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Strengthen the Things That Remain: The Sanist Will

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“STRENGTHEN THE THINGS THAT REMAIN:”¹
THE SANIST WILL

The construction and meaning of “mental capacity” within the constitutional arena of Mental Disability Law has been more strictly scrutinized by courts and scholars than the construction and meaning of mental capacity in the area of wills. One’s autonomy in life has naturally been seen as more important than one’s autonomy after death. Sanism seems more severe when dealing with an individual’s liberty and less traumatic when dealing with the individual’s right to dispose of property.² Sanism, therefore, is seen as more detrimental to the former. But in this society, we value our property almost as much as we value our liberty.³ In essence, it is our liberty and independence that are at stake when our voiceless wishes contained in a will are disregarded on the assumption of diminished capacity. Thus, the goal is to combat sanism and pretextuality⁴ by raising the bar in civil probate hearings; specifi-

1. BOB DYLAN, *When You Gonna Wake Up?, on SLOW TRAIN COMING* (Columbia 1979).

2. Michael Perlin, “*For the Misdemeanor Outlaw: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*,” 52 ALA. L. REV. 193, 226-227 (2000):

Simply put, “sanism” is an irrational prejudice of the same quality and character as other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged “ordinary common sense” (“OCS”) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

3. Jonathan L. Hafetz, “*A Man’s Home is His Castle?: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*,” 8 WM. & MARY J. OF WOMEN & L. 175, 198 (2002) (“Ultimately, the home would come to embody not only the sanctity of private property, but also a ‘unique combination of values’ expressed in the exercise of protected individual liberties in marriage and marital relations, family and childbearing, and education and school.”).

4. See Perlin, *supra* note 2:

“Pretextuality” means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in

cally raising the bar to a stricter standard of scrutinizing the mental capacity of the aged or disabled. We must realize how discreetly and easily sanism can seep into every area of law.

If the atmosphere of a will probate hearing is anything like a civil commitment hearing, sanism runs wild. Both hearings are susceptible to the misuse of experts in order to manipulate autonomy in the name of paternalism.⁵ Usually when a will is contested, the testifying physician or psychiatrist will never have personally met the testator.⁶ He or she will base their testimony as to the testator's capacity solely on the testator's medical records.⁷ The same occurs in civil commitment hearings. Although the testifying individual may have briefly encountered the patient or know of his or her medical or psychological history, they themselves may not have diagnosed or treated the patient. If the testifying psychiatrist relies mainly on records written by colleagues or members of prior institutions, the patient is subject to the extremes of pretextuality. Oftentimes, the treating psychiatrist is not present at the hearing and a hospital administrator testifies on his or her behalf.⁸ The future of the patient is determined without the testimony of the treating psychiatrist and without the ability to effectively cross-examine the testifying individual who is without sufficient knowledge of the patient's status.

order to achieve desired ends." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying. *Id.* at 227 (internal citation omitted).

5. MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 68 (2000). ("[E]xpert witnesses in civil commitment cases often impose their own self-referential concept of 'morality' to ensure that patients who 'really need treatment' remain institutionalized."); *Dobie v. Armstrong*, 50 N.Y.S. 801, 806 (1898). (On the issue of testamentary capacity Justice Follett commented, "The experience of the courts has demonstrated that the answers of experts, though honestly given, to hypothetical questions embracing pages of assumed and isolated facts covering a long lifetime, about which facts the experts have no personal knowledge, are the weakest and most unreliable kind of evidence in respect to the sanity or insanity of the person inquired about.").

6. Lawrence A. Frolik, *Science, Common Sense, and the Determination of Mental Capacity*, 5 *PSYCH. PUB. POL. & L.* 41, 47 (1999).

7. *Id.*

8. Grant H. Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 *SAN DIEGO L. REV.* 343, 393 (1995).

In both areas of law, it is important to look deeper than what is written on paper. We need to find a better way to merge our objective observances with the individual's actual subjective intent and needs. In these instances, courts need to probe the validity of a diagnosis as to competency and testamentary capacity. In both will contests and guardianship hearings, "the ultimate obligation of the fact finder is to assess an individual's mental capacity."⁹ The kind of evidence available is affected by whether the person is alive or dead,¹⁰ but that evidence needs to be viewed through non-sanist eyes.

