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## **Personal Reality: Delusion in Law and Science**

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# CONNECTICUT LAW REVIEW

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## Article

### Personal Reality: Delusion in Law and Science

JOSHUA C. TATE

*The concept of an insane delusion appears in several branches of the law, including contracts, gifts, and wills. Critics of the traditional doctrine have made compelling arguments in favor of its modification or abolition in the context of wills, given that it is often used as an excuse to substitute the values of jurors for those of the testator. Moreover, recent scientific studies have shown correlations between delusions and other cognitive impairments, calling into question the need for an independent doctrine of insane delusion. Nevertheless, there is evidence that not all deluded individuals have additional cognitive biases, and those who do may have some impairments while lacking others. Due to the nature of gratuitous transfers, adoption of the fairness-based approach to mental illness in the Restatement (Second) of Contracts is not a feasible alternative to the traditional insane delusion doctrine for wills. This Article accordingly proposes a new use for the concept of a delusion in making legal determinations regarding mental capacity in the context of wills. The concept would be better formulated as a doctrine of partial sanity, used when a testator is found to lack general mental capacity, and only as a basis for upholding all or part of a will. Under such a rule, the issue of a testator's general mental capacity would be decided first. If the person in question had general mental capacity, the will would be held valid. But if the person did lack general mental capacity, the court would then consider whether the testator was capable of making some rational decisions. To the extent that a particular decision was the product of rational decision making, the testator would be deemed to have had the capacity to make that decision. This would preserve, in modified form, a legal concept that has existed for centuries and remains relevant in modern science, without giving excessive license to courts and juries to second-guess the lifestyles and eccentricities of individuals.*

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# Personal Reality: Delusion in Law and Science

JOSHUA C. TATE \*

## INTRODUCTION

In the early nineteenth century, American physician John Eberle made an effort to define the psychiatric condition then known as “monomania,” which “consists in a state of partial insanity.”<sup>1</sup> As anecdotal evidence of the existence of this condition, Eberle related the story of a barber from Lancaster “who continued to occupy himself regularly and cheerfully with his customers, and to converse rationally upon all subjects except his own fortune, and the universal conspiracy among his neighbours to poison him.”<sup>2</sup> The barber accordingly sought out his own food supply from a river that “could contain no poison, since the fish continued to live in it.”<sup>3</sup> In other words, while he generally perceived the world in the same way as his neighbors, in one important respect the barber inhabited his own personal reality into which reason could not intrude.

A modern psychiatrist might diagnose the Lancaster barber as having a delusional disorder of the persecutory type.<sup>4</sup> A judge might conclude more generally that the barber suffered from an “insane delusion,” or “a belief that is so against the evidence and reason that it must be the product of

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<sup>1</sup> 2 JOHN EBERLE, *A TREATISE ON THE PRACTICE OF MEDICINE* 160 (1831) (emphasis omitted). On the life and influence of Dr. Eberle, see Thomas D. Mitchell, *John Eberle*, in *LIVES OF EMINENT AMERICAN PHYSICIANS AND SURGEONS OF THE NINETEENTH CENTURY* 460, 460–78 (Samuel D. Gross ed., 1861).

<sup>2</sup> EBERLE, *supra* note 1, at 161 n.1.

<sup>3</sup> *Id.*

<sup>4</sup> See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 90 (5th ed., text rev. 2013) [hereinafter *DSM-V*] (defining a subtype of delusional disorder that “applies when the central theme of the delusion involves the person’s belief that he or she is being conspired against, cheated, spied on, followed, poisoned, or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals”).

derangement.”<sup>5</sup> Under traditional law, if the barber entered into a contract that was premised on his false belief regarding his neighbors’ intentions, such a contract would be voidable at the barber’s option.<sup>6</sup> If the barber attempted to make a gift or devise because of his delusion, that transfer would be invalid;<sup>7</sup> however, the barber could enter into enforceable contracts with regard to matters unconnected with his erroneous beliefs,<sup>8</sup> and he could, at least in theory, make a gift or execute a will provided that it was not the product of his delusion.<sup>9</sup>

Over the past few decades, newer tests of mental capacity have emerged in contract law that are more attuned to developments in psychiatry and do not focus on cognitive impairments.<sup>10</sup> Under the *Restatement (Second) of Contracts*, the fairness of the transaction is an important concern.<sup>11</sup> However, in the law of gratuitous transfers, the traditional insane delusion doctrine remains firmly entrenched, and scholars have begun to criticize its

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<sup>5</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (AM. LAW INST. 2003) [hereinafter RESTATEMENT (THIRD) OF DONATIVE TRANSFERS] (defining an insane delusion for purposes of determining the validity of a donative transfer). The doctrine of insane delusion may apply even when the testator has “an otherwise high degree of intelligence.” WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES 316 (4th ed. 2010). Ironically, this doctrine became prominent in American courts during an age when “confidence in human ability soared to unprecedented heights.” See SUSANNA L. BLUMENTHAL, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE 10–12 (2016) (explaining the contradictions that preoccupied Gilded Age thinkers who had to wrestle with issues of mental capacity).

<sup>6</sup> See, e.g., *Weller v. Copeland*, 120 N.E. 578, 583 (Ill. 1918) (“[I]f the monomania or delusion is so connected with the subject-matter of the agreement as to render one of the parties thereto incapable of understanding the nature or effect of the contract or of acting rationally in the transaction, it is thereby rendered voidable at the option of the party so afflicted.”).

<sup>7</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. s (affirming that a donative transfer is invalid “to the extent that it was the product of an insane delusion”); see also MCGOVERN ET AL., *supra* note 5, at 317.

<sup>8</sup> See *Hanks v. McNeil Coal Corp.*, 168 P.2d 256, 260 (Colo. 1946) (upholding validity of sale not affected by seller’s insane delusion); cf. *Weller*, 120 N.E. at 583 (“[A] monomania or delusion unconnected with the subject-matter of the contract does not destroy its binding force”).

<sup>9</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. s; MCGOVERN ET AL., *supra* note 5, at 317.

<sup>10</sup> See, e.g., *Sparrow v. Demonico*, 960 N.E.2d 296, 302 (Mass. 2012) (describing the “modern” test as one recognizing “that competence can be lost, not only through cognitive disorders, but through affective disorders that encompass motivation or exercise of will”); *Ortelere v. Teachers’ Ret. Bd.*, 250 N.E.2d 460, 462 (N.Y. 1969) (“[I]ncapacity to contract or exercise contractual rights may exist, because of volitional and affective impediments or disruptions in the personality, despite the intellectual or cognitive ability to understand.”).

<sup>11</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (AM. LAW INST. 1981) (“Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance . . . terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust.”); see also *id.* § 15 cmt. b (“Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.”).

application there as flawed, redundant, and inconsistent.<sup>12</sup> According to this view, the doctrine of insane delusion does testators more harm than good, particularly in jurisdictions that allow amateur jurors to inject their own personal biases into the process.<sup>13</sup> Some argue that courts hearing will contests should focus on the general question of mental capacity, although the presence or absence of certain types of delusions might be relevant in determining whether a testator was of sound mind.<sup>14</sup> Others have proposed that a will be considered partially invalid when some, but not all, of the testamentary gifts were affected by an insane delusion.<sup>15</sup>

Due to the nature of gratuitous transfers, adoption of the fairness-based approach to mental illness in the *Restatement (Second) of Contracts* is not a feasible alternative to the traditional insane-delusion doctrine for wills and

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<sup>12</sup> See, e.g., Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 68–71 (2007) (criticizing the insane-delusion doctrine because the laws that surround it are largely over- and under-inclusive); Alan J. Oxford, II, *Salvaging Testamentary Intent by Applying Partial Invalidity to Insane Delusions*, 12 APPALACHIAN J.L. 83, 88 (2012) (arguing that “[c]ourts should reexamine how they view insane delusions and be willing to partially void a will in lieu of completely destroying it”); Amy D. Ronner, *Does Golyadkin Really Have a Double? Dostoevsky Debunks the Mental Capacity and Insane Delusion Doctrines*, 40 CAP. U. L. REV. 195, 260–61 (2012) (discussing how the doctrine of insane delusion might best be reformed). Although scholarship on the insane-delusion doctrine has not focused on its application in the law of contracts, some of the problems that have been identified in the context of gratuitous transfers apply equally well to contractual arrangements. By contrast, much has been written about the doctrine of insane delusion in criminal law, but the purpose of the doctrine (exculpating a defendant with regard to one specific act) is very different in the criminal context. This Article will focus on the insane delusion doctrine as applied to voluntary transfers and transactions.

<sup>13</sup> See, e.g., Fogel, *supra* note 12, at 100–01 (discussing how parts of the test for monomania are flawed and how factfinders disregard evidence showing the intent of the testator and instead insert their own biases into the cases). Similar problems of bias have been noted with regard to the doctrine of undue influence. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37, 245–46 (1996) (reporting that “determinations often are more dependent on courts’ normative views of the relationships between the testator, beneficiary and contestant than by the actual presence or absence of factors often deemed indicative of undue influence”); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 589–92 (1997) (explaining that devises to family members are rarely treated as “unnatural,” while devises to non-family members may be taken as evidence of undue influence); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 280–86 (2010) (discussing the “blindness” courts put on when applying the traditional doctrine of undue influence). On the disadvantages of trial by jury in will contests, see John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2043 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993)).

<sup>14</sup> Compare Fogel, *supra* note 12, at 111 (arguing that “[t]he doctrine of monomania should be abrogated in favor of the general test for testamentary capacity”), with Ronner, *supra* note 12, at 261 (suggesting that the test incorporate “an added mandate that a mentally incompetent testator must also suffer from what the DSM defines as bizarre delusions”).

<sup>15</sup> See, e.g., 1 PAGE ON WILLS § 12.47 (2015) (“The better view, and apparently the weight of authority, is to the effect, that under such circumstances, a will may be valid as to the gifts which were not affected by the insane delusion and invalid as to the gifts which were affected by the insane delusion.”); Oxford, *supra* note 12, at 121 (“Courts utilizing the doctrine of partial invalidity can correct the effect of the insane delusion by partially voiding the offending provisions, and by appropriately protecting the sanctity of a testator’s testamentary freedom and wishes, by preserving those gifts unaffected by the insane delusion.”).

trusts.<sup>16</sup> The reform of contract law does, however, provide a precedent for looking to modern psychiatry for guidance.<sup>17</sup> Among psychiatrists and scientific researchers, the concept of a delusion is far from obsolete. The current *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) used by psychiatrists and other experts recognizes a category of “delusional disorder” in which, “[a]part from the impact of the delusion(s) or its ramifications, functioning is not markedly impaired.”<sup>18</sup> Although some individuals with a delusional disorder go on to develop schizophrenia, the “diagnosis is generally stable.”<sup>19</sup> Recent scientific studies have shown correlations between delusions and other cognitive impairments.<sup>20</sup> Nevertheless, there is evidence that not all deluded individuals have additional cognitive biases, and those who do may have some impairments while lacking others.<sup>21</sup>

Courts should not be too quick to abandon a concept that continues to have relevance for the scientists and doctors who deal with mental illness on a daily basis. This Article will accordingly propose a new use for the concept of a delusion in making legal determinations regarding mental capacity in the context of wills. The concept would be better formulated as a doctrine of partial sanity, used when a testator is found to *lack* general mental capacity, and only as a basis for upholding all or part of a will. Under such a rule, the issue of a testator’s general mental capacity would be decided first. If the person in question had general mental capacity, the will would be held valid. But if the person did lack general mental capacity, the court would consider whether the testator was capable of making some rational decisions. To the extent that a particular decision was the product of rational decision making, the testator would be deemed to have had the capacity to make that decision. This would preserve, in modified form, a legal concept that has existed for

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<sup>16</sup> A person who lacks the capacity to execute a will also lacks the capacity to create a testamentary trust, and the same standard is increasingly applied to revocable trusts. See 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 3.2 (4th ed. 2006).

<sup>17</sup> See *Sparrow v. Demonico*, 960 N.E.2d 296, 302 (Mass. 2012) (explaining how “the traditional test for contractual incapacity . . . evolved to incorporate an increased understanding of the nature of mental illness in its various forms”).

<sup>18</sup> DSM-V, *supra* note 4, at 90.

<sup>19</sup> *Id.* at 92–93.

<sup>20</sup> See, e.g., Richard P. Bentall et al., *The Cognitive and Affective Structure of Paranoid Delusions*, 66 ARCHIVES GEN. PSYCHIATRY 236, 243–44 (2009) (finding a correlation between paranoid delusions and impaired cognitive performance); Lars O. White & Warren Mansell, *Failing to Ponder? Delusion-Prone Individuals Rush to Conclusions*, CLINICAL PSYCHOL. & PSYCHOTHERAPY 111, 121–22 (2009) (finding a “tendency of delusion-prone individuals to strike decisions after collecting less data than controls”).

<sup>21</sup> See, e.g., Susannah May Colbert et al., *Jumping to Conclusions and Perceptions in Early Psychosis: Relationship with Delusional Beliefs*, 15 COGNITIVE NEUROPSYCHIATRY 422, 423, 438 (2010) (finding that individuals with delusions were no more likely to jump to conclusions, but were more likely to identify “an ambiguous perceptual event as external and real, rather than internal and imaginary”).

centuries and remains relevant in modern science, without giving excessive license to courts and juries to second-guess the lifestyles and eccentricities of individuals.

This Article is divided into three parts. Section I will examine the history and current application of the doctrine of insane delusion in the law of contracts and donative transfers. Section II will discuss the historical and current scientific understanding of delusions and their relationship with other cognitive impairments. Section III will then consider how current law might be reformed to reflect the current state of scientific knowledge while addressing the criticisms that have been made of the legal doctrine of insane delusion.

