THE DILEMMA OF AN AGING POPULATION: EVALUATING THE TREATMENT OF INSANE TESTATORS IN THE MODERN PROBATE PROCESS

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INTRODUCTION

The Uniform Probate Code (UPC), published by the Uniform Law Commission, was designed to update and simplify most aspects of probate law.[1] However, the UPC, which has been adopted by several states to modify their probate structures, fails to fully anticipate the range of trusts and estates hurdles that will arrive with the aging U.S. population.[2] According to 2014 U.S. Census Bureau estimates, the number of people 65 and older in the U.S. will rise from 46.2 million to 98.2 million in the years between 2014 and 2060.[3] This demographic will see significant proportionate growth, with

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1. UNIF. L. COMMISSION, Probate Code (2010), https://www.uniformlaws.org/committees/community-home?communitykey=a539920d-c477-44b8-84fe-b0d7b1a4cca8&tab=groupdetails (last visited Mar. 25, 2021).

2. *Id.*

3. *Facts for Features: Older Americans Months: May 2016*, U.S. CENSUS BUREAU (Aug. 3, 2018),

representation in the general population growing from 14.5% in 2014 to 25.0% in 2060.[4] The growing senior population presents myriad challenges to the federal and state governments, probate and family courts, and the trusts and estates profession.[5]

Two significant rising challenges, unrelated but equally pressing, are the rising prevalence of mental illness among testators and its impact on probate proceedings, and the tax treatment of conditional charitable donations by estates in the face of an aging baby boomer population.[6] One difficulty faced by researchers studying probate and tax issues is the inaccessibility of historical narratives that provide relevant case studies for analyzing judicial methodologies and executive policies. The most useful testator cases reveal major end-of-life and will execution issues facing estate planning professionals.[7] It is rare that a single historical probate narrative appropriately exemplifies an array of pressing, future legal issues. With this in mind, Scofield Thayer's ("Thayer") biography tragically captures the essential elements of these two key issues—mental illness and charitable deductions.[8] Thayer's estate history, long buried in the probate records, provides a unique case study with which to shed light on these critical estate planning topics.[9] Thayer is known in New York art circles for his uniquely expansive modern art collection willed to the Metropolitan Museum of Art ("the Met") and the Harvard Fogg Art Museum ("the Fogg") in 1982 and exhibited for the first time in 2018.[10] Thayer's incredible and heartbreaking biography as a modern art collector and a patient of Dr. Sigmund Freud provides a rarely detailed look into legal issues now facing contemporary estate planning professionals.[11]

The analysis below evaluates two critical estate planning topics through the lens of Thayer's story.[12] First, the analysis explores the current state of judicial treatment of insane testators in probate and the potential for admitting extrinsic evidence in will contests to improve the protection of testators and

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https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff08.html [https://perma.cc/U7YH-SWH2] [hereinafter *Facts for Features*].

4. *Id.*; *2014 National Population Projections Tables, Table 1*, U.S. CENSUS BUREAU (May 9, 2017), https://www.census.gov/data/tables/2014/demo/popproj/2014-summary-tables.html [https://perma.cc/BN8Y-EUN3].

5. *See Facts for Features*, *supra* note 3.

6. *See id.*; *The State of Mental Health in America*, MENTAL HEALTH AM. (2021), https://mhanational.org/issues/state-mental-health-america [https://perma.cc/UJ9K-FJUL] (last visited Feb. 8, 2021); *see, e.g.*, JAMES DEMPSEY, THE TORTURED LIFE OF SCOFIELD THAYER (2014) (discusses American poet and publisher Scofield Thayer's mental illness in conjunction with estate planning matters).

7. *See* DEMPSEY, *supra* note 6; *see infra* Part II.

8. *See* DEMPSEY, *supra* note 6.

9. *See id*. at 186.

10. *See id.* at 185–86; Exhibition Overview, *Obsession: Nudes by Klimt, Schiele, and Picasso from the Scofield Thayer Collection*, THE MET (The Metropolitan Museum of Art, 2018), https://www.metmuseum.org/exhibitions/listings/2018/obsession [https://perma.cc/M2XM-756Q] (last visited Feb. 8, 2021) [hereinafter Exhibition Overview].

11. *See* DEMPSEY, *supra* note 6.

12. *See infra* Parts V, VIII.

beneficiaries.[13] Second, the analysis transitions to a discussion of the deductibility of conditional donations to nonprofit organizations and possible policy changes to deductibility in the case of restricted gifts.[14] Both of these topics are central to a clearer understanding of the trajectory of estate planning in the next half century in the face of a future landscape that includes rising levels of mental illness and the enormous wealth transfer.[15]

I. THAYER'S PLACE IN THE DEBATE

Thayer's story provides an optimal case for analyzing the effect of rules barring extrinsic evidence.[16] By 1925, the year in which Thayer wrote his final will, he had been seeing psychotherapists for over 6 years.[17] Two neurologists, L. Pierce Clark and Sigmund Freud, had independently confirmed his "neurosis" and developed consistent and necessary treatment plans.[18] It is unknown how long Thayer had experienced symptoms of mental illness prior to being declared legally insane in 1937.[19] By the late 1910's, Thayer was already displaying signs of being a hypochondriac, visiting multiple doctors who performed a barrage of medical tests.[20] For example, in 1919, he had six separate urine tests performed by doctors in New York City and Boston.[21] Thayer's longest medical engagement prior to Freud was a nine month period of therapy with American psychoanalyst L. Pierce Clark, to whom he paid $4,700 in July 1920.[22] However, feeling like he had not made progress, he made a personal commitment to working with Freud, the leading psychoanalyst of the period.[23] Thayer moved to Europe in 1921 to seek more advanced psychiatric treatment.[24] By 1922, he had made contact with Freud in Vienna and had begun psychotherapy sessions.[25] Referring to Freud as "The Great Master" in his letters, it is clear that Thayer had great respect for Freud.[26] However, in a January 8, 1922 letter to Alyse Gregory, his best friend, Thayer disputed Freud's medical diagnosis of Thayer's condition as

13. *See infra* Parts II–IV.

14. *See infra* Parts V–VIII.

15. *The Cerulli Report: U.S. High-Net-Worth and Ultra-High-Net-Worth Market 2018*, CERULLI ASSOCS. (2018), https://info.cerulli.com/rs/960-BBE-213/images/HNW-2018-PreRelease-Factsheet.pdf [https://perma.cc/5USK-LFWN].

16. *See* DEMPSEY, *supra* note 6.

17. *Id.* at 60, 185.

18. *Id.* at 79, 102.

19. *Id.* at 48.

20. *Id.*

21. *Id.* at 79.

22. *See id.* at 20 (paraphrasing Scofield Thayer, Dial/Scofield Thayer Papers at the Beinecke Library 34.29.774).

23. *See Stroke of Genius: Scofield Thayer*, STROKE OF GENIUS MOVIE, https://strokeofgeniusmovie.com/scofield-thayer-2 [https://perma.cc/C9CC-WQ6C] (last visited Feb. 8, 2021).

24. *Id.*

25. *See* DEMPSEY, *supra* note 6, at 101.

26. *Id.*

"neurosis."[27] While Thayer actually admitted in the letter his inability to accept the diagnosis, he adamantly disputed the diagnosis and argued that his former physicians had never made such a severe diagnosis.[28] By the mid-1920s, it was clear to friends and relatives that Thayer was also experiencing severe paranoia and lack of sound judgment as a result of his paranoid schizophrenia.[29]

The strangely effortless process by which Thayer's will was probated and his estate distributed in 1982 raises several legal questions. Should courts consider extrinsic evidence in probate cases dealing with testators who meet legal guidelines for legal insanity?[30] Along these lines, should the Worcester Probate and Family Court have examined extrinsic evidence that might have pointed to invalidation of Thayer's will?[31]

Despite his dealing with mental illness, Thayer's will was executed flawlessly under the will formality requirements of Massachusetts.[32] Thayer died in Edgartown, MA in 1982.[33] His living will was probated in Worcester, MA, and left instructions for distribution of his business interests, personal wealth, and art collection.[34] A number of questions were raised by museum beneficiaries and distant relatives regarding conditions attached to Thayer's art distributions and monetary distributions, respectively.[35] However, the validity of Thayer's will in the first instance was never seriously questioned by the court.[36] The will was prepared by attorney Maurice Leon of the firm Evarts, Choate, Sherman & Leon, who also signed and served as a witness.[37] The will was also signed by Andrew P. Backus, an attorney from New York City.[38] Despite Thayer's rocky history of mental illness, the court only briefly

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27. *See id.* at 105.

