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A SANIST WILL?

PAMELA R. CHAMPINE*

I. INTRODUCTION

Discrimination runs rampant through the law of wills. Although the statute of wills¹ purports to confer the right to determine disposition of one's own property at death, subject to specified constraints, on every individual who meets minimal qualifications, probate will constitute a significantly greater hurdle for those wills that eschew societal expectations as opposed to those that embrace them.² This discrimination against "abhorrent testators"³ pervades all major grounds for a will contest: failure to comply with statutory formalities for will execution, undue influence, and lack of testamentary capacity. For that reason, some commentators address the discrimination problem on an aggregate basis,⁴ while others analyze the problem within the context of a single doctrine.⁵

Remarkably, there is a dearth of commentary focusing on this type of discrimination in connection with the doctrine of testamentary capacity. The work of Professor Michael L. Perlin,⁶ which focuses on

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1. Unif. Probate Code § 2-502 (amended 1990), 8 U.L.A. 144-145 (1998).

2. See, e.g., Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996). For a discussion of this issue in the context of testamentary capacity specifically, see Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271 (1943).

3. The term "abhorrent testator" was coined by E. Gary Spitko in E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1995).

4. *Id.*; see also Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

5. See, e.g., Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981); Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMPLE L. Q. 231 (1962).

6. For a sampling of Professor Perlin's work in this area, see MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000) [hereinafter PERLIN, *HIDDEN PREJUDICE*]; MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (2d ed. 1998); Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth:" *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEG. ISS. 3

mental disability law, provides a novel framework for analyzing the specific problem of discrimination in cases involving allegations of testamentary incapacity. Rather than conceptualizing the problem as one of discrimination against individuals whose dispositive preferences lie outside societal norms, his work suggests that the problem may be conceptualized as one of "sanism," irrational prejudice against or judgment about persons with mental disabilities.⁷

This essay considers whether the observed discrimination in the application of the testamentary capacity doctrine may be explained as a product of sanist prejudice rather than, as previously assumed, discrimination based on a dispositive plan. The essay first describes the policy underlying the doctrine of testamentary capacity as well as the doctrine itself as reflected in case law, and identifies aspects of both policy and doctrine that may be considered sanist. The essay then discusses several beneficial corollaries to the reduction of sanism, including reduction of discrimination in testamentary validity based upon failure to comport with societal norms; renewed focus on the extent to which family protection is desired and desirable; potential enhancement of therapeutic consequences for testators and those involved in will contests; and integration of ethical concerns faced by estate planning lawyers who serve clients of questionable capacity into the law of testamentary capacity. In conclusion, this essay calls for a reevaluation of the policy and doctrine of testamentary capacity in order to ameliorate sanism and to achieve these corollary benefits.

(1999) [hereinafter Perlin, *Half-Wracked*]; Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993); Michael L. Perlin, *On "Sanism,"* 46 S.M.U. L. REV. 373 (1992); Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM ACAD. PSYCHIATRY & L. 131 (1991).

7. Professor Perlin defines sanism as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry." Perlin further elaborates on sanism as follows:

[Sanism] 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.

See generally Perlin, *On "Sanism,"* *supra* note 6 at 374-375.

II. THE SANIST LENS

Perlin posits that courts rely on pretexts⁸ to achieve desired ends which reflect sanist bias, and that this bias pervades all areas of mental disability law.⁹ Sanist influence, in his view, explains the gap between what mental disability law appears to be and what it actually is.¹⁰ If Perlin is correct, sanism will explain, in whole or in part, the documented gulf between the ostensible doctrine of testamentary capacity as articulated in the abstract and the results reached in actual cases that is manifested in (what appears to be) discrimination based on the dispositive plan.

A. *Signs of Sanism*

The validity of an analysis extending the theoretical construct of sanism from the areas of civil commitment and criminal law, in which it was developed, to the law of wills, is not self-evident. The purpose of imposing a competency or capacity requirement in areas of public law relates, in large part, to protection of the individual himself and members of society at large from direly detrimental consequences of ill-conceived decisions or acts that individuals with the requisite capacity would not or could not perform. The requirement of testamentary capacity, in contrast, serves to preclude certain individuals from exercising a choice that those deemed to possess the requisite capacity may and do enjoy, on the grounds that these individuals would not have chosen as they did if they possessed the necessary level of understanding.

