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Testation and the Mind

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Testation and the Mind

Adam J. Hirsch*

Abstract

This Article explores the panoply of state-of-mind rules in inheritance law. In areas of law concerned with wrongdoing, consideration of mental states achieves specific deterrence and moral justice. By comparison, in the inheritance realm, I argue that consideration of mental states can serve to economize on decision costs. The Article looks at state-of-mind rules through this prism and also analyzes the public policy of these rules from the perspective of modern research into psychology. Finally, the Article examines state-of-mind rules comparatively, identifying inconsistencies between them that require justification. The Article closes by observing potential expansions of the model and applications in other areas of law.

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I. Introduction

Should lawmakers care what people think? Rules can, and often do, apply to behavior alone—whether judged on the basis of reasonability or some other metric—laying aside all reference to subjective experience. For his part, Justice Oliver Wendell Holmes, Jr., advocated the evaluation of all conduct on the basis of what he called “external standards,”¹ and he insisted that “[t]he law has nothing to do with the actual state of the parties’ minds.”² Proposals to confine branches of law to reckonings of parties’ acts continue to appear from time to time.³ Stepping back, we can behold a fundamental problem of jurisprudence: In what circumstances, and to what ends, should lawmakers peer into the black box of mental states, given its opaqueness—even in this day and age—to all but a few bands of light?⁴

In some areas of law, the answer is clear. *Mens rea* signals moral culpability and, in instrumental terms, identifies instances where we can achieve specific deterrence of injurious or risky

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 49–51, 134 *passim* (Dover Publications 1991) (1881). For a discussion, see Sheldon M. Novick, *Holmes’s Philosophy and Jurisprudence: Origin and Development of Principal Themes*, in *THE COLLECTED WORKS OF JUSTICE HOLMES* 18, 43–45 (Sheldon M. Novick ed. 1995).

2. HOLMES, *supra* note 1, at 309. “In contract, as elsewhere, it must go by externals.” *Id.* Even in criminal law, “while the terminology of morals is still maintained . . . [the law] is continually transmuted those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.” *Id.* at 38.

3. See, e.g., BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* *passim* (1963) (proposing to banish the insanity defense from criminal law); Larry Alexander, *Free Speech and Speaker’s Intent: A Reply to Kendrick*, 115 COLUM. L. REV. SIDEBAR 1, 1–2 (2015) (arguing that First Amendment protection of speech should not hinge on the speaker’s state of mind).

4. Researchers have sought to pry open the black box from every side, and—dim though it remains—it is gradually beginning to brighten. For a neuropsychological study relevant to gratuitous transfers, see Abigail A. Marsh et al., *Neural and Cognitive Characteristics of Extraordinary Altruists*, 111 PROC. NAT’L ACAD. SCI. 15036 (2014).

conduct by knowing parties.⁵ Yet in other fields, concerned with acts that cause no harm, deterrence either fails to arise or does so only when a wrongdoer enters the scene. Within any such area, we must develop new justifications for subjectivity. The point to emphasize is that, at every juncture where human agency is implicated, *lawmakers have a choice to make*—a choice, that is, between imposing what we shall call a “state-of-mind rule” and an external standard. We need a theory for selecting one or the other.

This Article explores the problem in the field of inheritance law. In this placid vineyard, where wrongdoing rarely appears, I will argue that the key considerations are information and decision costs. The mind of a testator teems with data, but data that is difficult to access, and assess, without risk of inaccuracy or misrepresentation. Death compounds those risks. Even so, evidence of state-of-mind may prove cheaper and less risky to work with than alternatives. We should premise our choice on considerations of relative utility.

We shall explore the problem here—unusually—from a wide perspective, taking in all of the instances where lawmakers have considered, or have considered considering, a testator’s state of mind in evaluating the validity of a will.⁶ For the most part, prior scholarship on state-of-mind rules has addressed them individually, an approach as typical of lawmakers as it is of commentators. A narrow focus facilitates in-depth analysis. Its less obvious demerit is a tendency to obscure context. When lawmakers craft rules in isolation, inconsistencies can creep in, and insular study may continue to blind us to those inconsistencies. In such circumstances, the switch to a panoramic view can be eye-opening. Before we can conceive anything approaching a general theory of state-of-mind rules, we shall have to regard them side by side.⁷

5. See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (reiterating the centrality of *mens rea* to criminal law).

6. Another body of potentially subjective rules governs *construction* of wills. For a criticism of those rules, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1115–25 (1996).

7. See *id.* at 1135–62 (discussing inter-doctrinal analysis as a jurisprudential imperative).

Simultaneously, we will endeavor to bring to bear insights from other disciplines—principally those of economics and psychology. The first pertains to all topics legal; the second relates more particularly to any rule having to do with decision making. Thus far, commentators have lagged in their application of interdisciplinary analysis to the inheritance field, which remains a technical sanctuary by and large.⁸ As such, it wants a cutting edge. The field will have to catch up, before it can catch on.

Assaying our subject at a structural level, we can identify states of mind relevant to the validity of a will as falling into any of several categories. One concerns a party's volitional state—*what* a party was thinking. Another concerns a party's deliberative state—*how* a party was thinking. The two are related, in that a party's processes of deliberation guide his or her resolutions. Affect bears on effect, so to say. This interrelated duality also arises in other areas of law—in criminal law, for instance, where *mens rea* stands beside the insanity defense, as well as in contract law, a structural correlate of inheritance law and an ever-fruitful point of comparison.⁹ At another level, we can also differentiate mental states that result naturally, as a result of parties' organic processes and experiences, from those that result purposefully via the efforts of other minds to sway parties' thinking.

Another issue concerns how to frame a given state-of-mind rule. An under-remarked dichotomy exists within our law between rules that require proof that an actor caused something to happen—what we might dub “causal” rules—and “per se” rules, where the legal outcome depends only on a demonstration that a thing did happen. Each type is ubiquitous. Famously within tort law, causal rules predominate: conduct must proximately cause harm in order to trigger liability.¹⁰ But within

8. See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 857–63 (2012) (surveying the literature).

9. For a discussion of the proximity of these fields, which we shall further explore hereinafter, see Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2180–85 (2011).

10. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2010).

contract law, it sometimes makes no difference whether conduct caused a particular harm, proximately or otherwise. For instance, goods sold at retail come with an implied warranty of merchantability; if they are defective, the buyer can claim damages.¹¹ Proof of the defect suffices to create the liability.

By the same token, a state of mind may be associated with a legally significant act. In formulating a *per se* rule, lawmakers could focus singularly either on the state of mind or on the act. Alternatively, lawmakers could make the outcome hinge on whether or not the state of mind caused the act. We can observe this dichotomy within criminal law: under the *M'Naghten* test of criminal culpability, a defendant was not guilty of a crime by reason of insanity if the defendant had particular mental characteristics at the time when the act occurred.¹² The defendant did not have to prove that he or she would have committed no crime but for the presence of those characteristics.¹³ The *M'Naghten* test was a *per se* state-of-mind rule. By comparison, the *Durham* test that some courts preferred represented a causal rule: the defendant had to prove that the criminal act was a “product” of mental disease.¹⁴

As we shall see, the dichotomy between *per se* and causal state-of-mind rules could—and does—reappear within inheritance law, where it again raises questions of relative utility.

The analysis that follows will unfold in stages. In Part II, we consider state-of-mind rules that might validate or invalidate a will by virtue of a testator’s volitional state. Herein, we address whether lawmakers should inquire into a testator’s subjective intent to make a will. In Part III, we shift to state-of-mind rules concerned with processes of thought. To what extent should a testator’s cognitive characteristics invalidate a will? In Part IV, we proceed to the problem of a testator whose thoughts originated

11. See U.C.C. § 2-314 (1977).

12. See WAYNE R. LAFAVE, CRIMINAL LAW § 7.2, at 397–99 (5th ed. 2010).

13. See, e.g., *State v. McLaughlin*, 725 N.W.2d 703, 714 (Minn. 2007) (“[T]hat the shootings would not have occurred ‘but for’ [the defendant’s] mental illness . . . is not particularly relevant to the *M'Naghten* standard.”).

14. See LAFAVE, *supra* note 12, § 7.4, at 414–19.

in interactions with others, which again might invalidate a will. In Part V, we turn to a neglected problem, cutting across the lines of others—namely, the temporal dimension of mental states, given the protean nature of the mind, and the shadowy doctrines connected to that problem. We conclude, finally, with some larger observations about the place of state-of-mind rules in our jurisprudence.

II. Volition

The essence of a will is testamentary intent. This volitional attribute defines the category, distinguishing wills from other transfers of property.¹⁵ Lawmakers need not, however, rely on a state-of-mind rule to discover intent. The protocols accompanying a transfer could serve as an external standard to determine its character.

Within the adjoining field of contracts, this issue is supposed to have produced one of the great controversies in American legal history. To create a contract, parties must mutually intend to bind themselves to the agreed terms. How does a court determine whether they have formed an agreement? It was believed that before the mid-nineteenth century, a “meeting of the minds” had to occur—that is, both of the parties had subjectively to intend to bind themselves to the same agreement. Courts thereafter rejected this conception, even as they continued to repeat the maxim—and still do—but no longer as a shibboleth of subjectivism.¹⁶ Courts now insisted that the issue turned on whether contracting parties *objectively appeared* to bind themselves.¹⁷ What they actually thought was immaterial, even

15. See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *499–500 (observing that a will is, at its heart, “the legal declaration of a man’s intentions, which he wills to be performed after his death”).

16. See, e.g., *Tiller v. RJB Assocs.*, 770 S.E.2d 883, 887 (Ga. Ct. App. 2015) (quoting *Graham v. HHC St. Simons*, 746 S.E.2d 157 (2013)). Professor Williston described the maxim as a “quaintly archaic expression” and a “cliché.” GRANT GILMORE, *THE DEATH OF CONTRACT* 43 (1974).

17. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 210 (3d ed. 2004) (“By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today.”).

if, as Judge Learned Hand posited, twenty bishops (apparently violating confessional privilege) stood ready to recount the parties' true intentions.¹⁸ This view is enshrined in the Restatement of Contracts, which defines a promise as a "manifestation of intention to act . . . so made as to justify a[n] . . . understanding that a commitment has been made."¹⁹ Lest there be any doubt, the comment spells out that "[t]he phrase 'manifestation of intention' adopts an external or objective standard in interpreting conduct."²⁰

In reality, as Professor Joseph Perillo has demonstrated, the subjective theory (also known as the "will theory") never took hold within common law.²¹ Apart from occasional "flirtation[s]"²² with subjectivism in the nineteenth century, courts preferred the objective approach to contract formation throughout English and American legal history.²³ Perillo dissects the cases conventionally trotted out to illustrate the former ascendancy of subjectivism and finds them to apply nothing but objective doctrine, sometimes adorned with subjective "rhetoric."²⁴ The issue is real enough, and it remains a fixture of the contracts literature, but the dispute over it within the case law appears more myth than reality.

Within the commentary of inheritance law, the same issue has gone almost entirely unnoticed, although relevant cases can and do arise. Presented with a properly executed will, a court could conclusively presume intent to make the document legally performative. Alternatively, a court could open the door to evidence controverting such intent. The first approach is

18. *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd* 201 F. 664 (2d Cir. 1912), *aff'd* 231 U.S. 50 (1913).

19. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (AM. LAW INST. 1981); *see also id.* §§ 3, 17, 19 (repeating this terminology).

20. *Id.* § 2 cmt. b.

21. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 430, 477 *passim* (2000).

22. *Id.* at 428.

23. *See id.* at 477 (concluding that "objective approaches have dominated the common law since 'to the time that the memory of man runneth not to the contrary'").

24. *See id.* at 435–51.

objective, relying on external manifestations of intent reflected in a party's fulfillment of the formal requirements for executing a will. The second approach is subjective, allowing inquiry into a party's state of mind. And so we face the question: should lawmakers pursue a will theory of wills?

As a matter of law, if the language of a formalized writing fails to convey unambiguously whether or not it is intended to comprise a will, all courts admit extrinsic evidence of the author's state of mind to resolve the question.²⁵ But when the document on its face evinces testamentary intent, courts are divided. Some admit extrinsic evidence to rebut a presumption of intent created by the document, while others bar such evidence, relying on an external standard to judge intent.²⁶ In Great Britain, courts can reject wills executed by testators who lacked testamentary intent, but only where extrinsic evidence of their state of mind is clear and convincing.²⁷ The Restatement (Third) of Property endorses this approach.²⁸

On the contracts side, scholars today offer two substantive rationales for the objective approach. The first speaks to fairness. If a contracting party has made what appears a commitment, the

25. See W.E. Shipley, *Admissibility of Extrinsic Evidence upon Issue of Testamentary Intent*, 21 A.L.R.2d 319, §§ 3[a]–[b] (1952) (citing to cases).

26. Compare, e.g., *Nat'l Sav. & Tr. Co. v. Smith* (*In re Smith's Estate*), 14 N.W.2d 71, 74 (Mich. 1944) (barring extrinsic evidence), and *Norback v. Duemeland* (*In re Estate of Duemeland*), 528 N.W.2d 369, 371 (N.D. 1995) (same), with, e.g., *Shiels v. Shiels*, 109 S.W.2d 1112, 1113, 1115 (Tex. Civ. App. 1937) (admitting extrinsic evidence), and *Clark v. Hugo*, 107 S.E. 730, 734–35 (Va. 1921) (same). For collections of cases, see THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 46 (2d ed. 1953); 1 *PAGE ON THE LAW OF WILLS* § 5.10 (rev. ed. 2003 & Supp. Jeffrey A. Schoenblum ed. 2014) [hereinafter *PAGE*]; Jan Ellen Rein-Francovich, *An Ounce of Prevention: Grounds for Upsetting Wills and Will Substitutes*, 20 GONZ. L. REV. 1, 4–6 (1984–85); Shipley, *supra* note 25, §§ 8–9[b].

27. See *Lister v. Smith* (1863) 164 Eng. Rep. 1282, 1284–86; 3 Swabey & Tristram 282, 284–89.

28. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. g & illus. 1 (AM. LAW INST. 1999). The reporter had previously recommended this rule in a law review article. See John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 541–43 (1982) (citing to *Lister*); cf. UNIF. PROBATE CODE § 2-502(c), 8 pt. 1 U.L.A. 209 (2013) (stating that “[i]ntent that a document constitute the testator’s will can be established by extrinsic evidence,” without setting an evidentiary standard).

other party behaves reasonably by relying on that commitment.²⁹ The second rationale is instrumental: a functioning market in executory agreements can exist only when supported by an effective enforcement mechanism. If parties on the losing end of a speculative bargain could (falsely) plead lack of subjective intent, the risk of invalidation would undermine the market.³⁰

Neither argument crosses over to the law of wills. In adopting an objective stance, one court sounded a contract-like note, insisting that “[w]hen you intend the facts to which the law attaches a consequence, you must abide by the consequence whether you intend it or not.”³¹ A will is revocable, however; it is not a commitment on which beneficiaries can rely. Although testators sometimes make bequests as rewards for services, beneficiaries typically provide those services gratuitously, possibly in the hope of testamentary favor but not in reliance on it.³² To the extent parties agree to perform services in exchange for bequests, as they occasionally do, those deals comprise *contracts to make wills* that take effect under the regime of contract law.³³

In jurisdictions that exclude extrinsic evidence of intent to make a will, some courts and commentators observe that the exclusion accords with the parol evidence rule, again suggesting

29. See 1 FARNSWORTH, *supra* note 17, § 3.6, at 209–10 (“As an analyst from the field of torts might be tempted to view it, the first party had, through fault, induced the other to believe that there was a contract.”); see also Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 364 (2007) (“[T]he law . . . enforces apparent commitments that a promisee has reasonably taken seriously”).

30. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 273 (1986) (“Because the subjective approach relies on evidence inaccessible to the promisee, much less to third parties, an inquiry into subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments.”).

31. *Norback v. Duemeland (In re Estate of Duemeland)*, 528 N.W.2d 369, 371 (N.D. 1995) (quoting *State ex rel. Sathre v. Moodie*, 258 N.W. 558, 556 (N.D. 1935)).

32. For a further discussion of bequests as informal media of exchange, see Hirsch, *supra* note 9, at 2182–83, 2235; *infra* note 89 and accompanying text.

33. See BERTEL M. SPARKS, *CONTRACTS TO MAKE WILLS* 22–27 (1956) (observing that will contracts require offer and acceptance). Case law has yet to explore whether formation of a will contract is judged objectively, however.

that it is a contracts-flavored doctrine.³⁴ The analogy is misplaced. The parol evidence rule follows from the inference that terms negotiated orally remain tentative and are not intended as final when parties anticipate committing a contract to writing.³⁵ The same logic applies to wills: testators often voice one estate plan and ink another, after reflecting on the matter. Here, though, we are not concerned with the terms of a will—it is the performative effect of the document that lies at issue.³⁶ As the cases reveal, any number of factors might explain the execution of a document intended as nothing more than make-believe. Some testators have executed specimen wills to demonstrate to others what a will might look like.³⁷ Others have executed sham wills to fulfill an initiation ritual,³⁸ or to appease family members.³⁹ Still others have sought to influence family members by threatening them with a phony will—“an admonition . . . , a mere measure to have its effect *in terrorem* on the mind of [the testator’s] daughter.”⁴⁰ Any such sentiments expressed before the apparent execution of a document are unlikely to have been tentative.

34. See *Ward v. Campbell*, 73 Ga. 97, 97 (1884); ATKINSON, *supra* note 26, § 46, at 205.

35. See MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 105 (2010).

36. See *Clark v. Hugo*, 107 S.E. 730, 734 (Va. 1921) (“This is not a case in which we are permitting parol evidence to vary or contradict the terms of a written instrument.”).

37. See *Nichols v. Nichols* (1814) 161 Eng. Rep. 1113, 1114–16; 2 Phill. Ecc. 180, 183–84, 186–88 (holding ineffective as a will a document written in “levity” to “ridicule[e]” the prolixity of professionally drafted wills).

38. See, e.g., *Vickery v. Vickery*, 170 So. 745, 746 (Fla. 1936) (holding a will drafted “as part of the ceremony of initiation into a secret order” ineffective); see also *In re Watkins’ Estate*, 198 P. 721, 721–22 (Wash. 1921) (holding a lodge will effective because it appeared to have been made with performative intent, despite conflicting evidence).

39. See *Nat’l Sav. & Tr. Co. v. Smith (In re Smith’s Estate)*, 14 N.W.2d 71, 72 (Mich. 1944) (concerning an unintended will prepared to placate a family member); *In re Kennedy’s Will*, 124 N.W. 516, 516 (Mich. 1910) (concerning an unintended will prepared as “a peacemaker”).

40. *Small v. Small*, 4 Me. 220, 221–22 (1826) (raising this possibility); see also *Norback v. Duemeland (In re Estate of Duemeland)*, 528 N.W.2d 369, 370 (N.D. 1995) (paraphrasing contestant’s argument that the testator “was merely bluffing” by executing a purported will); *Lister v. Smith* (1863) 164 Eng. Rep. 1282, 1283; 3 Swabey & Tristram 282, 283–84 (concerning a sham codicil disinheriting a daughter prepared in order to persuade her mother-in-law to pay

The concern raised in some opinions to justify a conclusive presumption of intent is that otherwise wills would become vulnerable to fraudulent contests.⁴¹ This danger arises whenever we tinker with an unambiguous will following the death of the individual best equipped to clarify intent. Still, a disinterested drafting attorney can sometimes testify as to whether a will was or was not executed with testamentary intent.⁴² Other times, written declarations by an alleged testator are available.⁴³ The

rent on property where title was disputed); *Sons' Claim to Inheritance Goes Up in Smoke; Sisters Get their Share*, PRETORIA NEWS (S. Afr.), Mar. 4, 2015, 2015 WLNR 6428746 (noting argument by disinherited son that a purported will was prepared “simply as a threat to smoker [son], and not the real thing . . . in an attempt to make him stop smoking”); cf. *Fleming v. Morrison*, 72 N.E. 499, 499 (Mass. 1904) (concerning a sham will benefiting a mistress, prepared in order “to induce her to let [the testator] sleep with her”). Holographic wills present still greater volitional uncertainties. See, e.g., *In re Cosgrove's Estate*, 287 N.W. 456, 457 (Mich. 1939) (evaluating a document that “was in form a [holographic] will,” but which extrinsic evidence suggested was a draft). Existing case law draws no distinction between proof of volition for formalized and holographic wills, and rules barring or admitting extrinsic evidence of testamentary intent apply to both. See, e.g., *Nugent v. Wright*, 356 A.2d 548, 553 (Md. 1976); *Wolfe v. Wolfe*, 448 S.E.2d 408, 409 (Va. 1994). On this point, however, the Restatement is unclear. Its provision creating a strong but rebuttable presumption of testamentary intent appears in a section covering “attested” (i.e., executed) wills; the section covering holographic wills admits extrinsic evidence of volitional intent but announces no rules concerning the presumption or strength of the presumption that applies to them. Compare RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. g (AM. LAW INST. 1999) (“A clear, unambiguous expression of testamentary intent in the document raises a strong (but not irrefutable) presumption that the document was executed with testamentary intent. The presumption is rebuttable only by clear and convincing evidence.”), with *id.* § 3.2 cmt. c (“Testamentary intent need not be shown from the face of the will, but can be established by extrinsic evidence.”).

41. See *Nat'l Sav. & Tr. Co. v. Smith (In re Smith's Estate)*, 14 N.W.2d 71, 75 (Mich. 1944) (Boyles, J., concurring) (admitting extrinsic evidence would “place all wills at the mercy of a parol story” (quoting *In re Kennedy's Estate*, 124 N.W. 516, 517 (Mich. 1910))); *Norback v. Duemeland (In re Estate of Duemeland)*, 528 N.W.2d 369, 371 (N.D. 1995) (admitting extrinsic evidence “would leave every will open to attack as to the testator's alleged ‘real’ intent”); *Lister v. Smith* (1863) 164 Eng. Rep. 1282, 1285; 3 Swabey & Tristram 282, 288 (offering the original observation quoted in *Smith*).

42. See *Fleming*, 72 N.E. at 499; *In re Kennedy's Will*, 124 N.W. 516, 516–17 (Mich. 1910); *Clark v. Hugo*, 107 S.E. 730, 732 (Va. 1921); *Lister*, 164 Eng. Rep. at 1283; 3 Swabey & Tristram at 283.

43. See *Smith's Estate*, 14 N.W.2d at 72.

one academic discussion assessing the problem favors the admission of extrinsic evidence in these cases because doing so fails to implicate overwhelming evidentiary “dangers”⁴⁴—or, in technical jargon, error costs.