28. *See id.* (paraphrasing Scofield Thayer, Dial/Scofield Thayer Papers at the Beinecke Library 163.38.660).

29. *See id.* at 151–52.

30. *See Will Contests*, LAW SHELF EDUCATIONAL MEDIA, https://lawshelf.com/coursewarecontentview/will-contests/ [https://perma.cc/8V7H-8MRG] (last visited Feb. 9, 2021).

31. *See id.*

32. *See* DEMPSEY, *supra* note 6, at 105 (paraphrasing Scofield Thayer, Dial/Scofield Thayer Papers at the Beinecke Library 163.38.660).

33. *See* Michael Brenson, *Major Art Collection Left to Metropolitan*, CLARION-LEDGER (Sept. 3, 1982), https://www.newspapers.com/clip/14704426/clarion-ledger/ [https://perma.cc/62ZA-25CJ]. Death Certificate of Scofield Thayer. On a humorous note, the Edgartown clerk listed Thayer's usual occupation as "Art Collector." *Id.* Interestingly, it appears from his letters (as documented by James Dempsey) that Thayer did not think of himself as a collector of art, but rather as a publisher and developer of the modern art movement in the United States. His collecting was an afterthought, a byproduct of finding post-World War I depression deals during his time in Paris and Vienna receiving psychotherapy treatments. Last Will and Testament of Scofield Thayer (June 1, 1925) (on file with the Worcester Probate and Family Court).

34. *See* DEMPSEY, *supra* note 6, at 180.

35. *See id.* at 178.

36. *Id.*

37. *Id.*

38. Fordham Law School, *Bulletin of Information 1924-1925*, LAW SCHOOL BULLETINS 1905-2000, Book 19 (1925), http://ir.lawnet.fordham.edu/bulletins/19 (download full text available) [https://perma.cc/6SDE-N7KX].

considered the question of testamentary capacity.[39] According to a legal memoranda written by Robert Whipple, an attorney involved in administration of the estate, the court viewed the question of testamentary capacity as a relatively straightforward.[40] The court looked to witness evidence to make a determination of mental capacity.[41] By the time Thayer's will was probated in 1982, the first witness, Maurice Leon, had died.[42] However, Charles P. Williamson, attorney and former legal guardian of Thayer, was able to produce an affidavit of second witness Andrew P. Backus.[43] Backus' affidavit testified to Thayer's mental competence at time of will execution.[44] The affidavit stated that, "Thayer at the time of so executing said instrument was upwards of the age of 21 years, and in [Backus'] opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will."[45] The Worcester probate court ostensibly admitted the will based solely on the Backus affidavit.[46] Apart from subsequent litigation over Thayer's art donations, the distribution of Thayer's estate proceeded without any further questions of validity.[47]

II. WORKING WITH LEGALLY INSANE TESTATORS

Before evaluating the process under which Thayer's will was examined by the court and the role extrinsic evidence can play in probate cases involving legally insane testators, it is fitting to look at the disinterested way courts have traditionally dealt with legally insane testators.

Working with mentally incompetent testators has proven particularly hazardous and challenging for probate courts.[48] In most states, courts apply the doctrine of monomania to mentally incompetent testators, effectively placing mentally incompetent testators into a class of their own.[49] The doctrine of monomania permits courts to invalidate a will based on insane delusion if the insane delusion materially affects disposition in the testator's will.[50]

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39. *See* DEMPSEY, *supra* note 6, at 180.

40. *See* Brenson, *supra* note 33.

41. Administration of the Estate of Scofield Thayer, Memorandum of Robert Whipple, Attorney at Fletcher, Tilton, and Whipple PC 2 (1994) [hereinafter Whipple].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* discussion *infra* Part V.

48. *See* Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 68 (2007).

49. *Id.*

50. Breeden v. Stone, 992 P.2d 1167, 1171 (Colo. 2000) (en banc).

Massachusetts courts have not explicitly discussed the doctrine of monomania as an insane delusion materially affecting disposition in a will. However, Massachusetts case law holds the same as the majority rule; testators may experience delusions as long as they do not materially affect disposition in the testator's will.[51] The Massachusetts standard holds that a testator must be "free from delusion" when executing the will.[52] It has become "settled law in [Massachusetts] that a person of pathologically unsound mind may possess testamentary capacity at any given time and lack it at all other times."[53] In other words, a testator may experience insane delusions at times, yet have the testamentary capacity to execute a will at others.[54] It is not the prior or subsequent mental capacity that determines mental capacity.[55] Mental capacity is determined as of the date of execution of the will, and the will may be executed during a lucid interval.[56]

For the court to invalidate a will on insane delusion, a will contestant must prove two criteria.[57] First, the will contestant must show the testator suffered from insane delusion.[58] Second, the will contestant also must show the will was a "product" of the insane delusion.[59] Will contestants must present evidence that covers both criteria.[60] The evidence must show an insane delusion at the time of the will execution and that the insane delusion had a direct influence on the will.[61]

Adding difficulty to an already problematic task, the court must distinguish between eccentricity and insane delusion.[62] For example, a court might need to decide whether a testator is (a) disinheriting his daughter because of an insane delusion that she was stealing from him, which directly impacted his will writing, or is (b) disinheriting his daughter simply because the testator does not like his daughter.[63] Hard probate decisions can become a subjective value judgment based on an unclear set of admissible evidence.[64]

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51. O'Rourke v. Hunter, 446 Mass. 814, 827 (Mass. 2006).

52. *Id.* at 826.

53. *Id.* at 830.

54. Daly v. Hussey, 275 Mass. 28, 33–34 (Mass. 1931).

55. *In re* Reardon's Will, 232 N.Y.S.2d 581, 582 (Sur. Ct. 1962).

56. Maimonides School v. Coles, 71 Mass. App. Ct. 240, 251 (Mass. 2008); Wellman v. Carter, 286 Mass. 237, 247 (Mass. 1934); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. m (AM. LAW INST. 2003) ("A person who is mentally incapacitated part of the time but who has lucid intervals during which he or she meets the standard for mental capacity . . . can, in the absence of an adjudication or statute that has contrary effect, make a valid will . . . provided such will . . . is made during a lucid interval.").

57. *In re* Estate of Aune, 478 N.W.2d 561, 564 (N.D. 1991).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See, e.g.*, *In re* Est. of Watlack, 945 P.2d 1154, 1156–58 (Wash. Ct. App. 1997) (holding that testator's second will, naming his nieces and nephews as beneficiaries (and disinheriting his own children), was the product of insane delusion).

63. *See id.*

64. *Id.*

Courts have noted that extreme or groundless prejudice or dislike of the testator's bounty, unexplained aversions for relatives, and notional disaffections and family feuds are not equivalent to insane delusion and do not justify invalidation of a will.[65] Only in exceptional instances has the court considered extreme aversion of a general nature as constituting insane delusion.[66] To assess extreme aversion situations, courts will usually look to the testator's level of fixation in his belief against all evidence to the contrary showing that the belief is mistaken.[67]

Evidence of testamentary capacity at will execution is problematic because of the lack of established standards of review for insane delusion.[68] In these cases, contests are won by showing that an insane delusion created a specific delusion of fact that materially affected the will with regard to property to be disposed of and the beneficiaries to whom the property is distributed.[69] The types of evidence that a judge will consider is less well defined.[70]

However, evidentiary standards for evaluating insane delusion and monomania is remains largely undefined and lacking standardization.[71] The Massachusetts Guide to Evidence establishes no clear standards regarding the types of evidence that may be considered by judges in evaluating testamentary capacity.[72] The Massachusetts Supreme Court has failed to establish bright-line rules for when circumstantial evidence will be admitted to determine a testator's mental state at will execution.[73] The case law seems to indicate that circumstantial evidence will be admitted to determine insane delusion, as is the case in other states.[74] In *Woodbury*, the court held that a testator's statements of facts respecting his opinion of an heir, and expert analysis of the testator's statements, was admissible evidence and

65. *See generally* Barnes v. Barnes, 66 Me. 286 (1876) (discussing the testator's bounty and relationships with relatives are insufficient to justify invalidation of a will); *In re* Hinde, 200 Cal. 710, 714 (1927) (a testator has the right to make an unreasonable, unjust, or even cruel will, and such a will may not be legally set aside on these bases alone); Brumbelow v. Hopkins, 197 Ga. 247, (1944); Higgins v. Smith, 150 S.W.2d 539 (Mo App. 1941).

