software wills. San Francisco County featured DIY wills in 141 of 676 (21%) cases, with thirty-six homemade and attested documents, sixty-one holographs, nineteen forms,¹¹³ and twenty-five software wills.

Figures 6 & 7. Study Sample



¹¹² Seven form wills were created by third-party vendors, and four were California statutory form wills.

¹¹³ Ten were created by third-party vendors, and nine were California statutory forms.



It is surprising that both datasets have similar proportions of software wills. For one, San Francisco experienced a tech renaissance in the mid-2010s, adding more than 25,000 digital service jobs.¹¹⁴ In the same vein, internet estate planning has supposedly gathered steam in the last decade.¹¹⁵ Thus, I expected to find far more digital wills in 2014-16 San Francisco County than I did in 2008-09 Alameda County. Yet the share of digital wills in Alameda County (3%) and San Francisco County (4%) are almost identical.

¹¹⁴ See Mark Muro & Jacob Whiton, *Tech Is (Still) Concentrating in the Bay Area: An Update on America's Winner-Take-Most Economic Phenomenon*, BROOKINGS (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/tech-is-still-concentrating-in-the-bay-area-an-update-on-americas-winner-take-most-economic-phenomenon/> [<https://perma.cc/7JVQ-6RG4>].

¹¹⁵ See Goodwin, *supra* note 13, at 951 (discussing the “transformat[ive]” potential of software wills); Jeffrey A. Dorman, Note, *Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule*, 30 QUINNIPIAC PROB. L.J. 36, 36-37 (2016) (“With the growth of services, such as LegalZoom . . . more and more testators are drafting wills without an attorney.”). Indeed, at least two major legal service providers were not even established when the Alameda County testators put pen to paper: Rocket Lawyer did not emerge until 2008, and Willing was founded in 2015. See *Rocket Lawyer*, CRUNCHBASE, <https://www.crunchbase.com/organization/rocketlawyer> (last visited Mar. 13, 2020) [<https://perma.cc/P27C-H34c>]; *Willing*, CRUNCHBASE, <https://www.crunchbase.com/organization/willing#section-overview> (last visited Mar. 13, 2020) [<https://perma.cc/XFG9-DB62>].

1. Access to Justice

Are poor testators especially likely to use DIY options? What about people who are on the brink of death? This Subsection explains why my data renders a mixed verdict on these topics.

a. Wealth

The evidence about whether DIY testators are lower on the economic totem pole is inconclusive. Although the mean value of estates with lawyer-drafted wills was higher than the mean value of estates with DIY wills (\$843,023/\$724,615 in Alameda County and \$1,438,367/\$1,274,453 in San Francisco County), these differences were not statistically significant. Also, as Table 1 reveals, there was also no statistically meaningful divergence between the wealth of testators who hired attorneys and testators whose wills were either homemade and attested, holographic, fill-in-the-blank forms, or created on the internet.¹¹⁶

Table 1. Testator Wealth.

Type of Will	Alameda County		San Francisco County	
	N	Mean Gross Value of Estate [†]	N	Mean Gross Value of Estate [†]
Lawyer-Drafted	371	\$843,023	534	\$1,438,367
Homemade/Attested	20	\$581,953 (p = 0.786)	36	\$1,198,355 (p = 0.727)
Holograph	42	\$835,161 (p = 0.991)	61	\$1,607,888 (p = 0.755)
Form	11	\$665,904 (p = 0.892)	19	\$702,189 (p = 0.432)
Software	13	\$636,620 (p = 0.863)	25	\$1,005,373 (p = 0.597)
Total	457	\$820,740	675	\$1,404,127

¹¹⁶ In fact, in San Francisco County, the average value of estates with holographs (\$1,607,888) was actually \$169,521 *higher* than the mean value of estates with lawyer-drafted wills. Cf. Clowney, *supra* note 13, at 44-45 (explaining that holograph authors in his study hailed from all over the financial map).

Notes:

(1) † T-tests compare lawyer-drafted wills with each kind of DIY will.

(2) One lawyer-drafted San Francisco will is missing the value of the estate.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Yet there are also reasons to take this finding with a rock-sized grain of salt. Probate files do not capture assets that pass outside of the court system through mechanisms such as trusts, pensions, joint tenancy, life insurance, and pay-on-death accounts.¹¹⁷ Suppose a decedent owns \$200,000 cash but has transferred her million-dollar house to her trust. Because property in the trust never passes through the court system, my data will dramatically understate her net worth. Thus, I am working with only a partial snapshot of each testator's assets.