## I. THE LEGAL DOCTRINE OF INSANE DELUSION

The doctrine of insane delusion entered the common law in the nineteenth century as an embrace of a concept that was, at the time, cutting-edge science. Since that time, however, the doctrine has come unmoored from its scientific origins. In the field of contracts, the case law has gradually abandoned the doctrine in favor of other, more sophisticated tests. In the context of donative transfers, the doctrine has come under attack from commentators who argue that it provides an unnecessary second opportunity for jurors to insert their own biases into assessments of mental capacity. This Section will provide some background on the origins of the legal doctrine of insane delusion as well as recent criticism of the doctrine.

### A. *Origins of the Legal Doctrine of Insane Delusion*

Although the concept of partial insanity was mentioned by English courts as early as 1790,<sup>22</sup> the first clear application of the doctrine was in the 1822 case of *Dew v. Clark*, which involved a plea by a daughter to challenge her father's will.<sup>23</sup> According to the daughter, Charlotte Mary Dew, her father Ely Stott "laboured under great and continued delusion of mind" regarding her, "declaring, whilst she was in her earliest infancy, that she was invested by nature with a singular depravity—was born to become the

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<sup>22</sup> See *Greenwood v. Greenwood* (1790), 163 Eng. Rep. 930; 3 Curt. 868. As noted by Bradley Fogel, the facts of *Greenwood* actually involved the distinct concept of a lucid interval, although *Greenwood* was nonetheless cited in *Dew v. Clark*, the first case to apply the actual insane-delusion doctrine. See Fogel, *supra* note 12, at 83. The *Greenwood* decision was frequently cited in judicial opinions and treatises in the nineteenth century but was generally regarded as wrongly decided. See BLUMENTHAL, *supra* note 5, at 115–16, 323 n.22.

<sup>23</sup> The *Dew* case actually appears three times in the English Reports. The first opinion, in 1822, was followed by two subsequent opinions issued in 1824 and 1826, respectively. *Dew v. Clark* (1822) (*Dew I*), 162 Eng. Rep. 98; 1 Add. 279; *Dew v. Clark* (1824) (*Dew II*), 162 Eng. Rep. 233; 2 Add. 102; *Dew v. Clark* (1826) (*Dew III*), 162 Eng. Rep. 410, 455; 3 Add. 79; Fogel, *supra* note 12, at 83 n.95.



peculiar victim of vice and evil—was the special property of Satan.”<sup>24</sup> The testator’s nephews responded to this claim by asserting that the alleged delusion could not amount to a lack of general testamentary capacity as defined by law.<sup>25</sup> The Prerogative Court rejected this defense, holding that partial insanity might in fact invalidate a will.<sup>26</sup> However, the court also emphasized that the daughter could prevail only by proving “that the deceased was insane as to her, notwithstanding his general sanity.”<sup>27</sup> In a subsequent opinion, the court concluded that the decedent did indeed have a “morbid delusion” with respect to his daughter that rendered the will invalid.<sup>28</sup>

The Prerogative Court did not incorporate any scientific justification in *Dew* for its conclusion that partial insanity could invalidate a will. In the 1830 case of *Fulleck v. Allinson*, however, the Prerogative Court made reference to a scientific concept that had recently gained currency, namely, that of “monomania.”<sup>29</sup> The contestant in *Fulleck* alleged that the testator falsely believed that his well had been poisoned by his niece’s husband.<sup>30</sup> Like the barber from Lancaster in John Eberle’s medical treatise,<sup>31</sup> the testator continued to have sound judgment with regard to all other subjects.<sup>32</sup> Thus, the *Fulleck* court reasoned, the testator’s alleged delusion would properly be classified as “a monomania.”<sup>33</sup> Nevertheless, because the alleged delusion seemed to have a reasonable basis in fact (for example, the evidence showed that the testator’s dog had actually been poisoned), the court ultimately rejected the contest and allowed the will to be probated.<sup>34</sup>

American courts embraced both the scientific concept of monomania and the legal doctrine of insane delusion, which they applied not only in will contests, but also in cases involving contract disputes. In the 1846 case of *Alston v. Boyd*,<sup>35</sup> the Supreme Court of Tennessee set aside a contract on the ground that the plaintiff’s “distinctly established monomania” regarding evil spirits in his house may have influenced his agreement to exchange land with the defendant.<sup>36</sup> Seven years later, the Virginia Supreme Court of Appeals affirmed the validity of a deed executed by a grantor who was “laboring

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<sup>24</sup> *Dew I*, 162 Eng. Rep. at 98.

<sup>25</sup> *Id.* at 99.

<sup>26</sup> *Id.* at 99 (citing *Greenwood*, 163 Eng. Rep. 930).

<sup>27</sup> *Id.* at 100.

<sup>28</sup> *Dew III*, 162 Eng. Rep. at 455.

<sup>29</sup> *Fulleck v. Allinson* (1830), 162 Eng. Rep. 1251, 1252; 3 Hagg. Ecc. 527, 530.

<sup>30</sup> *Id.*

<sup>31</sup> See EBERLE, *supra* note 1, at 161–62 n.† (describing the functional monomania of a Lancaster barber). On the concept of monomania in early psychiatry, see *infra* Section II.

<sup>32</sup> *Fulleck*, 162 Eng. Rep. at 1257; 3 Hagg. Ecc. at 542.

<sup>33</sup> *Id.*

<sup>34</sup> 162 Eng. Rep. at 1258; 3 Hagg. Ecc. at 545–47.

<sup>35</sup> 25 Tenn. (6 Hum.) 504 (1846).

<sup>36</sup> *Id.* at 505–08.

under *monomania*, but upon a subject in nowise connected with affairs of this nature.”<sup>37</sup> In 1857, the Supreme Court of North Carolina upheld a jury instruction defining monomania as “a species of insanity . . . confined to a particular faculty of the mind, or existing in reference to a particular subject,” and limiting the defense to contracts entered into “under the influence of [an insane] delusion.”<sup>38</sup>

The application of the doctrine of insane delusion in nineteenth-century cases occasionally shows what might be regarded as an enlightened attitude toward the mentally ill. Judges in insane delusion cases were not always swayed by any social stigma that might have been felt by those who were committed to mental hospitals or who exhibited delusional behavior. For example, in 1874, an Illinois man was held to be capable of entering into a contract despite having spent time in “the lunatic asylum” because “in many forms of insanity, the capacity to transact business is entirely unaffected.”<sup>39</sup> In 1880, an Iowa man who was found to be “laboring under some insane delusions upon the subject of religion” was nevertheless held to have executed a valid deed.<sup>40</sup> In these cases, the concept of monomania was applied to protect the rights of persons who exhibited signs of mental illness.

A good illustration of how far nineteenth-century judges were willing to go to uphold the choices of delusional individuals may be found in the 1892 case of *Lewis v. Arbuckle*.<sup>41</sup> Shortly before her death, Margaret Walsh had conveyed eighty acres of land to two of her children.<sup>42</sup> Margaret, who was eighty years old, exhibited a number of bizarre tendencies:

She had for a long time an hallucination that she could see fairies; conversed with them; set the table for them; thought sticks of stove wood fairies; wanted to keep on the good side of them; imagined she could see departed spirits, particularly of her children; imagined she could see their whitened bones, and could not be led to believe but that some of them were dead; called people’s attention to seeing their spirits out in the road.<sup>43</sup>

Despite Margaret’s hallucinations and eccentric beliefs, several witnesses testified that she was nevertheless capable of exercising good judgment in her business affairs.<sup>44</sup> The court held that Margaret’s beliefs did not render her conveyance invalid, noting that “[m]any persons believe in spiritual

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<sup>37</sup> *Boyce’s Adm’r v. Smith*, 50 Va. (9 Gratt.) 704, 707 (1853).

<sup>38</sup> *Gillespie v. Shuliberrier*, 50 N.C. 157, 159 (1857).

<sup>39</sup> *Searle v. Galbraith*, 73 Ill. 269, 271–72 (1874).

<sup>40</sup> *Burgess v. Pollock*, 5 N.W. 179, 181 (Iowa 1880).

<sup>41</sup> 52 N.W. 237 (Iowa 1892).

<sup>42</sup> *Id.* at 238.

<sup>43</sup> *Id.* at 239.

<sup>44</sup> *Id.*

manifestations, insist that they have communication and conversations with deceased friends, and the like,” but such beliefs did not render them “unfit to make a disposition of their property.”<sup>45</sup>

### B. *Insane Delusions in Contract Law*

Although the concept of insane delusion was applied in cases involving wills as well as contracts, the consequences of a finding of mental incapacity were quite different in the two categories of cases. Wills were gratuitous, and their validity did not (at least in theory) depend on fairness. If a testator lacked mental capacity at the time the will was executed, whether due to an insane delusion or otherwise, the will or any infected portion of it would be invalid.<sup>46</sup> By contrast, contracts were two-way transactions for consideration. This raised a number of questions that were absent in the wills context. What would happen if one of the contracting parties was unaware of the other’s incapacity? Could the contract be set aside even if it was fair and executed in good faith? And what if the mentally incompetent person subsequently regained capacity and wished to ratify the contract?

Early U.S. decisions on the subject of agreements and transactions made by mentally incompetent persons fell into two broad categories. According to one line of cases, it was impossible for a mentally incompetent person to enter into a valid contract.<sup>47</sup> As the Alabama Supreme Court reasoned in 1900, “[o]ne of the essential elements to the validity of a contract is the concurring assent of two minds. If one of the parties to a contract is insane at the time of its execution, this essential element is wanting.”<sup>48</sup> This line of argument was supported by the U.S. Supreme Court’s 1872 decision in *Dexter v. Hall*,<sup>49</sup> which held that a power of attorney executed by a mentally incompetent person was not merely voidable, but void.<sup>50</sup>

Most U.S. courts rejected the view that contracts entered into by a

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<sup>45</sup> *Id.* at 239–40. Many cemeteries established in the nineteenth century included features designed to “promote a close association between the living and the dead,” such as walking paths between small sections of plots, small monuments that required maintenance by family members, and benches for reflection. Albert N. Hamscher, *Death and Dying in History*, in *TEACHING DEATH AND DYING* 155, 161–62 (Christopher M. Moreman ed., 2008).

<sup>46</sup> See *Dew III*, 162 Eng. Rep. at 455.

<sup>47</sup> See 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 250 n.8 (1920) (“[I]t was decided in early English cases that a lunatic could not execute a deed, nor a bond, nor indorse a bill of exchange. And so a family settlement made by a lunatic was set aside, although it was reasonable and for the convenience of the family. In accordance with this view it is held in many cases, especially those of not very recent times, that a lunatic’s contract or deed is absolutely void.”).

<sup>48</sup> *Daugherty v. Powe*, 30 So. 524, 525 (Ala. 1900).

<sup>49</sup> 82 U.S. 9 (1872).

<sup>50</sup> *Id.* at 26. The Supreme Court later clarified that its decision did not apply to all transactions by mentally incompetent persons. See *Luhrs v. Hancock*, 181 U.S. 567, 574 (1901) (“The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside.”).

mentally incompetent person were void, holding them to be voidable only.<sup>51</sup> Courts taking the latter position pointed to the treatment of minors, whose contracts were generally held to be voidable, not void, even though they were not able to offer meaningful consent.<sup>52</sup> Although the analogy was imperfect, it was sufficiently persuasive to establish enforceability, subject to avoidance by or on behalf of the mentally incompetent party, as the majority rule.<sup>53</sup> However, this raised a second issue. If a contract could be enforced at the option of the mentally incompetent party, was it fair to deny the other contracting party any right of enforcement?

In the leading case of *Molton v. Camroux*,<sup>54</sup> the English Court of Exchequer held that an executed contract could not be set aside on the basis of mental incompetency when the allegedly incompetent party appeared to be of sound mind and the contract was fair and made in good faith.<sup>55</sup> The *Molton* rule was widely followed in the United States in jurisdictions that considered contracts of mentally incompetent persons to be voidable.<sup>56</sup> Although U.S. courts would generally decline to enforce an executory contract made by an incompetent person,<sup>57</sup> they were reluctant to set aside executed contracts in the absence of bad faith or unfairness. As noted by Susanna Blumenthal, American judges did not want to admit to the public, or to themselves, that they were “violating the hallowed ideal of mutual assent.”<sup>58</sup> Unless the consideration could be refunded and the status quo restored for the other contracting party, U.S. judges concluded that it would be inequitable to set aside a fair and bona fide agreement.<sup>59</sup>

Beginning in the first half of the twentieth century, some judges and commentators began to notice difficulties of interpretation and application

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<sup>51</sup> See 1 WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS § 269 & nn.86–87 (1913) (citing the opinions of U.S. courts to support the proposition that the contracts of mentally incompetent persons are voidable “except when for necessities”).

<sup>52</sup> See, e.g., *Eaton v. Eaton*, 37 N.J.L. 108, 117 (1874) (“[D]eeds or instruments under seal executed by infants, are voidable only, with the exception of those which delegate a naked authority.”).

<sup>53</sup> See 1 WILLISTON, *supra* note 47, at § 251 (referring to voidability as “the view more commonly expressed”).

<sup>54</sup> *Molton v. Camroux* (1848) 154 Eng. Rep. 584; 2 Ex. 487.

<sup>55</sup> *Id.* at 590.

<sup>56</sup> See, e.g., 1 WILLISTON, *supra* note 47, § 254 (citing numerous cases recognizing the *Molton* rule).

<sup>57</sup> See *Corbit v. Smith*, 7 Iowa 60, 64–65 (1858) (noting that courts generally will not enforce executory contracts entered into by parties that are “incapable”); 1 WILLISTON, *supra* note 47, § 254 (noting exceptions for executory contracts and contracts where the consideration could be refunded).

<sup>58</sup> BLUMENTHAL, *supra* note 5, at 183.