We can restate the case in economic terms. On the one hand, when we admit extrinsic evidence of a testator’s volitional state of mind, we run the risk that a fact finder will reconstruct that state of mind incorrectly. On the other hand, if we bar extrinsic evidence of a testator’s volitional state of mind, then we run the risk of implementing an estate plan that he or she never intended to take effect. By hypothesis, this risk is small because—as common sense and the sparsity of cases suggest—most documents that look like wills are intended to be exactly what they seem. But so long as the error costs of admitting extrinsic evidence remain low, we more accurately clarify intent by admitting extrinsic evidence than by excluding that evidence.

We can also conceptualize the problem in another way. By calling on courts to judge a testator’s volitional state of mind, we would impose on courts an evidentiary burden that raises their decision costs. By barring such evidence, we would lessen those costs.

Society, though, has an interest in ensuring that only documents intended as wills function as wills. One reason we grant freedom of testation is to exploit a testator’s knowledge about the needs of his or her dependents, which testators typically use to craft judicious estate plans.⁴⁵ Yet, if a testator executes a document that he or she does *not* intend to operate as a will, then how could we expect its estate plan to be judicious? Costly though the inquiry may be, confirming that a testator intended a document to function as a will helps to ensure that it was made upon “mature consideration,” as one court put it.⁴⁶

In this regard, lawmakers still have the alternative of applying an external standard. Courts could assess the merits

44. Langbein & Waggoner, *supra* note 28, at 542–43.

45. For a further discussion and references, see *infra* note 84 and accompanying text.

46. *In re Sharp’s Estate*, 183 So. 470, 472 (Fla. 1938); see also *Nichols v. Nichols* (1814) 161 Eng. Rep. 1113, 1115; 2 Phill. Ecc. 180, 187 (observing a document’s crudity as evidence that it was not intended as a will).

and maturity of each estate plan on its face. Manifestly, the information cost associated with such an external standard would exceed the cost of investigating the testator's volitional state of mind. Determining at some expense that a testator intended a document to comprise a will serves, then, as an efficient surrogate for a more exorbitant hearing into whether the estate plan stipulated by that will enhances the welfare of his or her survivors.

Having made the case for exploring a testator's volitional state of mind, we need to address the attendant presumptions. Plainly, courts ought to presume that a document which appears to be a will was intended to be one. We ordinarily set presumptions to accord with the balance of probabilities—that way, in the absence of evidence, the presumption minimizes error costs.⁴⁷ But whether we should go further in this instance and require clear and convincing evidence to overcome this presumption, as the Restatement advocates,⁴⁸ is doubtful. A heightened threshold of evidence for a result raises error costs. Economic theory suggests that lawmakers should create lopsided evidentiary thresholds only when the cost of an erroneous finding of one outcome exceeds the cost of an erroneous finding of the contrary outcome.⁴⁹ This circumstance explains the beyond-a-reasonable-doubt standard for establishing criminal guilt, where the harm of a false conviction exceeds the harm of a false acquittal, even though tilting the balance produces more false results.⁵⁰ In the absence of such a disparity, a preponderance-of-the-evidence standard minimizes error costs.⁵¹

47. 2 MCCORMICK ON EVIDENCE § 343, at 682 (7th ed. Kenneth S. Brown et al., eds. 2013) [hereinafter MCCORMICK]; see also *infra* note 315 and accompanying text.

48. See *supra* note 28.

49. See Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 461–62 (2002).

50. See *id.*

51. See *id.* at 462–63 (“A preponderance standard produces the greatest number of correct decisions, within the limits of the court’s factfinding abilities.”).

In the present context, an erroneous finding that a benefactor meant a formalized document to comprise a will when it was in truth a sham causes unintended beneficiaries to take instead of intended ones. An erroneous finding that a formalized document was meant as a sham when it was in truth a will likewise causes unintended beneficiaries to take instead of intended ones. Because false positives and false negatives are equally costly, we minimize error costs by following a preponderance-of-the-evidence standard, contrary to the Restatement.⁵²

These problems resurface in reverse with respect to revocation of wills. A testator can revoke a will either by executing a new one or by cancelling the old one with the intent to revoke it.⁵³ If a will last known to be in the possession of a testator disappears, lawmakers presume that it was revoked. Yet, in this instance, all states allow parties to introduce extrinsic evidence showing the absence of volition to revoke the will.⁵⁴ States divide only over whether the evidence necessary to overcome the presumption must be clear and convincing.⁵⁵ Under the Restatement, it need not be—even though the Restatement sets a higher bar for disproving intent to execute a will.⁵⁶ The point to emphasize here is that execution and revocation are opposite sides of a coin. The state-of-mind rules applicable to each should correspond with one another.⁵⁷

52. See *supra* note 28.

53. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(a) (AM. LAW INST. 1999).

54. See 3 PAGE, *supra* note 26, § 29.142, at 854.

55. See *id.* § 29.142, at 855–56; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 reporter’s note 9 (AM. LAW INST. 1999).

56. Compare RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. LAW INST. 1999), with *id.* § 3.1 cmt. g.

57. See *Nichols v. Nichols* (1814) 161 Eng. Rep. 1113, 1115; 2 Phill. Ecc. 180, 185–86 (“The mere act of witnessing or signing does not exclude, of necessity, the absence of the animus testandi any more than the mere act of cancellation excludes of necessity the absence of the animus revocandi.”). The Restatement distinguishes the two cases: regarding revocation, “[b]ecause of . . . other plausible explanations for a will’s absence or condition, the presumption is not such a strong one that clear and convincing evidence is required to rebut it.” *Id.* § 4.1 cmt. j (emphasis added). The fallacy here is assuming that burdens of proof (and not just presumptions) should reflect the

III. Deliberation

What a party thought he or she was doing when executing a document obviously pertains to the problem of will-making, but it is not the only mental state lawmakers regard as meriting inquiry. Presented with a document that a party plainly meant to take effect as a will, lawmakers are prepared to delve into his or her process of reasoning while executing that document.

A. Capacity

In order to make a will, the testator must possess a “sound mind.”⁵⁸ This threshold of mental capability traces to English law antedating even the earliest statute of wills,⁵⁹ with still deeper roots in ancient law.⁶⁰

One finds, of course, similar thresholds created within other regions of the legal landscape, notably within criminal law.⁶¹ Similar, but not identical: the test for testamentary capacity remains unique to inheritance law.⁶² Meanwhile, other fields, such as tort law, eschew such inquiries. Even insane persons

probability of facts when those burdens distort error costs. *See supra* text accompanying notes 47–49; *see also* 2 MCCORMICK, *supra* note 47, § 340, at 668 n.25 (recognizing the fallacy).

58. *See, e.g.*, UNIF. PROBATE CODE § 2-501 (amended 2010), 8 pt. 1 U.L.A. 205 (2013).

59. *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 48 n.113 (2006) (observing that from the time of the Norman conquest, ecclesiastical law imposed a capacity requirement). In the first English statute regulating testation, wills made by an “idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in law.” Act for the Explanation of the Statute of Wills, 1542-43, 34 & 35 Hen. 8, ch. 5, § 14 (Eng.). For an early discussion, see HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS pt. 2, §§ 2–6 (Dublin, Elizabeth Lynch ed., 7th ed. 1793) (1590).

60. *See* J. INST. 2.12.1 (533 A.D.); Anton-Hermann Chroust, *Estate Planning in Hellenic Antiquity: Aristotle’s Last Will and Testament*, 45 NOTRE DAME LAW 629, 637 (1970) (“Since the days of Solon . . . [a]ny male of age could make a formal will, provided he was a person of sound mind and body . . .”).

61. *See supra* note 12 and accompanying text.

62. *See, e.g.*, *Skelton v. Davis*, 133 So. 2d 432, 436 (Fla. Dist. Ct. App. 1961) (“[A] lunatic may draw a valid will.”).

remain responsible for their torts.⁶³ Investigation into the mental capabilities of legal actors is not a universal or inevitable feature of a legal regime assaying the consequences of human actions, and it takes no customary form. In connection with wills, a commentator once observed, “[i]t is just conceivable that the law should not make any particular requirement of mental capacity for testamentary purposes. This would be carrying the conception of freedom of testation to its fullest extent.”⁶⁴ The task before us is to identify the purposes served by a rule of this sort and, more particularly, the ideal structure of such a rule.

The Restatement summarizes the accepted components of a sound mind in respect of testation. At the time when they execute their wills, testators

must be capable of knowing and understanding in a general way the nature and extent of [their] property, the natural objects of [their] bounty, and the disposition that [they are] 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.⁶⁵

The public policy of the sound mind doctrine is open to debate. Discussions of its rationales have been few and far between. The Restatement posits two:

The law of donative transfers is premised upon implementing the donor’s intent. The law requires that the donor have the mental capacity to form such an intent. Moreover, [the sound

63. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 11(c) (AM. LAW INST. 2010) (“An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”).

64. ATKINSON, *supra* note 26, § 51, at 233.

65. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003); see, e.g., *In re Estate of Quirin*, 348 P.3d 658, 661–62 (Mont. 2015) (requiring these traditional elements). For an early American case, see *Harrison v. Rowan*:

[The testator] ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged—a recollection of the property he means to dispose of—of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them.

11 F. Cas. 658, 661 (Cir. Ct. D. N.J. 1820).

mind doctrine] serves a protective function The law protects a person who lacks mental capacity by providing that such a person is incapable of effectively formulating the requisite donative or testamentary intent.⁶⁶

What sense can we make of these arguments? The first one connects the sound mind doctrine with the requirement that a testator have the volition to execute a will. Instead of asking whether a testator *did* intend to make a will, we inquire whether he or she *could* intend to make one.⁶⁷ For reasons already discussed, this requirement is sound.⁶⁸ Yet, we could subsume it within a general rule requiring volitional intent or mandate it within a doctrine of capacity narrowly confined to requiring testators to understand what a will is. A testator can possess that understanding and still lack a sound mind under the Restatement and the extant case law.⁶⁹ If that were all, the shape the doctrine has assumed would improperly fit its rationale.

The second argument articulated by the Restatement is more mysterious. The notion that the doctrine “protects a person who lacks mental capacity”⁷⁰—that its purpose is paternalistic—is defensible as concerns gifts. Persons who cannot understand the nature and extent of their property might lavish it to the point of self-impoverishment, with implications for their wellbeing that justify intervention by the state.⁷¹ Expressly, but without elaboration, the Restatement extends this rationale to wills,⁷² a more doubtful proposition theoretically. Unlike gifts, wills are revocable, so if testators live to regret their estate plans they can

66. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. b (AM. LAW INST. 2003).

67. This idea is an old one. See SWINBURNE, *supra* note 59, pt.2, § 3, at 76 (“Mad Folks . . . cannot make a Testament The Reason is, because they know not what they do.”).

68. See *supra* notes 41–46 and accompanying text.

69. See *supra* note 65 and accompanying text.

70. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. b (AM. LAW INST. 2003).

71. See *In re Guardianship & Conservatorship of Tennant*, 714 P.2d 122, 123 (Mont. 1986) (concerning a donor who “believed she would always have whatever money she needed simply by writing another check” and who “would apparently give anything of hers to someone if she liked them”).

72. See *supra* text at note 66.

amend them. And once they have died, testators' wellbeing no longer merits concern by the state.⁷³

This much is obvious, so the drafters of the Restatement must mean something else. What, then, could they mean? To suggest that the doctrine protects "the decedent's true testamentary desires,"⁷⁴ as one scholar asserts, appears a trifle too metaphysical. We could render such a notion meaningful only by postulating that the doctrine protects testators' earlier "sound" selves from their later "unsound" selves—the structural antithesis of paternalism. It would be a perverse notion in inheritance law. On the contrary, we honor testators' last wills, not their first ones, because last wills reflect intent at the time when a testator actually makes the transfer.⁷⁵ If early selves nonetheless dread the choices that their later selves might make and wish to lock in their preferences, they could create irrevocable future interests that become possessory at death—at least covering their "own" property, not the property acquired by their later selves.⁷⁶

Another candidate for protection—although not mentioned by the Restatement—is the family of the testator. A number of scholars have identified dependents as the real beneficiaries of the sound mind doctrine: Testators able to recognize the natural objects of their bounty are more apt to provide for them than those lacking that ability. And if dependents are left without provision under a will, then the state must foot the bill for their

73. The prospect of regret comprises the central justification for paternalism. See DONALD VANDEVEER, PATERNALISTIC INTERVENTION 66–70, 95–163 (1986); see also Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 26 (1992) (addressing paternalism in the context of testation).

74. Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMPLE L.Q. 231, 233 (1962); see also *id.* at 232 ("[T]he incompetent testator is protected against his own unreasoned behavior.").

75. For a further discussion, see Hirsch, *supra* note 6, at 1126–27.

76. A donor cannot make a present transfer of an expectancy—that is, of property he or she might later acquire. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.1 cmt. f (AM. LAW INST. 2003) (barring such transfers).

support, an inefficient outcome given the costs of maintaining a welfare bureaucracy.⁷⁷

Yet lawmakers have at their disposal still more efficient options. A sound mind doctrine fails to protect dependents if a testator passes the threshold but nevertheless disinherits them, and the doctrine also implicates a costly evidentiary inquiry. Lawmakers can protect dependents more certainly and cheaply with an external standard, offering them automatic relief from disinheritance. Lawmakers have already taken steps in that direction by enacting elective share statutes, homestead statutes, and related measures.⁷⁸ By strengthening or adding to those rules, lawmakers could render the sound mind doctrine superfluous as a means of preserving dependents (and public treasuries).⁷⁹

A broader way to analyze the sound mind doctrine is to contemplate this limit on freedom of testation in light of the benefits the freedom secures. If a limit on freedom of testation would compromise its benefits, lawmakers must justify the imposition. Where, however, no benefit hangs in the balance, lawmakers can impinge on freedom of testation without fear of the repercussions. Any such restriction on freedom of testation remains compatible with its spirit.

One early English opinion, little noticed in the United States,⁸⁰ took this analytical tack. In *Banks v. Goodfellow*,⁸¹ the Court of Queen's Bench considered whether a testator who displayed "mental unsoundness . . . unconnected with the

77. See Epstein, *supra* note 74, at 232; Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1109–10 (1980).

78. See, e.g., UNIF. PROBATE CODE §§ 2-202, 2-402–404 (amended 2010), 8 pt. 1 U.L.A. 149, 198–201 (2013).

79. See Fellows, *supra* note 77, at 1110–12 (proposing to abolish the sound mind doctrine and supplement the elective share for a surviving spouse with a mandatory share for minor children, which Fellows observes would avoid the cost of adjudicating testamentary capacity).

80. The case goes unmentioned in the Restatement. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 reporter's note (AM. LAW INST. 2003).

81. *Banks v. Goodfellow* [1869–70] 5 Q.B. 549.

testamentary disposition in question,” nevertheless lacked testamentary capacity.⁸² The court began by observing that:

English law leaves [testation] to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties . . . may lead to the neglect of claims that ought to be attended to, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.⁸³

This notion—what an economist today might call the opportunity to freeride off the testator’s comparative advantage to create a welfare-enhancing estate plan—had been recognized as a justification for freedom of testation since Bentham’s time.⁸⁴ The court continued:

[T]o the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. . . . [W]e think . . . that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposition of his property.⁸⁵

82. *Id.* at 556.

83. *Id.* at 564.

84. For an early statement of this idea, see Jeremy Bentham, *Principles of the Civil Code*, in *THE WORKS OF JEREMY BENTHAM* 297, 336–37 (John Bowring ed. 1843) (photo. reprint Thoemmes Press 1995) (ms. c. 1775–1802); see also *Bird v. Luckie* (1850) 68 Eng. Rep. 375, 378; 8 Hare 301, 306 (“Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily.”). American courts have made equivalent observations. See, e.g., *Licata v. Spector*, 225 A.2d 28, 30 (Conn. C.P. 1966) (“The purpose of this policy [freedom of testation] . . . was to see that the estate of the testator was not wasted but improved for the best advantage of the children or legatees of the testator.”).

85. *Banks*, 5 Q.B. at 566; see also *Estate of O’Brien-Hamel*, 93 A.3d 689, 695 (Me. 2014) (asserting that in order to possess testamentary capacity, a

It followed that “a degree of form or unsoundness that neither disturbs the exercise of the faculties necessary for such an act . . . ought not to take away the power of making a will.”⁸⁶

The court’s analysis of the sound mind doctrine proceeded along a sound line of logic, and it explains why the unique form of this doctrine within inheritance law took shape as it did. An understanding of what one owns, who the natural objects of one’s bounty are, and what a will is all comprise building blocks of testamentary judgment.⁸⁷ Those who possess them can construct a sensible estate plan, even if they are not thinking clearly in other respects.

Still, the point needs developing. Exploiting a testator’s knowledge is not the only benefit society derives from freedom of testation. By enhancing owners’ power over property, freedom of testation encourages industry and savings.⁸⁸ It also permits a testator to reward family members for providing him or her with social services.⁸⁹ If the sound mind doctrine compromised either

testator “must have . . . mental power enough to . . . act with sense and judgment. . . .” (quoting *In re Estate of Siebert*, 739 A.2d 365, 366 (Me. 1999)).

86. *Banks*, 5 Q.B. at 566.

87. The Restatement alludes to the idea by requiring that a testator be capable of conceptualizing an “orderly” estate plan. *See supra* note 65 and accompanying text; *see also In re Estate of Koontz*, No. 04-15-00820-CV, 2016 WL 6775593, at *2 (Tex. Ct. App. Nov. 16, 2016) (“The testator also must know . . . the natural objects of his bounty . . . and have sufficient memory to . . . form a reasonable judgment about them.”). For an early articulation, see SWINBURNE, *supra* note 59, pt. 2, § 4, at *82 (denying freedom of testation to “Fools and Idiots” because “a Testament is an Act to be performed with Discretion and Judgment”).

88. *See, e.g., Heirs of Cole v. Cole’s Ex’rs*, 7 Mart. (n.s.) 414, 416–17 (La. 1829) (“[T]his doctrine [freedom of testation] . . . promotes under proper limitation a great purpose of public policy: for one of the strongest motives to industry and economy . . . is a conviction that the acquisitions of his frugality and enterprise, will be transmitted as he may direct at his death”); *Wogan v. Small*, 11 Serg. & Rawle, 141, 145 (Pa. 1824) (“[F]reedom of disposition by last will . . . is one of the greatest excitements to enterprise and industry.”).

89. *See, e.g., Mitchell v. Smith*, 779 S.W.2d 384, 391 (Tenn. Ct. App. 1989) (“It is not uncommon for older persons to use their power to dispose of their estate as a means to obtain the care and attention they require in their later years.”). Empirical evidence suggests that these “strategic bequests” are nonetheless rarer than “altruistic” ones. *See Maria G. Perozek, A Reexamination of Strategic Bequest Motives*, 106 J. POL. ECON. 423, 441 (1998) (assessing the data).

benefit, we could question its utility. That appears unlikely. When testators become incapable of understanding the nature and extent of their property, their incentive to produce and to conserve wealth would seem to have gone. Likewise, testators unable to recognize the natural objects of their bounty—including, presumably, those who are (or are not) furnishing them with care—have become ill-equipped to reward dutiful relatives.

But could we achieve the end in view more economically by recourse to an external standard? That is the cardinal issue whenever lawmakers propose a state-of-mind rule.

We may observe that lawmakers have established external standards to determine the judiciousness of bequests in two contexts. When testators dictate how property is to be allocated or used at future times, their decisions are predicated on predictions rather than knowledge. For this reason, estate plans that include future interests often prove unwise as events unfold. To ensure that estate plans remain tethered to reality, the rule against perpetuities cabins future interests roughly within the horizon of a testator's vision—that is, within the lives of beneficiaries whom a testator knew, plus the minority of the next generation (on the assumption that minors of every generation share universal qualities).⁹⁰ This rule mitigates the ill effects of

90. Lord Hobhouse put the argument succinctly:

A clear obvious natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.

ARTHUR HOBHOUSE, *THE DEAD HAND* 188 (Chatto & Windus 1880). Recent research in cognitive psychology suggests another rationale for the rule against perpetuities, reinforcing Hobhouse's classic argument: testators can be expected to put more effort into estate planning for beneficiaries whom they know personally; they are unlikely to focus as much attention on the welfare of abstract, future beneficiaries. See Sunita Sah & George Loewenstein, *More Affected = More Neglected: Amplification of Bias in Advice to the Unidentified and Many*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 365, 370 (2012) (finding such an "identifiability effect" among advisors, by analogy, and citing to additional studies).

ignorance with an external standard “concatenated with almost mathematical precision.”⁹¹

Likewise under current law, only persons above the age of majority can make a will; underage testators lack capacity per se.⁹² This rule posits that estate plans composed by minors, like ones divining the future, are unlikely to display “mature judgment.”⁹³

Lawmakers were able to develop mechanical rules for limiting future interests and bequests by minors because all human beings tend to share the same handicaps of limited foresight and immaturity during childhood.⁹⁴ At the same time, limits on future interests and bequests by minors fail to compromise other benefits of freedom of testation. Testators cannot extract services from unborn generations; and the tendency to discount later benefits mitigates any disincentive to produce or save that a restriction on far-future interests entails.⁹⁵ Meanwhile, minors have a right of support by their parents unaffected by the loss of privileges of testation; and, acting as guardians, parents limit minors’ abilities to dissipate their property freely.⁹⁶

91. JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 869, at 757 (Roland Gray ed., 4th ed. 1942) (1886).

92. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.2 (AM. LAW INST. 2003).

93. *Id.* § 8.2 reporter’s note 3. For an early discussion, see SWINBURNE, *supra* note 59, pt. 2, § 2, at *74 (observing that children ordinarily lack “Ripeness of Wit”); see also Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 95–99 (2014) (arguing that the rule functions as a “proxy” for the sound mind doctrine).

94. The two problems overlap when a testator bequeaths to an unborn minor. The rule against perpetuities allows testators freedom to exercise dead hand control over unborn minors of the next generation, because their predictably common characteristics compensate for testators’ limited foresight. For discussions, see JOHN H. MORRIS & W. BARTON LEACH, *THE RULE AGAINST PERPETUITIES* 68–69 (2d ed. 1962); LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 68–70 (1955).

95. For a further discussion, see Hirsch & Wang, *supra* note 73, at 16 n.60, 21.

96. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS* §§ 6.2, 8.1, at 310–11 (2d ed. 1988).

Lawmakers might, in theory, establish a mechanical analogue to the rule depriving minors of freedom of testation at the opposite end of the life cycle, invalidating wills by the superannuated. Such a rule would produce symmetrical efficiency, avoiding testation by anyone liable to be experiencing a first *or second* childhood. Of course, some elders retain possession of their faculties—just as some prodigies are wise beyond their years—but the rule could take effect at such an advanced age that testamentary judgment becomes no more likely than during youth.⁹⁷

Historical precedents exist for such a rule. In an era when wills were typically composed on the deathbed, “for the most part made by such persons as be visited with sickness, in their extreme agonies and pains,” the English Statute of Uses (briefly deprived Englishmen of freedom of testation, lest they “dispose indiscreetly and unadvisedly of their lands and inheritances.”⁹⁸ Until recently, mortmain statutes in some American states invalidated bequests to charity if executed near a testator’s death.⁹⁹ That said, a bar on testation by elders appears politically infeasible today. One can only imagine the reaction of the AARP to such a proposal.