66. Dew v. Clark, 3 Addams Eccl. 79 (1826) (extreme dislike of a child, without cause, can be so intense as to evidence mental illness); Johnson v. Moore, 11 Ky. (1 Litt.) 371 (1822) (where extreme hostility towards relatives was held to be so causeless as to evidence mental derangement); Pelamourges v. Clark, 9 Iowa 1 (1859) (where a testator showed unnatural opposition towards family members who showed him high levels of affection, including a brother who took care to educate and support the testator).

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

68. Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, *Massachusetts Guide to Evidence* (2018), https://www.mass.gov/files/documents/2018/02/22/massguidetoevidence.pdf [https://perma.cc/7SQ7-D5P5].

69. *Id.*

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. Hardy v. Barbour, 304 S.W.2d 21, 33 (Mo. 1957).

determinative of insane delusion.[75] Similarly, in Hammond, the court struck down a holding that a defendant's two letters showing his mental instability were indicative of insane delusion, although the court determined that the trial court properly gathered the evidence.[76] Extrinsic evidence can be used to show testator intent to use the document as their will but does not weigh into decisions on testamentary capacity.[77]

The question that remains is why the court is willing to consider circumstantial evidence in probate cases involving legally insane testators yet unwilling to admit extrinsic evidence that paints a narrative picture of the testator's life around the time of will signing.[78]

III. THE PROBATE PROCESS AND TESTAMENTARY CAPACITY

Evaluating the need for extrinsic evidence in probate cases involving legally insane testators requires analysis of the Massachusetts probate process.[79]

Massachusetts courts look primarily to will formalities in deciding to admit a will for probate.[80] Will formalities are established to assist the court in evaluating a will's authenticity despite the "best witness" problem.[81] In Massachusetts, a testator must be "an individual 18 or more years of age who is of sound mind."[82] Additionally, the testator's will should be "(1) in writing; (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (3) signed by at least 2 individuals, each of whom witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will."[83] The state also lays out guidelines for who may witness the will signing.[84] The witness must be:

> (a) An individual generally competent to be a witness . . . [and]
> (b) The signing of a will by an interested witness shall not invalidate the will or any provision of it except that a devise to a witness or a spouse of such witness shall be void unless there are 2 other subscribing witnesses to the will who are not similarly benefited thereunder or the interested

75. Woodbury v. Obear, 73 Mass. 467, 470–71 (1856).
76. Hammond v. Hammond, 247 Mass. 239, 240–41 (1924).
77. MASS. GEN. LAWS. ANN. ch. 190B, § 2-502(3)(b) (West 2012)
78. *See infra* Part IV.
79. *See infra* Part IV.
80. *See* Mary Randolph, *How to Determine If a Will Is Valid*, ALL L. (Feb. 9, 2021), https://www.alllaw.com/articles/nolo/wills-trusts/how-determine-will-valid.html [https://perma.cc/URN7-96SM].
81. *See id.*
82. MASS. GEN. LAWS ANN. ch. 190B, § 2-501 (West 2012).
83. *Id.* § 2-502(1)–(3).
84. *See id.* § 2-505(a), (b).

> witness establishes that the bequest was not inserted, and the will was not signed, as a result of fraud or undue influence by the witness.[85]

Massachusetts law utilizes an "of sound mind" standard in evaluating the testamentary capacity requirement of probate.[86] This test has its historical basis in the statutory treatment of testamentary capacity in the Commonwealth of Massachusetts.[87] An extensive body of Massachusetts case law defining testamentary capacity builds on this statutory history and the common law standards outlined in *Banks v. Goodfellow*.[88]

It is important to note that "sound mind" is the statutory description of testamentary capacity.[89] The Massachusetts Court has defined the requirement of testamentary capacity requirement in the following way: testamentary capacity requires ability on the part of the testator to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance.[90] It requires freedom from delusion, caused by disease or weakness, which might influence his property's disposition.[91] Moreover, it requires the ability at the time of execution of the alleged will to comprehend the nature of the act of making a will.[92]

In theory, under the *Twombly* definition of testamentary capacity, the court's sole question is whether the testator had the necessary mental capacity at the time of will execution.[93] In Massachusetts, once the testator's capacity has been questioned, the burden of proof shifts to the will proponent to prove the testator's soundness of mind.[94] Beneficiaries for whom the will is advantageous will attempt to show that the testator was of sound mind at the time of execution.[95] However, the proponent is "aided by a presumption that a person signing a written instrument knows its contents."[96] The presumption has effect only until evidence of want of capacity appears.[97] The burden of proof is placed on the proponent of the will to ensure that, in the face of a

85. *Id.*
86. *See id.*
87. *See id.* ch. 62, § 1 (West 1836).
88. Banks v. Goodfellow, LR 5 QB 549 (1869) ("For a testator to be capable of making a valid will he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which be ought to give effect and the manner in which his property is to be distributed between them.").
89. McLoughlin v. Sheehan, 145 N.E. 259, 262 (Mass. 1924).
90. *See* Whitney v. Twombley, 136 Mass. 145, 146–47 (1883).
91. *See id.*
92. *Id.*; Dunham v. Holmes, 225 Mass. 69, 71 (1916); Goddard v. Dupree, 322 Mass. 247, 250 (1948).
93. Daly v. Hussey, 275 Mass. 28, 29 (1931).
94. Tarricone v. Cummings, 340 Mass. 758, 761 (1960).
95. McLoughlin v. Sheehan, 145 N.E. 259, 262 (Mass. 1924).
96. Duchesneau v. Jaskoviak, 360 Mass. 730, 733 (1972).
97. *Id.*

testator's questionable mental state, a will is "regarded with great distrust and every presumption [is] . . . in the first instance . . . made against it."[98]

Testamentary capacity requirements were established to protect testators and beneficiaries from dangers including undue influence and fraud.[99] However, neither the *Twombly* case nor subsequent case law provides an exact methodology for evaluating testamentary capacity.[100] The question of sound mind is a question of fact decided by the court on a case-by-case basis.[101] There is no centralized explanation for the methodology used by the courts in determination of testamentary capacity.[102]

IV. ALLOWING EXTRINSIC EVIDENCE TO BE ADMITTED IN PROBATE

In Thayer's case, the Executor's presentation of the Backus affidavit to the probate court in 1982 signals that there must have been a question of Thayer's mental capacity at the time of will execution.[103] However, under contemporary 1982 Massachusetts law, the only question for the court was whether Thayer was of sound mind at the time of his will execution.[104] The affidavit produced to the probate court by Williamson, one of two witnesses to Thayer's signing, was swiftly accepted as sufficient evidence of testamentary capacity.[105] There was no serious inquiry into the possibility of insane delusion or undue influence impacting Thayer's will execution, likely because there was no will contest by Thayer's beneficiaries.[106] Moreover, Thayer was not declared legally insane until 1937, likely due to his elevated socioeconomic status and careful planning by his mother.[107] Even under modern probate practices, the 1982 court's brief analysis is typical.[108] In Thayer's case, the court was barred from evaluating critical extrinsic evidence detailing biographical events that might have led the court to disallow probate of Thayer's will.[109] Additionally, there was no state record of Thayer's mental illness, as his wealth allowed for the hire of private home care by doctors and nurses.[110]

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98. Banks v. Goodfellow, L.R. 5 Q.B. 549 (1896).
99. *See* Whitney v. Twombly, 136 Mass. 145, 147 (1883).
100. *See id.* at 145–47.
101. *In re* Est. of Rosen, 23 N.E.3d 116, 121 (Mass. App. Ct. 2014) (finding the testator had the necessary testamentary capacity to execute a will and a brokerage account beneficiary designation form during lucid intervals, despite a medical record indicating periods of confusion).
102. *See id.*
103. *See* Whipple, *supra* note 41.
104. *See* O'Rourke v. Hunter, 848 N.E.2d 382, 392 (Mass. 2006).
105. *See* Whipple, *supra* note 41.
106. *See id.*
107. DEMPSEY, *supra* note 6, at 48.
108. *See* Whipple, *supra* note 41.
109. *See id.*
110. *See id.*