<sup>59</sup> See *Coburn v. Raymond*, 57 A. 116, 117 (Conn. 1904) (observing that the majority of cases suggest that a “deed cannot be set aside on the ground of the grantor’s incompetency where the grantee acted in ignorance of the incompetency, and fairly and in good faith”); *Young v. Stevens*, 48 N.H. 133, 136–37 (1868) (basing the court’s holding on the well-accepted principle that where a contract is entered into in good faith, it will be upheld); *Eaton v. Eaton*, 37 N.J.L. 108, 118 (1874) (noting that other courts have held that where “persons apparently of sound mind and not known to be otherwise, enter into a contract which is fair and bona fide,” the “contract cannot be set aside”).

with respect to the legal doctrine of insane delusion for both contracts and wills. As early as 1905, the Missouri Supreme Court noted that “[m]edical men of great learning maintain that a mind diseased on one subject must be classed as unsound,” but nonetheless considered itself bound by its prior precedent to affirm the legal doctrine of insane delusion.<sup>60</sup> In 1935, the Illinois Supreme Court found at least three separate definitions of “insane delusion” in prior case law.<sup>61</sup> The court ultimately concluded that the decedent in the case was influenced by an insane delusion without adopting any particular definition.<sup>62</sup>

The decades after the First World War witnessed the rise of Legal Realism, a school of thought that questioned the nineteenth-century understanding of law as a science.<sup>63</sup> Realists questioned whether the stated reasons offered by judges to support their decisions were the real reasons, suggesting that other factors were often determinative.<sup>64</sup> In the early 1940s, law professor Milton Green published a series of articles applying a Realist critique to traditional legal doctrines relating to mental capacity.<sup>65</sup> Green’s principal criticism of the doctrine of insane delusion, and other current tests of capacity, was that such tests were inherently subjective and asked questions about state of mind that were impossible for judges to answer.<sup>66</sup> Green argued that, despite the stated application of objective standards, judicial decisions regarding capacity were actually based on objective assessments of behavior that were analogous to diagnoses made by psychiatrists.<sup>67</sup> To support this claim, Green pointed to cases where the “unnatural” nature of a particular contract or will was mentioned to justify a

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<sup>60</sup> *Sayre v. Trs. of Princeton Univ.*, 90 S.W. 787, 797 (Mo. 1905).

<sup>61</sup> *Eubanks v. Eubanks*, 195 N.E. 521, 526 (Ill. 1935).

<sup>62</sup> *Id.*

<sup>63</sup> See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 15–21 (1995) (summarizing the traditional account of the Realist movement).

<sup>64</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* 112 (1930) (discussing various factors—such as personality, education, and environment—that may influence judicial decision making).

<sup>65</sup> See Milton D. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189, 1192 (1940) (discussing the legal conceptions of mental incompetency and the public policies behind them); Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 141–42 (1941) [hereinafter Green, *Judicial Tests*] (addressing when “mental unsoundness” is “sufficient to destroy contractual or testamentary capacity”); Milton D. Green, *Fraud, Undue Influence and Mental Incompetency—A Study in Related Concepts*, 43 COLUM. L. REV. 176, 177 (1943) (analyzing the legal concepts of fraud, undue influence, and mental incompetency in connection with contracts and wills); Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 554 (1943) (discussing the operative effect of mental incompetency in the context of wills and agreements); Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 274 (1944) [hereinafter Green, *Proof*] (questioning whether judicial tests of incompetency are useful tools despite their “defects,” and whether there is an “inarticulate standard” that somehow justifies the decisions made by courts).

<sup>66</sup> See Green, *Judicial Tests*, *supra* note 65, at 161 (arguing that courts can infer an individual’s state of mind “but they can never know,” and thus “[t]he task which they have set themselves is an impossible one”).

<sup>67</sup> *Id.* at 160–64.

determination that it was motivated by an insane delusion.<sup>68</sup> According to Green, the “real standard of mental incompetence” was not expressed by the judges and focused on “the fairness or the unfairness of the transaction.”<sup>69</sup>

Green’s criticism of traditional capacity doctrine proved to be very influential in the future development of contract law. In 1979, the American Law Institute adopted the *Restatement (Second) of Contracts*, which contained a new provision, Section 15, on “Mental Illness or Defect:”

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.<sup>70</sup>

This new section made explicit the objective considerations that Green had considered to be the real standard for mental incompetence. Comment (b) of the new provision clarified that when a party had “some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.”<sup>71</sup> As justification for the new section, the Reporter’s Note cited several of Green’s articles among other authorities.<sup>72</sup>

The objective test of the *Restatement (Second) of Contracts* has gradually displaced the traditional doctrine of insane delusion in modern contract law. Under the modern approach, the presence of delusions has no special relevance toward the determination of whether a contract is valid. An example of this may be seen in the 1989 case of *Farnum v. Silvano*,<sup>73</sup>

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<sup>68</sup> Green, *Proof*, *supra* note 65, at 280–81.

<sup>69</sup> *Id.* at 311.

<sup>70</sup> RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 11, § 15.

<sup>71</sup> *Id.* § 15 cmt. (b).

<sup>72</sup> *Id.* § 15 reporter’s note.

<sup>73</sup> 540 N.E.2d 202 (Mass. App. Ct. 1989).

which involved a challenge to a sale allegedly agreed to by a mentally ill nonagenarian. Viola Farnum, who sold her house in Massachusetts to Joseph Silvano in 1986, suffered from several apparent delusions, believing, for example, that her dead sisters were still alive and her one-story house had an upstairs.<sup>74</sup> Nonetheless, the word “delusion” appears nowhere in the opinion of the Appeals Court of Massachusetts’s holding that Viola lacked the capacity to contract. Instead, the court repeatedly notes that the sale price for the house was about half its fair market value.<sup>75</sup> Under the *Restatement (Second) of Contracts* test,<sup>76</sup> in light of the unfairness of the transaction, it was irrelevant whether Viola’s alleged delusions caused her to sell the property.

### C. *Insane Delusions in the Law of Donative Transfers*

In contrast to contract law, the law of wills and other donative transfers is built around the fundamental principle that, absent some controlling public policy to the contrary, an individual may dispose of his or her property without regard to fairness. As explained by the *Restatement (Third) of Donative Transfers*, “American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”<sup>77</sup> This principle has been traditionally justified as creating an incentive for work and savings.<sup>78</sup>

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<sup>74</sup> *Id.* at 203.

<sup>75</sup> *Id.* at 203, 205.

<sup>76</sup> RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 11, § 15.

<sup>77</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 10.1 cmt. c. For criticism of this longstanding policy, see RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 82 (2007) (“The glue of the traditional family is biological connection, sometimes supplemented by adoption. . . . American ‘exceptionalism’ is now too often exemplified by excessive regard for the individualistic whims of parents to the possible detriment of their children.”); Deborah A. Batts, *I Didn’t Ask to Be Born: The American Law of Disinheritance and a Proposal for a Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1197 (1990) (“As sacred and fundamental as the [parent-child] bond may be . . . it is consistently abandoned whenever it clashes with another fundamental concept imbedded in America’s social and legal structure: testamentary freedom.”).

<sup>78</sup> See, e.g., THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 34 (2d ed. 1953) (arguing that limitations on testamentary freedom would “discourage individual initiative and thrift,” since people would have less of an incentive to accumulate property if they could not choose who would receive it after death); Jeremy Bentham, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM 297, 338 (Bowring ed. 1838–1843) (suggesting that individuals would become spendthrifts, purchase annuities, or spend all their money during life if they could not devise it by will); 1 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 352 (1755) (claiming that “industry should be much discouraged” if the right of testation were eliminated); HENRY SIDGWICK, THE ELEMENTS OF POLITICS 53 (4th ed. 1919) (“[T]he abrogation of the power of bequest would remove from [the individual] an important inducement to the exercise of industry and thrift in advancing years.”). The argument has been made since at least the thirteenth century. See 2 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed. & Samuel E. Thorne ed. & trans., 1968) (original work c. 1230) (“[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives.”). On the

As a practical matter, this principle is not always strictly followed, and the rules may be applied by judges and juries in such a way as to second-guess the testator's decisions.<sup>79</sup> However, the explicit introduction of a fairness-based test with regard to mental capacity issues would threaten the core doctrine underlying the law of gratuitous transfers and offer more opportunities for factfinders to inject their own personal biases into the process. In the absence of a fairness-based alternative, the nineteenth-century insane-delusion doctrine lives on in cases involving will contests, raising a number of doctrinal and practical problems.

### 1. *Mental Capacity in the Third Restatement*

The *Restatement (Third) of Donative Transfers* addresses mental capacity in Section 8.1. The first paragraph of Section 8.1 states generally that “[a] person must have mental capacity in order to make or revoke a donative transfer.”<sup>80</sup> If the donative transfer takes the form of a will or will substitute, the testator must be capable of understanding

[t]he nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.<sup>81</sup>

If the testator cannot satisfy this general test of mental capacity, the will is void.<sup>82</sup>

The doctrine of insane delusion is not addressed in the text of Section 8.1 of the *Restatement (Third) of Donative Transfers*. A comment to the

other hand, as Hirsch and Wang have noted, many individuals acquire wealth “to gratify their egos, to gain prestige, to gain power—and simply out of habit. Once these impulses are taken into account, the economic contributions traceable to freedom of testation could turn out to be small.” Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8–9 (1992). For a general discussion of this and other arguments in favor of freedom of testation, see Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 156–70 (2008).

<sup>79</sup> See, e.g., Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 586–608 (1999) (explaining how courts may manipulate undue influence and will formalities statutes so as to protect members of the testator's family). The problem seems particularly acute with respect to undue influence cases. See, e.g., Leslie, *supra* note 13, at 243–44 (arguing that courts tend to find undue influence only when the beneficiary is not related to the testator); Madoff, *supra* note 13, at 602 (noting that bequests in favor of the spouse or blood relatives are unlikely to be overturned on undue influence grounds); Spivack, *supra* note 13, at 280–86 (citing recent cases to demonstrate that “the vagueness of the undue influence doctrine still leaves the door open to courts imposing their ideology-driven views of morality and propriety upon the will of the testator”).

<sup>80</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1(a).

<sup>81</sup> *Id.* § 8.1(b). In the case of an irrevocable gift, the donor must satisfy this test and “must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.” *Id.* § 8.1 cmt. d.

<sup>82</sup> *Id.* § 8.1 cmt. c.



section, however, defines an insane delusion as “a belief that is so against the evidence and reason that it must be the product of derangement.”<sup>83</sup> The comment clarifies that “[m]ere eccentricity does not constitute an insane delusion,” and “[a] belief resulting from a process of reasoning from existing facts is not an insane delusion, even though the reasoning is imperfect or the conclusion illogical.”<sup>84</sup> Nevertheless, even though a person who “suffers from an insane delusion is not necessarily deprived of capacity to make a donative transfer,” a donative transfer will be invalid “to the extent that it was the product of an insane delusion.”<sup>85</sup>

The *Restatement* definition of insane delusion raises two difficult issues—one relating to the definition of an insane delusion and the other relating to the consequences of such a delusion. First, how are courts to determine whether a belief is “so against the evidence and reason that it must be the product of derangement?” Is the test satisfied if there is even a slight possibility that the delusion might be based in fact? Second, how is a court to determine whether a will was “the product of an insane delusion” when the testator is dead and cannot explain the reasons for his or her testamentary choices? Courts have wrestled with these issues for years, with inconsistent and sometimes dubious results.<sup>86</sup> As Bradley Fogel and others have shown, both components of the insane delusion test are difficult to apply, partly because factfinders sometimes disregard factual evidence supporting a testator’s choices when the result fails to comport with their own notions of fairness.<sup>87</sup>

## 2. *The Legal Definition of Delusion*

In some cases, it is not difficult to reach a determination that the testator was suffering from an insane delusion. A good example of this is *In re Estate*

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<sup>83</sup> *Id.* § 8.1 cmt. s.

<sup>84</sup> *Id.*; see also *Dibble v. Currier*, 83 S.E. 949, 950 (Ga. 1914) (“[A] bad reasoner, even one wanting in ordinary discernment or discrimination, is not necessarily insane.”); MCGOVERN ET AL., *supra* note 5, at 316 (“Contests based upon an insane delusion do not often succeed in upsetting a will, because a testator’s mistaken belief is not an ‘insane delusion’ if there was some rational basis for it.”).

<sup>85</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. s; see also MCGOVERN ET AL., *supra* note 5, at 317 (“In order for the challenge to succeed the will must be the product of the insane delusion. In other words, the terms of the will must be explainable by reference to the insane delusion.”).

<sup>86</sup> See Fogel, *supra* note 12, at 86–101 (discussing several cases involving mental capacity).

<sup>87</sup> See *id.* at 101 (arguing that “fact-finders disregard evidence that could have been the basis of the testator’s delusion based on their own biases,” and the requirement that the will be a product of the insane delusion “forces fact-finders to determine what the testator was thinking when he executed his will,” which “is an impossible factual determination”); see also Oxford, *supra* note 12, at 97 (“The difficulty with the ‘no factual basis’ standard is that all delusions are based in some fact.”); Note, *Testamentary Capacity as Affected By Insane Delusions*, 26 IND. L.J. 291, 302 (1951) (noting that “many instances are found in which the court, anxious to uphold a disposition, attempted to show that no delusion existed” in spite of “almost unsurmountable evidence to the contrary,” while in other cases “clearly irrelevant delusions have been allowed to void a will”).

of *Zielinski*,<sup>88</sup> a 1995 New York case that is often cited as an example of how a paranoid delusion can invalidate a testator's will.<sup>89</sup> Cecilia Zielinski, the decedent in the case, had executed a will devising her residuary estate to her sister, Barbara Moczulski, and Barbara's husband in equal shares, and disinheriting her son, Eugene Zielinski, along with all other lineal descendants, including two grandchildren and five great-grandchildren.<sup>90</sup> Upon Cecilia's death, Barbara offered the will to probate, and Eugene contested it on the ground that Cecilia lacked testamentary capacity.<sup>91</sup> At the trial, two psychiatrists testified along with some of Cecilia's employees and other acquaintances, calling attention to a number of bizarre beliefs that Cecilia had concerning her son and others.<sup>92</sup>

According to the trial witnesses, Cecilia thought that her son had performed unauthorized medical procedures upon her, including injecting her in the buttocks and placing balloons in her stomach.<sup>93</sup> She also believed that she was "getting instructions from a 'device' that turned the world inside out."<sup>94</sup> The Surrogate's Court denied Barbara's petition to probate the will, and the Appellate Division affirmed, finding "that the testimony fully supports the conclusion that decedent was suffering from an insane delusion regarding her son and that this delusion directly affected her decision not to leave anything to him under her will."<sup>95</sup> The court also found that, although the delusions might explain why Cecilia excluded her son from the will, "there was no evidence presented of any reasonable basis for the delusion."<sup>96</sup>

Given the bizarre nature of Cecilia's beliefs regarding her son, the court in *Zielinski* had no difficulty finding an insane delusion. In many cases, however, the alleged delusion involves a belief that might well be true depending on the facts. For example, a large number of insane-delusion cases involve a belief that the decedent's spouse or former spouse was unfaithful in marriage, and such beliefs can be difficult to disprove.<sup>97</sup> The

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<sup>88</sup> 623 N.Y.S.2d 653 (N.Y. App. Div. 1995).