Instead of a mechanical external standard, lawmakers could impose a flexible one. Courts could gain power to police estate plans case by case, invalidating ones that appear injudicious, perhaps by importing an unconscionability doctrine from contract law,¹⁰⁰ or—moving a step further—by allowing courts to rewrite

97. Henry Swinburne raised this possibility as early as the sixteenth century, drawing a connection to the prohibition on testation by minors, although he did not advocate such a rule. See SWINBURNE, *supra* note 59, pt. 2, § 5.

98. An Act Concerning Uses and Wills 1536, 27 Hen. 8, c. 10 (Eng.) (preamble). Shortly after freedom of testation was officially restored by legislation in 1590, Lord Coke admonished Englishmen to “take care . . . by act executed, to make assurances of your lands according to your true intent, in full health and memory. . . .” Butler & Baker’s Case (1592) 3 Co. Rep. 25, 36.

99. The last such statute disappeared from the United States in 1997. See GA. CODE ANN. § 53-2-10 (repealed 1997). See generally Shirley N. Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407 (1992).

100. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981); see also David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675 (2009) (proposing to extend unconscionability to trust law).

and reform an injudicious estate plan. Courts exercise such discretion today under family maintenance legislation in Commonwealth countries.¹⁰¹ Either approach would offer a variation on the same theme.

We should note that an external standard to ensure that dependents receive some predetermined fraction of an estate and one that assesses the judiciousness of an estate plan are quite different things. Courts can award fixed fractions mechanically but would not thereby achieve distributions sensitive to the unique circumstances of each testator and his or her family. A judiciousness doctrine could do so but only by authorizing expensive factual inquiries.¹⁰² By hypothesis, a sound mind doctrine costs less to administer than a judiciousness doctrine would. The first focuses on discrete capabilities of the testator; the second would sprawl by comparison.¹⁰³

We need also to consider the impact a judiciousness doctrine would have on other interests freedom of testation protects. We could reconcile such a doctrine with rewards for services by deeming these judicious *per se*. Its effects on incentives to produce and save appear more difficult to anticipate. Only a subset of individuals is motivated by the opportunity to formulate bequests—others may be solipsistic¹⁰⁴ or content to know that

101. See generally Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955) (summarizing this legislative development). Rules of this sort have ancient roots. See J. INST. 2.18.1 to .7 (533 A.D.) (“Parents may impeach the wills of their children as unduteous, as well as children those of their parents.”); see Chroust, *supra* note 60, at 635 (“An Athenian jury could always supplement or override the interpretation suggested by the instrument by resorting to its own sense of what was fair and equitable under the circumstances . . .”).

102. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1189 (1986) (“English courts have repeatedly expressed concern . . . about the fact that family provision litigation can seriously deplete a small estate.”).

103. See *id.* at 1188 (observing that contests invoking family maintenance doctrine in Great Britain implicate “a potentially large and colorful cast of characters as petitioners”); Kelly, *supra* note 8, at 893 (doubting whether “courts are capable of overcoming the information problems of being unfamiliar with the individual circumstances of each child and family and the ideal disposition of the decedent’s estate”).

104. See *Estate of Burg v. Anti-Defamation League Found.*, 2d Civ. No. B195382, 2007 WL 3349127, at 1* (Cal. Ct. App. Nov. 13, 2007) (quoting

their families will inherit from them, even if they cannot fine tune distributions—and research has yet to reveal statistical association between adults’ characteristics and responsiveness to freedom.¹⁰⁵ Given this uncertainty, lawmakers cannot separate testators who would tolerate a loss of freedom from those who would balk at preserving property without it. The sound mind doctrine differentiates the two groups in a rough and ready way at manageable cost.¹⁰⁶

Assuming these observations are correct, we can conceptualize the sound mind doctrine, like a volition requirement, as a cost-efficient alternative to an external standard. To be sure, soundness of mind assures only a likelihood of soundness of judgment, and even assessing soundness of mind is problematic following a testator’s death.¹⁰⁷ The star witness is unavailable for either cross-examination or psychiatric evaluation. But those uncertainties are no greater than the ones raised by any assessment a court might make concerning the judiciousness of an estate plan, which a testator might predicate on facts that his or her inability to testify obscures.¹⁰⁸

testimony describing a decedent as having been “profoundly uninterested in anything that happened after his death” (internal quotation marks omitted)).

105. Empirical research thus far has focused on the incentive effects of freedom of inheritance, viz. the right to leave wealth at death, rather than freedom of testation, viz. the right to choose one’s beneficiaries. As concerns freedom of inheritance, evidence suggests “heterogeneity in preferences for bequests despite homogeneity in earnings, occupation, and education. . . . Little is known regarding why individuals desire to leave a bequest.” Wojciech Kopczuk & Joseph P. Lupton, *To Leave or Not to Leave: The Distribution of Bequest Motives*, 74 REV. ECON. STUD. 207, 208 (2007). The existence of children is only weakly associated with bequest motives, see *id.*, and testators often derive utility from bequests to favored charities. See generally Leslie Moscow McGranahan, *Charity and Bequest Motive: Evidence from Seventeenth-Century Wills*, 108 J. POL. ECON. 1270 (2000) (drawing on historical data).

106. See *supra* text following note 89.

107. See RESTATEMENT OF PROPERTY § 428 cmt. a (AM. LAW INST. 1944) (“[Will contests] involve uncertain states of fact, a situation normally existing in claims of . . . lack of testamentary capacity.”).

108. Testators rarely disclose their reasoning within their wills, leaving courts little to go on. See, e.g., *In re Ranaldo*, 961 N.Y.S.2d 500, 502 (App. Div. 2013) (quoting a will that disinherited the testator’s daughter “for reasons best known to me”); see also *Bird v. Luckie* (1850) 68 Eng. Rep. 375, 378; 8 Hare 301, 306 (“Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be

Notice finally that the will of a testator who lacks testamentary capacity is void *per se*.¹⁰⁹ Contestants need not prove that a testator's failure to recognize the natural objects of his or her bounty or the bounds of his or her property distorted the provisions of the will.¹¹⁰ A testator, for instance, might have severed ties with family members before losing the wherewithal to recognize them. A later will disinheriting family members is void notwithstanding that fact.¹¹¹

Were lawmakers to make the sound mind doctrine a causal rule, requiring proof that the testator's mental disability influenced the estate plan, they could better protect the judiciousness of testation. Still, causality resists proof. And by adding a step to the inquiry, a causal rule would magnify decision costs. By choosing instead to streamline the doctrine, lawmakers have traded away welfare for efficiency. Similar tradeoffs are manifest within external standards. The rule against perpetuities

able to answer most satisfactorily.”).

109. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. c (AM. LAW INST. 2003) (“A purported will . . . by a person who lacks the mental capacity to make a will is void.”)

110. *See id.*

111. For an early discussion, see SWINBURNE, *supra* note 59, pt.2, § 4, at *80–82. Nonetheless, courts sometimes sound as though they are applying a causal rule, *de facto* if not *de jure*. Most allow comparison of the contested will to former wills, made when a testator assuredly possessed capacity, in order to determine whether “the testator . . . had a constant and abiding scheme for the distribution of his property.” *Achterberg v. Farmers State Bank & Tr. Co. (In re Camin’s Estate)*, 323 N.W.2d 827, 836 (Neb. 1982) (internal quotation marks omitted) (quoting *Bose v. Knutzen (In re Estate of Bose)*, 285 N.W. 319, 329 (Neb. 1939)); *see also In re Dunn*, 171 N.Y.S. 1056, 1059 (App. Div. 1918) (concluding that where the former and latter wills “vary[] merely in detail, and the details . . . are not unreasonable or freaky, the natural inference would be that the later will was merely a result of maturer deliberation, not that it was the result of irrationality on the part of the testator”); *Kerr v. Lunsford*, 8 S.E. 493, 503 (W. Va. 1888) (admitting a former will “to show a steady and fixed purpose” on the part of the testator). But some courts exclude evidence of former wills on the ground that the testator “had the right at any time to change her mind . . . and the mere fact that she did change her mind would have no bearing whatever upon the question of her mental capacity.” *O’Day v. Crabb*, 109 N.E. 724, 727 (Ill. 1915). *But cf. Hughes v. Hughes’ Ex’r*, 31 Ala. 519, 525 (1858) (distinguishing “the admissibility and the sufficiency of evidence. It is certainly true, that a testator may change his mind: and the fact of such change will not, *per se*, avoid his will These circumstances, however, are proper evidence for the jury . . .”).

simplifies the future interest problem. A more nuanced rule would respond to the problem with greater precision, but also at greater cost.¹¹²

Given a choice between two incommensurables—decision costs and welfare—lawmakers must ultimately take a stand and draw a line. At one extreme, they could ignore cost and explore testamentary judgment case by case. At the other extreme, they could wince at cost and either probate wills without exploring either capacity or judgment, or by abolishing freedom of testation and imposing mechanical rules for the distribution of all estates. The sound mind doctrine occupies a middle ground. Implicitly, it weighs cost as important, but not paramount.¹¹³

Conceptualizing the doctrine in this way enables us to clear up a thing or two. Were American states to enact family maintenance legislation, as several have considered,¹¹⁴ they should jettison the sound mind doctrine. A state-of-mind rule need not coexist with an external standard when one functions as a surrogate for the other. Once contestants can challenge the judiciousness of a will, they should lose the opportunity to contest a will that may be found judicious, merely because its author lacked capacity.¹¹⁵ Yet, this opportunity exists in Commonwealth countries, where the two causes of action stand side by side.¹¹⁶

112. For a fuller discussion, see Hirsch & Wang, *supra* note 73, at 4, 54–58.

113. Compare Professor Glover, who advocates that minority should create a rebuttable rather than a conclusive presumption of incapacity, because “many children satisfy the . . . competency requirements.” Glover, *supra* note 93, at 99–103 (quotation at 99). This observation is doubtless true, but no less true than the observation that some incompetent testators make sound estate plans. By extension, should a determination of incompetency create merely a rebuttable presumption of testamentary injudiciousness? Ultimately, lawmakers have to decide which evidentiary games are, or are not, worth the candle in light of decision costs.

114. Twice in New York and once in California, legislators have voted on but rejected such acts. Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 49 REAL PROP. TR. & EST. L.J. 175, 265 (2015).

115. At a minimum, contestants should be confined to one challenge or the other, with one determination collaterally estopping the other.

116. See JOHN G. ROSS MARTYN ET AL., THEOBALD ON WILLS §§ 3-005, 13-001 (17th ed. 2010). Similarly, contract law should not retain both a rule of

In the same vein, lawmakers should avoid garbling the alternative doctrines. Under existing law, contestants can introduce the terms of the estate plan itself to aid in proving that its author lacked a sound mind.¹¹⁷ The admissibility of this evidence negates the purpose of the sound mind doctrine as a simplified litmus test of judiciousness.¹¹⁸ Once the estate plan becomes admissible, each side will wish to demonstrate its reasonability (or not), at which point the doctrine is turned inside out. As long ago as 1870, the court in *Banks* observed that some judges “use language tending strongly to sh[o]w that, in [their] opinion, the rationality of the act done affords an effectual test of the mental capacity of the party doing it.”¹¹⁹ Modern commentators have likewise found some courts lighting on the judgment of the estate plan as a sort of *eo ipso*

competency and of unconscionability, if one serves as an efficient test for the other. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (AM. LAW INST. 1981) (acknowledging that the two doctrines “overlap[]”).

117. See, e.g., *Fletcher v. DeLoach*, 360 So. 2d 316, 318 (Ala. 1978) (“It is permissible for the jury to examine the will to see if its provisions are ‘just and reasonable’ . . . since this would reflect on her capacity to recall the natural objects of her bounty.” (quoting *Fountain v. Brown*, 38 Ala. 72, 74 (1861))); *Uhlig v. Wahl (In re Wahl’s Estate)*, 39 N.W.2d 783, 790 (Neb. 1949) (“Unjust, unreasonable, or unnatural provisions of a will are matters of consideration by jury as evidence tending to throw light on testamentary capacity.”); cf. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. c (AM. LAW INST. 2003) (suggesting as a principle of proof that “a will that favors persons who are not close family members . . . is not evidence that the testator” lacked capacity).

118. Cf. Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1050–52, 1059–61 (1987) (advocating the same evidentiary rule via a different analysis); Michael Falker, Comment, *A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Capacity*, 2 CONN. L. REV. 616 (1970) (same).

119. *Banks v. Goodfellow* [1869–70] 5 Q.B. 549, 558. American courts have made similar observations. See, e.g., *Carpenter v. Horace Mann Life Ins. Co.*, 730 S.W.2d 502, 507 (Ark. Ct. App. 1987) (“Where the provisions of a will are unjust, unreasonable and unnatural, . . . such unexplained inequality is entitled to great influence in considering the question of testamentary capacity”); *Degenhardt v. Joplin*, 239 S.W. 692, 694 (Tex. Civ. App. 1922) (similar statement). But see, e.g., *Patterson-Fowlkes v. Chancey*, 732 S.E.2d 252, 255 (Ga. 2012) (“[T]he law does not withhold testamentary capacity merely because a testator is capricious.”).

test of mental capacity,¹²⁰ and one state came close to codifying this approach.¹²¹

The sound mind doctrine should exclude this evidence. And here we discover a secondary justification for making the sound mind doctrine operate per se, rather than as a causal rule. A causal rule *relies on evidence of the underlying estate plan*—a fact finder must examine it in order to determine what impact, if any, a testator’s incapacity had. This necessity again raises the prospect that, in practice, a fact finder will focus on judiciousness under the pretense of applying the sound mind doctrine. In that event, lawmakers might as well dispense with the doctrine and replace it with an external standard of reasonability—a more candid approach to the matter in hand,¹²² and one that, by making the evidentiary inquiry forthright, would lead to better-informed assessments of judiciousness.

Unless, of course, dissimulation is the object. Lawmakers could find advantage in saying one thing and doing another when transparency would entail undesirable ex ante effects on the behavior of legal actors. If, for example, lawmakers *say* that they demand strict compliance with the formal requirements for wills but in truth *do* accept substantial compliance,¹²³ legal actors

120. See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 293, 296–308 (1944) (“It is submitted that in determining the issue of mental incompetency, more frequently than otherwise, courts are passing upon the abnormality of the transaction rather than on the ability of the alleged incompetent to understand the transaction.” (quotation at 306–07)); see also Champine, *supra* note 59, at 33–48 (updating Green’s data and finding a greater tendency for courts today to focus on expert psychological testimony than on the content of a will when judging capacity); Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 CASE W. RES. L. REV. 307, 341–86 (1989) (finding that “fairness [is] relevant . . . but not dispositive,” yet also finding a lack of “undue deference to psychiatric testimony” (quotations at 341)).

121. See GA. CODE ANN. § 53-2-9 (repealed 1997) (“A testator may bequeath his entire estate to strangers, to the exclusion of his spouse and children. In such a case the will should be closely scrutinized; and, upon the slightest evidence of aberration of intellect . . . probate should be refused.”).

122. See Laufer, *supra* note 101, at 280, 314 (observing that substituting family maintenance legislation for the sound mind doctrine would make the law “less devious”).

123. See *In re Will of Ranney*, 589 A.2d 1339, 1344 (N.J. 1991) (observing that “some courts, although purporting to require literal compliance, have

might observe formalities more diligently than if they knew the requirements were loosely enforced.¹²⁴ Of course, legal actors might eventually see through the facade. But in this regard, state-of-mind rules could prove ideal vehicles for subterfuge. Exactly because this evidentiary inquiry is enigmatic, a court's misapplication of state-of-mind rules will rarely strain credulity.

In the present situation, do lawmakers have reason to dissimulate? One possibility is that by limiting freedom of testation covertly, a testator who prefers an unnatural estate plan will be less apt to respond to the restriction *ex ante* by spending down wealth. Lawmakers might also have an easier time implementing a rule of testamentary judiciousness covertly, given our ideological veneration of freedom of testation.¹²⁵ Efforts to enact family maintenance legislation in the United States have failed repeatedly.¹²⁶ But the normative objections to either of these rationales in a democratic society are obvious. Courts have repudiated such tactics.¹²⁷

B. Mistake

Like all human persons, testators sometimes err. Mistakes in estate planning come in different varieties. Some testators execute wills that fail to say what they are supposed to say due to

allowed probate of technically-defective wills”).

124. In announcing a rule of substantial compliance, the court in *Ranney* alluded to the danger: “Our adoption of the [rule] . . . should not be construed as an invitation . . . to carelessness.” *Id.* at 1345.

125. Courts have often characterized freedom of testation as a “sacred” right. *See, e.g., In re Will of Barnes*, 579 S.E.2d 585, 594 (N.C. Ct. App. 2003); *Gedlen v. Safran (In re Estate of Safran)*, 306 N.W.2d 27, 30 (Wis. 1981) (quoting *Whaley v. Avery (In re Wilkins’ Estate)*, 211 N.W. 652, 653–54 (Wis. 1927)).

126. *See supra* note 114 (noting that California and New York have both rejected family maintenance legislation).

127. *See First Methodist Church of Ann Arbor v. Seeger (In re Doty’s Will)*, 180 N.W. 608, 616–17 (Mich. 1920) (observing that because “[t]he right to make a will . . . is . . . sacred . . . a finding that the will is not valid . . . based on any other foundation than a conscientious conviction of actual incapacity . . . is a disgraceful outrage” (internal quotation marks omitted) (quoting *Pierce v. Pierce*, 38 Mich. 412, 421 (1878))).

scriveners' errors (often blamed in the twenty-first century on faulty software).¹²⁸ These are known as mistakes in the execution, and lawmakers can correct them by examining objective facts—testimony by scriveners concerning their instructions, together with evidence concerning the care testators took to proofread their wills. Alternatively, testators might make mistakes of fact prompting them to grant or withhold bequests. These comprise deliberative mistakes about bequests they fully intended to make, known generically as mistakes in the inducement.

The common law differentiates these two categories of mistake. When confronted with a mistake in the execution, a court can delete language that a will was not supposed to include, although a court cannot restore language that the scrivener left out by mistake.¹²⁹ By comparison, mistakes in the inducement to make a will are irremediable *per se*.¹³⁰

The Restatement amalgamates these two categories of mistake and renders both of them remediable.¹³¹ A court can revise a will “to conform the text to the [testator’s] intentions” when it was “affected” by a mistake “whether in expression or inducement,” if shown by clear and convincing evidence.¹³² Presented with a mistake in the inducement, a court revises the will to reflect “what the [testator’s] actual intention would have been” but for the mistake.¹³³ An amendment to the Uniform

128. See *In re Estate of Lord*, 795 A.2d 700, 704 (Me. 2002) (concerning a will corrupted by a faulty “cut and paste” feature of [the scrivener’s] word processing computer program”); *In re Estate of Herceg*, 747 N.Y.S.2d 901, 902 (Sur. Ct. 2002) (concerning a will corrupted by “computer software”).

129. See 1 PAGE, *supra* note 26, §§ 13.7 to .9. For a further discussion and criticism of this rule, see Hirsch, *supra* note 6, at 1098–1102.

130. 1 PAGE, *supra* note 26, §§ 13.11 to .12.

131. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003).

132. *Id.* The term “mistake in expression” appears as a synonym for mistake in the execution, see *id.* § 12.1 cmt. i, although it ordinarily refers to misdescriptions, resolvable via construction. See 1 PAGE, *supra* note 26, § 13.9.

133. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. g (AM. LAW INST. 2003). The second Restatement was vaguer on this question but could be read to coincide with the third Restatement. See *id.* cmt. c; RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 34.7 cmt. d (AM. LAW INST. 1992).

Probate Code now reproduces this doctrine as a statutory rule for wills.¹³⁴ Thus far, however, neither model law has gained much traction. No court has adopted the Restatement's approach to mistakes in the inducement as judicial doctrine.¹³⁵ Only seven jurisdictions have enacted the statutory version.¹³⁶

Statutes covering mistakes in wills limited to discrete kinds of inducements and beneficiaries are older and more widespread. Beginning as early as 1863, but repealed after 1997, a statute in Georgia offered relief when a testator labored "under a mistake of fact as to the existence or conduct of an heir."¹³⁷ The heir received an intestate share in lieu of any provision relating to him or her that appeared within the will.¹³⁸ Under successive versions of the Uniform Probate Code, if a testator fails to provide for a living child in a will "solely because [the testator] believes the child to be dead," he or she receives the same share as a pretermitted child, born after a will was executed.¹³⁹ This narrow provision continues to appear as a separate section of the Code, despite its revision to include a general remedy for mistake in the

134. UNIF. PROBATE CODE § 2-805 (amended 2010), 8 pt. 1 U.L.A. 335 (2013) (added by amendment in 2008).

135. See *Radin v. Jewish Nat'l Fund (In re Estate of Duke)*, 352 P.3d 863, 879 n.16 (Cal. 2015) (creating a remedial doctrine for mistakes but expressly declining to commit to the model laws); see also *Flannery v. McNamara*, 738 N.E.2d 739 (Mass. 2000), quoted *infra* note 159.

136. These are: Colorado, Florida, New Mexico, North Dakota, South Carolina, Utah, and Washington. See *Hirsch*, *supra* note 114, at 218 n.181; cf. TEX. EST. CODE ANN. § 255.451 (West Supp. 2016) (effective Sept. 1, 2015) (permitting correction only of mistakes in the execution); Administration of Justice Act 1982, c. 53, § 20 (Eng.) (same).

137. GA. CODE ANN. § 53-2-8 (repealed 1997).

138. See *id.* The text of the statute remained virtually unchanged over its long history. GA. CODE § 2371 (1863). Courts in Georgia applied the statute narrowly and declined to offer relief for other mistakes of fact. See, e.g., *Shore v. Malloy*, 472 S.E.2d 303, 304–05 (Ga. 1996) (refusing a remedy where the testator's alleged mistake concerned what property she owned).

139. UNIF. PROBATE CODE § 2-302(b) (pre-1990 art. 2), 8 pt. 1 U.L.A. 473 (2013). The provision appears within the section of the Code covering pretermitted children, ordinarily pertaining to children born after a will is executed. See *id.*; see also MODEL PROBATE CODE § 41(b), in LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW 76 (1946) (creating the same rule within the antecedent to the Uniform Probate Code).

inducement.¹⁴⁰ And whereas only a few states have adopted the general remedy, twenty-four states feature the narrow provision for mistakes concerning the death of children.¹⁴¹ California has expanded it to cover children excluded from an estate plan “solely because the decedent believed the child to be dead *or was unaware of the birth of the child*,” another kind of mistake of fact.¹⁴²

Professor Lawrence Waggoner, who served as reporter for both the Code and the Restatement, had advocated a general remedy for mistake in an article that he and co-author John Langbein published in 1982; Waggoner seized the opportunity to enshrine the doctrine in the model laws two decades later.¹⁴³ In their article, Waggoner and Langbein claimed that the dual categories of mistake in the execution and in the inducement “remain useful for organizing fact patterns and collecting cases, but there is no reason for an explicit reformation rule to perpetuate such refinements at the level of doctrine.”¹⁴⁴ For this proposition they offered no analysis.¹⁴⁵ Yet, in several respects, these two kinds of mistake are planets apart.

