A Therapeutic Jurisprudential Framework of Estate Planning

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I. INTRODUCTION

Drawing upon the burgeoning field of therapeutic jurisprudence, this Article analyzes the psychological consequences of estate planning. This analysis reveals that the preparation and implementation of an estate plan through the execution of a will and other estate-planning documents has both therapeutic and antitherapeutic characteristics.[1] This analysis also suggests that the positive and negative psychological consequences of estate planning can serve as a framework through which to analyze the law of succession and which can provide fresh perspectives on a diverse array of estate-planning issues. Because legal scholars have generally failed to employ therapeutic jurisprudential analysis in the estate-planning context,[2] this Article illuminates the field's analytical relevance to the study of estate planning and encourages the broad expansion of therapeutic jurisprudential analysis to other areas of the law of succession.

To illustrate the field's overlooked analytical potential with respect to the law of succession, this Article analyzes the therapeutic implications of a set of focused and discrete estate-planning rules, namely the law governing the wills of soldiers and sailors. This analysis confirms the viability of therapeutic jurisprudence as an insightful analytical tool with respect to not only the law governing military wills but also the estate-planning process generally.[3] Moreover, the analysis demonstrates that the therapeutic jurisprudential framework of estate planning can ultimately reveal new areas of reform throughout the law of succession.

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1. *See infra* Parts III–IV.
2. *See infra* Part II.C.
3. *See, e.g.*, *infra* Part V.

Although legal scholars have not previously analyzed the estate-planning process from a therapeutic jurisprudential perspective,[4] the therapeutic potential of preparing for the disposition of one's property upon death is both intuitive and familiar. For instance, in his classic novel *Moby-Dick*, Herman Melville provides a striking example of the psychological consequences of finalizing an estate plan. Not long into Captain Ahab's search for the Great White Whale, one of the *Pequod*'s longboats is attacked while in pursuit of a pod of sperm whales.[5] As Melville's narrator Ishmael describes: "Then all in one welded commotion came an invisible push from astern, while forward the boat seemed striking on a ledge; the sail collapsed and exploded; a gush of scalding vapor shot up near by; something rolled and tumbled like an earthquake beneath us."[6] Although the sailors safely escape the immediate peril of the vengeful whale, they are "tossed helter-skelter into the white curdling cream of the squall."[7] They find themselves "drenched through, and shivering cold, despairing of ship or boat,"[8] and are left adrift throughout the night. Fortunately, as morning dawns, Ishmael and the other stranded sailors catch sight of their boat and eventually reunite with the *Pequod*.[9]

After escaping the "jaws of death,"[10] Ishmael reflects upon the perilous life a whaler leads, a life in which "squalls and capsizing in the water and the consequent bivouacks on the deep [are a] matter[] of common occurrence."[11] With these dangers in mind, Ishmael finds solace in the preparation of his estate plan. Instead of seeking camaraderie with his fellow crewmates, retiring to peaceful isolation in his quarters, or partaking in any number of religious rituals, Ishmael first tends to the terms of his will.[12] Upon ensuring that his testamentary wishes are in order, Ishmael describes his satisfaction: "After the ceremony was concluded upon the present occasion, I felt all the easier; a stone was rolled away from my heart."[13]

Ishmael's account of his testamentary experience illustrates the inherent therapeutic potential of estate planning.[14] Formalizing the intuition

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4. *See infra* Part II.C.

5. *See* HERMAN MELVILLE, MOBY-DICK; OR THE WHALE 244 (Penguin Books 2003) (1851).

6. *Id.*

7. *Id.*

8. *Id.* at 245.

9. *See id.* at 245–47.

10. *Id.* at 245.

11. *Id.* at 248.

12. *See id.* at 248–49.

13. *Id.* at 249.