<sup>89</sup> See *id.* at 656 (holding that the decedent's insane delusions "directly affected her decision not to leave anything to [her son] under her will"). For discussion of the case, see Fogel, *supra* note 12, at 108–10; Oxford, *supra* note 12, at 91–92; Ronner, *supra* note 12, at 211–13.

<sup>90</sup> *Zielinski*, 623 N.Y.S.2d at 654.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 655.

<sup>93</sup> See *id.* (citing testimony regarding Cecilia's delusions from her psychiatrists Abdul Hameed and Zoser Mohammed, her employees Patricia Russo and Donna Loro, and her son's ex-wife Jean Smith and current wife Lynn Zielinski).

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* at 656.

<sup>96</sup> *Id.*

<sup>97</sup> See Fogel, *supra* note 12, at 88–89 (citing cases that involve delusions of marital infidelity, such as *In re Kaven's Estate*, 272 N.W. 696 (Mich. 1937) and *In re Scott's Estate*, 60 P. 527 (Cal. 1900)); Oxford, *supra* note 12, at 93–95 (noting that insane delusions may pertain to perceived spousal infidelity, and discussing cases such as *In re Honigman's Will*, 168 N.E.2d 676 (N.Y. 1960), *In re Robertson's*

North Dakota case of *Kingdon v. Sybrant*,<sup>98</sup> decided in 1968, is typical. The decedent, Fred W. Kingdon, had devised \$1,000 to Lotus Irene Korner, the daughter of his first wife, and divided the balance of the estate between the two children of his second wife.<sup>99</sup> Lotus contested the will, arguing that it was the product of a false belief that the decedent was not Lotus's father.<sup>100</sup> A jury found that the will was invalid for lack of testamentary capacity, and the proponents appealed.<sup>101</sup>

According to the decedent's attorney, who testified at the trial, "it was common talk" that the decedent's wife was having an affair with another man named Sig Boeman.<sup>102</sup> The attorney also testified that the doctor who delivered Lotus told the decedent that, while Lotus's mother was on the delivery table, she had stated, "Sig, you shouldn't have done it."<sup>103</sup> Another witness testified that the first wife's "reputation for morals in the community was not all that it should have been."<sup>104</sup> The North Dakota Supreme Court granted a new trial, holding that the trial court had issued prejudicial instructions placing the burden on the will proponents of proving that the first wife was unfaithful, when the real issue was whether the decedent's belief to the contrary "had any evidential basis."<sup>105</sup>

Cases like *Kingdon*, involving allegedly delusional beliefs concerning marital infidelity, were difficult for courts to resolve before the development of modern DNA testing. In the 1941 New York case of *In re Hargrove's Will*,<sup>106</sup> the court was tasked with determining whether a jury had sufficient evidence to find that the testator, a "dignified, considerate gentleman" who executed his will in 1923, was delusional in believing that the children born to his ex-wife, Aimee Neresheimer, in 1902 and 1904, were not his.<sup>107</sup> The testator's divorce from his wife in 1906 had "created a considerable scandal" because the attorney who assisted in obtaining the divorce announced within an hour of the entry of the decree that he planned to marry Aimee, and did so a month later.<sup>108</sup>

Speaking for a majority of the Appellate Division, Justice Townley held that "it cannot be said that his belief on this subject was entirely without

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*Estate*, 189 P.2d 615 (Okla. 1948), *In re Estate of Coffin*, 246 A.2d 489 (N.J. Super. Ct. App. Div. 1968), and *In re Hargrove's Will*, 262 A.D. 202 (N.Y. App. Div. 1941)).

<sup>98</sup> 158 N.W. 2d 863 (N.D. 1968).

<sup>99</sup> *Id.* at 865-66.

<sup>100</sup> *Id.* at 866.

<sup>101</sup> *Id.* at 865.

<sup>102</sup> *Id.* at 866.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 867-69.

<sup>106</sup> 28 N.Y.S.2d 571 (N.Y. App. Div. 1941).

<sup>107</sup> *Id.* at 572-74.

<sup>108</sup> *Id.* at 573-74.

reason, although possibly mistaken.”<sup>109</sup> However, in a vigorous dissent, Justice Glennon argued that the jury had “ample testimony” to reach its finding, noting that the testator had referred to the two disinherited children as his in a 1907 affidavit to set aside the divorce.<sup>110</sup> A subsequent affidavit executed in 1920, relied upon by the majority, made statements concerning Aimee’s reputation that seemed highly implausible in light of the fact that she was only sixteen when the marriage took place.<sup>111</sup> Nevertheless, the will was allowed to stand.<sup>112</sup>

Although modern DNA testing could have resolved the paternity issues at the heart of *Kingdon* and *Hargrove*, it cannot help with other cases of suspected infidelity when no children have been conceived as a result of the alleged affair. As the leading case of *In re Honigman’s Will*<sup>113</sup> demonstrates, the absence of tangible proof of the alleged affair can create more problems than it solves.<sup>114</sup> A month before his death in 1956, Frank Honigman executed a will that disinherited his wife of nearly forty years of all except her minimum statutory share and devised the rest of his property to his surviving siblings and their descendants.<sup>115</sup> Florence, the testator’s widow, contested the will on the ground that her husband was not of sound mind, and the jury agreed.<sup>116</sup>

Frank was of the strong, and frequently expressed, belief that Florence was not faithful to him in their marriage. At the trial, the will proponents pointed to several “incidents” that might have justified Frank’s belief.<sup>117</sup> One incident “concerned an anniversary card sent by Mr. Krauss, a mutual acquaintance and friend of many years, bearing a printed message of congratulation in sweetly sentimental phraseology.”<sup>118</sup> This card “was addressed to the wife alone and not received on the anniversary date . . . .”<sup>119</sup> The evidence also showed that “whenever the house telephone rang Mrs. Honigman would answer it.”<sup>120</sup> In addition, there was evidence of a dramatic confrontation between the spouses:

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<sup>109</sup> *Id.* at 573.

<sup>110</sup> *Id.* at 575, 576–77 (Glennon, J., dissenting).

<sup>111</sup> *Id.* at 578.

<sup>112</sup> *See id.* at 575 (affirming the lower court’s decision to allow the will to stand).

<sup>113</sup> 168 N.E.2d 676 (N.Y. 1960).

<sup>114</sup> *See id.* at 677–78 (discussing the “proof” presented by Mr. Honigman to support his belief that Mrs. Honigman was unfaithful in their marriage). For critical examination of the problems raised by *Honigman*, see JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 282–83 (9th ed. 2013); STEWART E. STERK, MELANIE B. LESLIE, & JOEL C. DOBRIS, ESTATES AND TRUSTS 437 (4th ed. 2011); Fogel, *supra* note 12, at 95–96; Oxford, *supra* note 12, at 93–94; Ronner, *supra* note 12, at 222–25.

<sup>115</sup> *Honigman*, 168 N.E.2d at 676–77.

<sup>116</sup> *Id.* at 677.

<sup>117</sup> *Id.* at 677–78.

<sup>118</sup> *Id.* at 678.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

Mrs. Honigman asked the decedent as he was leaving the house what time she might expect him to return. This aroused his suspicion. He secreted himself at a vantage point in a nearby park and watched his home. He saw Mr. Krauss enter and, later, when he confronted his wife with knowledge of this incident, she allegedly asked him for a divorce.<sup>121</sup>

The court noted that the alleged incident in the park “was taken entirely from a statement made by Mr. Honigman to one of the witnesses. Mrs. Honigman flatly denied all of it.”<sup>122</sup>

### 3. *Problems of Causation and Personal Bias*

In light of the conflicting evidence, the majority in *Honigman* held that there was a sufficient basis to support the jury’s finding that Frank had no reasonable basis for believing that his wife was unfaithful.<sup>123</sup> This did not end the analysis, however. The will proponents argued that Frank’s decision to disinherit his wife could be justified on other grounds: Florence was independently wealthy and the residuary legatees had greater financial needs.<sup>124</sup> Quoting an earlier New York case, the *Honigman* majority rejected these arguments on the ground that the will was invalid because it “*might have been* caused or affected by the delusion.”<sup>125</sup> Judge Fuld dissented, arguing that “the evidence adduced utterly failed to prove that the testator was suffering from an insane delusion or lacked testamentary capacity.”<sup>126</sup>

The standard articulated in *Honigman*, which would treat a will as invalid when its provisions “*might have been*” caused by an insane delusion, is not the majority rule.<sup>127</sup> However, other courts have struggled with the concept of causation in insane delusion cases. In the 1947 case, *In re Strittmater’s Estate*,<sup>128</sup> a testator in New Jersey devised her property to the National Woman’s Party, an organization that fought for women’s rights.<sup>129</sup>

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 679.

<sup>125</sup> *Id.* (emphasis in original) (quoting *Am. Seamen’s Friend Soc’y v. Hopper*, 33 N.Y. 619, 625 (1865)).

<sup>126</sup> *Id.* at 680 (Fuld, J., dissenting).

<sup>127</sup> See Fogel, *supra* note 12, at 96 (noting that the standard in *Honigman* “is a much easier standard to meet than the standard required by most courts—including other New York courts—that the will be a product of the delusion”). It is possible that the court in *Honigman* did not intend to articulate a new standard.

<sup>128</sup> 53 A.2d 205 (N.J. 1947).

<sup>129</sup> *Id.* at 205. For analysis of the *Strittmater* case, including the testator’s connection to the National Woman’s Party, see DUKEMINIER & SITKOFF, *supra* note 114, at 275–77 (asking whether *Strittmater* might “have had another reason for favoring the [National Woman’s] Party over cousins with whom she had little contact”); DANAYA C. WRIGHT, *THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES* 784 (2013) (questioning the assumptions underlying the court’s decision); Mary Louise Fellows, *Wills and*

Louisa Strittmater, the testator, had very strong opinions about men, whom “[s]he regarded as a class with an insane hatred . . . [and] looked forward to the day when women would bear children without the aid of men, and all males would be put to death at birth.”<sup>130</sup> The Prerogative Court set aside the probate of the will on the ground that her devise to the National Woman’s Party (referred to in the opinion, erroneously, as the “National Women’s Party”) was caused by “her insane delusions” regarding men:

Her disease seems to have become well developed by 1936. In August of that year she wrote, “It remains for feministic organizations like the National Wom[a]n’s Party, to make exposure of women’s ‘protectors’ and ‘lovers’ for what their vicious and contemptible selves are.” She had been a member of the Wom[a]n’s Party for eleven years at that time, but the evidence does not show that she had taken great interest in it. I think it was her paranoid condition, especially her insane delusions about the male, that led her to leave her estate to the National Women’s Party.<sup>131</sup>

The court notes without comment that Louisa’s “only relatives were some cousins of whom she saw very little during the last few years of her life.”<sup>132</sup> The court failed to consider the possibility that Louisa might have passed over those relatives even in the absence of her alleged delusion.<sup>133</sup>

The *Strittmater* case illustrates a fundamental problem with the application of the doctrine of insane delusion for gratuitous transfers. It is difficult for judges—and especially hard for juries—to set aside their personal biases and notions of fairness when deciding whether or not to uphold the testamentary wishes of a person who had delusional beliefs. In his decision upholding the will in *Hargrove*, Justice Townley pointed out that a group of ten “men of importance in New York City” had testified that

*Trusts: “The Kingdom of the Fathers,”* 10 L. & INEQUALITY 137, 143 (1991) (noting that the court did not consider “whether any level of feminism could avoid the label of extremism and mental instability”); Ronner, *supra* note 12, at 219–21 (“Under a modern lens, Louisa’s chosen beneficiary could be seen as the ‘natural [object] of . . . her bounty.”); Edward S. Halsey, Note, *Insane Delusions Affecting Testamentary Capacity*, 2 WYO. L.J. 84, 84–87 (1947) (“[I]t does not appear that testatrix was impelled blindly into execution of her will, nor does it appear that her interest in the Party was great enough to destroy her free agency in naming the recipient of her property.”).

<sup>130</sup> *Strittmater*, 53 A.2d at 205.

<sup>131</sup> *Id.* at 205–06; see also DUKEMINIER & SITKOFF, *supra* note 114, at 277 (discussing the National Woman’s Party and its advocacy for the Nineteenth Amendment and the Equal Rights Amendment); Kristin A. Collins, *Representing Injustice: Justice as an Icon of Woman Suffrage*, 24 YALE J.L. & HUMAN. 191, 196–97 (2012) (noting the Party’s strategy in advocating for the Nineteenth Amendment); Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 IND. J.L. & SOC. EQUALITY 80, 82 (2013) (commenting on the Party’s advocacy for the Equal Rights Amendment).

<sup>132</sup> *Strittmater*, 53 A.2d at 205.

<sup>133</sup> *Cf.* DUKEMINIER & SITKOFF, *supra* note 114, at 277 (raising this possibility).