A similar complication stems from “pour over” wills. When a settlor executes a trust, she usually backstops it with a pour over will, which leaves everything to the trust.¹¹⁸ This maneuver ensures that any right or item that she failed to convey to the trust during her life passes under its terms after she passes away.¹¹⁹ But people usually fund their trust with at least *some* property before they die, and so pour over wills govern only a fraction of their overall wealth. Because pour over wills are both drafted by professionals and are endemic in my data,¹²⁰ I may have undervalued estates with lawyer-drafted wills. In turn, this may have masked a divergence in financial standing between attorney-assisted and DIY testators.

b. Timing

I unearthed some proof that DIY mechanisms allow testators to act quickly in pressing circumstances. In general, most people execute their wills long before they die. Indeed, the average span between will-creation and death was 478 weeks (9.2 years) in Alameda County and 489 weeks (9.4 years) in San Francisco County.¹²¹ But despite the

¹¹⁷ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (describing the rise of these “will substitutes”).

¹¹⁸ See David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 581 (2017).

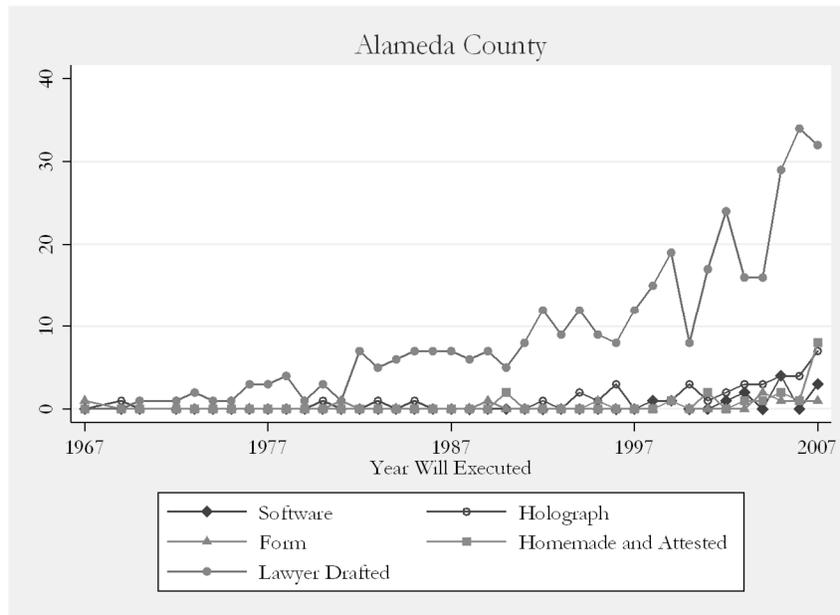
¹¹⁹ See *id.*

¹²⁰ In Alameda County, 76 of 457 instruments (17%) were pour overs. In San Francisco County, the figure was 230 of 676 (34%).

¹²¹ For the purposes of calculating the length of time between the will execution and death, I deemed the date of execution to be the date of the testator's last codicil. Under

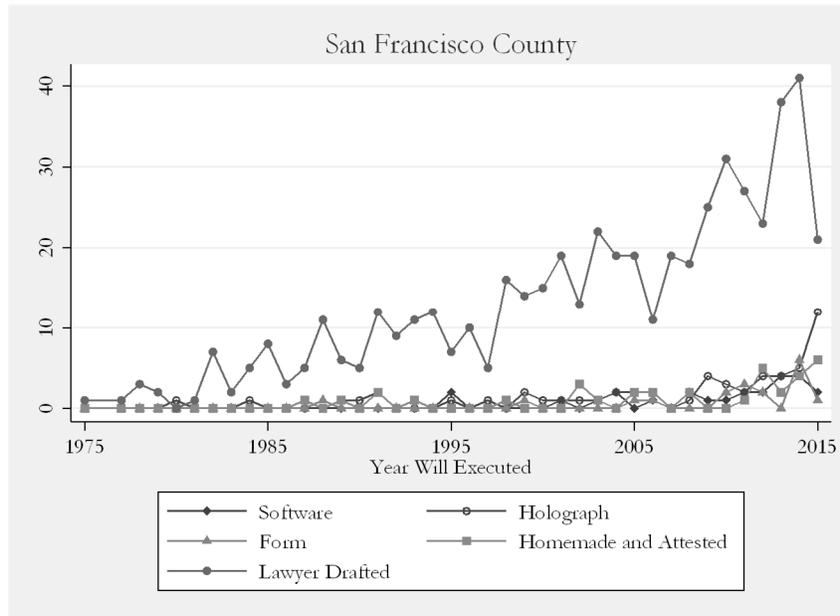
prevalence of “early testation,”¹²² the rate of will-making increases as death approaches. And as the graphs below elucidate, DIY mechanisms drive some of this eleventh-hour surge.