14. *See* Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 382 (1969) (explaining that this "passage from Moby Dick . . . seems to illu-

underlying Melville's insight, this Article uses therapeutic jurisprudence, which is founded on the idea "that the law itself can be seen to function as a kind of therapist or therapeutic agent,"[15] as an analytical tool to more deeply examine the therapeutic consequences of estate planning. When viewed within this framework, both negative and positive psychological consequences of preparing an estate plan are identifiable. For example, estate planning can impose a negative psychological toll because the process necessarily involves the recognition that the testator's life will end.[16] Less frequently acknowledged, however, are the positive psychological consequences of preparing an estate plan. These benefits are perhaps most apparent in the satisfaction that the testator experiences from knowing that his desired testamentary scheme is legally memorialized and that his estate will be distributed according to his wishes.[17]

The normative aim of therapeutic jurisprudence is to shape the law in a way that maximizes its therapeutic potential without undermining the law's fundamental purposes.[18] This goal is especially relevant to the law of succession because of the acute psychological consequences and emotionally charged contexts of estate planning and the ultimate administration of the testator's estate.[19] Recognizing the often-overlooked relevance of therapeutic jurisprudence to the law of succession and seeking to inspire the widespread application of the discipline in the estate-planning context, this Article examines the special rules governing the will-execution process of soldiers and sailors.[20] Because this area of the law comprises a set of insulated and specialized rules, the application of therapeutic jurisprudence to the will-execution process of soldiers and

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strate [the] point" that "will-preparation actually reduces fear of death and has a constructive or even therapeutic effect on death anxiety").

15. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

16. *See* Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Finding*, 72 OR. L. REV. 769, 778 (1993) ("Many persons are intellectually aware that estate planning is necessary, but find it emotionally difficult to confront the fragility of life and health."); *The Limits to a Do-it-Yourself Will,* CHANGING TIMES, Nov. 1984, at 82, 84 (explaining that "the first and perhaps biggest hurdle" to executing a will is "acknowledging your own mortality").

17. *See In re* SRC Holding Corp., 364 B.R. 1, 34 (D. Minn. 2007) (explaining that one "benefit" of creating a will is the "peace of mind" that the testator receives from "knowing that his/her wishes upon death [will] be carried out"); Nancy G. Henderson, *Drafting Dispositive Provisions in Wills (pt. 1)*, 43 PRAC. LAW. 33, 33 (1997) ("[T]he main reason for having a will . . . is the peace of mind that comes from knowing that their assets will be distributed the way they want them to be distributed.").

18. *See* Winick, *supra* note 15, at 184.

19. *See infra* notes 34–36 and accompanying text.

20. *See infra* Part V.

sailors clearly illustrates the unique perspective that this Article's framework can contribute to the analysis of the law of succession.

This Article proceeds in four parts. Part II provides an introduction to therapeutic jurisprudence. Parts III through V then apply therapeutic jurisprudence to the process of estate planning. Specifically, Part III identifies the antitherapeutic consequences of preparing an estate plan, and Part IV examines the positive psychological aspects of the estate-planning process. Finally, Part V uses the therapeutic jurisprudential framework of estate planning that is developed in Parts III and IV to analyze a set of discrete estate-planning rules, namely the special rules governing the execution of wills by soldiers and sailors. The analysis of the law governing this focused context illustrates how the therapeutic jurisprudential framework can serve as an analytical tool for a broad spectrum of legal rules governing the estate-planning process and the law of succession.

II. THERAPEUTIC JURISPRUDENCE AND THE LAW OF SUCCESSION

A. The Emergence of Therapeutic Jurisprudence

In recent years, therapeutic jurisprudence has emerged as a new lens through which to view and analyze the law. This analysis "focuses on the law's impact on emotional life and on psychological well-being."[21] As Professor David Wexler explains, the psychological effect of the law "has traditionally been ignored . . . or regarded as something apart from the law and its concern,"[22] but therapeutic jurisprudence "humaniz[es] the law" and inquires "whether the law can be made or applied in a more therapeutic way."[23] Professor Bruce Winick, who, along with Wexler, is a founder of the therapeutic jurisprudence movement, explains further that "[t]herapeutic jurisprudence is the study of the role of the law as a therapeutic agent."[24]

Since therapeutic jurisprudence emerged from mental-health-law scholarship roughly twenty years ago,[25] scholars have used its framework to analyze numerous areas of the law, including various facets of crimi-

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21. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

22. David Wexler, *Therapeutic Jurisprudence*, 20 TOURO L. REV. 353, 356 (2004).

23. *See* Wexler, *supra* note 21, at 125.

24. *See* Winick, *supra* note 15, at 185.