Ernest Temple Hargrove, a “very successful business man” who spent his first marriage travelling around Europe, Africa, and Australia, “was at all times of sound mind and a man of unusual intelligence.”<sup>134</sup> No important men spoke up for Louisa Strittmater to defend her intelligence or praise her decision to devise her property to the National Woman’s Party. Particularly in light of the fact that Louisa had no surviving close relatives, it seems cruel to deny her testamentary wish to benefit an organization devoted to women’s rights.<sup>135</sup>

In light of the various problems inherent in the application of the doctrine of insane delusion for gratuitous transfers, Bradley Fogel has proposed that the doctrine be abolished, leaving the general test of mental capacity to be the sole test for determining whether the testator was of sound mind.<sup>136</sup> It is worth noting, however, that the population of elderly individuals in the United States is increasing as the “baby boom” generation ages.<sup>137</sup> There is a higher prevalence of certain mental disorders, such as dementia, among older individuals.<sup>138</sup> The current demographic shift may thus increase the number of cases where wills are challenged on the ground of lack of mental capacity.<sup>139</sup> Under these circumstances, any attempt to remove one of the tools that courts have traditionally had in mental capacity cases may lead to opposition, and the consequences of such a change require careful consideration. The next part of this Article considers how recent scientific studies on delusions and their correlation with other cognitive impairments might be relevant to efforts to reform the testamentary doctrine of insane delusion.

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<sup>134</sup> *In re Hargrove’s Will*, 28 N.Y.S.2d at 572–73.

<sup>135</sup> See WRIGHT, *supra* note 129, at 784 (“Should a person with no spouse or children, whose only relatives are remote cousins, not be able to leave her property to whatever organization she wants, even if she has insane delusions about men?”).

<sup>136</sup> Fogel, *supra* note 12, at 111.

<sup>137</sup> See Kevin Kinsella & Wan He, *An Aging World: 2008*, U.S. CENSUS BUREAU 1, 12 (2009), <https://www.census.gov/prod/2009pubs/p95-09-1.pdf> [<https://perma.cc/65Q9-7XNX>] (“[A]s the large birth cohorts of the post-World War II Baby Boom . . . begin to reach age 65 after 2010, the percent older in the United States will rise markedly”).

<sup>138</sup> See Michele J. Karel et al., *Aging and Mental Health in the Decade Ahead: What Psychologists Need to Know*, 67 AM. PSYCHOL. 184, 185 (2012) (“Older adults are more likely to develop dementia, including Alzheimer’s disease.”).

<sup>139</sup> See Oxford, *supra* note 12, at 88 (“Although insane delusions are not limited to the elderly, the rise in the elderly population comes with an increase in the number of persons susceptible to memory-affecting conditions.”); see also MCGOVERN ET AL., *supra* note 5, at 317 (“The percentage of elderly in the population has dramatically increased and many challenges to capacity today arise from wills made by testators of advanced years.”).

## II. DELUSIONAL DISORDERS IN MODERN PSYCHIATRY

Before courts and lawmakers set aside a line of cases dating back for nearly two centuries, it would be wise to consider the scientific understanding of delusions and how it has evolved over the past two centuries. Although the discipline of psychiatry has matured considerably since the concept of “monomania” was first introduced in the scientific literature, the concept of a delusion remains alive and well and is an important component of the diagnosis and treatment of mental illness. In a sense, delusions are real, even if their factual basis is imaginary.

### A. *Delusion as a Clinical Condition*

The condition of “monomania” was first diagnosed—and named—around the year 1810 by the great French psychiatrist Jean-Étienne Dominique Esquirol.<sup>140</sup> The term “denoted an *idée fixe*, a single pathological preoccupation in an otherwise sound mind.”<sup>141</sup> The term spread quickly to English-language scientific literature.<sup>142</sup> In the early twentieth century, the term “monomania” was supplanted by “delusion.”<sup>143</sup> Karl Jaspers defined delusions as “abnormal beliefs held with extraordinary conviction” that are “impervious to experiential evidence or counter-arguments” and “often bizarre.”<sup>144</sup>

DSM-V, the current standard reference guide used by psychiatrists to diagnose mental disorders, defines “delusions” as “fixed beliefs that are not amenable to change in light of conflicting evidence.”<sup>145</sup> Examples include erotomaniac delusions (in which another person is thought to be in love with the individual); grandiose delusions; jealous delusions; nihilistic delusions; persecutory delusions; referential delusions (beliefs that “gestures, comments, environmental cues, and so forth are directed at oneself”); and somatic delusions (beliefs involving the individual’s health and organ function).<sup>146</sup>

The DSM-V standard further distinguishes between “bizarre” delusions, which are “clearly implausible and not understandable to same-culture peers and do not derive from ordinary life experiences,” and other types of

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<sup>140</sup> JAN E. GOLDSTEIN, *CONSOLE AND CLASSIFY: THE FRENCH PSYCHIATRIC PROFESSION IN THE NINETEENTH CENTURY* 153 (1987).

<sup>141</sup> *Id.* at 155–56.

<sup>142</sup> See, e.g., JAMES COWLES PRICHARD, *A TREATISE ON INSANITY AND OTHER DISORDERS AFFECTING THE MIND* 6 (1835) (listing monomania as one of the principal forms of insanity).

<sup>143</sup> See Stein Opjordsmoen, *Delusional Disorder as a Partial Psychosis*, 40 *SCHIZOPHRENIA BULL.* 244, 244 (2014) (noting the current definitions of delusions is often dated back to Karl Jaspers’s 1923 book *ALLGEMEINE PSYCHOPATHOLOGIE*).

<sup>144</sup> *Id.*

<sup>145</sup> DSM-V, *supra* note 4, at 87.

<sup>146</sup> *Id.* at 87, 90.



delusions.<sup>147</sup> The barber from Lancaster who believed that he was being poisoned may have been delusional, but his belief was not so bizarre that any sane person would reject it without investigating the facts. As the old saying goes, “just because you’re a paranoid doesn’t mean they aren’t out to get you.”<sup>148</sup> By contrast, according to DSM-V, a person who believes that his or her internal organs have been surreptitiously replaced by an imaginary surgeon who left no wounds or scars suffers from a bizarre delusion.<sup>149</sup>

In DSM-V, “Delusional Disorder” is classified independently from schizophrenia and other conditions, and it is also given its own numeric code (297.1).<sup>150</sup> In addition to providing a definition and specific examples of delusions, DSM-V specifies specific criteria that must be met in order to diagnose a patient with delusional disorder, including the presence of one or more delusions lasting one month or longer, an absence of schizophrenia or lengthy manic or major depressive episodes, and a determination that, “[a]part from the impact of the delusion(s) or its ramifications, functioning is not markedly impaired, and behavior is not obviously bizarre or odd.”<sup>151</sup> Delusional disorder generally has a more circumscribed functional impairment than other psychotic disorders, “although in some cases, the impairment may be substantial and include poor occupational functioning and social isolation. . . . A common characteristic of individuals with delusional disorder is the apparent normality of their behavior and appearance when their delusional ideas are not being discussed or acted on.”<sup>152</sup>

Delusional disorder is not common. According to DSM-V, the lifetime prevalence of delusional disorder is around 0.2%.<sup>153</sup> A study in 1998 focusing on a population of individuals aged sixty-five and over found a prevalence of delusional disorder of 0.04%.<sup>154</sup> Another study found that persecutory delusions may disproportionately affect older individuals.<sup>155</sup> The theme of persecutory delusions is “the individual’s belief of being conspired against, cheated, spied on, followed, poisoned, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals.”<sup>156</sup>

<sup>147</sup> *Id.* at 87.

<sup>148</sup> On the origins of this saying, which appears in different forms in a variety of sources, see CHARLES C. DOYLE ET AL., *THE DICTIONARY OF MODERN PROVERBS* 189–90 (2012).

<sup>149</sup> DSM-V, *supra* note 4, at 91.

<sup>150</sup> *Id.* at 90.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 93.

<sup>153</sup> *Id.* at 92.

<sup>154</sup> John R.M. Copeland et al., *Schizophrenia and Delusional Disorder in Older Age: Community Prevalence, Incidence, Comorbidity, and Outcome*, 24 *SCHIZOPHRENIA BULL.* 153, 158 (1998).

<sup>155</sup> See Naoto Yamada et al., *Age at Onset of Delusional Disorder Is Dependent on the Delusional Theme*, 97 *ACTA PSYCHIATRICA SCANDINAVICA* 122, 123 (1998) (finding that the oldest age at onset was associated with persecutory delusions).

<sup>156</sup> DSM-V, *supra* note 4, at 91–92.

Jealous delusions, regarding suspected infidelity, are more common in men than in women.<sup>157</sup>

The acknowledgement in DSM-V that a person can suffer from a delusion while otherwise continuing to function normally is consistent with the traditional definition of monomania. From the perspective of legal reform, however, the key question is not whether a delusional person can function in society, but whether they can have the requisite mental capacity to enter into a valid contract or execute a valid will. In this context, the law is not interested in behavior, but in cognition. To what extent can a delusional person make sound decisions notwithstanding the aberrant nature of their thinking in one particular context? This is the question that must be answered in order to apply the concept of delusion in the courts. Fortunately, scientists have begun to focus their attention on this question and are using controlled experiments and rigorous analysis in their search for an answer.

### B. *Delusions and Other Cognitive Impairments*

Three recent studies may serve to illustrate the techniques currently being used to assess the likelihood of a correlation between delusions and other cognitive impairments. The first, by Lars White and Warren Mansell, focuses on the question of whether delusion-prone individuals are more likely than others to exhibit the cognitive bias known as “jumping to conclusions” (JTC).<sup>158</sup> Using an opportunity sample composed mainly of first-year psychology students, White and Mansell divided the participants into control and delusion-prone categories based on their answers to questionnaires.<sup>159</sup> The participants were administered a classic experiment known as the “beads task.”<sup>160</sup>

In the “beads task” experiment, frequently used to determine a propensity to jump to conclusions,<sup>161</sup> the subjects are shown two containers filled with red and white colored beads.<sup>162</sup> One container has a ratio of fifteen white beads to eighty-five red beads, while the other container has the opposite ratio.<sup>163</sup> The experimenter then hides the containers and pretends to draw beads from one of the two containers, asking the participant after each

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<sup>157</sup> See *id.* at 92.

<sup>158</sup> White & Mansell, *supra* note 20, at 111.

<sup>159</sup> *Id.* at 115.

<sup>160</sup> *Id.* at 111, 117.

<sup>161</sup> This method was pioneered in the 1960s by Lawrence Phillips and Ward Edwards at the University of Michigan. See Lawrence D. Phillips & Ward Edwards, *Conservatism in a Simple Probability Inference Task*, 72 J. EXPERIMENTAL PSYCHOL. 346, 347 (1966) (explaining the purpose and methodology of a “poker chips” experiment aimed at identifying the impact of prior data on subsequent probability estimates).

<sup>162</sup> White & Mansell, *supra* note 20, at 111.

<sup>163</sup> *Id.*

“draw” whether he or she is ready to decide which container was selected.<sup>164</sup> Individuals with a JTC bias are likely to reach a decision after only one or two “draws,” without having sufficient information to make an accurate guess.<sup>165</sup>

White and Mansell found that the control participants in their study requested a significantly higher number of beads on average than the experimental group,<sup>166</sup> thus demonstrating a tendency of delusion-prone individuals to jump to conclusions.<sup>167</sup>

The second study, by a team of British researchers led by Richard Bentall, involved a sample of 173 psychiatric patients being treated in London and the northwest of England for a variety of disorders, including both schizophrenia and major depression, 117 of whom were currently experiencing or had previously experienced paranoid delusions.<sup>168</sup> This group was compared to a control group of sixty-four healthy participants to determine whether any correlation exists between paranoid delusions and impaired cognitive performance or a pessimistic style of thinking.<sup>169</sup> The Bentall study found a correlation between paranoid delusions and a pessimistic thinking style<sup>170</sup> and also between paranoid delusions and cognitive impairments,<sup>171</sup> however, the former link was the stronger of the two.<sup>172</sup> On the other hand, the authors found “no specific association between paranoia and jumping to conclusions bias after controlling for general cognitive functioning.”<sup>173</sup> This finding, based on an application of the beads test, differs with the result of the White and Mansell study.<sup>174</sup>

In the third study, conducted by a different team of British researchers led by Susannah May Colbert, a group of individuals with current or remitted delusions were recruited from early-onset psychosis services.<sup>175</sup> The researchers compared this group with a control group to determine whether a bias existed toward jumping to conclusions or toward a different phenomenon known as “jumping to perceptions” (JTP).<sup>176</sup> Individuals who

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<sup>164</sup> *Id.*

<sup>165</sup> *See id.* (noting that 40% to 70% of delusional patients decide after just one or two draws).

<sup>166</sup> *Id.* at 118–19.

<sup>167</sup> *Id.* at 121–22.

<sup>168</sup> Bentall et al., *supra* note 20, at 237–38.

<sup>169</sup> *Id.* at 238.

<sup>170</sup> *Id.* at 243.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at 243 (“[E]motion-related processes were more closely linked to paranoia than was cognitive performance.”).

<sup>173</sup> *Id.* at 244.

<sup>174</sup> *Compare id.* (finding no connection between paranoid delusions and JTC bias), *with* White & Mansell, *supra* note 20, at 119 (“[D]elusion-prone individuals displayed a large JTC effect . . .”).

<sup>175</sup> Colbert et al., *supra* note 21, at 424.