Pamela Champine has stated in her assessment of the sanist will that the test alone for capacity in probate hearings is non-sanist.¹¹ But is the test rigorous enough to prevent sanism when it is implemented? To create a valid will, the testator must (a) know the nature and extent of his property, (b) know the natural objects of his bounty, (c) know how the proposed will disposes of his property, and (d) have the ability to make a rational plan to dispose of his property.¹² This basic criteria can be compared with the criteria to determine whether a mentally disabled defendant is able to stand trial. The test for incompetency to stand trial was formulated in 1960, in the decision of *Dusky v. United States*:

[I]t is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.¹³

Although *Dusky* established the competency test only for federal cases, several circuits and state supreme courts have also adopted it as setting out minimal constitutional standards.¹⁴ The criteria for deter-

9. Frolik, *supra* note 6, at 45.

10. *Id.*

11. See Pamela Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547 (2003).

12. *Delafield v. Parish*, 25 N.Y. 9, 29 (1862).

13. *Dusky v. United States*, 362 U.S. 402 (1960).

14. Claudine Walker Ausness, Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit*, 66 Ky. L.J. 666, 673 n.35 (1978).

mining whether a mentally disabled individual is able to stand trial seems sufficient on its face, but the questions do not thoroughly address the individual's competency to stand trial. Whether or not the defendant is functionally competent is not truly evaluated. Procedural questions such as reciting the roles of various individuals within the court system do not properly and thoroughly address an individual's mental capacity.¹⁵ Unfortunately, mental disability can be disguised and mask the defendant's illness undermining a fair and effective trial.

Similarly, the test for determining a testator's capacity when creating a will needs to be more complex so that subjective intent can be accurately determined. Oftentimes an aged testator is unable to recite or recall details. He or she also may be unable to express their desires in a way which we deem acceptable but this does not mean that their wishes are any less valid. These assumptions create another branch of sanism which can be properly labeled "ageism."¹⁶ Ageism is the belief that the mental deterioration from age renders the elderly completely incompetent in all areas of their life. Out of a false sense of necessity, their wishes are transformed into our wishes or what we subjectively feel they would want. Too often we practice sympathy without empathy. The object of sympathy is the other person's well-being; the object of empathy is understanding. I see the former as looking on the outside and the latter as looking on the inside. It is important to incorporate both; the outside view to protect well-being, and the inside view to protect true intent.

In order to protect well-being, the testator and their loved ones must be shielded from irrational episodes and undue influence. While the court's paternalistic role is necessary, it must be equipped with open eyes to view sanism. The undue influence doctrine allows the judge or jury to impose its own norms on the testator's dispositive plans.¹⁷ One specific example of sanism in a paternalistic setting is

15. See Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCH. PUB. POL. & L. 323, 355-59 (1998). Legal mental illness is distinguished from incompetence. Competence for criminal proceedings is established by mere visual observations and social control. The purpose of a competence hearing is not to establish one's mental disability but to determine whether or not they can exist on an equal playing ground within the criminal justice system.

16. Suzanne Meeks, *Age Bias in the Decision-Making Behavior of Clinicians*, 21 PROF. PSYCHOL.: RES. & PRAC. 279 (1990).

17. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 70 (2000):

Any aspect of probate law that injects judicial discretion into the distribution of a decedent's property may create problems for persons whose behavior and family structure do not fit the prevailing social norms. Undue influence is notorious as a tool used to undo a will that does not meet soci-

seen in the case of *Parham v. J.R.*¹⁸ When discussing the involuntary commitment of minors, Chief Justice Burger said that the "natural bonds of affection lead parents to act in the best interests of their children."¹⁹ This can be analogized to the same myth in probate court that children will always act in the best interests of their parents or relatives will act in the best interests of relatives when it comes to the wishes of the aged testator. Paternalism is an important element to law and society but from our highest to our lowest courts, it is not exempt from sanism.

As Michael Perlin has stated repeatedly throughout his writings, sanism is largely invisible and largely socially acceptable.²⁰ A masked sanism which extends to economic status and social status has been overlooked in both the law of wills and the law of mental health.²¹ Someone of high social status with greater economic resources has a much better chance of probating a will even though the will has eccentricities or leaves out close relatives. Sanism in how we view people's economic status in society will draw a fine line between being eccentric and being mentally ill or incompetent. For example, Seward Johnson of Johnson & Johnson left a massive portion of his estate to a woman more than half his age who had captured his heart and possibly his mind.²² Seward was able to hire a full-time lawyer whose sole duty for

ety's approved distributive pattern. If a testator makes testamentary dispositions to persons outside the societal definition of the 'natural objects of testator's bounty,' disinherited blood relatives may charge that those persons unduly influenced the testator. In some cases, courts appear to find undue influence based on disapproval of the relationship between the testator and the beneficiary. *Id.* at 69-70.