The relevance of this distinction between the purpose of capacity requirements in public law arenas and that of testamentary capacity depends upon the reasons why sanism abounds in public law. Perlin identifies historical, practical, and emotional reasons for this phenomenon. The historical reason relates to the inextricable link between evil and mental illness which created a belief that those who lost their capacity to reason were not entitled to the treatment accorded to

8. Professor Perlin defines "pretextuality" as implicit or explicit judicial acceptance of testimonial dishonesty and similarly dishonest decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends. See PERLIN, HIDDEN PREJUDICE, *supra* note 6 at 60.

9. See Perlin, *Half-Wracked*, *supra* note 6 at 5.

10. *Id.* at 10.

humans.¹¹ The practical reason is that assessments of capacity are complex, and therefore the temptation to rely on heuristics, “ordinary common sense,”¹² and other simplifying devices to address the issue is hard to resist.¹³ The emotional reason is based upon individuals’ subconscious fear of contracting mental illness or declining in mental capacity themselves which incites virulence exceeding that associated with immutable traits, such as race and gender, which also trigger discrimination.¹⁴

The practical and historical explanations for the prevalence of sanism apply with full force in the law of wills: assessing capacity is no easier in the context of a will contest than it is in the context of a criminal trial, and deeply held conceptions of personhood transcend legal context. The emotional basis for sanism, one would expect, would be context-dependent because the fear of mental illness or incapacity would be based in part upon the treatment accorded to individuals with that characteristic. If involuntary commitment is more frightening than denial of testamentary freedom, as one would suspect it is for most individuals, then this emotional force of sanist decision-making would be greater in the context of an involuntary commitment proceeding than a will contest. For this reason, sanism may be less pronounced in the law of wills than it is elsewhere, but this acknowledgment hardly undermines concern about its existence. Instead, it simply highlights how the signs of sanism may vary from one context to the next. The following examination of testamentary capacity in terms of underlying policy as well as established case law reveals a sanist bias in the law of wills that bears out Perlin’s assertion of sanism’s permeation of mental disability law.

11. See Perlin, *On “Sanism,” supra* note 6, at 388-397.

12. PERLIN, HIDDEN PREJUDICE, *supra* note 6 at 13, citing Richard Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988); Richard Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Story Telling*, 87 MICH. L. REV. 543, 595 (1988) (defining “ordinary common sense” as a “pre-reflexive attitude exemplified by the attitude of ‘what I know is “self-evident;” it is what ‘everybody knows’”).

13. Perlin, *On Sanism, supra* note 6, at 388-397.

14. *Id.*

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1. Policy

Liberty and autonomy form the core of this country's political structure.¹⁵ The law imposes capacity requirements for acts of legal significance, such as entering into contracts and exercising rights in the criminal trial process, because the paternalistic desire to protect incapacitated individuals from their own ill-considered acts, the desire to protect society from the consequences of those acts, or both, outweigh the curtailment of individual autonomy.¹⁶ The existence of a paternalistic concern is necessary to justify a capacity requirement, and evaluation of its importance as compared to the value of autonomy is essential to determine the nature and rigor of the requirement. The context-specific nature of the determination explains why tests of capacity vary from area to area and issue to issue.

In the law of wills, there is a dearth of discussion or debate about the purpose of the requirement of testamentary capacity.¹⁷ This stands in marked contrast to the plentiful scholarship addressing other requisites for testamentary validity such as the requirement of execution formalities.¹⁸ The contrast is all the more striking in light of (i) the ease

15. See generally Bruce J. Winick, *Integrating Legal and Psychological Perspectives in the Right to Personal Autonomy*, 37 NOVA L. REV. 1705 (1992).

16. See, e.g., George J. Alexander and Thomas S. Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAWYER 537 (1973).

17. The notable exception is a series of articles written by Dean Green in the 1940's. Green, *supra* note 2; Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554 (1943); Milton D. Green, *Fraud, Undue Influence and Mental Incompetency: A Study In Related Concepts*, 43 COLUM. L. REV. 176 (1943); Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141 (1941); Milton D. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940). This body of work, more than half a century old, remains the definitive authority on the issue of testamentary capacity. See, e.g., Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066 (1980) (rejecting ant-mortem probate in favor of abolishment of the doctrine of testamentary capacity); see also, Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 CASE WESTERN RES. L. REV. 307 (1988-1989). For an alternative viewpoint, see Jane B. Baron, *Empathy, Subjectivity and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043 (1987).