Today, two rules prevent courts in a majority of states, including Massachusetts, from admitting extrinsic evidence to alter a will.[111] First, the "plain meaning" or "no extrinsic evidence" rule prohibits courts in most states, including Massachusetts, from admitting extrinsic evidence in the evaluation of a testator's will.[112] The plain meaning rule "prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'"[113] *Mahoney v. Grainger* set the precedent for the court's refusal to accept extrinsic evidence in will contests.[114] In *Mahoney*, the court held that "when the instrument has been proved and allowed as a will [,] oral testimony as to the meaning and purpose of a testator in using language must be rigidly excluded."[115] The court added that "where no doubt exists as to the property bequeathed or the identity of the beneficiary [,] there is no room for extrinsic evidence; the will must stand as written."[116]

Second, the "no reformation" rule prevents courts from reforming a will to correct a mistaken provision to better reflect the testator's intent.[117] In *Sanderson v. Norcross*, the court held that "[c]ourts have no power to reform wills . . . [m]istakes of testators cannot be corrected[,] . . . [o]missions cannot be supplied[,] . . . [and] [l]anguage cannot be modified to meet unforeseen changes in conditions."[118] The court also held that "[t]he only means for ascertaining the intent of the testator are the words written and the acts done by him."[119] Mistakes not accompanied by ambiguity cannot prompt the court to reform the will.[120]

The justifications for the plain meaning and no reformation rules are wide-ranging and often unclear.[121] Scholars have presented possible justifications including protection of the testator from use of fabricated or mistaken evidence, the opportunity for fraud and collusion by beneficiaries who would benefit from introduction of false evidence, beneficiary reliance on will language in long-term financial planning, and hesitancy by courts to abide by the non-reformation rule.[122] Other scholars have suggested that the

111. *See* Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC LAW JOURNAL 1, 4 (2014); Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills*, 64 S.C. L. REV. 403, 409 (2012).

112. *See* Franke & Moody, *supra* note 111, at 4.

113. 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, 521 (1982); *see* Mahoney v. Grainger, 186 N.E. 86, 87 (Mass. 1933).

114. *Mahoney*, 186 N.E. 86 at 87.

115. *Id.*

116. *Id.*

117. *See* Gazur, *supra* note 111, at 409.

118. Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922).

119. *Id.*

120. *See id.*

121. *See* Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of The Plain Meaning Rule*, 35 REAL PROP., PROB. & TR. J. 811, 815–17 (2001).

122. *See id.*

worst evidence problem presents the best justification.[123] In other words, "[w]hen the court is asked to implement the testator's intention, he 'will inevitably be dead' and unable to authenticate or clarify his declarations, which may have been made years, even decades past."[124] Proponents of the worst evidence problem explanation argue that "[b]ecause a testator is unable to corroborate or refute extrinsic evidence of intent that is at odds with the words of her will, she is protected from fraud and error by categorically excluding such evidence."[125] Will formalities, such as the witness and signature requirements, are meant to ensure the final will, as written, best captures the intent of the testator.[126]

There is an exception to the plain meaning rule.[127] If there is ambiguity found in probate, the court may admit extrinsic evidence to clarify the ambiguity.[128] Currently, two types of ambiguity are recognized by courts.[129] First, while historically excluded, courts are increasingly admitting extrinsic evidence for patent ambiguity.[130] Patent ambiguity is evident "on the face of the instrument."[131] For example, in *Estate of Cole*, the testator left to her friend "the sum of two hundred thousand dollars ($25,000)."[132] The court found that the ambiguity between the "two hundred thousand dollars" and "$25,000" warranted admission of the affidavit of the scrivener who drafted the testator's contradictory will term.[133] Second, the court may introduce extrinsic evidence in the event of latent ambiguity, which "manifests itself only when the terms of a will are applied to the facts."[134] This situation arises when "a description for which two or more persons or things fit exactly, or a description for which no person or thing fits exactly but two or more persons or things fit partially."[135] The first type of latent ambiguity, equivocation, is exemplified by the court's holding in *Bacot.*[136] The court allowed extrinsic evidence with regard to the term "I leave all to Danny," in order to correctly construe the will when "three interveners named 'Danny' assert[ed] they . . . [were] the most probable legatee named in the will."[137] The second type of

123. Robert H. Sitkoff & Jesse Dukeminier, *Wills, Trusts, and Estates*, 326 (Rachel E. Barkow et al. eds., 10th ed., 2017).

124. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975).

125. Sitkoff & Dukeminier, *supra* note 123.

126. TEX. EST. CODE ANN. § 253.002.

127. *See, e.g.*, Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates*, 414–15 (5th ed. 1995) (discussing *Mahoney v. Grainger*, 283 Mass. 189 (1933)).

128. *Id.*

129. *In re* Est. of Cole, 621 N.W.2d 816 (Minn. Ct. App. 2001).

130. *Id.*

131. *Id.*

132. *Id.* at 817.

133. *Id.* at 819.

134. Sitkoff & Dukeminier, *supra* note 123, at 333.

135. *Id.*

136. Succession of Bacot, 502 So. 2d 1118 (La. Ct. App. 1987).

137. *Id.* at 1123.

latent ambiguity, personal usage, was addressed in *Moseley*.[138] In this case, the testator left a cash bequest to "Mrs. Moseley."[139] However, while Mrs. Lenoir Moseley, the spouse of the owner of the R.L. Moseley cigar brand, claimed the bequest, the testator had no contact with Moseley.[140] Instead, he had intended the bequest for Mrs. Lillian E. Trimble, whom the testator referred to with the nickname "Mrs. Moseley" due to her position as spouse of a salesman for the R.L. Moseley cigar brand.[141] The court allowed extrinsic evidence to resolve the discrepancy.[142]

A minority of courts and statutes reject the no reformation rule outright and allow reformation of a will in order to correct a mistake that is "proved by clear and convincing evidence."[143] Courts have, for example, allowed extrinsic evidence to influence reformation of a will in the case of a scrivener's error.[144] Statutory proposals for eliminating the no reformation rule have taken hold in the twenty-first century. In 2003, the Restatement (Third) of Property was reformed to correct a mistake.[145] Importantly, the 2008 modification of the Uniform Probate Code added a reformation provision.[146] Section 2-805 states:

> [t]he court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.[147]

Leading up to 2008, the addition of Section 2-805 had been debated heavily since the introduction of intent-based admissibility of extrinsic evidence first emerged with Section 2-503 of the 1990 Uniform Probate Code.[148]

Admissibility of extrinsic evidence for purposes beyond ambiguity, error, and intent is the next frontier for probate reform. The benefit of the courts taking a more expansive view of testators' lives can be seen in a reassessment of Thayer's story under the fictitious premise that the probate court had been allowed to admit extrinsic evidence.

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138. Moseley v. Goodman, 195 S.W. 590 (Tenn. 1917).
139. *Id.* at 591.
140. *Id.*
141. *Id.*
142. *Id.*
143. Sitkoff & Dukeminier, *supra* note 123, at 341.
144. *See* Erickson v. Erickson, 246 Conn. 359 (1998).
145. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (AM. L. INST. 2003).
146. UNIF. PROB. CODE § 2-805 (amended 2008), 2008 Mass. ALS 521.
147. *Id.*
148. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

Key questions arise in view of Thayer's narrative in the years preceding and following the will execution. Is it coincidental that Thayer's mental breakdown was acknowledged by his mother in 1926, only after he wrote his 1925 last will and testament?[149] Was there undue influence involved in his story?[150] With the benefit of extrinsic evidence on its side, the court might have reasoned that a man in his twenties would not have self-initiated a will except for the insistence of his wealthy mother and family attorney.[151] It is also unlikely that a paranoid schizophrenic like Thayer, with an established history of long-term paranoia and insane delusion as described above, could have crafted a will materially free of influence from his delusions.[152]