The Restatement asserts that “the rationale for reformation [rests] on two related grounds: giving effect to the [testator’s]

140. See UNIF. PROBATE CODE §§ 2-302(c), 2-805 (amended 2010), 8 pt. 1 U.L.A. 194, 335 (2013).

141. This rule exists with textual variations in Alabama, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, and Utah. See Hirsch, *supra* note 114, at 219 n.185.

142. CAL. PROB. CODE § 21622 (West 2011) (emphasis added); see also WIS. STAT. ANN. § 853.25(2)(a) (West 2002 & Supp. 2010) (stipulating that “if clear and convincing evidence proves that the testator failed to provide . . . for a child . . . by mistake or accident, *including* the mistaken belief that the child was dead,” then he or she is entitled to a pretermitted child’s share (emphasis added)); VT. STAT. ANN. tit. 14, § 333 (2010) (employing language that may also cover unknown children); Hirsch, *supra* note 114, at 223–24, 237 n.240 (noting a Maryland statute that may operate like the California statute).

143. See Langbein & Waggoner, *supra* note 28, at 577–90; see also James A. Henderson, Jr., *Mistake and Fraud in Wills—Part II: A Suggested Statutory Departure*, 47 B.U. L. REV. 461, 544–50 (1967) (making a similar proposal).

144. Langbein & Waggoner, *supra* note 28, at 577 n.212.

145. See *id.*

intention and preventing unjust enrichment.”¹⁴⁶ Plainly, this reasoning applies to mistakes in the execution, when a will says something different from what it was supposed to say. Such mistakes are also relatively easy to correct. A court need only clarify the intended language of the will, which a disinterested scrivener can often bring to light.¹⁴⁷

In respect of mistakes in the inducement, though, the Restatement’s rationale becomes problematic. Here, by comparison, the testator intended *exactly the terms that he or she executed*. A testator possibly would have intended different terms if disabused of a mistake. And (what is a separate issue) a testator possibly would have intended that a court adjust the will on his or her behalf. But both propositions are doubtful. The lips of a testator are sealed, and unless the will explains how he or she would have acted but for a mistake in the inducement,¹⁴⁸ direct evidence on the matter is unavailable. And whereas some testators might trust a court to second guess their estate plans, others would abhor the idea, fearing error or abuse. Under the model laws, relief for mistake operates as a mandatory rule, not as a default rule.¹⁴⁹ This attribute belies the premise that reformation functions to effectuate the intent of the testator.

Lawmakers need not, at any rate, focus exclusively on intent. As in connection with testamentary capacity—another mandatory doctrine—public policy might justify limiting freedom of testation regarding mistakes in the inducement.¹⁵⁰ The connection between

146. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. b (AM. LAW INST. 2003).

147. See, e.g., cases cited *supra* note 128.

148. In such rare instances, the common law affords a remedy for mistake in the inducement. See 1 PAGE, *supra* note 26, §§ 13.11, at 780–81, 13.13, at 786; see also James A. Henderson, Jr., *Mistake and Fraud in Wills—Part I: A Comparative Analysis of Existing Law*, 47 B.U. L. REV. 303, 322 (1967) [hereinafter Henderson, *Part I*] (observing that this exception appears mostly in dicta).

149. The Uniform Probate Code provision is not classified as a rule of construction and does not appear in either of the two parts (6 & 7) of article 2 where those rules appear. See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 pt. 1 U.L.A. 335 (2013); cf. Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 447–52 (2001) (proposing to make reformation of mistakes a default rule).

150. See *Young v. Mallory*, 35 S.E. 278, 278 (Ga. 1900) (“The apparent object

the two problems appears readily: an uninformed mind resembles an uncomprehending mind in that both can warp an estate plan, distancing it from reality. On first glance, we might suppose incapacity to distort planning more pervasively than individual mistakes in the inducement. But that is not necessarily correct. A single mistake becomes pervasive when it concerns the sole beneficiary or heir. Vice versa, an unsound mind causes narrow distortions when a mentally-weakened testator retains the ability to recognize some natural beneficiaries but not others.

The differences lie in the ramifications of these alternative states of mind. Every person who ever lived has made mistakes of fact. Mistakes come in gradations, and most are unlikely to affect an estate plan. But, on reflection, even mistakes about significant matters, centered on the natural objects of a testator's bounty, or on the testator's property, implicate greater ambiguity than incapacity. Incapacity stems from organic factors—disease, brain damage, or just the senescence that creeps forward, like a lengthening shadow, in the evening of life. Mistakes, by comparison, spring from ignorance, which often signals indifference or alienation. For example, a testator is likely to conclude that a living child is dead only after the two have lost contact, suggesting independent reasons for a child's disinheritance.¹⁵¹ The drafters of the Uniform Probate Code did not think to expand its specific remedy for mistaken beliefs that a child has died to mistaken beliefs that a spouse has died—a structurally natural extension¹⁵²—presumably because such a

of the law [covering mistakes in the inducement in Georgia] is to guard against unjust consequences . . . of a mistake as to the existence of a rightful claim on the part of that person to become a beneficiary under the will.”)

151. See, e.g., *Kinnear v. Langley*, 192 S.W.2d 978, 978–79 (Ark. 1946) (finding that a testator believed an adopted child who had broken off contact with him to be dead); *In re Will of Araneo*, 511 A.2d 1269, 1272 (N.J. Super. Ct. Law Div. 1985), *aff'd* 516 A.2d 638 (N.J. Super. Ct. App. Div. 1986) (finding that disinheritance might have stemmed from belief of death or from alienation); *Gifford v. Dyer*, 2 R.I. 99, 102 (1852) (finding that a testator who believed her child dead “did not intend to give him anything, if living”).

152. The Code contains a section covering pretermitted spouses analogous to (and directly preceding) the section on pretermitted children, where the remedy for mistaken belief in a child's death appears, but creating no equivalent remedy. Compare UNIF. PROBATE CODE § 2-301 (amended 2010), 8 pt. 1 U.L.A. 192 (2013), with *id.* § 2-302(c), 8 pt. 1 U.L.A. 194.

mistake would, still more manifestly, indicate that a spousal relationship had disintegrated.

In the same vein, the mistakes upon which testators ground their choices might follow not from mere ignorance, but from *willful* ignorance.¹⁵³ If a mistaken fact lies within his or her power to check, a testator's failure to investigate would again suggest that the estate plan was premised upon other facts, not requiring of a remedy.

In short, determining the individual impact of mistakes great and small on the reasonability of an estate plan is no simple task. Commentators have identified uncertainty as a ground for the common law's traditional refusal to grant relief for mistake in the inducement.¹⁵⁴ Further uncertainties follow from other issues of fact. People sometimes dissemble. Whether they were mistaken or just pretending to be mistaken for some emotional or social reason might remain unclear.¹⁵⁵ And a testator might waver in his or her beliefs. Which way the wind was blowing when the testator executed a will might be difficult to reconstruct without his or her testimony.

Further complexities arise out of the ripple effects of mistakes. Expressions of erroneous beliefs can elicit responses that make them true, known in the psychological literature as self-fulfilling prophecies.¹⁵⁶ A testator might alienate family

153. See Zachary Grossman, *Strategic Ignorance and the Robustness of Social Preferences*, 60 MGMT. SCI. 2659, 2663–64 (2014) (discussing the psychology of this phenomenon in the context of decision theory).

154. See ATKINSON, *supra* note 26, § 59, at 278 (“We would be thrust into the realm of speculation as to how far the mistake entered into the legacy or devise and what the testator would have done except for the mistake.”). For similar observations, see WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES § 6.1, at 290 (4th ed. 2010); 1 PAGE, *supra* note 26, § 13.11, at 780; see also *In re Estate of Malone*, No. P-322-12, 2014 WL 5712975, at *7 (N.J. Super. Ct. App. Div. Nov. 6, 2014) (“This claimed motivation based on a mistake is pure speculation on the [plaintiff’s] part . . .”).

155. See cases cited *infra* note 222 (raising this possibility). See generally TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES (1995) (examining social pressures for falsehoods).

156. See SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 231–40 (1993); Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148, 148 (1978).

members, for example, by treating them as though they were hostile. Is an estate plan disinheriting those family members still a product of mistake? Alternatively, a mistake could lead other would-be beneficiaries to challenge a testator's misconceptions. If a testator reacts by breaking away from beneficiaries on account of their dissent, about which the testator is not mistaken, is the estate plan still the product of mistake?¹⁵⁷ In other words, should lawmakers distinguish a mistaken view of reality from a correct view brought about by a mistake? In the second case, the estate plan would not exist in the form that it does but for the mistake—yet it nevertheless reflects relationships accurately and in that sense could be said to comprise a well-reasoned estate plan.

Limiting freedom of testation in connection with mistake would probably not erode testators' incentives to produce or conserve their wealth to a measurable extent.¹⁵⁸ Even testators suspicious of a judicial remedy for mistake remain unaware that they are mistaken. For that reason, few testators will anticipate judicial intervention to overturn their estate plans.

In light of all this, let us contemplate lawmakers' options. Once again, lawmakers could establish an invasive external standard—some form of judiciousness doctrine that would correct flawed estate plans stemming from all causes, including mistake. Or they could avoid the decision costs associated with any remedial doctrine altogether, by allowing no relief for mistake in the inducement—a different external standard. In rejecting the model laws, one court pointed explicitly to cost considerations.¹⁵⁹

Or lawmakers could establish a state-of-mind rule. And it, too, could take alternative forms. Like an unsound mind, a mistaken mind could void an estate plan *per se*. Under Georgia's former statute,¹⁶⁰ if evidence showed that a testator labored under a mistake about the existence or conduct of an heir, then any provision of the will relating to the heir became invalid and

157. See *infra* note 220 for examples in the related case law of insane delusions.

158. See cases cited *supra* note 88 (recognizing these objectives).

159. See *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) (rejecting the Restatement's general doctrine of reformation for mistake because "[j]udicial resources are simply too scarce to squander on such consequences").

160. GA. CODE ANN. § 53-2-8 (repealed 1997).

he or she received an intestate share—no further questions asked.¹⁶¹ To exclude cases of willful ignorance, courts construed the statute to limit relief to mistakes beyond the control of a testator. Those mistakes tracing to negligence or indifference remained irremediable.¹⁶²

By comparison, the model laws establish a causal state-of-mind rule. If evidence shows that the testator labored under a mistake of fact, then the court corrects the will—but only if evidence demonstrates that the mistake “affected” the will.¹⁶³ This causal requirement carries over to the separate, more widely adopted rule preserving a share for any child disinherited under the mistaken belief that the child was dead.¹⁶⁴ Under the Uniform Probate Code, and in most of the adopting states, the rule operates only if the testator disinherited the child “solely because” of this mistake.¹⁶⁵ In two states, though, rules applicable to mistaken beliefs that a child has died appear to operate as *per se* rules.¹⁶⁶

A *per se* rule pertaining to mistakes remains questionable, even limited (as it obviously must be) to specified kinds of mistakes of fact. The impact any mistake has on an estate plan is more doubtful than the impact of incapacity. Like incapacity, a mistake is cheaper for a court to identify than injudiciousness. But mistakes comprise a comparatively less reliable barometer of injudiciousness in light of other considerations, possibly

161. See *Mallery v. Young*, 25 S.E. 918, 918 (Ga. 1896) (rejecting causal analysis).

162. See *Yancy v. Hall*, 458 S.E.2d 121, 124 (Ga. 1995); *Thornton v. Hulme*, 128 S.E.2d 744, 748 (Ga. 1962); *Franklin v. Belt*, 60 S.E. 146, 148–49 (Ga. 1908); *Young v. Mallory*, 35 S.E. 278, 278–79 (Ga. 1900).

163. UNIF. PROBATE CODE § 2-805 (amended 2010), 8 pt. 1 U.L.A. 335 (2013).

164. See *id.* § 2-302(c), 8 pt. 1 U.L.A. 194.

165. *Id.*

166. See OHIO REV. CODE ANN. § 2107.34 (West 2005) (stating, in a nonuniform statute, that “if a child . . . who is absent and reported to be dead proves to be alive,” the child receives a share of the estate); S.D. CODIFIED LAWS § 29A-2-302(b) (West 2004) (following the Uniform Probate Code but omitting the requirement that the mistaken belief be the *sole* cause of disinheritance, thus apparently preserving a share for a child when the mistake was just a factor contributing to the child’s disinheritance).

encouraging the formation of mistakes, that could shape any given estate plan.¹⁶⁷

By limiting remediation to cases where evidence indicates that a mistake affected the estate plan, causal versions of the doctrine reduce the error costs of using mistake as a surrogate for injudiciousness. The model laws also include a clear and convincing evidence requirement within their general reformation doctrine that, for no apparent reason, the Code's reformation doctrine pertaining to children mistakenly believed dead fails to replicate.¹⁶⁸ In their article proposing a general remedy for mistake, Waggoner and Langbein had characterized a heightened standard of proof as an "essential safeguard."¹⁶⁹ But the problem here appears similar to the problem of proving volitional intent to make a will. As previously discussed,¹⁷⁰ so long as the error costs of false positives and false negatives are the same, we minimize error costs by following the preponderance of the evidence, not by distorting the burden of proof.¹⁷¹

167. See *supra* notes 151–153 and accompanying text.

168. No explanation for the discrepancy appears in the Uniform Probate Code, and the two sections do not even cross-reference each other. See UNIF. PROBATE CODE §§ 2-302 cmt., 2-805 cmt. (amended 2010), 8 pt. 1 U.L.A. 194, 335 (2013).

169. Langbein & Waggoner, *supra* note 28, at 578.

170. See *supra* text accompanying note 49.

171. *But cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2003) ("Tilting the risk of an erroneous factual determination in this fashion is appropriate because the party seeking reformation is seeking to establish that a [will] does not reflect the [testator's] intention."). The fallacy of this argument is its failure to consider what our objective is for overriding a mistakenly-induced will. An erroneous determination that an estate plan was predicated on a mistake is just as likely to result in an injudicious distribution as an erroneous determination that an estate plan was *not* so predicated. The reporter continues that "[t]his tilt also deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence." *Id.* That heirs often bring frivolous will contests in the hope of extracting a settlement is well known, but lawmakers can seek to deter strike suits via more direct means than tinkering with evidentiary standards. See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685–86, 1695–1712 (2011) (suggesting remedies). At any rate, the Restatement fails to address this problem consistently: it proposes no stricter evidentiary standard for contests over testamentary capacity, a traditional platform for strike suits in probate. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. f (AM. LAW INST. 2003).

In other respects, a causal mistake doctrine carries in its train undesirable consequences. Analysis by fact finders of the causal connection between a mistake and an estate plan adds to decision costs. And, as previously discussed, a causal rule cannot but rely on evidence of the underlying estate plan, creating the risk that a fact finder will discover mistakes in the inducement whenever an estate plan appears injudicious.¹⁷²

In sum, we can question the public policy of a doctrine for curing mistakes in the inducement, whether framed as a per se rule or as a causal rule. In defense of the model laws, Waggoner and Langbein point to the law of gifts by way of comparison. Courts, we are told, “routinely” grant relief for mistake in cases where donors of inter vivos gifts have died, when courts must make do without their testimony.¹⁷³ But that has been true only in cases of alleged mistakes in the execution, where the evidentiary challenge posed by a donor’s absence is less daunting.¹⁷⁴ In no reported case has a donor’s estate ever sought to rescind a gift ostensibly predicated on a mistake in the inducement.¹⁷⁵ Whatever their merit, the model laws of mistake represent more than a minor tweak of preexisting rules.

172. See *supra* text following note 121. Anticipating this concern, the Restatement deems reformation an equitable remedy, where a court comprises the fact finder. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 cmts. a & b (AM. LAW INST. 2003); see also Langbein & Waggoner, *supra* note 28, at 587 (raising the concern and pointing to equity as a corrective); cf. UNIF. PROBATE CODE § 2-805 cmt. (amended 2010), 8 pt. 1 U.L.A. 335 (2013) (indicating no remedy but stating that the Code’s doctrine of reformation is “based” on the Restatement). The suggestion that juries are more prone than courts to manipulate state-of-mind rules is a commonplace. See, e.g., Taylor v. McClintock, 112 S.W. 405, 411 (Ark. 1908); *In re Russell’s Estate*, 210 P. 249, 256 (Cal. 1922); Freeman v. Easley, 7 N.E. 656, 658 (Ill. 1886). Nonetheless, courts are not immune to such pressures: to recall a maxim, *hard cases make bad law*—as well as bad verdicts.

173. Langbein & Waggoner, *supra* note 28, at 525–26.

174. See, e.g., *Simms v. Simms*, 249 N.Y.S. 171, 173–74 (Sup. Ct. 1931) (reforming deeds of gift post mortem).

175. See 4 GEORGE E. PALMER, THE LAW OF RESTITUTION § 18.9(a), at 70 (1978).

C. Insane Delusion

Another state-of-mind objection that contestants can make to the validity of a will demands analysis in context. If a testator suffered from an “insane delusion”¹⁷⁶—defined typically as “a belief that is so against the evidence and reason that it must be the product of derangement”¹⁷⁷—then a court can hold a will void.¹⁷⁸ British common-law courts first developed this doctrine late in the eighteenth century, and American courts began applying it several decades later.¹⁷⁹

Courts conceive the insane delusion rule as an addendum to the sound mind doctrine, filling a “gap” in that doctrine, as one court averred.¹⁸⁰ Another court maintains that “a simple extension of the testamentary capacity framework to account for claims of insane delusions provides the best approach” to disposing of them.¹⁸¹ From the beginning, though, these two branches of law diverged, differing in significant respects. Whereas the sound mind doctrine addresses testators’ abilities to understand matters central to estate planning—who the natural

176. Some cases use the terms “monomania” or “partial insanity” as synonyms for an insane delusion. *See, e.g.*, *Ahmann v. Elmore*, 211 S.W.2d 480, 486 (Mo. 1948) (employing all three terms).

177. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (AM. LAW INST. 2003).

178. Courts have also occasionally applied the doctrine to contracts. *See, e.g.*, *Forman v. Brown*, 944 P.2d 559, 562 (Colo. Ct. App. 1997) (“A person is incompetent to contract when the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding the nature and effect of the agreement or of acting rationally in the transaction.”).

179. *See Greenwood v. Greenwood* (1790) 163 Eng. Rep. 930, 943 (jury charge); *Dew v. Clark* (1826) 162 Eng. Rep. 410, 415–17. One of the earliest American opinions referred to an English treatise that had cited both of those cases, suggesting the English origins of the doctrine. *See Townshend v. Townshend*, 7 Gill 10, 32–33 (Md. 1848) (citing to LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 296 (1833)). Nevertheless, in the first American case to accept the doctrine, counsel had argued over its novelty. *See Johnson v. Moore’s Heirs*, 11 Ky. (1 Litt.) 371, 374, 381–82, 388–89, 391 (1822).

180. *Dougherty v. Rubenstein*, 914 A.2d 184, 186 (Md. Ct. Spec. App. 2007).

181. *Enders v. Parker (In re Estate of Kottke)*, 6 P.3d 243, 246 (Alaska 2000).

objects of their bounty are and what they own¹⁸²—the insane delusion rule addresses all manner of delusions. Moreover, the insane delusion rule operates as a causal rule. It voids a bequest only “to the extent that it was a product of an insane delusion.”¹⁸³ Thus, “[a] man may believe himself to be the supreme ruler of the universe, and nevertheless make a perfectly sensible disposition of his property, and the courts will sustain it when it appears that his mania did not dictate its provisions.”¹⁸⁴ Were the same testator unable to recognize close relatives, the court would undertake no comparable inquiry of causation—incapacity invalidates a will per se.¹⁸⁵

There exists another comparison for us to draw. Whatever other ramifications they have, beliefs held *contra mundum* comprise factual errors. In other words, insane delusions represent a subset of mistakes in the inducement. Under common law, as we have seen, mistakes in the inducement are irremediable.¹⁸⁶ Viewed in this dimension, the insane delusion

182. See *supra* note 65 and accompanying text.

183. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. s (AM. LAW INST. 2003). Whether an insane delusion could invalidate only part of a will, as the Restatement could be read to suggest, is an issue on which little authority exists. In one case (not previously noticed by commentators), a court upheld on appeal a jury charge inviting the jury to strike any portion of a will that was affected by an insane delusion. *Hart v. Gould (In re Hart's Estate)*, 236 P.2d 884, 888 (Cal. Dist. Ct. App. 1951). Other cases have raised but not resolved the issue. See *Florey's Ex'rs v. Florey*, 24 Ala. 241, 249–50 (1854); *Holmes v. Campbell College*, 125 P. 25, 26 (Kan. 1912); *Hildreth v. Hildreth*, 156 S.W. 144, 145 (Ky. 1913). In Great Britain, the doctrine has been applied to invalidate part of a codicil. *Estate of Bohrmann*, [1938] 1 All E.R. 271, 281–82. For commentary, see 1 PAGE, *supra* note 26, § 12.47, at 750; Alan J. Oxford, *Salvaging Testamentary Intent by Applying Partial Invalidity to Insane Delusions*, 12 APPALACHIAN J.L. 83 (2012).

184. *Fraser v. Jennison*, 3 N.W. 882, 900 (Mich. 1879); see also, e.g., *Breeden v. Stone (In re Estate of Breeden)*, 992 P.2d 1167, 1171 (Colo. 2000) (“[W]e hold that before a will can be invalidated because of a lack of testamentary capacity due to an insane delusion, the insane delusion must materially affect the disposition in the will.”); *Levin v. Levin*, 60 So. 3d 1116, 1119 (Fla. Dist. Ct. App. 2011) (questioning whether an alleged insane delusion was “linked” to the estate plan); *Bauer v. Bauer*, 687 S.W.2d 410, 411–12 (Tex. Ct. App. 1985) (“[T]he will is valid unless the terms of it appear to have been directly influenced by the infirmity”).