18. For a sampling of the scholarship relating to will execution formalities, see, e.g., Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893 (1996); James H. Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992); 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 — Part Two: Uniform Probate Code Section 2-503 and a Counterproposal*, 43 FLA. L. REV. 599 (1991); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

of avoiding execution formality problems by engaging a lawyer experienced in will drafting, (ii) the relative volume of case law addressing the two issues,¹⁹ (iii) developments in social science that might shed light on our understanding of capacity assessment,²⁰ and (iv) the probability that testamentary capacity litigation will increase as the population ages.²¹ The lack of attention to the issue of testamentary capacity, and its purpose in particular, exemplify the insensitivity to sanism that courses through law and society as a whole.

The scholarship that does exist on this issue focuses primarily on protection of decedents' families as the justification for imposition of a capacity requirement.²² If a will is denied probate (and there is no valid prior will in existence), the intestacy scheme will govern distribution of the estate, which will provide for the property to pass to the decedent's closest relatives. Financial protection for decedents' families is a supportable policy objective,²³ but the policy applies with equal force to all decedents regardless of the extent of the decedent's mental functioning. Accordingly, increasing the stringency of general restraints on testamentary freedom in favor of the family for testators as a class could be justified. Use of the capacity requirement to achieve familial protection, however, would be suspect because it would affect only estates of those whose capacity is questionable. This would be sanist unless there is some basis for the proposition that families of testators whose mental capacity falls below the requisite threshold require more protection than do families of unquestionably competent testators who disinherit family members intentionally.

19. The volume of reported cases addressing testamentary capacity is more than double that of reported cases addressing formalities required for wills based upon a search of Westlaw key numbers 21-55 for capacity and 108-125 for formalities in the topic of Wills for the period 1996-2000.

20. See *infra* notes 46 to 48.

21. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS: SPECIAL STUDIES 23-190, *65+ in the United States*, U.S. Govt. Printing Office; available at <http://www.census.gov/prod/a/pop/p23-190/p23-190.html> (quantifying the "elderly [65+] population explosion" as an increase from 30 million to 40 million from 1988 to 2007, and up to 50 million within the following seven years).

22. See *supra* note 17.

23. See, e.g., Deborah A. Batts, *I Didn't Ask to Be Born*, 41 HASTINGS L. J. 1197 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); Ronald Chester, *Should American Children Be Protected Against Disinheritance*, 32 REAL PROP. PROB. & TR. J. 405 (1997); Epstein, *supra* note 5.

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2. Doctrine

The vagueness of the policy underlying the requirement of testamentary capacity is paralleled by an equally vague standard for evaluating capacity. The standard, which varies slightly from jurisdiction to jurisdiction, essentially requires the testator to understand the nature and extent of his property, the persons who are the natural objects of the testator's bounty, and the disposition embodied in the will at the moment he executes it.²⁴ This test is subjective in the sense that it focuses on the understanding of the particular testator in question and requires knowledge commensurate with the complexity of his situation.²⁵

The test for capacity is decidedly non-sanist in the sense that it focuses on the individual testator's ability to understand the transaction at issue and does not, by its terms, invalidate the will of a person who suffers from any particular mental disability or illness. Yet the subjectivity and vagueness of the standard allow for the exercise of tacit discrimination which, as noted, has been observed.²⁶ Although this discrimination has been viewed as bias based on the content of wills' dispositions, an examination of the evidentiary bases for testamentary capacity determinations in light of the scholarship of sanism, and in particular the signs of sanism identified by Perlin, reveal sanism at work. These signs are evident in the use, misuse or non-use of each of the major categories of evidence relied upon to establish testamentary capacity or lack of it: the nature of the dispositive plan, expert testimony and lay testimony.

(a) Dispositive Plan

Of the three categories of evidence, the content of the dispositive plan is the single most important factor in predicting the outcome of will contests.²⁷ Plans that favor close family members over more distant relatives or unrelated beneficiaries are significantly more likely to be admitted to probate than are wills that fail to comport with this norm. Many view this as evidence of fact-finders' desires to protect surviving family members from unorthodox testamentary dispositions.²⁸ Another view is that this phenomenon does not reflect a fam-

24. See, e.g., *Peters v. Catt*, 154 N.E.2d 280 (Ill. 1958).

25. See Green, *Judicial Tests of Mental Incompetency*, *supra* note 17.

26. See generally, *supra* note 2.

27. *Id.*

28. *Id.*

ily preference per se, but rather a reciprocity norm pursuant to which fact-finders implicitly give effect to implied, unenforceable promises of testators to disappointed beneficiaries that created an expectation of testamentary beneficence that was ultimately unfulfilled.²⁹ Both of these views focus on the outcome of will contests and attribute disparities to an intentional desire to conform the disposition of the estate at issue to norms adopted by the finder of fact.