Under a legal regime allowing extrinsic evidence, Thayer's will likely would not have been admitted for probate.[153] The court would look to Thayer's biography to help inform its decision.[154] At the time his will was executed in 1925, Thayer already had a history of medical diagnosis of paranoia and neurosis dating to the late 1910s, coupled with long-term delusions.[155] Thayer ceased responding to close friends and work colleagues.[156] Perhaps most telling of his mental state was his stated belief that the mail service was unsafe and that his correspondence was being watched and read.[157] Thayer also had a long-running paranoid delusion that rival collector Dr. Albert C. Barnes was out to ruin his life, and acted as "the dark force behind the 'fantastic and sinister happenings'" that Thayer was experiencing internally.[158] Correspondence from friends and family also point to his deteriorated mental state by the mid-1920s. [159] Within a year of the will execution in 1926, Thayer's friend E.E. Cummings described in a letter to former wife Elaine an alleged incident in which a man complained that Thayer had seduced his teenage son.[160] Thayer had a history of homosexual behavior, but this affair with a teenager showed a complete lack of moral judgement.[161] While not formally charged by authorities, by Cummings' account he had committed what, at time of probate in 1982, constitute statutory rape.[162] Finally, in 1926, Thayer stepped down from his

149. *See* DEMPSEY *supra* note 6, at 8.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *See id*. at 8.
155. *See id.*
156. *See id*. at 102 (paraphrasing Scofield Thayer, Dial/Scofield Thayer Papers at the Beinecke Library 34.30.795).
157. *Id.*
158. *Id.*
159. Andrew Donohue et. al, *Legal Insanity: Assessment of The Inability to Refrain*, 58 PSYCHIATRY (Edgemont) 5(3) (2008).
160. *See* DEMPSEY, *supra* note 6, at 174 (paraphrasing E.E. Cummings, E.E. Cummings Papers at the Houghton Library, Harvard 1892.7 (198)).
161. *Id.*
162. Carolyn E. Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* 17 (2004).

position at *The Dial*, although the magazine continued to run through 1929, and was escorted from Europe to the U.S. by his mother.[163] There is no documentation citing exactly why Thayer removed himself from his career and social life.[164] However, it is difficult to believe that, by the time of his will execution in 1925, the paranoia and neurosis diagnosed by Dr. Clark and Dr. Freud was not blatantly obvious to Thayer's friend and attorney.[165]

Another question raised by Thayer's story is whether it is easier for wealthy testators to blur the line between insane delusion and eccentric behavior. If the law shifts towards admissibility of extrinsic evidence, the discrepancy in treatment of high-income and low-income testators will likely be exacerbated.

Thayer was not declared legally insane until 1937, almost 20 years after his first diagnosis of mental illness by a leading psychotherapist.[166] More notably, his status did not change until two years after the death of his mother, a wealthy Worcester patroness.[167] As shown by Thayer's story, wealthy testators can afford to pay for private healthcare services, including home visits by doctors, round-the-clock home nursing care, and delivery of prescriptions.[168] There is no need to involve the government in the affairs of a wealthy testator, no need to apply for public mental health care, and no need to disclose an insanity status prior to a will writing.[169] In effect, wealthy testators can keep their insane status secret.[170] On the other hand, low-income insane testators have no means to pay for private healthcare services, and instead must rely on public mental hospitals, emergency rooms, and free clinics.[171] These government-provided mental health services leave a paper trail of mental illness in government databases. In probate, the mental health history of low-income testators is readily available to judges as part of the public record.[172] On the other hand, wealthy testators like Thayer avoid judicial scrutiny of their mental health history by leaving behind no paper

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163. *See* DEMPSEY, *supra* note 6 at 8.

164. *Id.*

165. *See* Kenneth S. Kendler, *The Clinical Features of Paranoia in the 20th Century and Their Representation in Diagnostic Criteria from DSM-III Through DSM-5*, 43, 2 Schizophrenia Bulletin 332 (2016) (noting the ways in which clinical features of paranoia in the 20th century were depicted inconsistently over time); *see also* Assen Jablensky, *The Diagnostic Concept of Schizophrenia: Its History, Evolution, and Future Prospects*, 12(3) DIALOGUES CLIN NEUROSCI 271 (2010) (detailing the clinical diagnosis of schizophrenia over time).

166. *See* DEMPSEY, *supra* note 6, at 8.

167. *Id.*

168. *Id.*

169. *Id.*

170. *See generally* Dan Mangan, *Wealthy Spending More on Health Care than Poor and Middle Class, Reversing Trend*, CNBC (July 6, 2016), https://www.cnbc.com/2016/07/06/wealthy-spending-more-on-health-care-than-poor-and-middle-class-reversing-trend.html (demonstrating that the wealthy spend more on health services) [https://perma.cc/S8JM-E987].

171. *See id.*

172. *See* Substance Abuse and Mental Health Services Administration, *The Freedom of Information Act (FOIA)*, SAMHSA (Apr. 29, 2020), https://www.samhsa.gov/foia [https://perma.cc/ETU2-7TXY].

trail.[173] Wealthy testators avoid government systems by engaging private home care services.[174] In the current legal regime, the bar against admittance of extrinsic evidence in determinations of testamentary capacity protects unfair scrutiny of these low-income testators' mental health history.[175] However, a change to evidentiary rules to allow extrinsic evidence may mean the wills of wealthy testators without a paper trail showing mental illness could be treated more favorably in probate.

V. THE IMPORTANCE OF SCOFIELD THAYER'S ART STORY

Thayer's probate history serves as a valuable legal case study for evaluating the judicial regime for evaluating mentally ill testators. In addition, the litigation over Thayer's charitable donations between his museum beneficiaries and his estate offer a scenario under which to analyze policy alternatives to the charitable contribution deduction allowed under IRC Sections 2055 and 2522.[176] However, the full weight of Thayer's probate story, as it relates to art donations, is only fully understood in the context of a biographical review of his career as a father of the American modern art movement.

Thayer translated his early academic interest in modern literature and arts into a career through his work on *The Dial* magazine.[177] In the winter of 1917–1918, Thayer met with progressive writer Randolph Bourne, who at that time was a friend and passivist writer for radical magazine *The Masses*.[178] Martyn Johnson, who was present at the same meeting, voiced that he was seeking financing for his magazine *The Dial*.[179] This marked Thayer's first encounter with *The Dial*, a magazine which he later financed and developed into arguably the leading modern art publication of the early 20th century.[180] Following his meeting with Johnson, Thayer signed on as an investor and a contributing editor.[181] In 1918, Thayer was already investing heavily in *The Dial*, a financially distressed publication, trying without success to get Bourne's progressive treatises recognized by Johnson and the other editors.[182] Tragically, September 1918 marked the first outbreak of Spanish Influenza in New York City.[183] By December 1918, Bourne had

173. *See* Mangan, *supra* note 170.
174. *See id*.
175. *See id*.
176. *See* I.R.C. §§ 2055, 2522.
177. *See* Ann Connery Frantz, *'Tortured Life' of Scofield Thayer Bequeathed Beauty*, TELEGRAM.COM (May 20, 2017), https://www.telegram.com/entertainmentlife/20170520/tortured-life-of-scofield-thayer-bequeathed-beauty [https://perma.cc/3YWD-8HSV].
178. DEMPSEY, *supra* note 6, at 54.
179. *Id.* at 57.
180. *See id*.
181. *Id.*
182. *Id.*
183. *Id.* at 59.

caught the illness and died.[184] *The Dial* was a sinking ship with need of complete financial renovation and new leadership.[185] Thayer decided in 1919 to buy out the current owners, purchasing their debt alongside business colleague Dr. James Sibley Watson, Jr.[186]

Together, Thayer and Watson transformed *The Dial* from a small, alternative publication into one of the leading arts publications of the 1920s.[187] The pair made a number of early decisions, which put the magazine on a highly successful trajectory.[188] In 1920, the first post-acquisition issue published a number of poems by E.E. Cummings.[189] Thayer and Cummings had a deep relationship built on their shared love for and discussion of art during their time at Harvard.[190] Among other critical works, the 1920 publication included Cumming's later acclaimed "Buffalo Bill's."[191] Thayer made informed decisions based on his knowledge of the classics and modern literature and arts, as well as his "distaste for what he saw as mere novelty."[192] The magazine was highly successful under Thayer and Watson, and it published an astonishing collection of successful writers and artists in its first year.[193] A sample of the writers and artists published by *The Dial* in its first year under Thayer gives some perspective on its success.[194]