Figures 8 & 9. Execution Timing



the venerable doctrine of republication by codicil, a “codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil.” *Payne v. Payne*, 18 Cal. 291, 302 (1861). Thus, if a testator signed a will in 2001 and a codicil in 2003, I treated the will as arising in 2003. Conversely, because I needed to slot each case into one will type, I was not able to take the codicil into account when coding a will as lawyer-drafted or DIY. For instance, if a testator executed a lawyer-drafted will and then a holographic codicil, I marked the estate as involving a lawyer-drafted will.

¹²² Mark Glover, *The Timing of Testation*, 107 Ky. L.J. 221, 259 (2018).



Likewise, testators execute DIY wills closer to death than conventional wills. The mean number of weeks between signing of a self-made instrument and death is 317 (6.1 years) in Alameda County and 320 (6.2 years) in San Francisco County. The corresponding figures for attorney-written wills are 514 weeks (9.9 years) in Alameda and 532 weeks (10.2 years) in San Francisco (differences that are statistically meaningful, $p = 0.001$ and 0.000 , respectively). Moreover, Table 2 demonstrates that this divergence holds when comparing almost every individual type of DIY will to lawyer-created wills.

Table 2. Execution Timing

Type of Will	Alameda County		San Francisco County	
	N	Mean Weeks Between Will Execution and Death [†]	N	Mean Weeks Between Will Execution and Death [†]
Lawyer-Drafted	370	514	533	532
Homemade/Attested	20	183** ($p = 0.004$)	36	323* ($p = 0.012$)

Holograph	41	368 (p = 0.074)	56	366* (p = 0.016)
Form	11	552 (p = 0.807)	19	235* (p = 0.010)
Software	13	161* (p = 0.012)	25	276* (p = 0.011)
Total	455	478	669	489
Notes:				
(1) † T-tests compare lawyer-drafted wills with each kind of DIY will.				
(2) In Alameda County, one lawyer-drafted will and one holographic will are missing information about the date of execution. In San Francisco County, five holographic wills and one lawyer-drafted will are missing information about the date of execution, and one holographic will is missing information about the date of the decedent's death.				
* p < 0.05, ** p < 0.01, *** p < 0.001				

Finally, I found some support for the thesis that DIY wills “allow[] testators caught in life-or-death emergencies to memorialize their final wishes”¹²³ Because I have already covered this terrain in Alameda County,¹²⁴ I will focus on San Francisco County. Overall, few testators execute their wills just before they die. Yet nine of the sixteen instruments executed within a week of death were self-made. The same was true for twenty of the forty-two wills created within a month of death.¹²⁵ For example, Walter Munz signed a holograph in the hospital one day before he passed on¹²⁶ and Roger Bye used the last hours of his

¹²³ Clowney, *supra* note 13, at 58.

¹²⁴ See *supra* text accompanying note 67; see also Horton, *Partial Harmless Error for Wills*, *supra* note 104, at 2052 (describing a testator who created a software will shortly before he committed suicide).

¹²⁵ DIY devices can also benefit testators who are isolated. For example, George Stanley, who was apparently reclusive, wrote a holograph and taped it to his apartment door. See Petition for Probate of Will and for Letters of Administration with Will Annexed at 9, Estate of Stanley, No. PES-14-297660 (Cal. Super. Ct. Apr. 10, 2014).