<sup>176</sup> *See id.* (“[I]t was hypothesised that reduced data-gathering and jumping to perceptions would be found in individuals with current delusions, and that these biases would be related to each other.”).

show the latter bias tend to identify “an ambiguous perceptual event as external and real, rather than internal and imaginary.”<sup>177</sup> The Colbert study, like the other two, employed the beads test to determine JTC bias,<sup>178</sup> but the researchers found no correlation between the current or remitted delusional groups and JTC.<sup>179</sup> However, the Colbert study did find a correlation between delusions and JTP.<sup>180</sup> Employing an “Auditory Perceptual Bias Task,”<sup>181</sup> the study found that individuals who suffered or formerly suffered from delusions were more likely to report hearing a voice when it was not there, or vice versa, thus indicating a stronger JTP bias compared to the control group.<sup>182</sup>

Because the findings of individual studies may reflect variations in the subject populations, psychiatrists have also conducted meta-analytic comparisons to try to make sense of the data.<sup>183</sup> A meta-analysis conducted in 2007, before the three studies mentioned above, found “support for the view that patients with delusions exhibit a genuine difference in the amount of evidence they require to embrace a hypothesis . . . .”<sup>184</sup> A more recent meta-analysis from 2015 found that, although delusional individuals “required significantly less information than people with psychosis who did not have delusions” when taking the JTC test, “the difference was small and the estimate imprecise.”<sup>185</sup>

Although psychiatrists are making progress toward understanding the possible correlation between JTC bias and delusions in general, few studies have looked at individual delusional sub-types, such as persecutory delusions, to determine if there is a correlation with respect to those sub-

<sup>177</sup> *Id.* at 423.

<sup>178</sup> *See id.* at 427 (describing the methodology of its “probabilistic reasoning task,” where participants were told that they had to choose which of two jars a colored bead was drawn from).

<sup>179</sup> *See id.* at 435–36 (noting that participants lacked a JTC bias).

<sup>180</sup> *See id.* at 436 (identifying a JTP bias among study participants suffering from delusions).

<sup>181</sup> *See id.* at 426 (“Participants are required to listen to trials of white noise, some of which have a voice embedded within them. Participants are asked to state how sure they are that they heard a voice speaking within each trial. The task assesses perceptual biases in either direction; i.e., whether participants show a bias towards perceiving a voice in the white noise . . . or whether participants show a bias towards perceiving the signal (the voice) as noise.”).

<sup>182</sup> *See id.* at 433, 436 (finding that delusional participants jumped to perceptions more often than the control group in the auditory perceptual bias task, and concluding that the results suggest a correlation between delusions and JTP bias).

<sup>183</sup> *See, e.g.,* Cordelia Fine et al., *Hopping, Skipping or Jumping to Conclusions? Clarifying the Role of the JTC Bias in Delusions*, 12 *COGNITIVE NEUROPSYCHIATRY* 46, 54 (2007) (“In order to provide a more objective evaluation of the association of different JTC measures with delusions, we conducted a meta-analysis.”).

<sup>184</sup> *Id.* at 74.

<sup>185</sup> Robert Dudley et al., *Psychosis, Delusions and the “Jumping to Conclusions” Reasoning Bias: A Systematic Review and Meta-Analysis*, *SCHIZOPHRENIA BULL. ADVANCE ACCESS*, at \*5 (2015), doi: 10.1093/schbul/sbv150.

types.<sup>186</sup> On the other hand, some studies have found that individuals whose delusions are in remission continue to exhibit JTC bias.<sup>187</sup> One recent study, focusing on individuals in early psychosis, found that being prone to delusions was a stronger predictor of JTC than the current severity of delusions.<sup>188</sup>

At this stage, it would be difficult for judges and lawmakers to draw any specific lessons from recent scientific research on the subject of delusions. It is clear, however, that scientists are interested in delusions and are making efforts to understand the relationship between those delusions and other cognitive impairments. The current legal doctrine of insane delusion may require significant reform, but abolishing that doctrine completely would only widen the gap between legal and scientific knowledge with respect to delusional beliefs. The question, then, is what sort of reform might be needed to make the doctrine of insane delusion useful in the modern law of wills and other donative transfers. The next Section will address this question.

### III. REFORMING THE LEGAL DOCTRINE OF INSANE DELUSION

As proposed by Fogel, one possible solution to the problems with the insane-delusion doctrine in the context of gratuitous transfers would be to abolish it completely, leaving the test of general mental capacity as the exclusive basis for challenging a will on the ground that the testator was not of sound mind.<sup>189</sup> Scholars have also proposed less drastic measures that would retain the doctrine of insane delusion in a modified form.<sup>190</sup> This Section will discuss the two main proposals that have been made to date and suggest a new alternative: that courts invert the doctrine so that it may be used only as a basis for upholding part of the testator's will when the testator is found to lack general mental capacity.

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<sup>186</sup> See Daniel Freeman, *Suspicious Minds: The Psychology of Persecutory Delusions*, 27 CLINICAL PSYCHOL. REV. 425, 437 (2007) (noting the scarcity of studies linking persecutory delusions to a JTC bias).

<sup>187</sup> See, e.g., Steffen Moritz & Todd S. Woodward, *Jumping to Conclusions in Delusional and Non-Delusional Schizophrenic Patients*, 44 BRITISH J. CLINICAL PSYCHOL. 193, 195, 203 (2005) (finding a "hasty response style" in participants with schizophrenia, but exhibiting "no or low current delusional symptomatology").

<sup>188</sup> See Robyn Langdon et al., *Jumping to Delusions in Early Psychosis*, 19 COGNITIVE NEUROPSYCHIATRY 241, 250–51 (2014) (noting that the results of their study showed a significant correlation between JTC bias and levels of delusion proneness, but not with current delusional symptoms).

<sup>189</sup> See Fogel, *supra* note 12, at 110–11 (arguing that the "doctrine of monomania is fatally flawed" and that courts should instead base all testamentary capacity decisions on the general test for capacity).

<sup>190</sup> See, e.g., Oxford *supra* note 12, at 120 (advocating for application of the partial invalidity doctrine); Ronner *supra* note 12, at 261 (arguing that courts should apply "sound-mind" and "bizarre delusions" tests).

### A. *Proposed Alternatives to Abolition*

To date, two main proposals have been made that would retain the legal concept of an insane delusion while attempting to address some of the inequities resulting from the current application of that concept. Amy Ronner agrees with Fogel that the sole test of whether the testator is of sound mind should be the general test of mental capacity.<sup>191</sup> As an amendment to the current general test, however, Ronner would add a requirement that the decedent suffer from a “bizarre delusion” as defined by the DSM.<sup>192</sup> Thus, the concept of a delusion would remain in the law but as a limitation on the general test of mental capacity. Alan Oxford, focusing on the tendency of courts applying current doctrine to void the entire will, has proposed a different solution.<sup>193</sup> Oxford proposes that, when “a testator otherwise possesses testamentary capacity and the insane delusion does not affect every provision in the will,” courts should “apply the doctrine of partial invalidity to preserve any salvageable piece of the testator’s legitimate testamentary intent.”<sup>194</sup>

#### 1. *Bizarre and Non-Bizarre Delusions*

In addition to a classification by theme—erotomantic, grandiose, jealous, persecutory, and somatic—DSM-V requires that a diagnosis of delusional disorder specify whether the delusion is “with bizarre content.”<sup>195</sup> A delusion is “deemed bizarre” if it is “clearly implausible, not understandable, and not derived from ordinary life experiences,”<sup>196</sup> such as “an individual’s belief that a stranger has removed his or her internal organs and replaced them with someone else’s organs without leaving any wounds or scars.”<sup>197</sup> Noting this psychiatric distinction, Ronner agrees with Fogel that the traditional independent doctrine of insane delusion should be abolished,<sup>198</sup> but also suggests that a new requirement be added to the general test of mental capacity: “[T]hat a mentally incompetent testator must also suffer from what the DSM defines as bizarre delusions.”<sup>199</sup>

According to Ronner, most of the problems with the traditional insane delusion doctrine arise in cases where the testator exhibits a non-bizarre delusion, such as suspicion of marital infidelity.<sup>200</sup> Ronner argues that

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<sup>191</sup> Ronner, *supra* note 12, at 261.

<sup>192</sup> *Id.*

<sup>193</sup> Oxford, *supra* note 12, at 83.

<sup>194</sup> *Id.*

<sup>195</sup> DSM-V, *supra* note 4, at 91–92.

<sup>196</sup> *Id.* at 91.

<sup>197</sup> *Id.*

<sup>198</sup> Ronner, *supra* note 12, at 261.

<sup>199</sup> *Id.*

<sup>200</sup> *See id.* at 214, 222–25 (describing a non-bizarre delusion case in which a husband believed that his wife was unfaithful).

adding a bizarre delusion requirement to the general test of mental capacity would “more effectively help foster the perception of law as legitimate and essentially rational.”<sup>201</sup> This would be a significant change from current law, which does not require a contestant to allege a delusion in order to challenge the testator’s general mental capacity.<sup>202</sup>

Although the law has centuries of experience with the concept of a delusion,<sup>203</sup> introducing the psychiatric distinction between bizarre and non-bizarre distinctions would force judges to make new determinations with regard to mental capacity. In some cases, judges might have difficulty deciding whether delusions count as bizarre. This potential problem is illustrated in the 1932 California case of *In re Sandman’s Estate*.<sup>204</sup> Solomon Sandman, the decedent, was predeceased by his wife in 1917.<sup>205</sup> In his will, executed shortly before his death in 1928, Solomon devised \$10 to his daughter Henrietta Marks, \$500 to a woman named Mary Nicholson, and the residue to his brother Philip Sandman.<sup>206</sup> Henrietta contested the will, arguing that it was the result of Solomon’s delusional belief that “he and his wife were in communication; that she visited and advised him, and that he could see her moving through the air.”<sup>207</sup> The court held that the evidence sufficiently showed that Solomon was suffering from an insane delusion that caused the disposition in his will and affirmed the lower court’s denial of probate.<sup>208</sup>

Applying the DSM-V standard, Solomon could be said to suffer from a bizarre delusion, insofar as it seems “clearly implausible, not understandable, and not derived from ordinary life experiences.”<sup>209</sup> However, many individuals in the general population believe in ghosts and other supernatural phenomena.<sup>210</sup> A court forced to decide whether Solomon’s delusion was bizarre would be writing on a clean slate, since that distinction has not previously mattered in the application of the traditional doctrine. Under Ronner’s formulation, a determination that the belief was delusional, but not bizarre, would result in the will being upheld in its entirety, while a finding that the delusion was bizarre would require the court to analyze the other factors in the general test of mental capacity. This change would add an additional layer of complexity to the court’s decision,

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<sup>201</sup> *Id.* at 261.

<sup>202</sup> See MCGOVERN ET AL., *supra* note 5, at 317.

<sup>203</sup> See Ronner, *supra* note 12, at 205–06 (“The rule requiring a testator to be of sound mind to make a will has existed for about five centuries.”).

<sup>204</sup> 8 P.2d 499 (Cal. Dist. Ct. App. 1932).

<sup>205</sup> *Id.* at 500.

<sup>206</sup> *Id.* at 499.

<sup>207</sup> *Id.* at 500.

<sup>208</sup> *Id.* at 500–01.

<sup>209</sup> See DSM-V, *supra* note 4, at 91 (quoting language from the DSM-V standard).

<sup>210</sup> See THE EPIDEMIOLOGY OF SCHIZOPHRENIA 371 (Robin M. Murray et al. eds, 2003) (citing a British study in which 25% of the people surveyed expressed a belief in ghosts).

while leaving open the possibility of bias in favor of the disinherited child.

Another example of a case where the bizarre/non-bizarre distinction could present difficulties is *In re Will of Brush*,<sup>211</sup> a New York case from 1956. The decedent Ellyn Brush executed a will devising half her estate to her niece and nephew and the other half to Linda Pringle, a nonrelative who served as her live-in housekeeper and nurse, among other roles.<sup>212</sup> The evidence showed “that the decedent maintained a belief that she had died during an operation and had been restored to life by the ‘right thinking’ of [Pringle] and friends and acquaintances and that on other occasions she had been helped physically” by Pringle’s “right thinking.”<sup>213</sup> The trial court admitted the will to probate,<sup>214</sup> but the appellate court ordered a new trial on the ground that the jury was not properly instructed on the doctrine of insane delusion.<sup>215</sup>

Ellyn Brush’s belief in the restorative effects of “right thinking” might be called a bizarre delusion. On the other hand, if she had attributed her recovery to prayer, she would have placed herself firmly in the mainstream of religious individuals who believe that prayers have healing power.<sup>216</sup> Religious beliefs have traditionally been held not to be insane delusions,<sup>217</sup> although courts have occasionally made exceptions for uncommon beliefs.<sup>218</sup> If Ronner’s proposal were adopted, courts would be faced with the novel question of whether a false belief that is similar to—but distinct from—widely held religious convictions should be classified as not only delusional but bizarre.

In sum, engrafting a bizarre delusion requirement onto the general test of mental capacity would create some novel definitional problems for the courts, which already face a difficult task in trying to assess whether the

<sup>211</sup> 1 A.D.2d 625 (N.Y. App. Div. 1956).

<sup>212</sup> *Id.* at 625–27.

<sup>213</sup> *Id.* at 627.

<sup>214</sup> *Id.* at 626.

<sup>215</sup> *Id.* at 626–28.

<sup>216</sup> A vast literature exists on the power of prayer and its connection to healing. *See, e.g.*, HAROLD E. KOENIG, *THE HEALING POWER OF FAITH: HOW BELIEF AND PRAYER CAN HELP YOU TRIUMPH OVER DISEASE* 25–26 (1999); PETE KOERNER, *THE BELIEF FORMULA: THE SECRET TO UNLOCKING THE POWER OF PRAYER* (2007); SITHEMBILE STEM MAHLATINI, *THE POWER OF PRAYER AND BELIEF* 39 (2012); MARK STAVISH, *THE INNER WAY - THE POWER OF PRAYER AND BELIEF IN SPIRITUAL PRACTICE* 19–24 (2014); CHESTER TOLSON & HAROLD KOENIG, *THE HEALING POWER OF PRAYER: THE SURPRISING CONNECTION BETWEEN PRAYER AND YOUR HEALTH* (2003).