185. See *supra* note 109 and accompanying text.

186. See *supra* note 130.

rule carves out an exception from the general law of mistake, distinguishing irrational errors from rational ones.¹⁸⁷ Courts intervene when confronted with the first sort of mistake and ignore the second. Possibly because insane delusions are traditionally categorized as a special variety of incapacity, commentators have never pondered their relation to the law of mistake. Those courts that have noticed the relation take it for granted—none has ventured a policy analysis to justify it.¹⁸⁸

Even under the Restatement, which creates a remedy for mistakes in the inducement,¹⁸⁹ and thereby moves toward unifying the law of all mistakes, inconsistencies—unremarked and apparently unnoticed—remain. Whereas the insane delusion rule can only operate to void an estate plan, the Restatement's provision on mistake allows a court to replace the infected estate plan with one the testator would have favored but for the mistake.¹⁹⁰ The evidentiary thresholds also differ. Whereas contestants must prove that a mistake affected an estate plan by clear and convincing evidence, they need only prove that an insane delusion affected an estate plan by a preponderance of the evidence.¹⁹¹ Are these doctrines, which appear in separate sections of the Restatement, mutually exclusive? Or could a court address an insane delusion under the Restatement's provision on

187. Allegations of insane delusion, even when fortified with evidence of mental disease, are often dismissed as rational mistakes. *See, e.g.*, *Oechsner v. Ameritrust Tex., N.A.*, 840 S.W.2d 131, 136–37 (Tex. Ct. App. 1992).

188. *See, e.g.*, *Pyle v. Millar (In re Millar's Estate)*, 207 P.2d 483, 487 (Kan. 1949); *Ahmann v. Elmore*, 211 S.W.2d 480, 486 (Mo. 1948); *Flaherty v. Feldner (In re Estate of Flaherty)*, 446 N.W.2d 760, 765 (N.D. 1989); *Carroll v. Mertz*, No. 03-05-00540, 2007 WL 3225407, at *5 (Tex. Ct. App. Nov. 1, 2007).

189. *See supra* notes 131–133 and accompanying text.

190. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1, 12.1 (AM. LAW INST. 2003). In addition, whereas the Restatement suggests that issues of mistake are decided by the court, *see supra* note 172, it nowhere purports to modify the traditional rule that an insane delusion is an issue of fact for the jury to resolve. *See, e.g.*, *First Interstate Bank of Utah v. Kesler (In re Estate of Kesler)*, 702 P.2d 86, 95–97 (Utah 1985).

191. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1, 12.1 (AM. LAW INST. 2003). Some states establish a more stringent standard of proof for insane delusions. *See* *Marshall v. McCannon (In re Estate of Killen)*, 937 P.2d 1368, 1374–75 (Ariz. Ct. App. 1996); 3 PAGE, *supra* note 26, § 29.35, at 577–78.

mistake, modifying (and not merely voiding) the estate plan if clear and convincing evidence showed how a testator would have acted but for an insane delusion? The accompanying comments fail to elaborate the relationship between the two sections, which do not even cross-reference each other.¹⁹²

Surveying the problem from dual contexts, we can identify multiple inconsistencies, each of which requires analysis. From the standpoint of the law of capacity, should the scope of the sound mind doctrine differ from that of the insane delusion rule? And why is one a per se rule and the other a causal rule? Then again, from the standpoint of the common law of mistake, why does the law give effect to wills grounded in rational mistakes but invalidate those predicated on irrational ones? We can explore these problems together, because the laws of capacity and mistake revolve around the same object—determining efficiently whether testators have formulated their estate plans judiciously. The same is true of the law of insane delusions.¹⁹³

Expanding the scope of the insane delusion rule beyond central matters of family and property to which the sound mind doctrine is confined makes sense if a testator's delusions, in contrast with his or her disabilities, pose differential threats to the quality of an estate plan. On reflection, such a difference appears to exist. Old age frequently leaves people confused or disoriented about all sorts of things, such as their surroundings.¹⁹⁴ Failures of comprehension other than ones about family members and property are unlikely to compromise an estate plan. By disregarding those failures, lawmakers economize on decision costs that ordinarily would be wasted, while also lessening the opportunity for strike suits by disgruntled

192. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1 cmts., 12.1 cmts. (AM. LAW INST. 2003).

193. See *Marshall*, 937 P.2d at 1373 (observing that an insane delusion “did not allow [the testator] a rational and lucid view of her relationships”); *In re Will of Hargrove*, 28 N.Y.S.2d 571, 572 (App. Div. 1941) (“[A]s a consequence [of an insane delusion] the testator did not know the true objects of his bounty.”); *Greenwood v. Greenwood* (1790) 163 Eng. Rep. 930, 943 (asserting that an insane delusion might have “prevented [the testator] from judging . . . who the objects of his bounty should be”).

194. SUSAN M. HILLIER & GEORGIA M. BARROW, *AGING, THE INDIVIDUAL, AND SOCIETY* 141 (10th ed. 2015).

relatives.¹⁹⁵ Delusions are rarer, presenting fewer targets of opportunity for strategic litigation. And because they concern *ideas*, all delusions—including ones unrelated to family members or property—have the potential to influence estate planning indirectly.¹⁹⁶ To synchronize the insane delusion rule with the sound mind doctrine by confining it to delusions about family or property would again reduce decision costs. But the excluded delusions might prove significant ones.

Once we accept the prevailing distinction in scope, the further distinction in structure between the (per se) sound mind doctrine and the (causal) insane delusion rule follows readily. The sound mind doctrine tests testators' abilities to recognize the people to whom, and the property with which, they might wish to bequeath. The doctrine is unconcerned with the loss of ability to recognize other things. Thus limited, lawmakers can fairly assume—thereby scrimping on decision costs—that incapacity will warp an estate plan. But an insane delusion rule covering all delusions can make no such assumption. Many have no impact on estate planning.¹⁹⁷

Conceivably, lawmakers might distinguish “central” delusions from peripheral ones, treating one sort under a per se rule and the rest under a causal rule. But even delusions concerning testators' relatives or property could vary in significance. They might concern matters tied to estate

195. On abusive litigation as a policy concern, see *supra* note 171.

196. In 2000, for example, a testator who imagined herself the victim of a government conspiracy bequeathed her estate to other supposed victims of the same conspiracy. See Thomas Mullen, *Oklahoma Suit Challenges Woman's Will*, AP ONLINE, Oct. 31, 2000, 2000 WLNR 29036521; *Eliau Kin Reach Settlement in Suicide Will Dispute*, REUTERS NEWS, Apr. 25, 2001.

197. See *In re Campbell's Will*, 136 N.Y.S. 1086, 1100 (Sur. Ct. 1912) (“[H]armless delusions which do not unseat the mind in the daily affairs of life, and which do not enter into the fabric or constitution of the will, are not inconsistent with testamentary capacity.”). Even some presidential candidates have voiced paranoid—but benign—delusions. In 1998, Hillary Clinton imagined a “vast right-wing conspiracy that has been conspiring against my husband.” *Excerpts from Interview with Hillary Clinton*, SEATTLE TIMES, Jan. 27, 1998, 1998 WLNR 1508596. Vice versa, in 2012, Mitt Romney saw around him a “vast left-wing conspiracy . . . to attack me.” *Romney Political Balancing Act Leans to Right*, DAILY GAZETTE (Schenectady, N.Y.), May 6, 2012, 2012 WLNR 9545079.

planning—delusions that a relative sought to harm a testator, for instance¹⁹⁸—or irrelevant matters. If we further narrowed our focus to delusions concerning the existence of family members or property, we could at last contemplate folding them into the sound mind doctrine. In a surprisingly common fact pattern, testators disbelieve that they have fathered their children, for example.¹⁹⁹ Occasionally testators concoct the reverse fantasy, imagining that they have sired the children of others,²⁰⁰ or they imagine themselves to have fictional parents,²⁰¹ or relationships,²⁰² or property.²⁰³ Arguably, testators who are thus deluded are unable to comprehend the natural objects of their bounty or the bounds of their property; courts could hold their wills invalid *per se* under the sound mind doctrine.²⁰⁴ Nonetheless, courts historically have dealt with all delusions—including those relating to parentage or property—under the insane delusion rule and have required proof that a delusion distorted the estate plan.²⁰⁵

This issue of doctrinal overlap has gone largely unnoticed in the case law.²⁰⁶ As it happens, modern psychological research into

198. See, e.g., *Bell State Bank & Tr. v. Oakland (In re Estate of Gassmann)*, 867 N.W.2d 325, 328 (N.D. 2015) (“Gassmann experienced incidents in which he believed his wife and others were involved in a conspiracy to poison him . . .”).

199. See *infra* note 214 and accompanying text.

200. See *Athey v. Rask (In re Estate of Rask)*, 214 N.W.2d 525, 528–30 (N.D. 1974).

201. See *In re Estate of Berg*, 783 N.W.2d 831, 841–42 (S.D. 2010) (“Fred [Berg] had a static delusion that Fred MacMurray was his father.”). For a thorough review of this case, see Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175 (2015).

202. See, e.g., *Dixon v. Fillmore Cemetery*, 608 S.W.2d 84, 86–90 (Mo. Ct. App. 1980); *Janes v. Adams*, No. 10-14-00319-CV, 2015 WL 4381265, at *4–5 (Tex. Ct. App. July 9, 2015).

203. See, e.g., *In re Berrien’s Will*, 5 N.Y.S. 37, 42–43 (Sur. Ct. 1889).

204. See *supra* note 65 and accompanying text.

205. See *Dixon*, 608 S.W.2d at 90; *McGrail v. Rhoades*, 323 S.W.2d 815, 822 (Mo. 1959); *Berrien’s Will*, 5 N.Y.S. at 43; *Athey*, 214 N.W.2d at 530; *Berg*, 783 N.W.2d at 842.

206. *But see In re Russell’s Estate*, 210 P. 249, 254 (Cal. 1922) (recognizing, in the context of delusions about the legitimacy of children, that “the ability of the testator to know or understand . . . the natural objects of his bounty . . . is substantially identical with . . . the allegation of an insane delusion”).

delusions justifies courts' traditional preference of classification. Delusions raise graver doubts about causation than do other cognitive failures.

Mental disabilities flowing from brain damage, disease, or senescence occur randomly. By contrast, delusions—stemming from hallucinations, false memories, or disorders such as paranoia²⁰⁷—can include a motivational component: people believe what they want to believe.²⁰⁸ A father who rejects a child can more easily conjure up a fantasy that the child is not his than could a loving father.²⁰⁹ Hence, in a significant number of cases, the delusion might serve merely to reinforce a predisposition to disinherit a beneficiary or to add a bequest,²¹⁰ rather than to distort an estate plan.

To be sure, this correspondence is not inevitable. Delusions are sometimes stimulated by emotions such as jealousy that

207. For discussions of the psychology of delusions, see WILLIAM HIRSTEIN, *BRAIN FICTION: SELF-DECEPTION AND THE RIDDLE OF CONFABULATION* (2006); ALISTAIR MUNRO, *DELUSIONAL DISORDER: PARANOIA AND RELATED ILLNESSES* (1999); *DELUSIONAL BELIEFS: INTERDISCIPLINARY PERSPECTIVES* (Thomas F. Oltmanns & Brendan A. Maher eds., 1988).

208. See THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASONING IN EVERYDAY LIFE* 75–87 (1991); HIRSTEIN, *supra* note 207, at 231–37 (2005); DAVID PEARS, *MOTIVATED IRRATIONALITY* (1984). Always an astute observer, Francis Bacon noticed the phenomenon long before the birth of modern psychology: “The human understanding resembles not a dry light, but admits a tincture of the will and passions, which generate their own system accordingly; for man always believes more readily that which he prefers.” FRANCIS BACON, *NOVUM ORGANUM* ¶ 49 (Joseph Devey ed., 1902) (1620) (footnote omitted). Compare Oliver Goldsmith's satirical twist on the insight:

This dog and man at first were friends;
But when a pique began,
The dog, to gain some private ends,
Went mad, and bit the man.

OLIVER GOLDSMITH, *An Elegy on the Death of a Mad Dog*, in 2 *THE WORKS OF OLIVER GOLDSMITH* 89, 90 (J.W.M. Gibbs ed., London, George Bell & Sons 1884) (1766).

209. See *Mondale v. Edgers (In re O'Neil's Estate)*, 212 P.2d 823, 829 (Wash. 1949) (“The beliefs to which he gave expression [that he had not fathered his children] seem only to have existed when the relations between himself and his daughters were strained.”).

210. See *Janes v. Adams*, No. 10-14-00319-CV, 2015 WL 4381265, at *4–5 (Tex. Ct. App. July 9, 2015) (concerning an alleged delusion that the testator was romantically involved with a beneficiary who had “brightened her life”).

might cause a testator to become convinced that a spouse is unfaithful (another fact pattern abounding in the case law),²¹¹ even though he or she would prefer otherwise.²¹² The cases vary, but this variance makes causal analysis more important than when a mind that would ordinarily craft a prosaic estate plan merely deteriorates.

But all of this raises, or rather re-raises, another concern—error costs. Mistakes in the inducement likewise have the potential to distort an estate plan, and wanting the opportunity to quiz the testator, a court can only strive to infer what impact a mistake had.²¹³ Lawmakers have preferred to hold mistakes in the inducement irremediable exactly because they considered this inquiry too iffy to undertake.

Is the impact of an irrational mistake any less problematic than a rational one? On reflection, the two appear indistinguishable in their external ramifications. They often concern the same matters. Cases dealing with false beliefs about the parentage of children, for example, divide between those holding the belief an insane delusion and those holding the belief a rational mistake in the inducement. In the first moiety of cases, the belief voids the estate plan; in the second, it does not.²¹⁴ Evidence as to whether a delusion, like a mistake, clouded a testator's thinking at the time when he or she executed a will may also be unclear—for just as people might waiver in their rational convictions, so can delusions come and go.²¹⁵ Because

211. See, e.g., *In re McDowell's Estate*, 137 A. 823, 823 (N.J. Orphans' Ct. 1927).

212. See ALFRED R. MELE, SELF-DECEPTION UNMASKED 94–118 (2000) (citing to studies). Nevertheless, this variety of delusion appears to be “much less common” than motivated delusions. *Id.* at 94.

213. See *supra* notes 151–155 and accompanying text.

214. Compare, e.g., *Flaherty v. Feldner* (*In re Estate of Flaherty*), 446 N.W.2d 760, 761–66 (N.D. 1989) (finding an insane delusion), with, e.g., *Nat'l Newark & Essex Bank v. Bollin* (*In re Estate of Coffin*), 246 A.2d 489, 490 (N.J. Super. Ct. App. Div 1968) (finding a mistake rather than an insane delusion); see also *Petefish v. Becker*, 52 N.E. 71, 72 (Ill. 1898) (acknowledging that the evidence could have sustained a finding of either mistake or insane delusion); ATKINSON, *supra* note 26, § 52, at 245–46 (observing that “similar beliefs” have been classified one way or the other and providing additional examples).

215. Kenneth S. Kendler et al., *Dimensions of Delusional Experience*, 140 AM. J. PSYCHIATRY 466, 466–67 (1983); see, e.g., *Presho v. Presho* (*In re Presho's*

they are impervious to evidence, delusions do tend to be chronic (whether or not intermittent);²¹⁶ by comparison, time can try the truth of a rational conjecture. Still, delusional disorders are treatable today—drugs or other therapy can do the work of time.²¹⁷ When left untreated, or when treatment fails, delusions have the same effect on decision making as mistakes. Like a mistake, “a delusion is where one supposes a thing to be true which is not true, and acts in reference to it as though it were actually true.”²¹⁸ Both often correspond with prior preferences, which can motivate delusions no less readily than the ignorance fostered by preferences can induce mistakes.²¹⁹ Whether an estate plan would exist but for a belief is no less uncertain when it qualifies as a delusion than when it derives from mistake.²²⁰

Estate), 238 P. 944, 948 (Cal. 1925) (“[T]he deceased frequently expressed his belief that his wife was . . . poisoning him, but he soon thereafter changed his attitude and said he knew she would not do such a thing.”); *Walker v. Struthers*, 112 N.E. 961, 966 (Ill. 1916) (“The evidence does not show that the decedent adhered to his delusion.”); *Brown v. Fidelity Tr. Co.*, 94 A. 523, 525 (Md. 1915) (“[T]he grantor . . . at times entertained certain delusions as to persons and things . . .”).

216. MUNRO, *supra* note 207, at 45.

217. *See id.* at 225–42; *see also Dumas v. Dumas*, 547 S.W.2d 417, 418 (Ark. 1977) (concerning a delusional testator who was treated for paranoid schizophrenia, “and although he was improved, he soon reverted to his former mental condition”). At the same time, some drug treatments for other ailments *cause* delusions as a side effect. Such delusions are treated by reducing dosages. Anjan K. Banerjee et al., *Visual Hallucinations in the Elderly Associated with the Use of Levodopa*, 65 POSTGRADUATE MED. J. 358, 360 (1989).

218. *Lucas v. Parsons*, 24 Ga. 640, 651 (1858).

219. *See supra* notes 151–153, 208–210 and accompanying text.

220. *See, e.g., Marshall v. McCannon (In re Estate of Killen)*, 937 P.2d 1368, 1373 (Ariz. Ct. App. 1996) (“There is no way of knowing what [the testator] might have felt without the delusions.”). Courts have also grappled with the problem of ripple effects, *see supra* note 153 and accompanying text, in connection with insane delusions. In one case, the court concluded that when children challenged an insane delusion, which “was not what the father wanted to hear,” the will disinheriting them stemmed from an insane delusion, despite the fact that the testator was not deluded about his children’s response to his delusion. *Steiner v. Dickmeyer (In re Estate of Koch)*, 259 N.W.2d 655, 663 (N.D. 1977) (holding that “[t]he fact that the children in this case did not share their father’s insane delusions should not be held against them”); *see also Hayes v. De Groot (In re Estate of Mahnke)*, 95 N.W.2d 405, 408 (Wis. 1959) (“There is no evidence from which a sane mind could . . . conclu[de] that his daughters were ungrateful and disloyal because they failed to share his warped view and

Even the very distinction between rational and irrational error appears blurrier than legal doctrine has traditionally acknowledged. One problem here is that fact finders cannot know for sure what evidence (if any) prompted testators to reach the surmises they expressed to others. Inevitably, the extent to which a decedent's beliefs followed from fantasy or just misleading clues,²²¹ and whether they were sincerely held or fabricated,²²² or exaggerated,²²³ perhaps to vent frustration at a target, will remain open to doubt. What is more, psychological studies suggest a tropism toward slanted analysis of facts by healthy subjects by virtue of a phenomenon known as confirmation (or "my-side") bias. After a subject initially posits a conjecture, he or she tends to overvalue evidence that confirms it while undervaluing disconfirming evidence. This thumb on the scale can reinforce preliminary suppositions and cause them to persevere.²²⁴ At least for some people, to turn around an old

reasoning.”).

221. See *Pyle v. Millar (In re Millar's Estate)*, 207 P.2d 483, 490 (Kan. 1949) (observing that “[t]estator may have known some facts that the witnesses did not know, which caused him to believe” an alleged insane delusion).

222. Some testators feign their delusions. See *Smith v. Smith*, 48 N.J. Eq. 566, 582–89 (Prerog. Ct. 1891); *Ditchburn v. Fearn* (1842) 6 Jurist 201, 201–02; see also *In re Russell's Estate*, 210 P. 249, 254 (Cal. 1922) (raising this possibility); *American Seamen's Friend Soc'y v. Hopper*, 33 N.Y. 619, 624–25 (1865) (same). One testator claimed he had no surviving relatives when he knew he had a living child because he wished, “for whatever reason, to keep his past secret.” *Estate of Della Sala v. Father Flanagan's Boys' Home*, 86 Cal. Rptr. 2d 569, 574 (Ct. App. 1999).

223. See *In re Scott's Estate*, 60 P. 527, 531 (Cal. 1900) (“[T]here was nothing to indicate that [an alleged delusion] was more than an accusation made by reason of a suspicion . . .”).

224. JONATHAN BARON, *THINKING AND DECIDING* 195–97 (3d ed. 2000); GILOVICH, *supra* note 208, at 49–72; RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 167–92 (1980); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 *passim* (1998); see also MICHAEL MCGUIRE, *BELIEVING: THE NEUROSCIENCE OF FANTASIES, FEARS, AND CONVICTIONS* 201–02 (2013) (speculating that this tendency traces to energy conservation by the brain); Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 323 (2010) (presenting evidence that factual contradiction can have the perverse consequence of *strengthening* preexisting beliefs, at least where they are ideologically grounded, a phenomenon the authors call “backfire effects”).

adage, *believing is seeing*. In the event, courts must not only segregate incredible mistakes from plausible ones; they have also to contend with a host of fallacies that lie in between—fallacies that appear neither perfectly logical nor perfectly illogical. A wrongheaded mistake, so to say, might fit into either category.²²⁵ This fuzziness can only contribute to the risk and cost of litigation over insane delusions. And it also suggests the indeterminacy of the doctrine, giving fact finders all the more leeway to decide cases according to covert judgments about an estate plan that they would better address overtly, if at all.²²⁶

If testators who are deluded into believing fantasies forfeit part of their freedom of testation, are they likely to respond by producing or saving less than before?²²⁷ Given their conviction that they know the truth, deluded testators should disapprove of judicial policing of their wills more uniformly even than mistaken testators, some of whom might trust courts to correct their estate plans. Yet, both sorts of testators remain oblivious to their errors; hence, neither should respond *ex ante* to the threat of invalidation of their wills.²²⁸ With regard to rational and irrational errors alike, lawmakers can focus exclusively on issues of judiciousness and ignore other evils that might flow from confining freedom of testation.

225. See *In re Will of Cole*, 5 N.W. 346, 349 (Wis. 1880) (“The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless there are such) and insane delusion is sometimes quite indistinct and difficult to be defined.”).

226. See *supra* notes 119–122 and accompanying text. One can identify any number of cases where the doctrine of insane delusion may have been stretched to reach a preferred outcome. See, e.g., *In re Shanks’ Will*, 179 N.W. 747, 748 (Wis. 1920) (finding an insane delusion of infidelity despite the testator’s repudiation of that belief, and opining that “[t]here is no good reason shown why . . . the testator should not have left all his property to his wife, who for 50 years had helped earn it and whose needs required the income”).

227. See *supra* note 88 for cases rehearsing this consideration.

228. See Anthony S. David, *Insight and Psychosis*, 156 BRIT. J. PSYCHIATRY 798 *passim* (1990) (observing the typical lack of self-awareness of deluded subjects, although they can become self-aware retroactively upon recovery). *But see Riggs v. Am. Tract Soc’y*, 95 N.Y. 503, 509–12 (1884) (concerning a deluded testator who made *inter vivos* gifts of his property in anticipation of an eventual challenge to his testamentary capacity).

All of this suggests that lawmakers would do well to unify the laws of mistake and insane delusion. Both should become either remediable or irremediable.²²⁹ As a meta-benefit, unification would end costly litigation over whether a fallacy fell into one category or the other.

In the absence of any articulated rationale for the prevailing distinction,²³⁰ we can only guess at the reasons for its persistence. Perhaps the rhetoric of insanity has caused the legal mind to associate delusions with testamentary capacity while disassociating them from classical mistake doctrine.²³¹ If so, the rhetoric is deceptive. Mistakes produce the same symptoms, whether they stem from deductive reasoning or disease. Unlike doctors, lawmakers can only treat the symptoms. They have no reason to attend to them differently.