¹²⁶ See Petition for Probate of Will and for Letters of Administration with Will Annexed at 2, 6, Estate of Munz, No. PES-15-299308 (Cal. Super. Ct. Nov. 19, 2015); Declaration of Phillip Hurst Re Circumstances of Execution of Will at 2, Estate of Munz, No. PES-15-299308 (Cal. Super. Ct. Dec. 15, 2015) (explaining that Munz “had trouble talking” but indicated that he wanted the document to be his will). On the other hand, testators are not always correct when they believe that death is imminent. For example, Leonard Harrison sloppily handwrote a page of dispositions and then explained that because he did not have “time to write out this will in full,” he wanted “these notes [to] constitute [his] last will and testament.” Petition for Probate of Will and for Letters

life to bequeath \$100,000 to a friend.¹²⁷ As these stories illustrate, DIY wills can sometimes help testators who stand on the edge of the abyss.

2. Litigation

As noted, some commentators argue that DIY wills spark litigation.¹²⁸ This Subsection provides qualified support for that proposition.

At first glance, the orthodox critique of self-made wills seems exactly right. In both Alameda and San Francisco Counties, the incidence of “litigation” — defined as a case in which a party files an objection or opposition¹²⁹ — is higher by a statistically significant degree for estates with DIY wills. For example, in Alameda County, 7.5% of lawyer-drafted wills were marred by a dispute, compared to 15.1% of self-made instruments ($p = 0.027$). In San Francisco County, the numbers were virtually the same: 8.0% and 15.6% ($p = 0.007$).

Table 3 then complicates this story. It demonstrates that results vary by the type of DIY will and the jurisdiction. For example, in Alameda County, nearly a quarter of all estates with holographs devolved into conflict. Conversely, in San Francisco County, the culprit was homemade and attested wills and their 22% litigation rate. And on the flip side, the data about software wills in Alameda County was sharply counterintuitive: none of them ended up being litigated.

Testamentary at 7, Estate of Harrison, No. PES-15-299031 (Cal. Super. Ct. Aug. 7, 2015). Harrison wrote those words in 1991, but did not die until 2015. *See id.* at 2, 7.

¹²⁷ *See* Memorandum of Points and Authorities in Support of Petition for Probate of Codicil at 1-4, Estate of Bye, No. PES-14-297704 (Cal. Super. Ct. Dec. 10, 2014) (explaining how the decedent wrote a long email with testamentary dispositions before he committed suicide); Order Granting Petition for Probate of Codicil at 1-2, Estate of Bye, No. PES-14-297704 (Cal. Super. Ct. May 11, 2015) (admitting the email to probate as a codicil).

¹²⁸ *See supra* text accompanying notes 54–59.

¹²⁹ In probate, parties often need to file petitions to persuade the judge to take some action, such as identifying a decedent’s family members or interpreting a will. *See* Horton, *In Partial Defense of Probate*, *supra* note 104, at 633-34. Unless a counterparty filed a formal objection to these petitions, I did not count them as “litigation.” My logic was that these unopposed requests for relief do not have the same damaging tendencies as adversarial proceedings: the court often rubber stamps them, and thus they neither derail the administration of the estate nor generate excessive attorneys’ fees.

Table 3. Litigation

Type of Will	Alameda County		San Francisco County	
	N	Percent of Estates with Disputes [†]	N	Percent of Estates with Disputes [†]
Lawyer-Drafted	371	7.5%	535	8.0%
Homemade/Attested	20	10.0% (p = 0.688)	36	22.2%** (p = 0.004)
Holograph	42	23.8%*** (p = 0.001)	61	13.1% (p = 0.179)
Form	11	9.1% (p = 0.849)	19	15.8% (p = 0.229)
Software	13	0.0% (p = 0.304)	25	12% (p = 0.481)
Total	457	9.0%	676	9.6%

Note:
 (1) [†] Z-tests compare lawyer-drafted wills with each kind of DIY will.
 * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

I then ran a logistic regression that used litigation as the dependent variable. I included each type of DIY will as independent variables. I also created an independent variable called “Dispositive Choices,” which I assigned a value of “1” if the testator left property in a way that was unlikely to be controversial, such as dividing property equally among members of a class, “2” if the testator deviated from this equally-near-equally-dear baseline, and “3” if the testator used a pour over will (which, as noted above, masks the true beneficiaries of her estate).¹³⁰ Finally, I controlled for whether a creditor sought to recover a debt from the estate, whether the testator executed a codicil, the timespan between the signing of the will and the testator’s death, the testator’s gender, whether the testator was married when he or she executed the will, whether the testator was married at death, whether the will expressly disinherited a specific individual, whether a beneficiary took out a