> There was verse from Cummings, Pound, Carl Sandburg, Marianne Moore, Amy Lowell, Edna St. Vincent Millay, A.E., Louis Untermeyer, William Carlos Williams, William Butler Yeats, H.D., and James Joyce. The fiction came from the pens of D.H. Lawrence, Marcel Proust, Arthur Schnitzler, Sherwood Anderson, Mina Loy, and Djuna Barnes. Artists whose work was reproduced included Charles Demuth, Charles Burchfield, John Marin, Gaston Lachaise, Khalil Gibran, Rockwell Kent, and Wyndham Lewis. As importantly, the *Dial* in its first year also gave a forum for reviewing and criticism that was taken advantage of by T.S. Eliot, Walter Pach, Edmund Wilson, S. Foster Damon, Van Wyck Brooks, Malcolm Cowley, Kenneth Burke, Henry Mcbride, Emory Holloway, and Gilbert Seldes. Philosophical writings came Bertrand Russell, Romain Rolland, John Dewey, and Edward Sapir.[195]

James Dempsey speculates that *The Dial*'s success was built "not only on its judicious selection of talent but also from its careful tempering of the

184. *Id.* at 60.
185. *Id.* at 62.
186. *Id.* at 61.
187. *Id.* at 70.
188. *Id.*
189. *Id.* at 68.
190. *Id.* at 70.
191. *Id.* at 65.
192. *Id.*
193. *Id.* at 20.
194. *Id.*
195. *Id.* at 68.

avant-garde with the traditional."[196] Thayer and Watson successfully brought modern literature and art to the New York public.[197] The magazine used a precise "moderation that infuriated its detractors."[198] However, there was a negative response from Thayer's personal acquaintances, including his mother.[199] The risqué content was deemed inappropriate, specifically by government authorities who thought the magazine would corrupt the public.[200]

Despite financial troubles and constant scrutiny from art traditionalists and government authorities, *The Dial* was successfully published for nine years under Thayer's guidance.[201] Publishing *The Dial* was to swim against the mainstream currents of the 1920s.[202] Thayer's aggregation of modern works of poetry, narrative literature, and art reproductions in the magazine acted as one of the major forces that pushed the modern art movement forward.[203] A May 1920 letter to friend and poet Ezra Pound details Thayer's perseverance in the face of these hurdles.[204]

> It seems wise that I should speak to you rather frankly about the difficulties of publishing *THE DIAL* . . . [w]e are attacked most violently on every occasion, in the press and by mail and in personal conversation, for publishing verse that does not rhyme and pictures that are not lifelike. For some reason that is quite impossible of analysis, to publish a reproduction of a painting by Cezanne is discovered to be an attack, more terrible because insidious, upon the very heart of patriotism, Christianity and morality in general . . . [n]ewstands even refuse to carry *THE DIAL* and only day before yesterday the American News company, after months of deliberation, decided that they could not undertake to circulate our paper . . . Mr. Watson and myself have, since we took over control of the paper in the latter part of November, expended upon it about sixty thousand dollars. It is going to cost us another forty to finish up the current year.[205]

Thayer's time in Paris and Vienna from 1920 to 1923 is as notable for his collecting activities as it is for his continued direction of *The Dial*.[206] Thayer's arrival in Paris and Vienna in the early 1920s was opportune for a young collector with deep pockets.[207] By the end of his time in Europe in the mid-1920s, Thayer had accumulated a tremendous collection of modern

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 70.
206. *Id.*
207. *Id.*

art.[208] His personal collection included numerous painting and sketches by modern masters including Pablo Picasso, Egon Schiele, and Gustav Klimpt.[209] He also acquired an impressive collection of literature and drawings by illustrators, including a large collection of drawings by English illustrator Aubrey Beardsley.[210]

In 1926, following production of his 1925 will, Thayer experienced a mental breakdown and was escorted home to the U.S. by his mother.[211] The details of his final diagnosis of paranoid schizophrenia have been kept private by the Thayer family.[212] Following Thayer's discreet exit from European social life, his mother Florence took charge of all of his major personal decisions.[213] However, Thayer was not officially declared legally insane until 1937.[214] The eleven years between his 1926 mental breakdown and the declaration of his legal insanity remains unexplained likely due to his mother's wish to keep the family's personal struggles out of the public eye.[215] Once she died, it was necessary to declare Thayer legally insane in order to form a legal guardianship.[216] From 1926 until his death in 1982, Thayer lived reclusively with round-the-clock home care provided by nurses and doctors.[217]

VI. LIMITING DEDUCTIONS FOR CHARITABLE CONTRIBUTIONS WITH DONOR-IMPOSED CONDITIONS

Thayer's probated will left instructions for his estate to be distributed by the Guaranty Trust Company of New York as executor.[218] Thayer's will included minor distributions of real estate holdings, stock, and personal effects to Florence Scofield Thayer (mother), Elaine Eliot Orr (former spouse), Alyse Gregory (close friend), James Sibley Watson, Jr. (*The Dial* business partner and friend), Marianne Moore (friend), and the wife of deceased professor Reinhold Lepsius (German friend and colleague).[219]

However, the two most significant clauses of Thayer's will distributed his significant collection of modern European artworks to nonprofit organizations.[220] First, the will's seventh clause bequeathed to the Fogg Thayer's large collection of drawings by illustrator Aubrey Beardsley ("the

208. *Id.*
209. *See* Exhibition Overview, *supra* note 10.
210. Will of Scofield Thayer (1925) (on file with the Worcester Probate and Family Court).
211. DEMPSEY, *supra* note 6, at 70.
212. *Id.*
213. *Id.*
214. *Id.* at 175.
215. *See id*. at 159, 173.
216. *Id.* at 175.
217. *Id.* 172–76.
218. Will of Scofield Thayer, *supra* note 210, at 1–2.
219. *Id.*
220. *See id*.

Beardsley drawings").[221] Second, the will's eighth clause bequeathed to the Met "all sculptures, paintings, drawings, etchings and other works of plastic or graphic art" in Thayer's collection ("The Dial Collection"), other than the Beardsley drawings and a portrait by Reinhold Lepsius, which was left to the late artist's wife.[222] Any works not accepted by the Fogg or the Met were left to Adolf Dehn, Thayer's friend, for sale as needed to serve Dehn's financial demands.[223] Immediately following Thayer's death in 1982, the donated art collections were valued by Sotheby Parke Bernet.[224] The Beardsley drawings bequeathed to the FAM were valued at $51,600 (approximately $139,833 in 2019 dollars).[225] The Dial Collection, broken down into four categories—including paintings, the erotic portfolio, prints, and literature—was valued at $14,520,550 (approximately $39,349,920.59 in 2019 dollars).[226]

The Dial Collection, which included the bulk of Thayer's collection, had been housed at the Worcester Art Museum (WAM) and the Worcester Storage Warehouse since the 1920's.[227] While Thayer did not provide any information on why he left his art collection to the Met and disinherited the WAM, his hometown museum, a quick biographical review reveals a deep and lasting distaste for the Worcester art community.[228] Thayer's collection was only publicly displayed twice during his lifetime, both times in 1924.[229] The collection was shown first at the WAM.[230] Conservative Worcester art critics disparaged the show as a disgusting and inappropriate display of new-era erotica.[231] However, the collection won favor with the modern art community when shown at the Montross Gallery, a predecessor to the Museum of Modern Art, in New York City.[232] From 1924 forward, Thayer maintained a deep distrust of the Worcester socialite community, and clearly voiced his disapproval of the WAM by writing the museum out of his will.[233] Following probate of his will, the WAM reluctantly turned over the collection."[234]

For reasons not stated in the will, Thayer's gifts to the Fogg and the Met were made contingent on the condition that the museums accept the gifts for

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221. *Id.*
222. *Id.* at 2.
223. *Id.*
224. Whipple, *supra* note 41, at 6.
225. *Id.*; Bureau of Labor Statistics, CPI Inflation Calculator (accessed May 26, 2019), https://data.bls.gov/cgibin/cpicalc.pl?cost1=51600&year1=198201&year2=201904 **[**https://perma.cc/TE6A-G8GF].
226. CPI Inflation Calculator, *supra* note 225.
227. DEMPSEY, *supra* note 6, at 19.
228. *Id.* at 177–76.
229. *Id.* at 17, 171–72.
230. *Id.* at 17.
231. *Id.*
232. *Id.* at 171–72.
233. *Id.* at 178.
234. Whipple, *supra* note 41, at 6.