The sanist lens, in contrast, focuses on the means by which disparate outcomes are achieved. If the signs of sanism are present in the analysis of the means, the sanist perspective would suggest that the basis of the disparity in the outcome of will contests lies in the equally invidious but far less visible bias against individuals who exhibit signs of mental disability. Of course, the testamentary capacity requirement is designed to discriminate based upon mental capacity, and this discrimination is warranted to the extent that there is a justification for imposing a capacity requirement which the preceding policy discussion suggests there may be. If, however, capacity determinations are based upon stereotype, myth, or other irrational grounds, rather than coherent application of the articulated test, discrimination that appears to be legitimate in fact becomes an exercise in sanism.

One sign of sanism is the use of alleged “ordinary common sense” (“OCS”) in place of legitimate identifiable bases for determinations of incapacity.³⁰ Use of the dispositive scheme embodied in the will to evaluate the validity of an exercise of testamentary freedom reflects an application of OCS because the dispositions in the will, however unusual, do not themselves evidence the testator’s cognition. To evaluate the validity of an exercise of testamentary freedom based upon how an individual chooses to exercise that freedom is circular. This is not to say that the dispositive scheme should be entirely irrelevant to the capacity inquiry, but its preeminence as the predictive factor in will contest results suggests an overuse that improperly subordinates the influence of more directly relevant evidence.

(b) Expert Testimony

In contrast to the importance of the dispositive scheme embodied in a will subject to a capacity challenge, the value of expert testimony

29. See generally Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551 (1999).

30. PERLIN, HIDDEN PREJUDICE, *supra* note 6, at 4.

generally is negligible. This reflects a skepticism about the objectivity of experts retained in a partisan battle as well as a sense that the science underlying the mental health professions is insufficiently precise to merit consideration.³¹ This viewpoint parallels one of the sanist myths identified by Perlin which holds that “[m]ental illness can be easily identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behavior.”³² Eschewing medical and social science in this way creates a vacuum in which OCS can flourish.³³ Thus, this attitude about expert testimony exacerbates the problem of overreliance on a will’s dispositive scheme as evidence of incapacity.

This is not to suggest that the standard for testamentary capacity ought to be medical rather than legal, or that it would be appropriate to base a determination about testamentary capacity upon a particular medical diagnosis. Nor is this to assume that mental health professionals are immune from sanist thinking. Perlin expressly cautions that sanist experts are central to the problem of sanism.³⁴ If, however, the basis for the opinion is probed and determined to be sound, expert testimony, particularly from one who examined the testator near the time of the will execution, often should carry significant weight.

(c) Lay Testimony

The value accorded to lay testimony depends, in large part, upon the underlying facts that form the basis of an opinion about capacity or lack of it as well as the context in which the lay witness’ observations occurred.³⁵ Observations of the testator’s forgetfulness, confusion, undocumented suspicions, and other behavior consistent with declining capacity often is relied upon to support a determination of incapacity even when these observations occur in the context of casual exchanges

31. Willis J. Spaulding, *Testamentary Competency: Reconciling Doctrine with the Role of the Expert Witness*, 9 *LAW & HUMAN BEHAV.* 113, 114 (1985) (“Courts long have disparaged the evidentiary value of expert opinion about testamentary competency, relative to the value of lay opinion on the same issue.”). *See also* Meiklejohn, *supra* note 17, at 347 (1988-1989) (“Courts continue to assess capacity primarily by reference to lay testimony of forgetfulness, confusion disorientation and erratic or improvident behavior.”).

32. *See* Perlin, *On “Sanism,” supra* note 6, at 395.

33. Perlin, *Pretexts and Mental Disability Law, supra* note 6, at 670.

34. *Id.* at 629. (“Experts often testify according to their own self-referential concepts of morality.”). *See also*, PERLIN, *HIDDEN PREJUDICE, supra* note 6, at 10-11 (describing susceptibility of experts to heuristics contributing to sanist judicial determinations).

35. Meiklejohn, *supra* note 17.

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long before or after the will execution. Like the dispositive content of the will, this evidence is not devoid of value, but overreliance on it echoes the sanist myth that mental functioning can be easily identified by lay persons.