¹³⁰ See *supra* text accompanying note 118.

probate loan,¹³¹ the value of the estate, and whether the testator owned land.¹³²

Table 4 reveals that the results from the raw data withstand this additional scrutiny. Holographs in Alameda County are correlated with a 523% increase in the odds of litigation when compared to the reference group of lawyer-drafted wills. In the same vein, homemade and attested wills in San Francisco County are associated with a 301% rise in the odds of a dispute relative to attorney-created instruments.¹³³ Accordingly, even when I consider a range of other factors that might generate lawsuits, I find some support for the ancient adage that DIY wills are the litigator's best friend.¹³⁴

Table 4. Litigation Regression Analysis

Logit Model		
Logit Coefficient (Standard Errors) [Odds Ratio]		
	Alameda County	San Francisco County
DIY Will Type (Reference Category is Lawyer-Drafted Wills)		
Homemade and Attested	0.467 (0.846) [1.595]	1.100* (0.472) [3.006]

¹³¹ A probate loan occurs when a beneficiary sells part of her expected inheritance to a company. See David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 125 (2016).

¹³² Because there are multiple probate courts in Alameda County, I also controlled for whether a dispute was heard in Oakland.

¹³³ In both counties, "Will Divides Unequally" was also linked to statistically significant rise in the odds of litigation (by 338% in Alameda County and 212% in San Francisco County) when contrasted against the reference group of wills that tracked intestacy. In Alameda County, the same was true for estates in which creditors filed claims (by 388%) and testators who were married when they signed the document (by 295%).

¹³⁴ I reran both regressions with a linear probability model, which is capable of including the software will variable in Alameda County. I discovered that although software wills were connected to a decrease in the odds of litigation, the results were not statistically significant.

Holograph	1.654** (0.526) [5.227]	0.433 (0.457) [1.541]
Form	0.943 (1.157) [2.567]	0.805 (0.699) [2.237]
Software	†	0.517 (0.683) [1.676]
Dispositive Choices (Reference Category is Wills that Divide Equally)		
Will Divides Unequally	1.217* (0.491) [3.376]	0.752* (0.366) [2.121]
Pour Over Will	1.047 (0.635) [2.850]	0.205 (0.430) [1.228]
Other Controls		
Creditor's Claim Filed	1.356*** (0.379) [3.879]	0.547 (0.291) [1.727]
Codicil Executed	-0.538 (0.813) [0.584]	-0.167 (0.509) [0.846]
Weeks B/w Will & Death	-0.000 (0.000) [1.000]	-0.000 (0.000) [1.000]
Estate Filed in Oakland	-0.451 (0.383) [0.637]	††
Female T	-0.129 (0.376) [0.879]	-0.224 (0.287) [0.800]
T Married at Execution	1.082* (0.522) [2.950]	0.322 (0.448) [1.379]
T Married at Death	0.001 (0.645) [1.001]	-0.083 (0.526) [0.920]

Express Disinheritance	0.219 (0.516) [1.243]	0.678 (0.467) [1.970]
Probate Loan	1.337 (0.803) [3.806]	0.935 (0.723) [2.546]
Estate Value	-0.000 (0.000) [1.000]	0.000 (0.000) [1.000]
Estate Contains Land	-0.127 (0.420) [0.881]	0.458 (0.282) [1.581]
Constant	-3.921*** (0.609)	-3.294*** (0.456)
N	438	667
Notes: (1) † Because none of the software wills lead to litigation, the logit regression drops the variable. (2) ** Wills in Alameda County are filed in either Oakland, Hayward, or Fremont. All San Francisco County wills are filed in a single courthouse. (3) The regression samples are smaller than the overall datasets because some cases are missing information. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$		

CONCLUSION

The law sometimes must choose between a clash of incommensurate values and decide whether “a particular line is longer than a particular rock is heavy.”¹³⁵ My data from two California counties suggests that this may be true for DIY wills. On the one hand, self-authored testamentary instruments can be elegant shortcuts for ill testators. But on the other hand, with the notable exception of software wills in Alameda County, some of these documents seem to be litigation magnets. Whether courts and policymakers should encourage or deter DIY wills may depend on which policy they believe is paramount.

¹³⁵ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).