permanent exhibition.[235] The condition placed on the art donations set off a chain of events, eventually placing the museums adverse to Thayer's executors in the Worcester Probate and Family Court.[236] Robert Whipple, attorney for the Thayer estate, described the development of the case in his memoranda:

> The Metropolitan . . . was unwilling to state in writing what its intentions were with respect to exhibiting the art objects. It would only go so far as to deliver its receipt therefor. The [Thayer] heirs all agreed to take no affirmative action in opposition to the Metropolitan, but were strongly of the opinion that not only should the Metropolitan deliver its receipt, but that it should also state its acceptance of the bequest in accordance with the terms of Mr. Thayer's Will. In order to put the matter to rest it was decided to seek the Court's interpretation of the language "the gift of which said Museum shall accept for permanent exhibition. A Complaint for Instructions was prepared and filed by the Executor in the Probate Court for Worcester County. Appearing for the Met was John O. Mirick, O'Connell, Demallie and Loungie. Our member, Thomas R. Mountain, Esq. and Charles B. Swartwood, Esq. of Mountain, Dearborn & Whiting represented the Thayer heirs. Henry B. Dewey, Esq., also a member of this Society, of Bowditch & Dewey filed an amicus curiae brief on behalf of the Worcester Art Museum.[237]

The case was heard by The Hon. Francis W. Conlin of the Worcester Probate and Family Court.[238] For the Executor, Swartwood argued that "permanent exhibition" should be literally interpreted to mean that the artworks should be continuously displayed in unrestricted public exhibitions.[239] For the museums, Mirick argued that proper scientific conservation of the Thayer collection artworks made permanent display in galleries an impossibility.[240] Mirick highlighted the Met's use of study-display facilities, in addition to use of public exhibition galleries, to encourage study partnerships with New York University's Institute of Fine Arts and other art research organizations.[241] Counsel for the museums also brought in the Acting Curator of Drawings from the Fogg to emphasize that permanent exhibition in public galleries would lead to significant deterioration in the drawings and paintings.[242]

Judge Conlin held in favor of the museum defendants and ordered the Executor to turn over all paintings promised in Article Seventh and Article

235. Will of Scofield Thayer, *supra* note 210, at 2.

236. Est. of Thayer v. President of Harvard College, McCarthy Reporting Service (Mass. Supp. 1983).

237. Whipple, *supra* note 41, at 2.

238. *Id.*

239. Est. of Thayer v. President of Harvard College, Tr. 31:1-33:23, McCarthy Reporting Service (Mass. Supp. 1983).

240. *Id.* at 34:2–35:12.

241. *Id.* at 7:7–8:6.

242. *Id.* at 10:10–10:12.

Eighth to the Fogg and the Met.[243] The court's order, including an comparable order for the Fogg under Article Seventh, stated "the Metropolitan Museum of Art will be in compliance with the requirement of 'permanent exhibition' if all of the sculptures, paintings, drawings, etchings and other works of plastic or graphic art accepted by the Metropolitan Museum of Art pursuant to Article Eighth of the Will of Scofield Thayer:

> (a) are added to the permanent collection of the Metropolitan Museum of Art; and
> (b) are continuously exhibited in the Metropolitan Museum of Art's public exhibition galleries, or in studydisplay [sic] areas, or in other facilities where they will be readily available to the public upon request for viewing or study at all times that the museum is open to the public; provided, however, that such works of art may be removed for such periods of time as may be appropriate for preservation, conservation, building renovation, loans, photography, and/or scholarly examination.[244]

VII. TAX TROUBLES IN THE THAYER CASE

Following the transfer of the Beardsley drawings to the Fogg and the Dial Collection to the Met, the executors were met by disruption in their efforts to deduct the value of the gifts from the taxes owed by the estate.[245] The Thayer estate tax return stated total gross income of approximately $22,600,000.[246] The estate claimed total allowable deductions of approximately $15,000,000, the largest deduction including $14,276,000 in charitable gifts to the Met and the Fogg.[247] The Thayer case was audited by Internal Revenue Service (IRS) Examiner Ralph A. Piscopo.[248] The Examiner's report disallowed the charitable deduction "because the charitable bequests were conditioned upon acceptance and permanent exhibition, with gifts over to private beneficiaries for the parts of the art collection not accepted, making the charitable deduction unascertainable on the date of death."[249] As a result of this conclusion, Examiner Piscopo proposed an estate tax deficiency of approximately $7,000,000.[250] The Estate was caught off guard by this rejection of the charitable deduction and proposed deficiency.[251] As Whipple described, "All parties in interest

243. *Id.*
244. Judgement & Conclusions of Law of The Hon. Francis W. Conlin, *Estate of Thayer v. The President of Harvard College*, Tr. 31:1–33:23, McCarthy Reporting Service (Mass. Supp. 1983) [hereinafter Conlin].
245. Whipple, *supra* note 41, at 2.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

including the attorney for the Estate were in a state of complete shock."[252] The heirs, concerned that their inheritance would be significantly diminished, filed a protest to Examiner Piscopo's conclusion and the case was appealed to Examination managers.[253] After a review process at Examination, the IRS allowed the estate to deduct the full amount of the charitable bequest.[254] The IRS only disallowed $23,035.05 in items not accepted by the Met.[255]

VIII. POLICY ALTERNATIVES TO UNLIMITED CHARITABLE DEDUCTION

The failed attempt by Examiner Piscopo to disallow the Thayer estate's deductions raises important questions regarding the policy basis for unlimited deductions for charitable bequests written into the Internal Revenue Code (IRC) through Sections 2055 and 2522.[256] The unlimited deduction is justified based on the theory "that wealth transferred for charitable, educational and religious uses should not be burdened by a tax because the funds would be used for a public purpose."[257] Legislative history shows a Congressional belief that testamentary donations come from excess, "After they [testators] have done everything else they want to do, after they have educated their children and traveled and pent their money on everything they really want or think they want, then, if they have something left over, they will contribute it to a college or to the Red Cross or for some scientific purposes."[258] Later proponents have characterized the deductions as an effective alternative to public support for nonprofit organizations that offer public benefits.[259]

Some critics of the charitable deduction argue that the tax system is not the correct tool for equitable distribution of government support to public service organizations.[260] Other critics argue that the nonprofits that reap benefit from the charitable deduction provide outsized services to the families of wealthy testators that fund the nonprofits through bequests.[261] Meanwhile, supporters of the charitable deduction contend charitable bequests are not includable in personal consumption and therefore should not get pulled into the normative income tax base.[262] Supporters also argue that the deduction

252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. JAMES J. FISHMAN ET AL., *Nonprofit Organizations: Cases and Materials* 745 (Robert C. Clark et al. eds., 5th ed. 2015).
258. *Id.* (quoting remarks of Senator Hollis, 55 Cong. Rec. 6728 (1917)).
259. *Id.* at 745.
260. *Id.*
261. *Id.*
262. William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 313 (1972).

subsidizes collective goods provided by nonprofits.[263] Finally, a minority of supporters say that the charitable deduction compensates testators for the loss of welfare caused by their wealth transfer to nonprofit organizations.[264]

This ongoing debate focuses heavily on the difference between allowing unlimited deductibility of charitable bequests and embracing drastic alternatives including eliminating the deduction altogether or capping the deduction based on a chosen percentage of the contribution (most recently proposed by the Obama Administration as a 28% deductibility ceiling).[265] However, rarely has the debate included discussion of continuing unlimited charitable deductions with an amendment encouraging the IRS to partially disallow a charitable deduction based on diminished public use value caused by a donor stipulation. Despite articles urging museums to reject all restricted gifts to enable full curatorial and educational independence, common practice has shown museums generally will accept gifts without paying significant attention to restrictions on use.[266] In theory, IRS Publication 561 provides that determination of the fair market value (FMV) of donated property may include looking at the terms of the purchase or sale of property to be donated.[267] However, a number of private letter rulings have shown that, in practice, the IRS will rarely adjust the amount allowed for charitable deduction under Section 2055 after an assessment of the FMV.[268] For example, in Private Letter Ruling 200223013, the taxpayer's estate planned to donate a collection of artworks to a tax-exempt entity subject to the terms of restrictive gift and loan agreement (GLA).[269] The GLA imposed significant restrictions and conditions on the donation.[270] The GLA allowed the taxpayer to "retain possession of the artwork for a period of time each year commensurate with their proportionate interest in the" artworks.[271] In addition, the GLA allowed the taxpayer's living spouse "exclusive and unrestricted right to use the property during his or her lifetime, including, but not limited to, the right to sell, mortgage, or otherwise encumber or assign the life estate, or to license or exploit any intellectual property right pertaining to the artwork during his or her lifetime."[272] Additionally, the GLA divided

263. CHARLES T. CLOTFELTER, FEDERAL TAX POLICY & CHARITABLE GIVING 280–85 (Charles T. Myers ed., 1985).

264. Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 58–59 (1972).