B. Remediating Sanism

Recognition of sanism is a necessary preliminary step to its eradication or reduction, but mere recognition does not itself ensure that reform will follow. If Perlin's work in areas of public law is any indication, the effort to counteract sanism in the law of wills will require Herculean effort. A most important aspect of this effort is articulating anew a policy justification for the doctrine of testamentary capacity that is designed to attract widespread support by identifying benefits apart from or ancillary to reduction of sanism *per se*. These benefits could include some or all of the following: reducing discrimination based upon the dispositive plan, focusing on the extent to which family protection is desired and desirable, enhancing therapeutic consequences for testators and those involved in will contests, and confronting ethical concerns faced by estate planning lawyers who serve clients of questionable capacity.

1. Reducing Discrimination

The reduction of sanism will reduce commensurately discrimination based on the dispositive plan to the extent that it is the by-product of "ordinary common sense" employed for lack of a cogent comprehension of testamentary capacity as opposed to a conscious effort to discriminate against those who deviate from societal norms. The observation of this discrimination throughout the grounds for will contests, including execution formality, which could be applied evenhandedly without the necessity of heuristics, suggests that there is an element of intentional bias present in this discrimination. If this is true, eradication of sanism is nevertheless, or perhaps particularly, important in the effort to reduce discrimination based upon the dispositive plan.

Coherence in the application of the doctrine of testamentary capacity would reduce the ability to rely on that doctrine to effectuate unwarranted discrimination and consequently increase reliance on the doctrine of undue influence to effectuate this purpose. That doctrine, closely intertwined with testamentary capacity, establishes the invalidity of a will executed by a competent testator if it reflects the wishes of

someone other than the testator himself as a result of influence rising to the level of “coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear”³⁶ This doctrine is used in some cases to invalidate wills of testators whose competency is questioned but cannot, in the finder of fact’s view, be said to fall below the minimal level of capacity required to execute a valid will.³⁷ Increased reliance on undue influence to effectuate unwarranted discrimination, together with the optimism generated by successful revision of the doctrine of capacity, would rejuvenate interest in the considerable scholarship addressing the doctrine of undue influence which, in turn, could lead to further inroads against the problem of discrimination based upon the dispositive plan.³⁸

2. Focusing on Family Protection

As noted earlier, protection of testators’ families is the principal justification for the capacity requirement in contemporary legal scholarship. While many have argued in favor of legislative change to provide this protection overtly,³⁹ it also has been asserted that manipulation of doctrine, including the standard for testamentary capacity, is an appropriate means of pursuing this policy.⁴⁰ In light of this extensive support for family protection, any doctrinal change that

36. In the Matter of the Probate of the Will of Walthier, 159 N.E.2d 665, 668 (N.Y. 1959).

37. See Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?*, 24 J. OF LAW AND PSYCHIATRY 253 (2001). See also *Estate of Szewczyk*, 2001 WL 456448 (Del. Ch. 2001) (establishing relationship between undue influence and capacity such that presence of factors tending to show motive and opportunity to exercise undue influence shifts burden of proof on capacity from objectant to proponent).

38. For a sampling of the scholarship addressing undue influence, see Frolick *supra* note 37; Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What’s Love Go to Do With It?* 57 PITT. L. REV. 841 (1996); Sherman, *supra* note 5.

39. See *supra* note 23.

40. See generally Ronald Chester, *Less Law but More Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests*, 37 DUQ. L. REV. 173 (1999) (arguing that, despite the common law focus on the mind of the testator, the proper inquiry in will contests should address the fairness of the resulting distribution). For a contrary view, see Josef Athanas, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529 (1990) (arguing that the “equitable fairness” juries may provide in resolution of wills disputes should be supplied by legislative changes to laws that are “equitably unfair”).

might undermine such protection must expressly identify and justify this effect.

One facet of this issue that is worthy of exploration is the extent to which support for family protection exists, either in general or in specific situations such as those involving minor or disabled children. The discrimination based on the dispositive plan seems to suggest widespread support by jurors as well as courts, yet the absence of legislative reform in this area raises the question of how extensive such support actually is.