18. *Parham v. J.R.*, 442 U.S. 584 (1979).

19. *Id.* at 602.; See Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as An Example*, 22 J. FAM. L. 633, 647-60 (1983 - 84); see also Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873 (1996) ("Unfortunately, much current judicial reasoning with regard to child development too frequently relies on folk tales or the judge's personal experiences, rather than on more verifiable theory. Such decision making constitutes unethical judicial practice." *Id.* at 1906).

20. Michael L. Perlin, *"Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 *N.Y.L. SCH. L. REV.* 535 (2003).

21. See generally, Michael L. Perlin, et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 *PSYCH. PUB. POL. & L.* 80 (1995). ("It is also not coincidental that the majority of those subjected to involuntary civil commitment are poor, elderly, uneducated, or female. They are the people society renders the most visible within the community, and they are virtually invisible when expelled from the community." *Id.* at 87.).

22. DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993). Seward Johnson's allotment to the young woman increased significantly over the years while his family's inheritance markedly decreased. The will

numerous years was to protect his estate from scorned family members. If Michael Perlin were to leave the bulk of his estate to the Bob Dylan fan club, he would have a better chance of having his will admitted to probate than would a person with a record of mental illness and/or commitment to a mental hospital.²³ The notion would be that he is an intellectual, an eccentric, or someone simply preoccupied with a musical hobby rather than mentally ill or incompetent. Money and social status certainly has not proven to make us any saner but with such assets we would be less likely to fall under the umbrella of paternalism because through the sanist eye we are seen as more capable.

A final point that must be addressed is the availability of living wills and trusts. Fortunately, in the law of wills there are options to avoid probate and escape the test of testamentary capacity. In some states one such option is ante-mortem probate, also known as living probate. This long-debated probate reform allows the testator to personally defend his or her disbursement of property. The principal advantage of ante-mortem probate is that it allows the court to evaluate the will based on evidence supplied by the actual author, the testator. The testator is given the opportunity to explain to the fact-finder his or her estate plan and personally address any objections on the basis of undue influence or incapacity.²⁴ Another option is to set up a revocable trust during one's lifetime. Here, the testator can have his or her wishes carried out without threat of a testamentary capacity debate in probate.²⁵ Unfortunately those mentally disabled at birth or those who become ill through an unexpected or sudden onset in later life may not have the resources or sufficient time to create a trust. But

was contested on the grounds that the young woman exerted undue influence over Mr. Johnson and that Johnson lacked the capacity to make a will.

23. Michael Perlin, in many of his publications, has captured the essence of issues and problems which plague mental disability law by referring to the lyrics of Bob Dylan. Examples include: Michael L. Perlin & Keri K. Gould, "Johnny's in the Basement/Mixing Up His Medicine:" *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339 (2000); Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth:" *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999); Michael L. Perlin, "I Ain't Gonna Work on Maggie's Farm No More:" *Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C.*, 17 T.M. COOLEY L. REV. 53 (2000); Michael L. Perlin, "Make Promises by the Hour:" *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997); Michael L. Perlin, "There's No Success like Failure/and Failure's No Success at All:" *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247 (1998).

24. See John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978).

25. Mark R. Siegel, *Unduly Influenced Trust Revocations*, 40 DUQ. L. REV. 241, 243 (2002).

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those of us who may fall victim to ageism have options during our lucid years to safeguard our wishes, property and loved ones.

In conclusion, I will follow Michael Perlin's example and incorporate the lyrics of Bob Dylan in hopes of touching upon the importance of this topic:

You can't take it with you and you know that it's too
worthless to be sold,
They tell you, "Time is money," as if your life was worth its
weight in gold.
When you gonna wake up, when you gonna wake up
When you gonna wake up and strengthen the things that
remain?²⁶

As lawyers and advocates we must continuously strive to thoroughly investigate the actual state and desires of our clients so that when their sanity and life seem to fade we are able to strengthen the things that remain.

Heather S. Ellis

26. DYLAN, *supra* note 1.