<sup>217</sup> *See, e.g.*, *Owen v. Crumbaugh*, 81 N.E. 1044, 1052 (Ill. 1907) (“The fact that an individual holds any particular belief in regard to a future state of existence cannot of itself be evidence of an insane delusion or monomania.”); Fogel, *supra* note 12, at 88 n.137 (citing *Conner v. Stanley*, 14 P. 306, 307 (Cal. 1887)) (“The law pronounces no one insane for mere religious belief, no matter how unreasonable it may appear to the judge.”).

<sup>218</sup> *See, e.g.*, *Irwin v. Lattin*, 135 N.W. 759, 763–64 (S.D. 1912) (holding the “insane delusion” of “frequent and continual communications with departed spirits” that coerced the testator was not a free and voluntary act for purposes of executing a valid will).



other required elements are present.<sup>219</sup> Adding a poorly defined new factor to the existing test of mental capacity would also have ethical ramifications because lawyers have a duty to assess the capacity of a client prior to executing the will.<sup>220</sup> Although the reform suggested by Ronner could significantly limit the number of cases in which courts substitute their personal biases for that of the testator, that problem would remain for cases of bizarre delusions, and the line between bizarre and non-bizarre delusions is not clear. It would be preferable to reform the doctrine in a way that would produce greater accuracy in all cases.

## 2. *Partial Invalidity*

Another recent proposal to reform the insane delusion doctrine focuses on the remedy when a delusion is found to affect part of a will. Despite the fact that the insane delusion doctrine applies in cases where a testator is at least partially sane, courts invariably use the doctrine to strike down the testator's entire will rather than declare it to be partially invalid.<sup>221</sup> This is in sharp contrast to the treatment of wills infected by fraud, undue influence, or duress, when courts generally strike down only the affected portions of the will.<sup>222</sup> Noting this inconsistency, Oxford argues that courts should "apply the doctrine of partial invalidity to cases involving insane delusion," striking only the portion actually influenced by the delusion and preserving "any salvageable piece of the testator's legitimate testamentary intent."<sup>223</sup>

A good example of how the current all-or-nothing approach to insane delusion cases may frustrate testamentary intent is *In re Estate of Killen*.<sup>224</sup> Dorothy Killen, the decedent, executed a will that left one dollar each to her niece Carolyn Dixon and two nephews, Russell and R.C. McCannon.<sup>225</sup> Another nephew, Marion McCannon, received a significant bequest of money and other personal property, but Killen also made bequests "to other family members and friends."<sup>226</sup> Following Killen's death in 1993, Marion offered the will for probate, but it was contested by the disinherited niece

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<sup>219</sup> See WRIGHT, *supra* note 129, at 791 ("[T]here are countless reasons why a person might lack mental capacity, from the effects of dementia, to drugs, to brain injuries, to age and frailty, to simple omeriness.").

<sup>220</sup> See SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 640–41, 645 (discussing the Model Rules and relevant cases).

<sup>221</sup> See Oxford, *supra* note 12, at 108 n.149 (finding no "reported case where a court actually applied the doctrine of partial invalidity to [a] will affected by an insane delusion").

<sup>222</sup> See *id.* at 109–10 (citing *Arrington v. Working Woman's Home*, 368 So. 2d 851, 853 (Ala. 1979); *In re Estate of Haneberg*, 14 P.3d 1088, 1098 (Kan. 2000); *In re Koller's Est.*, 219 N.W. 4, 7–9 (Neb. 1928)).

<sup>223</sup> *Id.* at 83, 120.

<sup>224</sup> 937 P.2d 1368 (Ariz. Ct. App. 1996). Both Fogel and Oxford discuss the *Killen* case to illustrate the flaws in the current insane delusion doctrine. Fogel, *supra* note 12, at 102–03; Oxford, *supra* note 12, at 105, 111.

<sup>225</sup> *Killen*, 937 P.2d at 1369.

<sup>226</sup> *Id.*

and nephews for want of testamentary capacity.<sup>227</sup> The evidence showed that Killen had a number of false beliefs concerning Carolyn, Russell, and R.C.:

Even though these nephews and niece took care of her when her husband was ill and after his death and treated her well, she believed they lived in her attic, or caused others to live in the attic, and sprinkled chemicals and parasites down on her, put her to sleep and then pulled a tooth out and cut her arms and hands with glass, were in the Mafia, and were trying to kill her so they could take her property. Although other relatives tried to dissuade Killen from these bizarre beliefs, she would insist that Russell, R.C., and Carolyn were out to get her.<sup>228</sup>

The probate court found the will to be invalid,<sup>229</sup> and the Arizona Court of Appeals affirmed, holding that if, at the time of the will's execution, "the testator knew the natural objects of her bounty but suffered from insane delusions that affected her perception of those persons and the terms of the will, the testator did not have the requisite testamentary capacity and the will is invalid."<sup>230</sup>

The holding of the *Killen* court is problematic for a number of reasons. First, the court conflates the doctrine of insane delusion with the general test of mental capacity, rather than treating them as separate inquiries. The general test of mental capacity requires that the testator be capable of understanding the natural objects of her bounty.<sup>231</sup> Killen certainly was capable of understanding the blood relationship between herself and Carolyn, Russell, and R.C. The *Killen* court requires something more: that her capability be untainted by an insane delusion.<sup>232</sup> The *Killen* court also dismisses the usual definition of causation, suggesting that if the delusions had involved "only staff at the care center," rather than her close relatives, "the will might have been valid."<sup>233</sup> This comes dangerously close to formalizing the tendency to discount capacity challenges when the testator's decision comports with the judge's personal sense of fairness.

In addition to the problems with the *Killen* court's interpretation of insane-delusion doctrine, the remedy—setting aside the entire will—seems overly broad. The opinion states, without further elaboration, that the testator left property to "other family members and friends" in addition to making substantial bequests to her nephew Marion.<sup>234</sup> As Oxford points out, setting

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<sup>227</sup> *Id.* at 1370.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1369.

<sup>230</sup> *Id.* at 1374.

<sup>231</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1(b).

<sup>232</sup> *Killen*, 937 P.2d at 1371–72.

<sup>233</sup> *Id.* at 1374.

<sup>234</sup> *Id.* at 1369.

aside the entire will in this circumstance violates the fundamental principle of testamentary freedom.<sup>235</sup> The *Killen* court should have at least considered the possibility that the testator's bequests to certain friends might have been made even in the absence of delusion.

Adopting partial invalidity as the default when a will is affected by an insane delusion would come closer to following the testator's intent. For example, the court in *Sandman* might have preserved the \$500 devise to Mary Nicholson, which does not seem to have had any connection to the testator's alleged delusion regarding the ghostly instructions of his deceased wife.<sup>236</sup> Oxford cites a similar case, *In re City National Bank & Trust Co. of Danbury*,<sup>237</sup> which involved a testator's devise to an imaginary person named John Gale Forbes whose acquaintance the testator made via Ouija board.<sup>238</sup> The court declined to invalidate only the disposition made to the imaginary friend, which had the result of voiding the testator's otherwise unproblematic devise to two of his servants.<sup>239</sup> As Oxford notes, "by voiding the entire will, the court destroyed what little unaffected testamentary intent the testator possessed."<sup>240</sup>

The remedy of partial invalidity would help in some cases to limit the negative consequences of the insane delusion doctrine.<sup>241</sup> However, it would not help in cases where the testator's will is, in fact, entirely connected with the alleged delusion,<sup>242</sup> and such cases can be equally problematic. In the case of *In re Estate of Watlack*,<sup>243</sup> decided in Washington in 1997, a testator's will was set aside on the ground that it was the product of a delusional belief that his daughter was stealing from him.<sup>244</sup> A provision in the testator's will stated that he was disinheriting his children "because he had spent very little time with them" and had previously given his daughter a 1983 Lincoln.<sup>245</sup> The court disregarded this explanation without offering

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<sup>235</sup> Oxford, *supra* note 12, at 111.

<sup>236</sup> See *In re Sandman's Estate*, 8 P.2d 499, 499-501 (finding sufficient evidence of testator's "delusion or alienation of reason" based on the testator's daughter's assertion that their relationship had been "harmonious" without mention to testimony of Mary Nicholson).

<sup>237</sup> 144 A.2d 338 (Conn. 1958).

<sup>238</sup> *Id.* at 340; Oxford, *supra* note 12, at 112.

<sup>239</sup> *In re City Nat'l Bank & Tr. Co. of Danbury*, 144 A.2d at 339-41.

<sup>240</sup> Oxford, *supra* note 12, at 113.

<sup>241</sup> See *id.* at 120-21 (arguing that the doctrine of partial invalidity may appropriately preserve the testator's intent by voiding the provisions that were the product of insane delusions and preserving the rest).

<sup>242</sup> *Id.* at 108 ("If this insane delusion causes testators to execute a will they would not want but for the insane delusion, then the court should properly void the will . . .").

<sup>243</sup> 945 P.2d 1154 (Wash Ct. App. 1997), *reh'g denied* Nov. 26, 1997.

<sup>244</sup> See *id.* at 1156-57, 1159 (explaining the testator's delusional belief and noting that "he still held the false belief [when signing the will] that Ms. Freeman had stolen money from him and continued to accuse her of taking the money. From at least March 1988 through the date of his eventual death, Mr. Watlack suffered from this and other insane delusions.").

<sup>245</sup> *Id.* at 1156.

any justification.<sup>246</sup>

In his article calling for the abolition of the testamentary doctrine of insane delusion, Fogel rightly points to *Watlack* as an illustration of the doctrine's potential to allow factfinders to substitute their own biases for the expressed wishes of the testator.<sup>247</sup> Adopting the remedy of partial invalidity would have been of no help in *Watlack*, however, because the testator's will devised all his property to his brother's children.<sup>248</sup> The will is either entirely valid, or entirely invalid. The same is true of *Honigman*, *Strittmater*, and many other cases that have been rightly criticized for their infringement of testamentary freedom.<sup>249</sup> In order to address the flaws in those cases, something more than a remedy of partial invalidity is needed.

### B. *Insane Delusion and Conditional Validity*

To date, the various proposals that have been offered to reform the doctrine of insane delusion all take for granted one longstanding rule: namely, that the insane-delusion doctrine has no place in cases where the testator fails the general test of mental capacity.<sup>250</sup> Fogel states that "if courts only found individuals who failed the general test for testamentary capacity to be monomaniacs, then the law of monomania would be superfluous."<sup>251</sup> This conclusion, however, depends on the assumption that a finding of lack of general mental capacity results in the invalidity of the entire will. If some part of the will might be held valid even if the testator failed one of the elements of the general capacity test, then there might be a role for the doctrine of insane delusion as a test of partial sanity that could result in the upholding of all or part of the will.

The rule that a lack of general mental capacity invalidates the entire will is well entrenched.<sup>252</sup> If the independent doctrine of insane delusion were abolished, as proposed by Fogel and Ronner, one would expect to see more will contests based on an alleged lack of general mental capacity. For example, there is no evidence in the *Strittmater* opinion that Louisa lacked

<sup>246</sup> See *id.* at 1158–59 (holding that the facts indicate that the new disposition in the will was mainly because of his insane delusion, and not because he had not spent much time with his children).

<sup>247</sup> Fogel, *supra* note 12, at 100–01.

<sup>248</sup> *Watlack*, 945 P.2d at 1155.

<sup>249</sup> See *supra* Section I.C.3 (discussing *In re Honigman's Will*, 168 N.E.2d 676, 676–77 (N.Y. 1960); *In re Strittmater's Estate*, 53 A.2d 205, 205 (N.J. 1947)); see also Fogel, *supra* note 12, at 96 ("Rejecting a will that is not tainted by the testator's insane delusion impugns the testator's testamentary freedom . . .").

<sup>250</sup> See Oxford, *supra* note 12, at 105 ("There is no partial invalidity when a testator lacks testamentary capacity because the entire will must be void."); Ronner, *supra* note 12, at 205 ("Although the same policies minister to both mental capacity and insane delusion theories and contestants frequently lodge them together, courts treat them as two distinct attacks.")

<sup>251</sup> Fogel, *supra* note 12, at 104.

<sup>252</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. c ("A purported will or revocation of a will by a person who lacks the mental capacity to make a will is void.")

the capability of understanding the factors required for mental capacity.<sup>253</sup> In the absence of an insane-delusion claim, however, Strittmater's cousins would no doubt have framed their will contest in terms of the general-capacity test and would have pointed to whatever evidence might support a general-capacity challenge. The same opportunity for bias on the part of the factfinder would be presented, albeit in a different doctrinal guise.

The result might be quite different if, rather than simply abolishing the insane-delusion doctrine, the courts repurposed it as a basis for upholding all or part of a testamentary disposition when the testator failed the general-mental-capacity test. If the heirs of Strittmater were somehow able to demonstrate that she lacked general mental capacity, the will proponents would then have the opportunity to make the argument that Louisa's bequest to the National Woman's Party was the product of rational thinking, in which case the bequest would be allowed to stand.

Reformulating the insane-delusion doctrine as a test of partial sanity would bring the law of mental capacity into harmony with the law of undue influence, duress, and fraud, all of which are said to invalidate only specific provisions of the will that are specifically affected.<sup>254</sup> Moreover, the court's holding in the *Killen* case could be used to justify this shift. The Arizona Court of Appeals held in *Killen* that testamentary capacity was lacking when the testator "knew the natural objects of her bounty but suffered from insane delusions that affected her perception of those persons and the terms of the will . . ."<sup>255</sup> Extending that reasoning, a court might hold that a will is valid when a testator's lack of capacity stems from an insane delusion that did not affect the disposition in the will.