Another facet of the issue is the extent to which the policy articulated or perceived as family protection is more precisely providing assurance to testators that the presumed desire to provide for family members will prevail notwithstanding execution of a will that expresses a contrary intent which may be the product of mental impairment. The difference between family protection *per se* and protection of a presumed desire to benefit family members is important because the first focuses on the claim of family members and the second focuses on the effectuation of the testator's intent. If the latter purpose justifies the requirement of testamentary capacity, this raises the question of the extent to which the law of wills is, or should be, designed to protect testators from their own ill-conceived or mistaken decisions.

In general, the law of wills reflects a balance between the desire to protect testators from the consequences of their own or their lawyers' errors and the desire to protect testators as a group from erroneous determinations about testamentary intent based on evidence extrinsic to a validly executed will. In the context of doctrines other than capacity, such as construction, reformation, and enforcement of execution formalities, this balance historically favored avoiding the possibility of misinterpreting extrinsic evidence over attempting to effectuate the actual intent of individual testators who apparently erred. Recently, however, this balance has begun to shift in favor of effectuation of actual intent of those who are alleged to have erred.⁴¹

In the context of the capacity doctrine, as the earlier discussion of doctrine illustrated, the balance ostensibly favors protection of testators as a group over effectuation of the intent of an individual whose

41. See, e.g., RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (2001) (rejecting historic prohibition against reformation); RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 3.3 (1998) (dispensing with execution formalities where there is clear and convincing evidence that the decedent intended the instrument offered for probate to constitute his will).

dispositive scheme may have been ill-conceived due to mental shortcomings by establishing a lenient standard for capacity. Yet uneven implementation of the standard in reality creates a more stringent barrier to probate which reflects a desire to insulate some subset of testators from the consequences of their decisions and increases the risk that the will of a testator who in fact satisfied the test for capacity will be denied probate.

The proper balance between protection of testators as a group from the possibility of erroneous judicial determinations and effectuation of individual intent depends, in part, upon the ease of avoiding the error that the doctrine addresses. For example, guarding against execution of a will during a period of incapacity is much more difficult than is assuring that execution formalities are satisfied. The more difficult it is for the testator to protect against the error, the more the balance in the establishment of the parameters of the particular doctrine should favor effectuation of individual intent. This consideration suggests that the balance between protection of the group and effectuation of individual intent will differ depending upon the particular doctrine involved.

Transcending all areas of will doctrine is the question of the extent of the benefit of effectuating actual intent. One aspect of this issue is the philosophical debate about the possibility of harm to the dead,⁴² and in particular, whether a deceased testator whose will is denied probate suffers as a result. Another is the impact that corrective doctrines, including the doctrine of testamentary capacity, have upon the traditional justifications for conferring testamentary freedom: encouraging accumulation of wealth and fostering family care in old age.⁴³ If these purposes continue to justify testamentary freedom and liberal application of corrective doctrines advances them, effectuation of individual intent should weigh more heavily in the design of doctrine than should protection of testators as a group from the possibility of judicial error in application of corrective doctrines. Conversely, if the corrective doctrines have a negligible effect on the behavior testa-

42. See Barbara Baum Levenbook, *Harming Someone After His Death*, ETHICS 94 (1984); Joan C. Callahan, *On Harming the Dead*, ETHICS 341 (1987); Don Marquis, *Harming the Dead*, ETHICS 159 (1985).

43. See generally Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1877-1978); see also, Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected? – The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195 (1996); Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741 (1984).

mentary freedom is designed to motivate, protection of testators as a group arguably should take precedence over effectuation of individual intent.

These policy questions in the law of wills differ from those involved in other areas of law because they involve neither protection of the testator himself from any loss of liberty or wealth nor protection of the testator's family or society generally from loss of anything to which they were entitled. Balancing the loss of testamentary freedom against the abstract harm, if any, to the testator, resulting from failure to effectuate his actual testamentary desires, together with his family's loss of a mere expectancy of inheritance, is quite different from the interests considered in the development of capacity doctrine in the public law arena as well as the law of contracts and other areas of private law in which loss of pre-existing wealth may have a direct impact on the individual or other members of society. Accordingly, the analysis of the policy underlying testamentary freedom requires unique consideration.