IV. Impositions

Up to now, the states of mind we have considered have concerned testators' inward processes of reasoning—either their intentions, mental deficits, misimpressions, or personal demons. A state of mind might also ensue from testators' interactions with other persons, leading them to alter their thinking. To this problem we next turn.

229. Cf. 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, 102–11 (2007) (arguing that the insane delusion doctrine should be abolished because it implicates too much uncertainty).

230. See *supra* note 188 and accompanying text. The occasional observation that mistakes are common by comparison to insane delusions—see *In re Estate of Raney*, 799 P.2d 986, 996 (Kan. 1990); *In re White's Will*, 24 N.E. 935, 937 (N.Y. 1890)—hardly suggests a rationale for distinguishing them, assuming they are indistinguishable otherwise.

231. For an observation of this sort of saliency effect in another legal context, see Pedro Bordalo et al., *Saliency Theory of Judicial Decisions*, 44 J. LEGAL STUD. S7 (2015).

A. Fraud

If a third party deceives a testator as to facts or law, causing the testator to make an estate plan premised on those falsities, the estate plan is void under the doctrine of fraud in the inducement.²³² Fraud comprises an intentional act—the perpetrator must *disinform*, not merely *misinform* (or even negligently *misinform*), the testator for the doctrine to apply.²³³ In broader context, then, the common law carves out a second exception from the law of mistake, distinguishes dishonest mistakes from honest ones, and deeming only the first worthy of intervention. No modern policy analysis explores the distinction, and the model laws fail to relate the doctrines of fraud and mistake.²³⁴ Earlier generations of commentators did weigh in on the subject, however.

232. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (a), (d) cmts. j–k (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF RESTITUTION § 13 cmt. f (2011); 1 PAGE, *supra* note 26, §§ 14.3, 14.6–8. A few courts have required clear and convincing evidence of fraud. *See In re Coombs*, 92 A. 515, 516 (Me. 1914); *In re Mele*, 979 N.Y.S.2d 403, 406 (App. Div. 2014). The doctrine traces to Roman civil law. MOSES A. DROPSIE, *THE ROMAN LAW OF TESTAMENTS, CODICILS, AND GIFTS IN THE EVENT OF DEATH (MORTIS CAUSA DONATIONES)* 42, 44 (Philadelphia, T. & J.W. Johnson 1892). Variants also exist within contract and tort law. RESTATEMENT (SECOND) OF CONTRACTS §§ 159–73 (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF TORTS §§ 525–49 (AM. LAW INST. 1977).

233. *See, e.g., In re Estate of Weickum*, 317 N.W.2d 142, 146 (S.D. 1982); *see also In re Newhall's Estate*, 214 P. 231, 235 (Cal. 1923) (rejecting innocent misrepresentation as a ground for fraud); *In re Arnold's Estate*, 82 P. 252, 255 (Cal. 1905) (allowing fraudulent intent to be inferred from a misinformer's motive for fraud); *Union Planters Nat'l Bank of Memphis v. Inman*, 588 S.W.2d 757, 762 (Tenn. Ct. App. 1979) (rejecting an allegation of fraud upon finding that false statements were made “in the belief that they were true”). Misinformation in “reckless disregard” of truth also qualifies as fraud, *e.g., Sullivan v. Vick (In re Estate of Vick)*, 557 So. 2d 760, 768–69 (Miss. 1989), but such communication appears tantamount to disinformation. “[I]f [an informing party] falsely asserts a fact without caring whether it is true or not he probably, if not certainly, lacks a belief in its truth and it is entirely fair to treat the case as an intentional fraud.” DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* § 43.4, at 1120 (2d ed. 2016).

234. The Uniform Probate Code leaves fraud to judicial doctrine. *See UNIF. PROBATE CODE* § 1-103 (amended 2010), 8 pt. 1 U.L.A. 36 (2013); *id.* § 3-407, 8 pt. 2 U.L.A. 95. The provision creating a remedy for mistake makes no mention of fraud. *See id.* § 2-805 cmt., 8 pt. 1 U.L.A. 335. The Restatement, which covers

We may observe preliminarily that in its external consequences, a fraudulently induced mistake, like an irrational mistake, is indistinguishable from any other mistake. In either instance “the testator acts upon false data” which degrades the quality of his or her estate plan.²³⁵ Were lawmakers to impose an external standard here, assessing an estate plan’s judiciousness, fraud and mistake would receive identical treatment, and a will tainted by either would become equally subject to revision by a court.

So, we must repeat the question we raised in the last section. Why should lawmakers fashion a distinct state-of-mind rule for fraud, setting it apart from mistake in the inducement?

Professor Thomas Atkinson suggested one justification: “The true, or at least the main, reason for the distinction is the deep feeling that fraud should vitiate everything which it touches and that the conscious wrongdoer should not have an advantage from his act.”²³⁶ When enrichment is unjust, lawmakers have moral cause to intervene; in this respect, fraud resembles criminal

both, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.3, 12.1 (AM. LAW INST. 2003), observes that whereas “[a]n innocent or negligent misrepresentation is not fraud . . . [It] can, however, lead the donor to make a donative transfer that the donor would not otherwise have made. In such a case, the donative transfer has been induced by mistake, and should be remedied accordingly.” *Id.* § 8.3 cmt. k. Does this language imply that the rules governing fraud and mistake are mutually exclusive? The Restatement’s remedy for mistake requires clear and convincing evidence, but it also allows courts to amend a will to conform with the testator’s intention if clear and convincing evidence demonstrates what that intention would have been but for the mistake. *See id.* § 12.1 cmts. e, g. Meanwhile, the Restatement’s remedy for fraud requires only a preponderance of the evidence but provides only for the invalidation, not the amendment, of the estate plan that results. *See id.* § 8.3 cmts. b, d. If the rules are not mutually exclusive, and clear and convincing evidence exists to establish both fraudulent inducement and how a testator would have acted but for that inducement, then parties might seek recourse to the reformation provisions *for mistake* rather than fraud. But the Restatement fails to address this possibility. *See id.* §§ 8.3, 12.1 cmts.; *see also supra* notes 178–180 and accompanying text (noting analogous uncertainties regarding mistake and insane delusion).

235. ATKINSON, *supra* note 26, § 56, at 264.

236. *Id.* at 264, 278 (quotation at 264). For a broader moral discussion, see CHARLES FRIED, RIGHT AND WRONG 54–78 (1978).

wrongdoing. Indeed, it technically constitutes a crime, however rarely it is prosecuted.²³⁷

The other great treatise writer of his era, Professor William Page, drew a further distinction, concerning what we would today call the error costs entailed in proving fraud and mistake. Whereas “mistake . . . is completely subjective and wholly within the testator’s own mind, . . . fraud . . . is caused by the conduct of a third person,”²³⁸ which witnesses can identify as an “objective manifestation[]” of fraud.²³⁹ For this reason, “[t]he difficulty of proving the existence of fraud and its effect upon the mind of the testator are not quite as great as in the case of mistake.”²⁴⁰ On this basis, Page proposed to extend relief from fraud to innocent misrepresentations by third parties, which Page identified as “occup[ying] a place midway between mistake and fraud.”²⁴¹

Page’s analysis, when held up to the light, fails to withstand scrutiny. Evidence of a pure mistake must likewise have an objective component to support a cause of action. Unless a testator reported a mistake to someone, any allegation that he or she was mistaken would lack a material basis. Either way, then, courts must hear objective evidence of a statement made either *to* or *by* the testator, or both. If the testator articulated a mistake, then evidence that a third-party planted its seed fails to make either the genuineness of the mistake (*viz.*, whether the testator believed what he or she asserted to others)²⁴² or its impact on the estate plan any more certain than if the testator alone claimed credit for the idea. And if the only evidence of a mistake is a statement a third-party addressed to the testator, then surely the evidence of belief and impact is weaker than if the only evidence is a statement made by the testator. We must conclude, *pace*

237. See MODEL PENAL CODE §§ 223.3, 224.14 (AM. LAW INST. 1985).

238. 1 PAGE, *supra* note 26, § 14.1, at 790.

239. *Id.*

240. *Id.* § 14.8, at 806 (comma and typographical error omitted); see also ATKINSON, *supra* note 26, § 56, at 264; Henderson, *Part I*, *supra* note 148, at 386–87.

241. 1 PAGE, *supra* note 26, § 14.1; see also Joseph Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 HARV. L. REV. 309, 330 (1928) (associating innocent misrepresentations with fraud).

242. See *supra* note 222 and accompanying text.

Professor Page, that error costs loom to the same degree whether contestants allege fraud, innocent misrepresentation, or mistake in the inducement.²⁴³

There exists, however, another perspective on the problem at hand from which we can find justification for the existing distinction between fraud and mistake, as well as the distinction between fraudulent and innocent misrepresentation. The matter again concerns information costs, albeit of a sort different from the ones we have considered heretofore, bearing not on decision costs *ex post*, but on the social costs of estate planning *ex ante*.

Because it is a choice, deception comprises an activity that lawmakers can deter. By draining deception of its utility, the doctrine of fraud reduces its incidence and hence the burden of erroneous information on estate planning. By comparison, lawmakers cannot deter unwitting mistakes of fact. In this sense, the external consequences of fraud and mistake coincide only superficially. The first responds to rules before the fact; the second does not. With the aid of the doctrine of fraud, testators have to spend less time and money fact-checking than they would have to do otherwise. And the doctrine achieves this saving efficiently—indeed, at zero cost—because those who might perpetrate a fraud already know the truth of the matter.

But what about innocent misrepresentations—Page's intermediate category, which he proposed to treat like fraud? If neither the informant nor the testator yet knows the truth, then lawmakers must hold one or the other responsible for investigating facts.

In the context of tort law, the economic approach imposes the cost of accidents on the better cost bearer, to wit, on the party able to avoid accidents more efficiently.²⁴⁴ Ordinarily, that is the tortfeasor, although the concept of contributory negligence accounts for the potential of tort victims to prevent harm from befalling them.²⁴⁵ By analogy, in the context of estate planning,

243. See, e.g., *Walker v. Carson (In re Estate of Carson)*, 194 P. 5, 8–9 (Cal. 1920) (acknowledging the uncertain impact of fraudulent misrepresentations on an estate plan).

244. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970).

245. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC*

efficiency demands that we place the cost of accidental misinformation on the party better able to bear it—be that the informant or the testator.²⁴⁶

We may note, first of all, that innocent informants can avoid the risk of misinformation at no cost via a simple expedient: by holding their tongues. That would amount to a pyrrhic solution to the problem at hand. When informants convey accurate information, they lay the foundation for better planning; only falsity undermines it. Lawmakers should strive to allocate the cost of fact-checking efficiently, not chill reporting that would jettison the wheat with the chaff.²⁴⁷

Because informants and testators typically belong to the same family, they should have equal access to information and equivalent capabilities to verify facts. The key difference, on reflection, is that only testators know which facts *matter to them*—that is, which facts, once verified, would cause a testator to reformulate an estate plan. If lawmakers placed the cost of misinformation on informants, they would tend either to over- or under-invest in verification. When testators bear the cost, they can invest efficiently in verification, because they—and they alone—know which tales are important enough to merit investigating.

This observation corresponds with current law, which offers no relief for innocent misrepresentation.²⁴⁸ The burden of fact-checking falls on the testator, who represents the optimal cost bearer.

A few loose ends remain to be tied. The doctrine of fraud comprises a causal rule. No fraud occurs if testators were not

STRUCTURE OF TORT LAW 141 (1987).

246. If risk-averse parties could insure against the risk of misinformation, lawmakers could allocate its cost to the better insurer, as opposed to the better individual cost bearer. But, in practice, parties can only insure against *disinformation*—known as fidelity insurance—and it is typically available only in the business setting. See STEVEN PLITT ET AL., COUCH ON INSURANCE 3D § 1.16 (rev. ed. 2009).

247. See *Hegarty v. Hegarty*, 52 F. Supp. 296, 300 (D. Mass. 1943) (“It is perfectly lawful and proper for anybody to tell somebody who is about to give property true facts about the prospective recipient.”).

248. See *supra* note 233.

taken in, or if they learned the truth before executing a will, or if the disinformation was superfluous to estate planning.²⁴⁹

Lawmakers could transform fraud into a *per se* rule, eliminating the requirement that alternative takers prove that deceit caused the perpetrator of the fraud to receive a bequest. Such an approach would reduce decision costs but would make little sense otherwise. To state the obvious, lying is a ubiquitous element of social life. Not all lies are told to benefit deceivers—“white lies,” the sociologists tell us, protect listeners from hurtful truths or allow deceivers to avoid the embarrassment that truthful interactions might entail.²⁵⁰ To deter *all* lying, irrespective of its impact on an estate plan, by placing deceivers’ bequests at risk, would at once render every will vulnerable to challenge and disrupt normal social rhythms for no compelling reason.

Assuming fraud remains a causal rule, how should lawmakers define its prerequisites? As we shall see, proof of a related kind of imposition—undue influence—requires a showing that the testator was susceptible to the imposition.²⁵¹ Although the Restatement of Restitution identifies susceptibility to fraud, by analogy, as a factor material to its establishment, it fails to appear among the traditional elements of fraud and is scarcely seen in the case law.²⁵² The Restatement of Property

249. See *Moore v. Heineke*, 24 So. 374, 379 (Ala. 1898) (noting a lack of evidence about whether the testator was deceived); *Van Raalte v. Graff*, 253 S.W. 220, 223 (Mo. 1923) (finding that the testator was not deceived); *Howell v. Troutman*, 53 N.C. 304, 307–08 (1860) (finding that the deceit did not cause the bequest); *Cude v. Culberson*, 209 S.W.2d 506, 521 (Tenn. Ct. App. 1947) (finding that the testator was not deceived); see also *supra* note 243.

250. Jennifer J. Argo & Baba Shiv, *Are White Lies as Innocuous as We Think?*, 38 J. CONSUMER RES. 1093, 1093 (2012).

251. See *infra* note 273 and accompanying text.

252. See RESTATEMENT (THIRD) OF RESTITUTION § 13 cmt. f, illus. 10 (AM. LAW INST. 2011). For other commentary suggesting the relevance of susceptibility to fraud, but without citing to cases, see 1 PAGE, *supra* note 26, § 14.3, at 795; Milton D. Green, *Fraud, Undue Influence, and Mental Incompetency*, 43 COLUM. L. REV. 176, 185–86 (1943). For a statement of the traditional elements of fraud, see *Wood v. Caldwell (In re Estate of Mumby)*, 982 P.2d 1219, 1223–24 (Wash. Ct. App. 1999):

In the context of a testamentary disposition, the elements of fraudulent inducement are: (1) representation of an existing fact;

mentions susceptibility only in connection with undue influence.²⁵³

Perhaps the unspoken assumption is that everyone is susceptible to disinformation—that you can fool all of the people some of the time. Whatever the premise, psychological research reveals that individuals vary in how credulous they are, by personality and by circumstances.²⁵⁴ Evidence indicates that persons prone to fantasizing and related traits such as a creative imagination tend to be suggestible.²⁵⁵ Of course, if disinformation produces an insane delusion—a tropism we might predict from these studies—then the estate plan could fall to either challenge. At the same time, intelligence is negatively correlated with susceptibility to disinformation.²⁵⁶ Age also plays a part—the older the subject, the more vulnerable he or she becomes to disinformation.²⁵⁷

(2) materiality of representation; (3) falsity of representation; (4) knowledge of falsity or reckless disregard as to its truth; (5) intent to induce reliance on representation; (6) ignorance of falsity; (7) reliance on the truth of representation; (8) justifiable reliance; and (9) damages.

253. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. e, j (AM. LAW INST. 2003).

254. See Rute Pires et al., *Personality Styles and Suggestibility: A Differential Approach*, 55 PERSONALITY & INDIVIDUAL DIFFERENCES 381, 381 (2013) (“Results showed that there were individual differences in suggestibility and that these differences corresponded to certain personality characteristics . . . , mainly related to the Thinking Styles and some Behaving Styles.”); Allusions to this variance also appear within popular culture. In the 1967 musical production *You’re a Good Man, Charlie Brown*, the chorus serenades the famous cartoon character: “With a heart of gold, you believe what you’re told. . . ,” at which point Lucy interjects sarcastically: “Every single solitary word!” BILL HINANT ET AL., *You’re a Good Man, Charlie Brown, on YOU’RE A GOOD MAN, CHARLIE BROWN* (1967 ORIGINAL OFF-BROADWAY CAST) (Decca Broadway 2000).

255. See Peter Frost et al., *An Individual Differences Approach to the Suggestibility of Memory Over Time*, 21 MEMORY 408, 409, 413 (2013) (confirming prior studies).

256. See Pires et al., *supra* note 254, at 381 (citing to studies); Romuald Polczyk, *Interrogative Suggestibility: Cross-Cultural Stability of Psychometric and Correlational Properties of the Gudjonsson Suggestibility Scales*, 38 PERSONALITY & INDIVIDUAL DIFFERENCES 177, 178–79, 183 (2005) (confirming prior studies).

257. See Yiwei Chen, *Unwanted Beliefs: Age Differences in Beliefs of False Information*, 9 AGING, NEUROPSYCHOLOGY & COGNITION 217, 217–19, 225–26

Evidence also suggests that persons tend to credit deceivers who represent professional or authority figures.²⁵⁸ Jumping ahead again to the doctrine of undue influence, if an alleged influencer stands in a confidential relationship with the testator, the burden of proof shifts to the influencer to disprove undue influence in many jurisdictions²⁵⁹—but this rule of evidence does not extend to fraud.²⁶⁰ In the context of fraud, such a rule would skate close to a conclusive presumption: no one can prove that he or she never told a lie.²⁶¹ But the psychological studies justify a more limited rule of evidence. If contestants prove that a beneficiary with whom the testator shared a confidential relationship, “a relationship based on special trust and confidence,”²⁶² misstated facts, then courts have reason to presume that the testator believed the misstatements.²⁶³ It should remain for contestants to show that the misstatements were made deceitfully and affected the estate plan. Psychological evidence of susceptibility in these circumstances speaks neither to the informant’s honesty nor to the impact of false facts.

Although usually left unstated, susceptibility must comprise an implicit element of fraud.²⁶⁴ In the absence of susceptibility, causation is impossible. But that is also true of undue influence, which requires a showing of causation,²⁶⁵ and where lawmakers nonetheless isolate susceptibility as a separate element of proof.²⁶⁶ If susceptibility became an explicit element of fraud,

(2002).

258. See Frost, *supra* note 255, at 409 (citing to studies).

259. See *infra* note 278 and accompanying text.

260. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. f–h (AM. LAW INST. 2003); 3 PAGE, *supra* note 26, § 29.135, at 834.

261. Unusually, courts in Illinois presume fraud in this circumstance, but they have simultaneously developed defenses whereby those subject to the presumption can overcome it. See 3 PAGE, *supra* note 26, § 29.135, at 839.

262. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. g (AM. LAW INST. 2003).

263. See *supra* note 258 and accompanying text.

264. See 1 FARNSWORTH, *supra* note 17, § 4.14, at 487 (observing susceptibility within contract law’s doctrine of fraud).

265. See *infra* note 277 and accompanying text.

266. See *infra* notes 273, 277 and accompanying text.

paralleling undue influence, courts might focus more attention on the issue. And in those cases where a testator's skepticism would have rendered disinformation unavailing, courts could dispose of the issue of fraud more quickly and efficiently.

B. Undue Influence

A second, related sort of imposition, long-accepted as invalidating a will under English and then American law, is undue influence—a determination that testators have come under the sway of other minds, robbing them of the ability to think for themselves.²⁶⁷ The doctrine complements fraud in the inducement.²⁶⁸ Both enable a third party to prejudice the mind of a testator. And courts conceptualize both as wrongful acts.²⁶⁹ A third variation is duress, where a third party intimidates a testator into making a will, employing threats of physical force, rather than force of personality.²⁷⁰ Contestants sometimes allege all three acts as operating in concert upon the mind of a testator.²⁷¹

Courts traditionally break down undue influence into four elements.²⁷² Evidence must show that the testator was *susceptible* to undue influence. Any testator who was “strong

267. The doctrine did not exist under Roman law. On its historical roots, tracing to the English court of Chancery, see Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 43–54 (2008). The earliest published American cases appeared in Pennsylvania shortly after independence. *Starrett v. Douglass*, 2 Yeates 46, 47 (Pa. 1796); *Gallagher v. Rogers*, 1 Yeates 390, 390 (Pa. 1794).

268. See, e.g., *Union Planters Nat'l Bank of Memphis v. Inman*, 588 S.W.2d 757, 761–62 (Tenn. Ct. App. 1979) (relating but also distinguishing the doctrines).

269. See *Hamm v. Jenkins (In re Estate of Hamm)*, 227 N.W.2d 34, 39 (Wis. 1975); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (AM. LAW INST. 2003); 1 PAGE, *supra* note 26, § 15.6, at 839.

270. See 1 PAGE, *supra* note 26, § 15.14.

271. See, e.g., *In re Estate of Rosasco*, No. 4050/2006, 2011 WL 1467632, at *1 (N.Y. Sur. Ct. Apr. 5, 2011).

272. See *Clinger v. Clinger*, 872 N.W.2d 37, 48 (Neb. 2015); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (AM. LAW INST. 2003); 1 PAGE, *supra* note 26, § 15.5.

willed” courts deem immune to the imposition.²⁷³ The third party must also have had an *opportunity* to exercise undue influence. Otherwise, the testator is again immune in theory, even if he or she would have been vulnerable.²⁷⁴ The third party must have had a *disposition* to exercise undue influence—unintentional influence does not comprise undue influence.²⁷⁵ Finally—the crux of the matter—the third party must have taken advantage of the opportunity offered and have *exercised* undue influence.²⁷⁶

The doctrine of undue influence again represents a causal rule: even if undue influence is found, unless it resulted in an estate plan that the testator would not have made otherwise, the will remains effective.²⁷⁷ The contestant has the burden of proof, but if the third party stood in a confidential relationship with the testator, in many but not all jurisdictions, the burden of proof shifts to that party to disprove undue influence—in some states on that basis alone; in others only if the third party participated in the drafting or execution of the will; and in still others (as under the Restatement) only if coupled with another “suspicious circumstance,” loosely defined.²⁷⁸

Undue influence has elicited an outpouring of scholarly commentary more voluminous than any other state-of-mind rule. Most observers find fault with the doctrine. Criticism centers on its vagueness—the blurriness of the line separating “lawful influences” from undue influence and the want of an objective

273. *In re Estate of Till*, 458 N.W.2d 521, 525–26 (S.D. 1990).

274. *See, e.g.*, *B.W. v. J.W.*, 853 N.E.2d 585, 589 (Mass. App. Ct. 2006) (questioning whether the opportunity to exercise undue influence “is negated by the presence of third parties such as attorneys and financial consultants.”).