265. *See* Dep't of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals* 154–55 (Feb. 2015).

266. Marie C. Malaro, *Restricted Gifts and Museum Responsibilities*, 18 J. ARTS MGMT. & L. 3, 41–77 (1988).

267. I. R. S., Publication 561 (Rev. Apr. 2007).

268. I.R.S. Priv. Ltr. Rul. 2002-02-032 (Jan. 11, 2002); I.R.S. Priv. Ltr. Rul. 2002-23-013 (Mar. 11, 2002).

269. I.R.S. Priv. Ltr. Rul. 2002-23-013 (Mar. 11, 2002).

270. *Id.*

271. *Id.*

272. *Id.*

conditions into chronological stages with a different regime of conditions in each of three stages.[273] The IRS ruled that the taxpayer's gift of artworks, subject to the GLA, qualified for the charitable deduction at full FMV.[274] While private letter rulings have no precedential value and are only binding as to the submitting taxpayer, they are instructive in determining IRS policy on ambiguous tax issues.[275]

The motivation for lowering the value of charitable deductions for conditional gifts is to alleviate the cost borne by the public of the conditions. The Thayer donations provide a useful example.[276] In Thayer's case, the Met and the Fogg were so concerned with the requirement to place the Beardsley drawings and The Dial Collection on "permanent display" that they failed to accept the gifts until receiving a favorable judicial ruling allowing them to store the artworks in research-focused storage units.[277] Given that the IRS allowed the Thayer estate to take an unrestricted FMV ($14,520,550) deduction on the museum gifts, it seems two costs were borne by the public in this case.[278] First, as opposed to a situation in which the gift was unrestricted and the two museums could place the artworks in deep storage when not on full public display, both museums must bear the cost of caring for and storing the artworks either on their public walls or in the museums' limited "study display areas."[279] The second cost borne by the public resulted from the litigation costs of determining the meaning of "permanent exhibition" in the Worcester Probate and Family Court by the Met and the Fogg.[280] High legal fees paid by museums to obtain viable donations results in lower budgets for public services like education. In addition, the litigation imposed administrative costs on the Commonwealth of Massachusetts in the form of time spent by court staff on the case, the use of the courthouse building, and processing costs to the clerk's office. These public costs could be shifted from the public to the estate by reducing the allowed charitable deduction by the total cost calculated by the IRS.

Reducing charitable deductions by the cost imposed on the public as a result of donation conditions is appealing from an equity standpoint.[281] At first glance, the policy would redistribute the costs associated with the

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273. *Id.*

274. *Id.*

275. I.R.C. § 6110(k)(3) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.").

276. *See* DEMPSEY, *supra* note 6.

277. *See id.*

278. *See id.*

279. *See* Conlin, *supra* note 244.

280. *See* DEMPSEY, *supra* note 6.

281. *See* Eric S. Smith, *A Deduction Properly Extinguished? The Live-Burn Donation: A Proposed Sequence of Analysis and Policy Evaluation*, 33 VA. TAX R. 459, 491–92 (2014).

conditions from the public to wealthy estates.[282] However, significant downsides accompany an IRS policy shift towards a restricted charitable deduction.[283] First, under this policy, the administrative costs to the IRS and the Tax Court of charitable deduction valuation could be prohibitive.[284] As the IRS notes:

> Determining the value of donated property would be a simple matter if you could rely only on fixed formulas, rules, or methods. Usually it is not that simple. Using such formulas, etc., seldom results in an acceptable determination of FMV. There is no single formula that always applies when determining the value of property.[285]

A more restrictive charitable deduction regime would add an extra layer of difficulty to estate tax return processing.[286] The new regime would compel executors to hire valuation experts to calculate the cost of gift conditions to the public.[287] Auditing these tentative valuation calculations at IRS Examination would not only be difficult for IRS personnel, but would likely lead to more cases moving to IRS Appeals and the Tax Court for review.[288] Second, proponents of unlimited charitable deductions argue that restrictions discourage charitable giving by testators.[289] Legislative history, since the creation of the charitable deduction in 1917, shows a concern with discouraging private giving.[290] If the policy results in lower amounts of annual charitable giving, then replacing private support for nonprofit organizations with public support for nonprofit organizations would require legislative action.[291] The shift to primarily government financial support of nonprofit organizations would mean a move away from an efficient free market system of funding toward a potentially inefficient centralized system of funding.[292]

Given the recent history of failed attempts to reform the unrestricted charitable deduction under the Obama Administration, it seems unlikely that Congress will muster the political will to make any drastic changes in the

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282. *See id*.

283. *See id*.

284. *See generally* Ellen P. Aprill, *Reforming the Charitable Contribution Substantiation Rules*, 14 FLA. TAX REV. 275, 281–82 (2013) (discussing the difficulty in identifying, substantiating, and litigating overvaluations).

285. I.R.S. Publication 561 (Rev. Apr. 2007).

286. *See* T. Gregory Reymann II, *Avoiding the Most Common Mistakes in Estate Administration*, 30 EST. PLAN. 450, 451 (2003).

287. *See generally* I.R.S Publication 561 at 9 (Rev. Apr. 2007) (discussing appraisals and qualified appraisals).

288. *See* Mary Varson Cromer, *Don't Give Me That!: Tax Valuation of Gifts to Art Museums*, 63 WASH. & LEE L. REV. 777, 796 (2006).

289. *See id.* at 801.

290. *See* WILLIAM C. RANDOLPH, The Encyclopedia of Taxation and Tax Policy 63 (Joseph J. Cordes et al. eds., 1999).

291. *See id.*

292. *Id.*

near future.[293] Despite the above concerns, changes to the status quo, including increasing conditional gift giving as a result of the aging Baby Boomer population, might encourage museums with burdensome restrictions on their collections to lobby the government to rethink such a liberal charitable deduction.[294]

IX. CONCLUSION

Scofield Thayer's life and death provide a unique case study which illustrates many of the challenges testators and institutional beneficiaries face in the 21st century.[295] In Thayer's case, the Worcester court's failure to fully investigate the circumstances of Thayer's will execution, in spite of a clear history of paranoid schizophrenia exemplifies the need for a new evidentiary system for reviewing legally insane testators' wills in probate.[296] Additionally, the subsequent litigation over Thayer's art donations raises important questions about the necessity for changes to the unlimited charitable deduction for estates.[297] While this article highlights many questions surrounding the probate system raised by Thayer's story, many questions have remained unasked.[298] Issues such as court-initiated will contests for legally insane testators and the need for legal guardians to serve a more expansive role in the probate process remain to be explored.[299] The demand for increased scholarship in the trusts and estates field is growing in the 21st century.[300] Thayer's story represents only a drop in the ocean of testator case studies that merit continued scholarship to continue to shape and inform the contemporary debate on these critical topics.[301]

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293. *See* DEPT. OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 154–55 (2015).

294. *See generally* Jeremy Kahn, *Museums Fear Tax Law Changes on Some Donations*, N.Y. TIMES (Sept. 13, 2006), https://www.nytimes.com/2006/09/13/arts/design/13gift.html (discussing the preparation of a major lobbying effort by top art museums to reverse a federal tax condition that would harm their ability to acquire new artwork) [https://perma.cc/Y4BP-AE7D].

295. *See supra* Part V.

296. *See supra* Part V.

297. *See supra* Part VI.

298. *See supra* Parts V–VII.

299. *See supra* Part VIII.

300. *See* Marc Davis, *As America's Population Ages, Demand for Elder Law Attorneys Grows*, AM. BAR ASS'N (Mar. 27, 2019, 6:30 AM), https://www.abajournal.com/web/article/as-americas-population-ages-demand-for-elder-law-attorneys-grows [https://perma.cc/NH6M-XFWP].

301. *See* DEMPSEY, *supra* note 6.