3. Enhancing Therapeutic Consequences

Revisiting the policy underlying the doctrine of testamentary capacity creates the opportunity to consider a relatively new perspective: therapeutic jurisprudence. Therapeutic jurisprudence studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or anti-therapeutic consequences, and questions whether such rules, procedures and roles can or should be reshaped in order to enhance their therapeutic potential.⁴⁴ Normative in orientation, therapeutic jurisprudence seeks to promote therapeutic consequences and to reduce anti-therapeutic consequences without championing therapeutic value as a transcending norm to the exclusion of other values. In pursuit of this goal, therapeutic jurisprudence relies upon the behavioral sciences to examine law's impact on the mental and physical health of the people it affects.⁴⁵

Application of the therapeutic jurisprudence construct to the issue of testamentary capacity would require consideration of the therapeutic or anti-therapeutic impact of the imposition of a requirement of

44. See generally DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (Carolina Academic Press ed. 1990); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (Carolina Academic Press ed. 1991).

45. See generally BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED* (1997).

testamentary capacity at all; the therapeutic or anti-therapeutic consequences of alternative approaches to assessing capacity; and the therapeutic or anti-therapeutic consequences of each alternative for everyone affected by capacity determinations. The largely untapped resource of social science insight would play a central role in this analysis. This type of analysis may raise unanswered, or perhaps unanswerable, empirical questions, but almost surely will focus attention on existing social science or related data that may prove useful in the endeavor to develop a coherent policy of testamentary capacity.

One source of information is the work of Dr. Eric Cassell, a physician who has studied the effects of physical illness on individuals' thinking with a view to changing doctors' perspective from one which focuses on the body to one that focuses on the person as a whole.⁴⁶ In a recent study, he concluded that the thinking of physically ill individuals differs markedly from the thinking of well patients. While he cautions that the study constitutes an insufficient basis upon which to determine the effects of physical illness on testamentary capacity, it does raise the possibility that the current assessments of testamentary capacity fail to recognize the impact of physical illness on decisionmaking capabilities deemed essential for an effective exercise of testamentary freedom. At the least, this study helps to identify an important issue. Accordingly, Dr. Cassell's work merits further consideration.

Another source of information is the MacArthur Treatment Competency Study, a social science research project designed to develop a reliable and valid information base concerning criminal and civil competency, which focuses on the extent to which decision making processes of those suffering from a mental disability differ from those without such impairments.⁴⁷ The civil aspect of this study, which focused on the degree to which mental illness impairs healthcare treatment decision making competency, suggests that those with serious mental illnesses, including schizophrenia, may reason more completely than would have been expected.⁴⁸ Thus, just as Dr. Cassell's work suggests that the current approach to testamentary capacity may overestimate the competence of physically ill individuals so does the

46. Eric J. Cassell, M.D., et al., *Impairment of Thinking in Sick Patients*, in A SYMPOSIUM ON THE EFFECT OF ILLNESS AGING AND EMOTIONAL TRAUMA ON TESTAMENTARY CAPACITY AND TRANSMISSION OF PROPERTY (Apr. 28, 2000).

47. See Bruce J. Winick, Foreword: *A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme*, 2 PSYCHOL. PUB. POL'Y & L. 3 (1996).

48. See *id.* at 17.

MacArthur study suggest that the current approach to testamentary capacity, in application if not in doctrine, may underestimate the competence of mentally ill individuals to execute wills.

An intriguing idea is the possibility of adapting the measures of capacity used in the MacArthur study for the purpose of developing instruments to measure testamentary capacity. While the researchers and commentators uniformly agree that this type of use, amounting to construction of a "capacimeter," would constitute a misguided application of the research results,⁴⁹ their objections to this possibility may be less significant in the context of testamentary capacity determinations than they would be in the contexts in which the study and the commentators focused. Moreover, significant adaptation, or use of the instrument as a preliminary device as opposed to a definitive barometer, might address adequately the researchers' and commentators' concerns. This possibility merits additional consideration as well.

This preliminary discussion of therapeutic jurisprudence should not suggest that therapeutic concerns should play a central, much less exclusive, role in any revision of the policy or doctrine of testamentary capacity. Therapeutic jurisprudence would define neither the relative importance of therapeutic consequences generally as compared to other values such as family protection nor would it define the relative importance of the therapeutic or anti-therapeutic consequences to the testator versus family members. Moreover, the potential for paternalism that inheres in the therapeutic jurisprudence approach may detract from the goal of securing autonomy that the law of wills generally seeks to provide.⁵⁰ Other identified and potential shortcomings of therapeutic jurisprudence⁵¹ must be considered as well before a change so fundamental as the one contemplated here is based upon it. Notwithstanding these significant reservations, the largely unconsidered criterion of therapeutic value must be recognized as potentially important in any reconstruction of the law of testamentary capacity.