To see how a reformulated insane delusion might work in practice, consider the following hypothetical drawn from a leading casebook on wills, trusts, and estates.<sup>256</sup> Suppose that a testator believed that the trees near his farm had permanent human occupants. In the testator's will, he devised \$40,000 to provide food for the imaginary tree people and left the remainder of the estate to his wife.<sup>257</sup> Should the devise of \$40,000 be upheld as valid? The first step would be to determine whether the testator lacked general mental capacity, which, under current law, would invalidate the entire

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<sup>253</sup> See *Strittmater*, 53 A.2d at 205 ("Miss Strittmater, in her dealings with her lawyer . . . and with her bank, to cite only two examples, was entirely reasonable and normal."). Strittmater's physician did offer the opinion that Louisa "suffered from paranoia of the Bleuler type of split personality." *Id.*

<sup>254</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.3 cmt. d (explaining that if a donative transfer in a will is obtained through "undue influence, duress, or fraud," only that transfer is invalid, not the entire will). There is an exception where "[t]he court may . . . hold the entire will invalid if it determines that complete invalidity would better carry out the testator's intent." *Id.*

<sup>255</sup> *In re Estate of Killen*, 937 P. 2d 1368, 1374 (Ariz. Ct. App. 1996), *reh'g denied* Oct. 21, 1996.

<sup>256</sup> LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 231 (3d ed. 2002).

<sup>257</sup> *Id.* at 231.

will.<sup>258</sup> Under current law, if the testator did have general mental capacity, the next step would be to determine whether the testator suffered from a delusion. Under the *Restatement (Third) of Donative Transfers*, the devise to the tree people would likely be invalid as having been caused by a “belief that is so against the evidence and reason that it must be the product of derangement.”<sup>259</sup> People do not live in trees, and a testator who persists in believing that they do, contrary to all evidence, would likely be held to suffer from an insane delusion.<sup>260</sup>

If the devise to the tree people is stricken as invalid, what happens to the residuary devise? On the one hand, the *Restatement (Third) of Donative Transfers* says that “[a] particular donative transfer is invalid . . . to the extent that it was the product of an insane delusion.”<sup>261</sup> This would seem to justify upholding the residuary devise to the wife against any challenge (e.g., by the testator’s children, if any) because it was not the product of the delusion. On the other hand, in practice, courts invariably have stricken the entire will when it is found to be affected by an insane delusion.<sup>262</sup> Thus, although there is a strong policy argument for upholding the residuary devise to the wife, this would not be the likely result as the doctrine is currently applied.

Under the proposed new approach, the court would, as under current law, begin by applying the test of general mental capacity. If the testator passed that test, however, the analysis would end, and the entire will would be valid. If the devise for the benefit of the imaginary tree people was made to a third party, such as an anti-hunger organization, that organization would receive the \$40,000 and could put it to some other use. On the other hand, if the devise were made directly to the nonexistent tree people, it would be a void devise, which is treated the same as a lapsed devise.<sup>263</sup> Since no antilapse statute could apply to nonexistent persons, the entire estate would pass to the wife.<sup>264</sup> Thus, if the testator had general mental capacity, the result would be the same as if there were no doctrine of insane delusion.

The biggest departure from existing law under the new approach would

<sup>258</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. c (“A purported will . . . by a person who lacks the mental capacity to make a will is void.”).

<sup>259</sup> *Id.* § 8.1 cmt. s.

<sup>260</sup> Admittedly, trees may be occupied on a temporary basis, generally by children; however, the desirability of such an accommodation has been questioned. See, e.g., BILL WATTERSON, THE ESSENTIAL CALVIN AND HOBBS: A CALVIN AND HOBBS TREASURY 26 (1988) (“What on earth makes you think I’d want to sit in a stupid tree in the first place?”).

<sup>261</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. s.

<sup>262</sup> See Oxford, *supra* note 12, at 108 n.149 (“There does not appear to be a reported case where a court actually applied the doctrine of partial invalidity to a will affected by insane delusion.”).

<sup>263</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 5.5 cmt. a (“A distinction is sometimes drawn between *lapsed* devises and *void* devises . . . . The distinction is of no consequence in modern law, and is not perpetuated in this Restatement.”).

<sup>264</sup> See *id.* § 5.5 cmt. n (explaining that when assets are bestowed on nonexistent persons, such as when the testator devised the estate to deceased persons, the assets are considered “residue” of the estate and are passed on to the alternative devisee(s)).

occur if the testator were, in fact, found to lack general mental capacity. For example, suppose that the factfinder reached the conclusion that the testator was incapable of understanding the natural objects of his bounty.<sup>265</sup> Under current law, the analysis would end there, and the entire will would be held invalid.<sup>266</sup> By contrast, the proposed new approach would require the factfinder to answer a second question: was the testator capable of making *some* rational decisions? If so, the will would be invalid only to the extent it was a product of irrational thinking. The \$40,000 gift would be stricken, but the residuary devise to the wife would stand. Because the \$40,000 would pass into the residuary, the wife would receive the entire estate.

An example of a real case that might have come out differently under the proposed new approach is *English v. Shivers*,<sup>267</sup> decided in Georgia in 1963. The testator, LeVert Shivers, left her property to a close male friend, Emmet Johnson English, because she believed that her children “had mistreated her by not turning all of their father’s estate over to her . . . .”<sup>268</sup> The testator’s relatives challenged the will on the basis of lack of general mental capacity, monomania, and undue influence, claiming that English “would make love to the said Mrs. Shivers and made her believe that he was in love with her and that her children had treated her wrongfully . . . .”<sup>269</sup> The jury ruled in favor of the contestants.<sup>270</sup> On appeal, the Supreme Court of Georgia held that the allegations failed to support a finding of monomania because the testator’s beliefs were based in fact.<sup>271</sup> Nevertheless, because the testator had been found to lack general mental capacity, and because the contestants had alleged facts that might constitute undue influence, the judgment denying probate was upheld.<sup>272</sup>

If the Georgia Supreme Court had applied the proposed new test, the determination that Shivers lacked general mental capacity would not end the case. The jury would then need to consider whether the testator was capable of making *some* rational decisions and, if so, whether the decision to disinherit the children and leave the property to English was rational. The Georgia Supreme Court’s skepticism regarding the claim of monomania suggests that the bequest to English might be found to be the product of rational thinking.<sup>273</sup> The devise might nonetheless have failed on the ground

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<sup>265</sup> This is one of four requirements for a finding of general mental capacity. *Id.* § 8.1(b).

<sup>266</sup> *See id.* § 8.1 cmt. c (noting that current law requires a testator to be “of sound mind.”).

<sup>267</sup> 133 S.E.2d 867 (Ga. 1963).

<sup>268</sup> *Id.* at 868, 870.

<sup>269</sup> *Id.* at 868–69, 871–72.

<sup>270</sup> *Id.* at 869.

<sup>271</sup> *Id.* at 871.

<sup>272</sup> *Id.* at 872–73.

<sup>273</sup> *See id.* at 871 (“[W]e observe that there is no statement that Mrs. Shivers’ alleged beliefs were without any foundation in fact. On the contrary, from what is alleged, they *were* based on fact.”) (emphasis in original).

of undue influence, but a modern court might take a less skeptical view of the relationship between English and Shivers.<sup>274</sup>

Although the proposed new approach is a departure from existing law regarding insane delusions, it might be justified as an extension of the ancient concept of a lucid interval. As stated in the *Restatement (Third) of Donative Transfers*, an individual who is “mentally incapacitated part of the time,” but has “lucid intervals during which he or she meets the standard for mental capacity” has the power to execute a valid will during such a lucid interval.<sup>275</sup> The lucid-interval doctrine emerged centuries before psychiatrists first began to understand that a person’s mental capacity might be limited not only at certain times, but with respect to certain subjects.<sup>276</sup> However, the basic notion that insanity should not be an automatic bar to testamentary capacity could apply equally well in the context of delusions. Such an approach would also be consistent with the ancient principle that individuals are presumed to have mental capacity in the absence of contrary evidence.<sup>277</sup>

One possible objection to the approach proposed here is that it lacks precision in cases of partial validity. Suppose again that the testator in the tree-people hypothetical devised \$40,000 not to the tree people, but to an organization devoted to combating hunger. If the testator were found to have general mental capacity, the approach advocated here would result in the entire will being valid, including the \$40,000 devise caused by the delusion. In theory, the current doctrine of insane delusion would be more precise, as it would permit a court to strike the \$40,000 bequest while preserving the residuary devise. The response to this possible objection is that, in over two centuries of applying the doctrine of insane delusion, courts have never once used it in a reported case to strike a portion of a will while upholding the

<sup>274</sup> See RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.3 cmt. f (noting that a “domestic partner . . . is as much a natural object of the testator’s bounty as a donor’s spouse”); Spivack, *supra* note 13, at 281–83 (criticizing judicial assumptions about undue influence in relationships between older women and younger men).

<sup>275</sup> RESTATEMENT (THIRD) OF DONATIVE TRANSFERS, *supra* note 5, § 8.1 cmt. m; see MCGOVERN ET AL., *supra* note 5, at 317 (“[I]f [the] testator lacked capacity at different periods of her life but when the will was actually signed had capacity, the will is valid. Conversely, if the testator who was ordinarily of sound mind executes his will during a brief period when he is not, the will is invalid.”). The principle is an ancient one, tracing back to Roman law and discussed in Henry Swinburne’s sixteenth-century English treatise on the law of wills. See, e.g., JUSTINIAN’S INSTITUTES 71, § 2.12 (Peter Birks & Grant McLeod trans., 1987) (“An insane person’s will is considered valid if it is made in a lucid interval.”); HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES 36–37, § 2.3 (London, John Windet 1590) (“Madfolkes and Lunaticke persons, during the time of their furor or insanitie of mind, cannot make a Testament. . . . How be it if these madde or lunatike persons have cleer or calme intermissions, then during the time of such their quietnesse and freedome of minde, they may make their testaments, appointing executors, and disposing of their goodes at their pleasures.”).

<sup>276</sup> The lucid interval doctrine is described in a sixth-century introductory textbook of Roman law. JUSTINIAN’S INSTITUTES, *supra* note 275, at 8, 71.

<sup>277</sup> See SWINBURNE, *supra* note 275, at 37, § 2.3 (“[E]very person is presumed to be of [perfect] minde and memorie . . .”).



rest.<sup>278</sup> On the other hand, the concept of partial validity would be no help in cases like *Strittmater* when the entire will is related to the alleged delusion.<sup>279</sup>

Evidence shows that contested wills are more likely to be set aside when a testator devises property to nonrelatives and friends, and less likely to be set aside when property is devised to a close relative.<sup>280</sup> In many states, parties in will contests have a right to demand trial by jury, which puts the decision in the hands of ordinary individuals with no expertise in probate matters.<sup>281</sup> Studies show that juries are more likely than judges to be sympathetic to the arguments of will contestants.<sup>282</sup> Under the proposed new approach, the doctrine of insane delusion could no longer be a tool for mischief in the hands of judges and juries who wish to substitute their own preferences for that of the testator. Instead, it would be given a new, useful role: determining whether a mentally incapacitated decedent was sufficiently lucid to exercise valid testamentary judgment with respect to certain persons or property unconnected with his or her delusions.

#### CONCLUSION

The flaws with the traditional doctrine of insane delusion have been apparent since at least the 1940s. In the field of contract law, the doctrine has largely been supplanted with a modern test that explicitly focuses on concerns of fairness. Such an approach cannot easily be translated to the law of donative transfers, where the fundamental principle is freedom of disposition. Any reform effort must also take into account the unfortunate

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<sup>278</sup> See Oxford, *supra* note 12, at 108 n.149 (“There does not appear to be a reported case where a court actually applied the doctrine of partial invalidity to [a] will affected by an insane delusion.”). My own research supports the conclusion of Professor Oxford that no reported case exists.

<sup>279</sup> See *In re Strittmater’s Estate*, 53 A.2d 205, 205 (N.J. App. Div. 1947), which is discussed in Section I.C.3 above.

<sup>280</sup> See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 607, 659–60 (1987) (examining will contests in Nashville, Tennessee, between 1976 and 1984 and finding that will contests involving devises to close relatives generally failed, while contests involving devises to non-relatives were generally successful).

<sup>281</sup> See Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 536–40 (examining the right to trial by jury in will contests).

<sup>282</sup> See Schoenblum, *supra* note 280, at 652 (“[W]hile juries split fairly evenly, judges held decidedly in favor of proponents”); see also Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 180 (1999) (finding that, of a sample of twenty two judge-tried cases, “only five were originally decided for the contestant[,]” of which two were reversed, and “seven cases originally decided by a judge in favor of the proponent were reversed by the appellate court”). Most wills are not contested, and the percentage of wills that are varies significantly by jurisdiction. See, e.g., Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1453, 1467 (2007) (finding only seven contested wills in sample of 342 testate probate files from San Bernardino County in 1964); Kristine S. Knaplund, *The Evolution of Women’s Rights in Inheritance*, 19 HASTINGS WOMEN’S L.J. 3, 30–31 (2008) (finding that eleven of 108 wills probated in Los Angeles County in 1893 were formally contested and another seven cases resulted in distributions different from those in will).

biases that factfinders sometimes bring to determinations of mental capacity in will contests. An approach that seems rational and precise in theory may be of little use in practice, and perhaps make things worse.

Despite the obstacles, it is imperative that the insane-delusion doctrine in the law of gratuitous transfers be reformed. Abolishing the doctrine completely seems unwise, however, particularly in light of the interesting research currently being conducted by scientists to assess the likelihood of connections between delusions and other cognitive impairments. Psychiatrists continue to take the concept of delusion seriously and lawyers should as well, at least until a better alternative is found. If the doctrine of insane delusion is prematurely abolished, the courts will have lost a potentially useful tool in sorting through the testamentary wishes of individuals with mental illness. It would be difficult to revive the doctrine in the future if courts come to forget how to apply it.

This Article has suggested that, rather than abandon centuries of precedent regarding the legal doctrine of insane delusion, courts and lawmakers should consider repurposing the doctrine in a manner that promotes rather than frustrates testamentary intent. Reformulating the doctrine as one of partial sanity, and using it only to validate all or part of a will when the testator is found to fail the general test of capacity, might accomplish this goal. When a deluded individual's personal reality differs from the world the rest of us experience, we should acknowledge the difference but not give it any more significance than it deserves.