275. *See, e.g.*, *Patterson v. Jensen (In re Faulks’ Will)*, 17 N.W.2d 423, 443 (Wis. 1945).

276. *See, e.g.*, *Fritschi v. Teed (In re Estate of Fritschi)*, 384 P.2d 656, 662 (Cal. 1963) (“Plaintiffs have failed to show that the alleged ability and desire . . . unduly to influence the decedent were ever brought to bear upon the testamentary act.”).

277. *See, e.g.*, *Estate of Till*, 458 N.W.2d at 528; ATKINSON, *supra* note 26, § 55, at 260.

278. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. f–h & reporter’s notes 5–6 (AM. LAW INST. 2003); 3 PAGE, *supra* note 26, § 29.80, at 704–10.; Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 583–86 (1997).

test for its existence²⁷⁹—enabling courts to wield the doctrine to invalidate wills that defy social norms.²⁸⁰ Some critics decry such manipulation and suggest planning strategies to thwart it.²⁸¹ Others propose doctrinal reforms. One commentator favors abolishing the presumption of undue influence applicable to third parties in a confidential relationship with a testator.²⁸² Another advocates abolishing undue influence altogether as a ground for invalidating a will.²⁸³

Putting aside for a moment the problem of misuse of the doctrine, is undue influence a sensible cause of action for lawmakers to recognize? As articulated, the doctrine covers only

279. See *In re Will of Walther*, 159 N.E.2d 665, 668 (N.Y. 1959) (observing also that “[t]he concept of undue influence does not readily lend itself to precise definition or description”); see also *Clinger v. Clinger*, 872 N.W.2d 37, 48 (Neb. 2015) (“Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor; his or her life, character, and mental condition.”); *In re Reynolds’ Estate*, 27 A.2d 226, 231 (N.J. Prerog. Ct. 1942) (“[Undue] influence can never be precisely defined. Each case . . . must be governed by its own peculiar circumstances.”).

280. For empirical evidence suggesting manipulation of the doctrine, see Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243–58 (1996).

281. Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 200–07, 218–21 (1989); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227–67 (1981); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278–86, 294–314 (1999). *But cf.* Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?*, 24 INT’L J.L. & PSYCHIATRY 253, 261 (2001) (concluding that “[i]n the main courts do not apply the doctrine without justification and almost always only when the testator suffers from diminished capacity”); Sid L. Moller, *Undue Influence and the Norm of Reciprocity*, 26 IDAHO L. REV. 275, 286–307 (1990) (defending undue influence as a norm enforcer and urging more forthrightness in doing so).

282. See Madoff, *supra* note 278, at 629. *But cf.* Roger Kerridge, *Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator*, 59 CAMBRIDGE L.J. 310, 332–34 (2000) (proposing under English law to presume undue influence in *all* cases where the testator has not executed a will before a notary or independent solicitor who can protect the testator from undue influence).

283. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 245–49, 262–90 (2010).

those cases where a third party has subjugated the mind of another, substituting his or her will for that of the testator.²⁸⁴ Thus limited, the doctrine aligns with other state-of-mind rules serving as efficient surrogates for an objective assessment of the welfare of individual estate plans. Wills conceived by third parties do not utilize the testator's store of knowledge about family members and are unlikely to aim at enhancing their welfare, in any event. Here, we may relate the problem at issue not only to other deliberative rules, but also to volitional rules.²⁸⁵ Like sham wills, wills produced by third parties are not ones that testators intended to take effect. And, like the doctrine of fraud, the doctrine of undue influence serves to deter third parties from undermining estate planning, by denying them the fruits of their wrongdoing.²⁸⁶ Also like fraud, undue influence may constitute a crime under state law.²⁸⁷

Yet, questions remain. Is influence powerful enough to destroy a testator's "free agency"²⁸⁸ realistically achievable? Assuming so, under what circumstances might such domination occur? Although psychologists have yet to study undue influence in the laboratory, they have produced a flood of scholarship on related problems, forking into two streams of analysis. One addresses efforts to usurp free will, referred to as "thought reform"²⁸⁹ or "coercive persuasion,"²⁹⁰ applied historically to achieve political (and, some claim, religious) indoctrination. The

284. "Influence, in order to be classed as 'undue,' must place the testator in the attitude of saying 'It is not my will, but I must do it.'" *Hoffman v. Hoffman (In re Hoffman's Estate)*, 2 N.W.2d 442, 446 (Mich. 1942); *see also, e.g., In re Estate of Rotax*, 429 A.2d 1304, 1305 (Vt. 1981) ("The doctrine of undue influence is applicable when a testator's free will is destroyed and, as a result, the testator does something contrary to his 'true' desires.").

285. *See supra* Part II.

286. *See supra* text following note 243.

287. *See* Nina Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 8–11 (2012).

288. This or a similar phrase appears regularly in undue influence cases. *See, e.g., Clinger v. Clinger*, 872 N.W.2d 37, 48 (Neb. 2015); 1 PAGE, *supra* note 26, § 15.1, at 817.

289. ROBERT J. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* (1961).

290. EDGAR H. SCHEIN ET AL., *COERCIVE PERSUASION* (1961).

other addresses lesser forms of persuasion, used ordinarily to sell products or to mold public opinion.²⁹¹

The issue of coercive persuasion rose to prominence after the Korean War, when reports blamed collaborations and refusals of repatriation by American prisoners of war on efforts by their Chinese captors to reeducate prisoners.²⁹² More recently, some have accused religious cults of employing similar tactics. A clinical psychologist who became a leading authority on cults, the late Margaret Singer, drew this connection.²⁹³ Singer extended it to the doctrine of undue influence, asserting that an “Evil Nurse” could utilize “brainwashing tactics” to control the thoughts of testators.²⁹⁴ The process—paralleling the one to which American prisoners were subjected—requires undue influencers to isolate their victims, create in them a sense of dependency and powerlessness, and then manufacture in their minds a “pseudoworld” in which friends and relatives are portrayed as enemies.²⁹⁵ Others have since parroted Singer’s assertions.²⁹⁶

The proposition that captors or others could usurp individuals’ free will by psychological means was, however, controversial from the start. American prisoners of war who buckled under the strain endured physical as well as psychological abuse;²⁹⁷ skeptics question whether their behavior

291. See generally ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (4th ed. 2001).

292. See KATHLEEN TAYLOR, *BRAINWASHING: THE SCIENCE OF THOUGHT CONTROL* 3–4 (2004) (describing how “some of these soldiers continued their bizarre—and passionate—disloyalty even after they were free of the Communists’ grip”).

293. See MARGARET THALER SINGER WITH JANJA LALICH, *CULTS IN OUR MIDST: THE HIDDEN MENACE IN OUR EVERYDAY LIVES* 52–82 (1995) [hereinafter SINGER WITH LALICH].

294. Margaret Thaler Singer, *Undue Influence and Written Documents: Psychological Aspects*, 10 *CULTIC STUD. J.* 19, 20–21 (1993).

295. See *id.* 23–25 (quotation at 24). Singer had emphasized the same conditions as conducive to conversions to cults. See SINGER WITH LALICH, *supra* note 293, at 64–69.

296. See, e.g., Mary Joy Quinn, *Friendly Persuasion, Good Salesmanship, or Undue Influence*, *MARQ. ELDER’S ADVISOR*, Spring 2001, at 49, 51–52; C. Peisah et al., *The Wills of Older People: Risk Factors for Undue Influence*, 21 *INT’L PSYCHOGERIATRICS* 7, 10–11 (2009).

297. See MARK PETERSON, *A BRIEF HISTORY OF KOREA* 207 (2009).

reflected anything more than physical coercion.²⁹⁸ Be this as it may, the model appears to fit the circumstances of undue influence imperfectly. Coercive persuasion, whether applied in connection with political conflict or cults, includes the element of a motivating ideology, which ordinarily is absent from allegations of undue influence of testators. Whether a program to persuade someone coercively can succeed without this element has never been investigated.

Considered in the context of coercive persuasion, undue influence seems unnecessary as an independent doctrine. Wills produced under conditions of physical isolation in totalistic environments—occasionally seen in the case law²⁹⁹—should lie vulnerable to challenge under the doctrine of duress. But if it is to be based on the psychology of coercive persuasion and maintained as a separate cause of action, undue influence should include isolation among its predicates. Psychologists who regard coercive persuasion as scientifically sound accept that it requires time in a controlled setting to take hold.³⁰⁰ Although courts have sometimes pointed to isolation as evidence of undue influence,³⁰¹ none has ever held it crucial as an element of proof.

298. See Dick Anthony & Thomas Robbins, *Conversion and “Brainwashing” in New Religious Movements*, in THE OXFORD HANDBOOK OF NEW RELIGIOUS MOVEMENTS 243, 250–53, 283 (James R. Lewis ed. 2004) (“It is important to realize that the overwhelming majority of Lifton’s Western subjects, who had undergone Chinese thought reform, exhibited only *behavioral compliance* under physical duress and threats . . .” (emphasis in original)). But compare Professor Singer: “Thought reform is accomplished through the use of psychological and environmental control processes that do not depend on physical coercion[.] . . . creating a psychological bond that in many ways is far more powerful than gun-at-the-head methods of influence.” Margaret Thaler Singer, *Thought Reform Exists: Organized, Programmatic Influence*, 17 CULT OBSERVER, no. 6, 1994, at 1, 3–4. For a neurophysiological discussion, see TAYLOR, *supra* note 292, at 105–25.

299. See, e.g., *Alhadi v. Comm’r*, 111 T.C.M. (CCH) 1336, at *3–4 (2016) (concerning the tax consequences of undue influence); *Pellegrini v. Bank of America Nat’l Tr. & Sav. Assoc.*, (*In re Estate of Pellegrini*), 291 P.2d 558, 560–61 (Cal. Dist. Ct. App. 1955); *Schilling v. Herrera*, 952 So. 2d 1231, 1233 (Fla. Dist. Ct. App. 2007).

300. See SINGER WITH LALICH, *supra* note 293, at 64–69, 114–16.

301. See, e.g., *D’Amico v. MacMillan*, No. PLCV201100888, 2013 WL 5988405, at *8 (Mass. Super. Ct. Aug. 7, 2013) (citing to earlier cases); *In re Will of Smith*, 582 S.E.2d 356, 359–60 (N.C. Ct. App. 2003) (same).

Turning to the literature on lesser forms of persuasion, one finds that empirical evidence largely accords with judicial intuitions.³⁰² Courts assume that the sick and the aged are most susceptible to influence.³⁰³ Surprisingly few scraps of evidence appear as to the sick, whereas studies of the effect of advanced age on persuasion have produced conflicting results.³⁰⁴ Courts posit that third parties can more easily exercise influence in close proximity to a testator than at a distance.³⁰⁵ Even in an age of interactive communication—and demonstrated examples of radicalization from a distance—psychologists agree that touch and body language contribute to persuasion.³⁰⁶ Finally, courts

302. Persuasion studies are related to but distinct from gullibility studies, addressed earlier. *See supra* notes 255–258.

303. *See, e.g.*, *Brown v. Emerson*, 170 S.W.2d 1019, 1021 (Ark. 1943); *Cotten v. Cotten*, 169 S.W.3d 824, 827 (Tex. Ct. App. 2005) (“[E]vidence of age and the common maladies of age may be considered as establishing the testator’s physical incapacity to resist or the susceptibility of her mind to an influence exerted . . .”).

304. Illness: No studies are extant, and this variable is not reported among ones affecting persuasion. *See* Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 323, 356–66 (4th ed. Daniel T. Gilbert et al. eds. 1998) (summarizing studies). For a suggestion that Pavlov’s research on canines—finding that “strong minded and resistant dogs become completely suggestible after an operation or when suffering from some debilitating illness”—is relevant to humans, see ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 110 (Perennial Library 1989) (1958). Age: *Compare* David O. Sears, *Life Stage Effects on Attitude Change, Especially Among the Elderly*, in AGING: SOCIAL CHANGE 183, 195–99 (Sara B. Kiesler et al. eds. 1981) (associating advanced age with greater susceptibility to persuasion), and Penny S. Visser & Jon A. Krosnick, *Development of Attitude Strength Over the Life Cycle: Surge and Decline*, 75 J. PERSONALITY & SOC. PSYCHOL. 1389, 1402–05 (1998) (same), with Tom R. Tyler & Regina A. Schuller, *Aging and Attitude Change*, 61 J. PERSONALITY & SOC. PSYCHOL. 689, 695–96 (1991) (finding susceptibility constant over the life cycle).

305. *See, e.g.*, *In re Estate of West*, 522 A.2d 1256, 1264 (Del. 1987) (“[The testator’s] presence in David’s house provided an opportunity to exert influence . . .”); *In re Estate of Till*, 458 N.W.2d 521, 526 (S.D. 1990) (“[There is] little support to the contention that [the testator] was susceptible to the undue influence of Julie, however, since Julie lived hundreds of miles away . . . and obviously could not visit him on a regular basis.”). Courts do not hold physical proximity essential, however. For a finding of undue influence exerted from beyond the grave—at an infinite distance, so to speak—see *Trust Co. of Georgia v. Ivey*, 173 S.E. 648, 654 (Ga. 1934).

306. Judee K. Burgoon et al., *Nonverbal Influence*, in THE PERSUASION

assume that testators are most easily persuaded by those whom they trust.³⁰⁷ Psychologists confirm the hypothesis.³⁰⁸

Still and all, evidence from other studies gives us reason to doubt the susceptibility of any testator to lesser forms of persuasion. Research identifies attitudes themselves as a significant variable—the more important the attitude, the more impervious subjects become to outside influence.³⁰⁹ It is hard to imagine an attitude of greater importance, and hence more likely to foster an adamant disposition, than the distribution of one's property.³¹⁰ An empirical study of wills confirms, albeit on the basis of inference, testators' resistance to external pressures.³¹¹

In this light, we can surmise that overcoming free agency in estate planning is nigh on impossible without coercive persuasion, which can only occur when a third party is able to sequester a testator.³¹² By confining undue influence to such cases, lawmakers would limit the danger that courts will manipulate the doctrine to achieve results they perceive as just.³¹³

The presumption of undue influence that arises in many states when third parties in a confidential relationship with a testator benefit under a will also merits consideration.³¹⁴ Economic theory suggests that we set rebuttable presumptions

HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 445, 449–51 (James Price Dillard & Michael Pfau eds. 2002); Yuan-Shuh Lii et al., *The Challenges of Long-Distance Relationships: The Effects of Psychological Distance Between Service Provider and Consumer on the Efforts to Recover from Service Failure*, 43 J. APPLIED SOC. PSYCHOL. 1121, 1123 (2013).

307. See, e.g., *Hardy v. Hardy*, 230 S.W.2d 11, 15 (Ark. 1950) (“By reason of . . . the [testator’s] trust and confidence in the fiduciary, there is great opportunity for the exercise of . . . undue influence.” (quoting 3 GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 493, at 1560 (1935))).

308. See Petty & Wegener, *supra* note 304, at 345 (citing to studies).

309. See Jon A. Krosnick, *Attitude Importance and Attitude Change*, 24 J. EXPERIMENTAL SOC. PSYCHOL. 240, 240–42, 250 (1988) (citing also to earlier studies).

310. At least for most people. Cf. *supra* note 104.

311. See T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism, and Social Influences*, 34 SOC. Q. 337, 349–50 (1993).

312. See *supra* notes 295–296 and accompanying text.

313. See *supra* notes 119–122 and accompanying text.

314. See *supra* note 278 and accompanying text.

either to correspond with more probable facts or against the party with superior access to evidence.³¹⁵ The first ground for a presumption aims to minimize error costs; the second, to reduce information costs.

Persons in a confidential relationship with a testator do not have better access to evidence than others, given that an attorney-scrivener and witnesses to the execution of a will can testify as to the process whereby an estate plan was formulated and implemented. Those few courts that have articulated a policy justifying the presumption of undue influence associate it with an assessment of probabilities. The presumption follows from the “peculiar opportunities for taking advantage” of a testator that a confidential relationship affords.³¹⁶ Once again, this intuition finds support in the psychological literature.³¹⁷ Yet, it only serves to render likely a third party’s opportunity to exercise undue influence, justifying a more limited presumption than current law creates. This likelihood fails to render probable the actual exertion of undue influence unless empirical evidence shows that a majority of those who have the opportunity actually seize it.³¹⁸

On the contrary, arguably, a confidential relationship lessens that probability. The closer a testator’s connection to another person, the more likely it becomes that he or she would want to benefit that person in any event—that any influence exercised by that person was superfluous.³¹⁹ This observation points to a more

315. See 2 MCCORMICK, *supra* note 47, § 343, at 681–82.

316. *Forbis v. Neal*, 624 S.E.2d 387, 391 (N.C. Ct. App. 2006) (Steelman, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting *Smith v. Moore*, 55 S.E. 275, 281 (N.C. 1906)); see also *Alford v. Moore*, 77 S.E. 343, 344 (N.C. 1913) (same).

317. See *supra* note 308; see also *supra* notes 258–263 and accompanying text (addressing fraud, by analogy).

318. See *Clinger v. Clinger*, 872 N.W.2d 37, 50 (Neb. 2015) (rejecting a complete presumption of undue influence, but adding that “a court must . . . consider whether . . . a person inclined to exert improper control over the testator had the opportunity to do so. It was in that context that we referred to a presumption of undue influence”). *But cf. In re Barney’s Will*, 40 A. 1027, 1033 (Vt. 1898) (shifting the burden of proof for “all relations of trust and confidence in which the *temptation* and opportunity for abuse would be too great” (emphasis added)).

319. As one court observed over a century ago, rejecting a presumption of undue influence, “the very considerations which lead to suspicion . . . —

fundamental ambiguity embedded within the doctrine of undue influence: *people can influence us because we care about them*. If we did not, they could not. Yet, undue influence represents a causal rule. We can avoid this ambiguity by confining suits for undue influence to those predicated on allegations of coercive persuasion, where the process of achieving mastery over a subject does not depend on emotional ties.

V. Dynamics

A final dimension of the problem at hand stems from the variability of mental states. Like all else, minds can change. This dynamism leads us into some nooks and crannies of inheritance law that commentators seldom explore.

All else being equal, a testator's deliberative state prior to or after making a will should not affect its validity. His or her deliberations at the time when the testator formalizes the will determine the judiciousness of the estate plan. Current law acknowledges that a testator's state of mind "at the precise moment" of execution governs a will's validity.³²⁰ Still, evidence of deliberation at surrounding times bears circumstantially on his or her thinking at the moment of execution.³²¹ Such evidence is admissible on the theory that mental states tend to linger, at

friendship, trust, and confidence . . . may, and generally do, justly . . . give direction to testamentary dispositions." *Bancroft v. Otis*, 8 So. 286, 289 (Ala. 1890). A more recent court pointed out the paradox even under neutral rules of evidence:

The law does not and should not presume a spouse to be guilty of undue influence simply . . . because the spouse has been able throughout the marriage to have considerable influence on her spouse. If this were the case, the closer the spouse becomes to his or her mate, the more it could be said that the spouse is excessively, improperly, and illegally influencing the testator.

Tynan v. Weck (*In re Estate of Glogovsek*), 618 N.E.2d 1231, 1238 (Ill. App. Ct. 1993).

320. *Stormon v. Weiss*, 65 N.W.2d 475, 508 (N.D. 1954).

321. *See id.* ("[E]vidence of his previous or subsequent conduct is admissible only so far as it may throw light on his mental condition at the precise moment that the will was signed.").

least for a while.³²² But if evidence indicates that a testator's deliberative state when a will was executed differed from that of other times, then evidence from the moment of execution is conclusive.³²³ This principle relies on the unspoken—but reasonable—assumption that whatever he or she was thinking when formulating an estate plan, the testator will review it before formalizing it.

This rule is most fully developed within the doctrine of testamentary capacity. Even if evidence shows that a testator lacked capacity at times close to when the will was executed, beneficiaries can seek to prove that a testator enjoyed a “lucid interval” when execution occurred.³²⁴ But the same issue could arise with regard to other protean mental states. People may vacillate in their beliefs, unsure whether to accept a fact as true or false.³²⁵ The law of mistake should recognize, by analogy, the possibility of *accurate* intervals. Because insane delusions and fraud both comprise remediable mistakes, an express exception for accurate intervals ought to apply to both doctrines. Similarly, a testator who has fallen under the spell of another mind might command an *independent* interval at the moment of execution.

As compared to lucid intervals, the law of accurate and independent intervals emerges from just a trickle of holdings and dicta. The cases support both doctrines as defenses to contests

322. See, e.g., *Mooney v. Mooney (In re Estate of Mooney)*, 453 N.E.2d 1158, 1163 (Ill. App. Ct. 1983) (“[W]here the evidence of past occurrences is sufficiently connected to establish a pattern, continuous over time, it becomes relevant to the execution of the will.”); *Estate of Brown v. Brown*, 722 S.W.2d 345, 347 (Mo. Ct. App. 1987); see also *In re Shell’s Estate*, 63 P. 413, 414 (Colo. 1900) (excluding evidence “entirely too remote” from the time of execution); 3 PAGE, *supra* note 26, § 29.58, at 636–37.

323. See, e.g., *Smigielski v. Glanty (In re Bednarz Tr.)*, No. 283699, 2009 WL 1693482, at *1–2 (Mich. Ct. App. June 16, 2009) (crediting testimony of a testator’s state of mind “at the time of the signing” despite evidence of his “varying lucidity”).

324. See 1 PAGE, *supra* note 26, § 12.36. For an early observation, see SWINBURNE, *supra* note 59, pt.2, § 4, at *82. Vice versa, “temporary” incapacity due to drunkenness, use of drugs, etc., invalidates a will. See 1 PAGE, *supra* note 26, §§ 12.39–41; see also *Pierce v. Pierce*, 38 Mich. 412, 417 (1878) (offering qualifications); SWINBURNE, *supra* note 59, pt.2, § 6 (early discussion).

325. See sources cited *supra* note 215.

alleging insane delusion, fraud, or undue influence.³²⁶ The Restatement, though, mentions only lucid intervals, failing to address the possibility of accurate or independent ones.³²⁷

At the same time, courts have often included among the defining characteristics of one state-of-mind rule a dynamic element. To comprise an insane delusion, a belief must be “persistent.”³²⁸ For other rules, a state of mind remains legally significant even when it is transient.³²⁹ The case law fails to justify this peculiarity; presumably, courts view demonstration of the persistence of a delusion as serving to reinforce proof of irrationality and impact.³³⁰ Yet, the same requirement could buttress evidence of other states of mind. If evidence of undue influence was not prolonged, did it truly exist? And so on. Still, persistence is not an invariable quality of any relevant state of mind, including delusions.³³¹ Would it not make greater sense to

326. Insane delusion: *see* *Gholson v. Peters*, 176 So. 605, 606 (Miss. 1937) (“[S]ince a person afflicted with general insanity may . . . make a valid will when in a lucid period, the testatrix here, . . . [despite] her monomania, could do likewise in a lucid interval.”); *Zielinski v. Moczulski (In re Estate of Zielinski)*, 623 N.Y.S.2d 653, 656 (App. Div. 1995) (dicta); *Mondale v. Edgers (In re O’Neil’s Estate)*, 212 P.2d 823, 828 (Wash. 1950) (dicta). Fraud: *see In re Will of Donnelly*, 26 N.W. 23, 24 (Iowa 1885) (observing that the testator “had full knowledge of all the facts” at the time the will was executed). Undue influence: *see Boland v. Aycock*, 12 S.E.2d 319, 321, 323 (Ga. 1940) (citing earlier cases); *Ketchum v. Stearns*, 76 Mo. 396, 397 (Mo. 1882).

327. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1 cmt. m & illus. 5–7 (AM. LAW INST. 2003) (observing the doctrine of lucid intervals for testamentary capacity). Sections applicable to insane delusion, fraud, undue influence, and mistake are silent on the topic. *Id.* §§ 8.1 cmt. s, 8.3, 12.1.

328. *See Zelner v. Krueger (In re Estate of Evans)*, 265 N.W.2d 529, 536 (Wis. 1978) (denying an allegation of insane delusion for want of its persistence); *see also, e.g., Presho v. Presho (In re Presho’s Estate)*, 238 P. 944, 948 (Cal. 1925) (holding that the delusion was not irrational because it was not permanent”); *Walker v. Struthers*, 112 N.E. 961, 966 (Ill. 1916) (same); *In re Estate of Karabatian v. Hnot*, 170 N.W.2d 166, 168 (Mich. Ct. App. 1969) (quoting earlier case law); *Mondale*, 212 P.2d at 829 (concluding that a delusion was not “continued”).

329. *See* 1 PAGE, *supra* note 26, § 12.36.

330. *See Mondale*, 212 P.2d at 829 (“There is no evidence . . . that the . . . poisoning idea . . . continued in [the testator’s] mind to such an extent as to . . . guide . . . his attitude towards his daughter.”).

331. *See supra* notes 215–217 and accompanying text.

transform persistence into a principle of evidence, deeming it probative but not vital, and then apply that principle to all state-of-mind rules?

Matters grow more complicated when we add another variable to the mix—the possibility of evolving volitional intent with regard to a will. Suppose, for example, that a testator intends a document only as a sham will when it is executed. Later, the testator changes his or her mind, avers approval of the document, and treats it as a valid will. Can the will take effect retroactively, by virtue of the testator’s post hoc expression of testamentary intent?³³²

This question raises the neglected problem of *ratification*. Structurally, any doctrine allowing ratification of an otherwise invalid will extends the concept of a lucid interval. Wills executed during a lucid interval ratify estate plans that testators may have formulated when they lacked the required states of mind. A doctrine of ratification would allow testators to validate tainted estate plans after those plans were formalized.

Although not a new concept, the rules of ratification have barely begun to crystalize.³³³ Two courts have held that if a testator predicates an estate plan on a mistaken belief that a child has died and subsequently learns otherwise, his or her failure to amend the estate plan within a reasonable time implicitly ratifies the estate plan.³³⁴ Cases have produced

332. See *infra* note 343 and accompanying text.

333. The early treatise writer Henry Swinburne may have given birth to the notion. See SWINBURNE, *supra* note 59, pt. 2, § 2, at *75 (“[I]f after [reaching the age of majority testators] expressly approve the Testament made in their Minority, the same . . . is made strong and effectual.”). And again with regard to duress: see *id.* pt. 7, § 2, at *476 (“If the Testator afterward, when there is no Cause of Fear, do ratify and confirm the Testament, I suppose the Testament to be good in law.”). A better-developed doctrine of ratification exists within contract law, see *infra* note 353, and courts have noted the analogy. See *State v. Lancaster*, 105 S.W. 858, 861 (Tenn. 1907) (rejecting the analogy).

334. See *Pennington v. Perry*, 118 S.E. 710, 711 (Ga. 1923) (requiring a statement of this rule as part of a jury charge); *In re Will of Araneo*, 511 A.2d 1269, 1272 (N.J. Super. Ct. Law Div. 1985) (validating an estate plan on this basis); cf. UNIF. PROBATE CODE § 2-302(c) (amended 2010), 8 pt. 1 U.L.A. 194 (2013) (referring only to a mistaken belief “at the time of execution” that a child is dead); *id.* § 2-805, 8 pt. 1 U.L.A. 335 (making no reference to ratification within the general doctrine for reformation of wills induced by mistakes of fact).

conflicting authority as concerns other state of mind rules—wills executed during incapacity when the testator subsequently recovers,³³⁵ wills affected by fraud when the testator subsequently learns the truth,³³⁶ wills affected by undue influence that is subsequently removed.³³⁷ Nor have courts even laid out exactly what a testator must do in order to ratify a will if and when courts allow it. Some courts give effect to wills following periods of inaction;³³⁸ others rely on declarations;³³⁹ still others refer to either of these methods of ratification;³⁴⁰ and some fail to specify a method.³⁴¹

This problem could reappear in connection with volitional states of mind, concerning intent to execute or revoke a will. Suppose a will is destroyed by accident, without intent to revoke it. Suppose further that when a testator learns of the accident he or she either expresses contentment with its destruction or takes

335. Allowing ratification: *see* *Pierce v. Pierce*, 38 Mich. 412, 418 (1878):

If a person who is capable of knowing what he is about has a will in his possession that he is satisfied with and does not choose to cancel or destroy, the inference that it was not procured to be executed against his will or without his intelligent consent seems to arise . . . naturally.

In re Campbell's Will, 136 N.Y.S. 1086, 1100 (Sur. Ct. 1912) (dicta); *see also* *Brown v. Riggan*, 94 Ill. 560, 568 (1880) (hinting at the doctrine). *Contra Lancaster*, 105 S.W. at 861.

336. Allowing ratification: *see* *Hegarty v. Hegarty*, 52 F. Supp. 296, 301 (D. Mass. 1943); *Irish v. Smith*, 8 Serg. & Rawle 573, 580 (Pa. 1822); *Earp v. Edgington*, 64 S.W. 40, 43 (Tenn. 1901); *see also* *Graham v. Burch*, 55 N.W. 64, 65 (Minn.1893) (concerning fraud in the execution). *Contra* *Haines v. Hayden*, 54 N.W. 911, 916 (Mich. 1893); *Ingraham v. Struve* (*In re Rosenberg's Estate*), 246 P.2d 858, 864 (Or. 1952).

337. Allowing ratification: *see* *Lyons v. Campbell*, 7 So. 250, 253 (Ala. 1890); *In re Reynolds' Estate*, 27 A.2d 226, 236 (N.J. Prerog. Ct. 1942) (citing additional cases); *Smith v. Whetstone*, 39 S.E.2d 127, 133 (S.C. 1946) (same); *Lyman v. Am. Nat'l Bank & Tr. Co.*, 346 S.W.2d 289, 294 (Tenn. Ct. App. 1960) (same). *Contra* *Lamb v. Girtman*, 26 Ga. 625, 631 (1859); *Chaddick v. Haley*, 17 S.W. 233, 235 (Tex. 1891).

338. *See, e.g., Reynolds' Estate*, 27 A.2d at 236 ("Ratification may result if a testator allows such a will to remain uncanceled for any considerable length of time after its execution . . .").

339. *See, e.g., Davis v. Davis*, 52 S.E.2d 192, 198–99 (S.C. 1949) (rejecting ratification by mere passage of time).

340. *See, e.g., In re Van Ness' Will*, 139 N.Y.S. 485, 519 (Sur. Ct. 1912).

341. *See, e.g., Earp*, 64 S.W. at 43.

no steps to execute a new will in due course. Can a testator thereby retroactively revoke the will by act, by intending, explicitly or implicitly, to do so? Again, courts have deadlocked on the question.³⁴² The same issue could arise with regard to a holographic draft of a will, or an executed will intended as a sham, that a testator eventually decided to preserve as a will; as yet, neither scenario has yielded any published cases.³⁴³

The Restatement addresses only a sliver of the problem of ratification. Whereas a will tainted by incapacity or minority is “void,” the Restatement distinguished inter vivos gifts so tainted as “voidable.”³⁴⁴ Once a donor regains capacity or reaches the age of majority, “failure to disaffirm within a reasonable time . . . constitutes a ratification of the gift.”³⁴⁵ When it comes to fraud and undue influence, however, the Restatement switches terminology, referring to the will as “invalid” and offering no guidance about how to treat it after the fraud is exposed or the

342. Allowing ratification: see *Steele v. Price*, 44 Ky. 58, 63 (1844); *Cutler v. Cutler*, 40 S.E. 689, 689–90 (N.C. 1902); *Appeal of Deaves*, 21 A. 395, 395–96 (Pa. 1891); *Davis*, 52 S.E.2d at 198–99; *Parsons v. Balson*, 109 N.W. 136, 138–39 (Wis. 1906); see also *Klenert v. McElroy (In re Murphy’s Estate)*, 259 N.W. 430, 432 (Wis. 1935) (holding the testator too mentally weak and the interval of time too brief to imply ratification). For advocacy of ratification within dissenting opinions, see *In re Will of Fox*, 174 N.E.2d 499, 507 (N.Y. 1961) (Desmond, C.J., dissenting); *In re Estate of McCaffrey*, 309 A.2d 539, 543–44 (Pa. 1973) (Jones, C.J., dissenting). *Contra Will of Fox*, 174 N.E.2d at 505 (majority opinion); *In re Estate of Rollini*, 157 N.Y.S.2d 625, 627 (Sur. Ct. 1956); *Estate of McCaffrey*, 309 A.2d at 542 (majority opinion); *In re Booth* [1926] Prob. Div. 118, 132–33; *Gill v. Gill*, [1909] Prob. Div. 157, 161–62. Raising but not resolving the issue: see *In re Will of Roman*, 194 A.2d 40, 42 (N.J. Hudson County Ct. 1963); *Mills v. Millward*, (1889) 15 Prob. Div. 20, 21.

343. *Cf. Small v. Small*, 4 Me. 220, 221–22 (1826) (considering a testator’s subsequent treatment of a will as evidence of whether he had intended it as a sham when he executed it). If a testator initially believes a will is ineffective, subsequent inaction without an affirmative declaration of ratification appears ambiguous.

344. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1 cmts. c, g, & 8.2 (a)–(b) & cmt. d (AM. LAW INST. 2003); *cf.* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.4(1)(a) & cmt. b (AM. LAW INST. 1992) (permitting ratification by inaction of gifts and wills made during a testator’s minority); *id.* § 18.1 illus. 5 (asserting that the issue depends on “local law”). No cases appear on point.

345. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1 cmt. g, 8.2(b) & cmt. d (AM. LAW INST. 2003).

influence disappears.³⁴⁶ The Restatement's novel provision on mistake in the inducement changes terminology once more, calling for "reformation" rather than invalidation and ignoring the issue of a testator's subsequent enlightenment.³⁴⁷ Non-contemporaneous intent regarding a destroyed will also goes unmentioned in the Restatement.³⁴⁸

Half a century ago, Professor James Henderson became the sole commentator to reflect on the doctrine of ratification, and then only in the context of rules of remediable mistake. Henderson asserted that ratification

may be brought within the framework of [mistake] under the general heading of causation. . . . Whenever it can be shown that, having been appraised of the true facts . . . the testator nevertheless chose to leave things as they were, the court is all but precluded from finding the requirement of causation to have been satisfied.³⁴⁹

In other words, Henderson conceived of ratification as a rule of evidence. If a testator made no effort to revise or undo a will when he or she learned the truth, then that inaction proves (or suggests) that the mistake had had no impact on the estate plan in the first place.³⁵⁰ Several of the cases outside the law of mistake expressly adopt this position.³⁵¹

346. *Id.* § 8.3(a).

347. *Id.* § 12.1 & cmt. a.

348. *Id.* § 4.1.

349. Henderson, *Part I, supra* note 148, at 407.

350. "[T]he best evidence of 'what the testator would have done' is 'what in fact he did do' when no longer entertaining the erroneous belief." *Id.* As an alternative theory, Henderson posited that in the "unusual case" where ratification stemmed from a change of intent, courts could take subsequent intent into consideration when assessing what a testator would have done but for a mistake. *See id.* at 407–08.

351. *See* Babcock v. Johnson, 19 A.2d 416, 416 (Conn. 1941) ("Approval of the will at a time and place where he was not subject to [undue] influences would certainly tend to rebut a claim that it resulted from them."); Teschendorf v. Strangeway, 27 N.W.2d 429, 432 (Minn. 1947); *In re* Van Ness' Will, 139 N.Y.S. 485, 519 (Sur. Ct. 1912); Lauterjung v. Ford (*In re* Estate of Ford), 120 N.W.2d 647, 654 (Wis. 1963). Some courts are vague about whether they follow a rule of law or evidence. *See, e.g.,* Branter v. Papish (*In re* Brantner's Estate), 169 P.2d 326, 328 (Colo. 1946); Peery v. Peery, 29 S.W. 1, 4 (Tenn. 1895).

On this theory, ratification could apply to any causal state-of-mind rule—mistake, insane delusion, fraud, or undue influence. It could not apply to a *per se* rule—sound-mind and age of majority thresholds, or volitional requirements for execution and revocation of wills—where the causal impact of the state of mind on the estate plan is irrelevant.

We can, however, posit an alternative justification for a doctrine of ratification applicable to both *per se* and causal rules. Testators likely assume that any will they have executed is valid. By the same token, a testator might naturally suppose that a will destroyed by accident is no longer operative. We can conceptualize ratification as a curative doctrine for mistakes of law, giving effect to the estate plans testators believe they have.³⁵² Lawmakers would thereby uphold estate plans that unblemished minds assessed as desirable.

This theory relies, however, on the assumption that a testator was truly mistaken about the validity of his or her estate plan. Courts could admit evidence showing that a testator correctly assessed the status of his or her will, in which case ratification should not apply no matter how long testators sit on their hands. If, for example, a testator became aware that his will executed while a minor was ineffective, then his or her failure to make a new will after reaching the age of majority would not imply intent to ratify the ineffective will.

This theory also assumes that a sound or mature mind has time and opportunity to react to events. Whether lawmakers conceive of ratification as a rule of evidence or as a curative doctrine, parties should have to prove that the testator sustained the requisite state of mind without interruption for a long enough interval of inaction to account for the usual lag times of estate planning—either a “reasonable” period, or a fixed period that lawmakers consider reasonable. In some instances, we can assume that the rehabilitation of a mind is irreversible. Once a testator reaches the age of majority, or learns that a child mistakenly believed dead is alive, the clock should begin to tick and never be rewound. In other instances, if a testator teeters

352. Doctrines curing errors of formalization of wills serve the same end. See Hirsch, *supra* note 6, at 1067.

between rationality and irrationality or wavers in his or her beliefs, parties should have a tougher row to hoe, needing to prove rationality or accuracy of belief for a continuous span sufficient to overcome the probability of procrastination.

In lieu of the passage of time, the significance of a declaration is less clear. Within contract law, where a parallel doctrine of ratification exists, a contracting party must affirm a voidable agreement to the other contracting party, thereby imbuing the declaration with ritual meaning.³⁵³ By comparison, in the absence of formal reexecution of a will, a testator's declaration of intent to ratify a will would less clearly manifest finality. No one other than the testator has an existing interest in property governed by the document—hence the declaration derives no significance from the status of the party to whom it is directed. If incorporated into a doctrine of ratification for wills, declarations ought to undergo appraisals of solemnity by courts.

Whatever lawmakers require of testators in order to ratify a will (or its revocation), ratification should take shape as a discrete doctrine, replacing the current patchwork. This choice transcends mere taxonomy. When courts address ratification as an offshoot of individual state-of-mind rules, each line of cases evolves independently. Viewed as a curative doctrine, though, the policy of ratification applies equally in all corners. By uniting ratification under a single doctrinal banner, lawmakers would promote its consistent development by courts.

VI. Postmortem

So ends our foray into the world of state-of-mind rules. As we have seen, the best-known reasons for creating those rules—to identify culpability or opportunity for specific deterrence—arise only tangentially in the inheritance field. Rather, the choice of efficient means of decision emerged as our central theme. Thoughts cost more than a proverbial penny, but so too do other items of evidence. Lawmakers can compare recourse to an

353. See RESTATEMENT (SECOND) OF CONTRACTS §§ 7–8, 380 (AM. LAW INST. 1981).

external standard with a related state-of-mind rule and decide which provides greater value (i.e., accuracy) for money. At least some of the time, a state-of-mind rule is the better buy, substituting for costlier evidentiary inquiries.

When might we expect a state-of-mind rule to prove comparatively efficient? The question could hinge on the scope of the factual inquiry required to carry out objective policy. Where that inquiry is narrow, an external standard becomes more reliable and cheaper to apply. Hence, we find state-of-mind rules largely absent from tort law, where negligence boils down to a confined factual investigation of a single event.³⁵⁴ Under these circumstances, lawmakers would achieve little efficiency by inquiring instead into knowing conduct. But other, potentially expansive investigations into judiciousness or fairness invite simplification.³⁵⁵

Likewise, where facts pertinent to policy are peculiarly within a party's ken, the relative cost of objective inquiry rises. This variable helps to explain an asymmetry within trust law between the relevance of state of mind as concerns trusts for purposes and conditional trusts. If a settlor creates a trust to accomplish a purpose—to support some kind of research, for example—courts determine whether or not the trust qualifies as charitable by its objective characteristics, assessing whether the research will benefit society.³⁵⁶ It makes no difference whether the settlor's "dominant purpose"³⁵⁷ was public-spiritedness. But when we turn to trusts that terminate upon marriage, or that pay benefits upon divorce, most of the decisions hinge on exactly that subjective characteristic. If the settlor's "dominant motive"³⁵⁸ was to provide support until marriage, or after divorce, then the

354. See DOBBS ET AL., *supra* note 233, § 4.4, at 58 (observing that "negligence does not require a state of mind").

355. State-of-mind rules in contract law may stand in as surrogates for objective fairness, even though standards requiring fairness coexist with those rules. See RESTATEMENT (SECOND) OF CONTRACT § 208 cmt. a (1981) (relating state-of-mind rules with unconscionability doctrine).

356. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (AM. LAW INST. 2003).

357. *Shenandoah Valley Nat'l Bank v. Taylor*, 63 S.E.2d 786, 791 (Va. 1951).

358. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.1(2) (AM. LAW INST. 1983).

condition is valid; if the settlor sought to discourage marriage, or to encourage divorce, the condition is void.³⁵⁹

On first sight, any inquiry into a settlor's motivation for creating a trust appears beside the point. When we judge the public policy of a trust, only its impact on society, or on beneficiaries, should matter. If a trust causes fewer persons to marry, or more to divorce, and lawmakers perceive those sequelae as deleterious, then the motives that actuated a settlor are unimportant. Yet, on further reflection, we can spy a justification for the inconsistency, albeit one that goes unmentioned in the case law. Settlers have no unique insight into the consequences of trusts for social purposes, and subjective motives afford no useful intelligence about their consequences. But a settlor knows his or her family members better than any outsider. His or her motive for creating a condition within a trust reveals more about its propensity to elicit an undesirable response than a fact finder could readily discern. Here again, state of mind can serve as a surrogate for a costly, error-prone inquiry into the behavioral ramifications of a trust.³⁶⁰

Or consider the doctrine of adverse possession in property law. Whereas most jurisdictions apply the doctrine objectively, some of them consider the adverse possessor's state of mind, requiring either good-faith ignorance or, in a few states, bad-faith encroachment.³⁶¹ A possible justification for the last approach, despite its seeming perversity, is that a knowing encroachment offers a "useful mechanism"—an efficient surrogate, we might say—"for identifying those instances in which the record owner's valuation is much lower than that of an encroacher," under conditions of market failure.³⁶² Only then might we expect a

359. See *id.* §§ 6.1(2) & cmt. e, 6.2 cmts. g–h, 6.3 cmt. f & illus. 7, 7.1 & cmt. d, 7.2 & cmts. d–e, 8.2 cmt. c, 8.3 cmt. d; see also RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (AM. LAW INST. 2003) (suggesting that both objective and subjective considerations are relevant). For cases, see Hirsch, *supra* note 9, at 2204 n.91.

360. I previously took a different position, see Hirsch, *supra* note 9, at 2204–05, which I have reconsidered herein.

361. See JESSE DUKEMINIER ET AL., PROPERTY 159–62 (8th ed. 2014).

362. See Lee Anne Fennell, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession*, 100 NW. L. REV. 1037, 1075 (2006) (developing this argument).

potential encroacher to risk the consequences of encroachment. Here again, interpersonal comparisons of value resist objective inquiry when market signals are unavailable.

At the same time, in those situations where states of mind are generalizable, lawmakers may find opportunity to substitute a narrow objective test for a broader one. We earlier remarked this phenomenon in the inheritance realm, where the rule against perpetuities and the minimum age for testation operate in lieu of a judiciousness standard, avoiding recourse to a state-of-mind rule.³⁶³

And in those areas of law where state-of-mind rules serve independent purposes of policy, such as specific deterrence or moral condemnation, we can sometimes reverse the formula, using an external standard as an efficient surrogate for state-of-mind rules, where the objective test can remain simple. In bankruptcy law, where lawmakers seek to deter creditors from destroying the going-concern value of troubled firms by satisfying their claims against tangible assets, mindful behavior becomes relevant but is difficult to ascertain. Lawmakers circumvent this evidentiary task by associating guilt with temporal coincidence—if a creditor sought to satisfy its debt within 90 days of a bankruptcy petition, the trustee in bankruptcy can avoid the transfer.³⁶⁴ Here, the coincidence suggests knowing anticipation of the petition. By choosing a simple external standard, lawmakers “handle[] the problem in an administratively easy fashion.”³⁶⁵ Even within criminal law, so deeply absorbed with specific deterrence and desert, lawmakers sometimes dispense with *mens rea* and establish strict liability crimes. These avail society “[w]hen according to common experience, a certain fact generally is accompanied by knowledge, . . . [but] actual knowledge . . . [is] difficult to prove.”³⁶⁶

363. See *supra* notes 90–96 and accompanying text.

364. 11 U.S.C.A. § 547 (2012).

365. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 130 (1986).

366. *Commonwealth v. Smith*, 44 N.E. 503, 504 (Mass. 1896) (Holmes, J.). An advocate of external standards, see *supra* notes 1–2 and accompanying text, Holmes went on to propose that even in the absence of a likelihood of *mens rea*, “the law may stop at the preliminary fact, and, in the pursuit of its policy, may

Viewed in context, then, state-of-mind rules that serve as surrogates for objective ones exemplify a broader phenomenon that needs more attention: doctrinal surrogacy simpliciter. Lawmakers look for opportunities to streamline their inquiries by switching them in any which way. As well they should! Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.