49. Thomas Grisso, et al., *The MacArthur Treatment Competence Study: II. Measures of Abilities Related to Competence to Consent to Treatment*, 19 *LAW & HUM. BEHAV.* 127, 170 (1995). See also, Marshall B. Kapp & Douglas Mossman, *Measuring Decisional Capacity: Cautions On the Construction of a 'Capacimeter'*, 2 *PSYCHOL. PUB. POL'Y & L.* 73 (1996); Roesch et al, *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model*, 2 *PSYCH. PUB. POL'Y & L.* 96 (1996).

50. John Pettila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, 10 *N.Y.L.SCH. J. HUM. RTS.* 877, 891 (1993).

51. See generally Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *PSYCH. PUB. POL'Y & L.* 193 (1995).

4. Confronting Ethical Concerns

Yet another important benefit of curtailing sanism is the opportunity to coordinate, if not unify, substantive doctrine with the ethical standards and concerns of estate planning lawyers who serve clients they suspect may suffer from a mental impairment. The issue of the lawyer's ethical obligation in representation of such clients is receiving increasing attention from practicing lawyers as well as scholars.⁵²

Within the ethical realm, the conflict between paternalistic concern and respect for autonomy creates friction just as it does in the analysis of policy underlying the substantive law. If a lawyer suspects that a client's capacity may fall below the requisite threshold, is it permissible or mandatory for the lawyer to undertake an assessment of capacity? If it is, should the lawyer consult a mental health professional? Does the lawyer's obligation vary according to the length or depth of the relationship with the client? Do the ethical obligations differ where the choices expressed by the client are both inconsistent with previously expressed wishes and, in the lawyer's view, the product of a mental disability that falls short of establishing testamentary incapacity? Neither the American Bar Association's Model Rules of Professional Conduct nor the Restatement of Law Governing Lawyers provides specific guidance for estate planning lawyers.⁵³ While The American College of Trust & Estate Counsel has published commentary on the Model Rules to supply this guidance,⁵⁴ conflicting promulgations addressing the ethical issues arising from clients' mental impairments suggest that more attention is required.⁵⁵

Overlapping with the ethical issue is the question of the extent to which a lawyer who anticipates a will contest over capacity may or should arrange for a pre-mortem expert determination. To what degree may the lawyer influence the expert? If the expert concludes that

52. See, e.g., Clifton B. Kruse, *My Basement is Filled With Pornography! But – You Don't Have a Basement*, 27 ACTEC J. 235 (2001); Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 GA. L. REV. 735 (2001); Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241 (1998).

53. MODEL RULES OF PROF'L CONDUCT R. 1.14; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §24 (2000).

54. ACTEC Commentaries on the Model Rules of Prof'l Conduct, available at <http://www.actec.org/pubinfoArk/comm>.

55. See generally Marita K. Marshall & Frayada L. Bruton, *Has Your Client Lost Ethical Considerations in Estate Planning*, 35 A HECKLERING INST. ON ESTATE PLANNING at 5-22 (2001).

the client lacks capacity, what is the lawyer to do? Does the risk of an expert determination of incapacity justify or compel foregoing inquiry if the lawyer is uncertain of the client's capacity? Will an inquiry, even if it ultimately proves satisfactory to the lawyer, prompt or support a later challenge on the grounds of capacity? These and other related questions require analysis that reflects ethical concerns of lawyers representing clients of questionable capacity as well as the post-mortem impact of an inquiry on the client's estate plan.

III. CONCLUSION

Several impetuses, some longstanding and others more recent, should prompt reevaluation of the policy underlying testamentary capacity and the resulting doctrine designed to effectuate it. The prism of sanism as an explanation for the biased results of wills contests, the tension between testamentary freedom and family protection, the insights of therapeutic jurisprudence together with developments in the behavioral and medical sciences, and the discourse on related ethical issues offer potential enlightenment for the reassessment of the law in this area. To ignore the opportunity to use these sources of scholarship to reduce the irrationality of the current approach to testamentary capacity falls short of intentional discrimination against those who exhibit signs of mental disability but it is just as reprehensible once the signs of sanism in the law of wills have been recognized. To answer the question posed in the introduction to this essay, there is no evidence of an affirmative sanist will to discriminate against those who manifested signs of mental disability during lifetime. If, however, the trusts and estates community fails to consider opportunities to redress the irrationalities in this area, the label will be appropriate.