25. *See* Marilyn McMahon & David Wexler, *Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand*, *in* THERAPEUTIC JURISPRUDENCE 1, 1 (2003); Winick, *supra* note 15, at 184.

nal and family law.[26] The scope of therapeutic jurisprudence continues to expand, and its proponents suggest that its framework is relevant to the analysis of all areas of law.[27] Indeed, proponents urge the extension of therapeutic jurisprudence beyond the realms of academia and law reform, and suggest that therapeutic jurisprudence should be a part of the traditional law school curriculum, the daily practice of law, and the legal culture generally.[28]

B. The Mechanics of Therapeutic Jurisprudence

A therapeutic jurisprudential analysis has two components. First, such analysis begins with the positive task of identifying the therapeutic and antitherapeutic consequences of the law.[29] Second, the normative goal of therapeutic jurisprudence is to shape the law to maximize its therapeutic qualities and minimize its negative psychological consequences.[30] This second component of the analysis involves proposing reforms of the legal system that will increase the law's overall therapeutic potential. Such proposals can include reforms of substantive doctrines, procedural rules, and the roles of various actors within the legal process (e.g., lawyers and judges).[31]

Therapeutic jurisprudence acknowledges, however, that other factors warrant consideration in the debate over a particular law's substance

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26. *See* Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 11 (2006) (explaining that therapeutic jurisprudence has "spread into many . . . areas," such as "sentencing and probation agreements, workers' compensation law, sexual orientation law, disability law, fault-based tort compensation schemes, domestic violence, crime victims, mandatory child abuse reporting, contract law, and family law").

27. *See, e.g.*, Gregory Baker, *Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law—How Exposing Its Presence in the Environmental Justice Movement Can Legitimize the Paradigm and Make the Case for Its Inclusion into All Aspects of Legal Education and the Practice of Law*, 9 FLA. COASTAL L. REV. 215, 218 (2008).

28. *See* Dennis P. Stolle, *Introduction* to PRACTICING THERAPEUTIC JURISPRUDENCE xv, xvii (Dennis P. Stolle et al. eds., 2000).

29. *See* Wexler, *supra* note 21, at 125–26.

30. *See* Jason Schultz, *Can Women Judges Help Make Civil Sexual Assault Trials More Therapeutic?*, 16 WIS. WOMEN'S L.J. 53, 54 ("The goals of therapeutic jurisprudence analysis vary by project and protagonist, but generally, most advocates . . . attempt to evaluate and redesign legal systems so as to provide the participants with the most positive experience . . . .").

31. *See* Wexler, *supra* note 21, at 126; *see also* Murry Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711, 713 (1993) (using therapeutic jurisprudence to examine "the impact of the mandate to report suspected child maltreatment on the psychotherapy relationship"); Jennifer Marie Sanchez, *Therapeutic Jurisprudence and Due Process in the Juvenile Parole Revocation Process: An Arizona Illustration*, 7 FLA. COASTAL L. REV. 111, 112 (2005) (exploring "the use of [therapeutic jurisprudence] principles to reform the parole revocation process of the Arizona Department of Juvenile Corrections"); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 283 (1994) (using therapeutic jurisprudence to analyze "the role of the judge" in criminal courts).

and application.[32] In fact, "Wexler and Winick have repeatedly emphasized that therapeutic jurisprudence does not dictate the more therapeutic outcome."[33] Instead, therapeutic jurisprudence suggests that therapeutic consequences should be evaluated alongside other considerations when analyzing the costs and benefits of the law. Accordingly, the normative foundation of therapeutic jurisprudence is not that therapeutic consequences should be elevated to such an extent that other considerations are ignored, but instead is that, all else being equal, the law should be shaped to maximize its therapeutic potential.

C. Therapeutic Jurisprudential Analysis of the Law of Succession

Despite therapeutic jurisprudence's broad expansion and the intuitiveness of estate planning's therapeutic potential—which Melville recognized more than a century and a half ago—the application of therapeutic jurisprudence to the study of the law of succession has been limited.[34] This is true even though maximizing the law's therapeutic potential in the context of succession is a prudent objective given the emotionally charged nature of the estate-planning and probate processes.[35] Nonetheless, limited examples of the application of therapeutic jurisprudence to the law of succession can be found.[36]

For example, one commentator has examined the law governing the personal representative who supervises the distribution of the testator's estate. The author began the analysis by identifying the therapeutic and antitherapeutic effects of the personal representative's actions on the testator's family.[37] Based on this therapeutic jurisprudential analysis, the author proposed the implementation of a mediation system to the probate process, which she argued would reduce some of the "bitter feelings"

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32. *See* Schultz, *supra* note 30, at 54 (listing other factors, such as "constitutionality, individual autonomy, integrity of the fact-finding process, and community safety").

33. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 211 (1995); *see also*, David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L SCH. J. HUM. RTS. 759, 762 (1993).

34. *See* Patricia Monroe Wisnom, Note, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1354 (1995).

35. *See id*.

36. *See, e.g.*, Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547, 560–62 (2002–2003) (providing a therapeutic jurisprudential analysis of testamentary capacity); Dara Green, Note & Comment, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RES. 663, 680 (1999); Wisnom, *supra* note 34, at 1345.

37. *See* Wisnom, *supra* note 34, at 1356–57 (explaining that "the laws . . . set forth in the Arizona probate code regarding the duties of the personal representative . . . may be considered therapeutic" because "they set forth guidelines that . . . generally result in timely and accurate distributions in accordance with the wishes of the decedent").

experienced "at the closure of difficult estates."[38] This study of the personal representative's role in the probate process provides a rare example of a therapeutic jurisprudential analysis of the law of succession.

In addition to the few explicit applications of therapeutic jurisprudence to the law of succession, some legal scholars have examined the psychological consequences of estate planning and will-execution within a less structured framework.[39] The work of Professor Thomas Shaffer is the most comprehensive of this scholarship. Although Shaffer does not expressly frame his work within a therapeutic jurisprudential context, his scholarship contains many of the hallmarks of the discipline. For example, Shaffer has examined the psychological consequences of the testator's confrontation with death and ultimately suggested ways that the estate-planning attorney can more effectively address the negative psychological consequences of the testamentary experience.[40] Supplementing Shaffer's scholarly analysis and adding to the sparse literature that explicitly applies therapeutic jurisprudence to the law of succession, this Article examines the estate-planning process within a therapeutic jurisprudential framework.

III. ANTITHERAPEUTIC CONSEQUENCES OF ESTATE PLANNING

The first step of a therapeutic jurisprudential analysis is to identify the negative and positive psychological consequences of the law.[41] This process facilitates the second step of the analysis by providing a framework through which to evaluate the therapeutic impact of potential law reforms.[42] When applied to the process of estate planning, the first step of a therapeutic jurisprudential analysis reveals that the exercise of testamentary power has both antitherapeutic and therapeutic consequences. Indeed, in contrast to Ishmael, who seemingly experienced only the therapeutic effects of estate planning,[43] some may experience negative psychological consequences from the act of preparing and implementing a testamentary scheme.

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38. *Id.* at 1362.

39. *See, e.g.*, Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 419–20 (1988). Other scholars have merely mentioned the psychological consequences of various aspects of the law of succession in passing. S*ee, e.g.*, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1047 (2004) ("Executing a will can yield obvious psychic benefits . . . .").

40. *See generally* Shaffer, *supra* note 14; *see also* Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345 (1968).

41. *See supra* Part II.B.

42. *See supra* Part II.B.

43. *See* MELVILLE, *supra* note 5, at 249.

A. Death Anxiety

The preparation and implementation of an estate plan can be psychologically damaging because the testator must confront the inevitability of death. While aboard the *Pequod*, Ishmael needed no reminder of life's fragility. But for many people, estate planning is one of the few tasks that require direct consideration of their own mortality. Indeed, for most individuals, contemplating one's death is difficult and unpleasant,[44] and may evoke severe negative emotions, such as fear, anxiety, and even terror.[45] While the severity of these antitherapeutic consequences varies,[46] all testators are susceptible to some degree of death anxiety because the confrontation with death is inherent to the estate-planning process.[47] A wide array of unique concerns may produce a particular testator's anxiety, which likely vary depending on each testator's distinct situation.[48] Because a multitude of considerations—including "personal circumstances of age, wealth, family, personality, [and] attitude toward death,"—affect each testator's decision to exercise testamentary power,[49] these same characteristics may likewise affect the nature and severity of the testator's death anxiety.

Although the sources of death anxiety vary, psychologists have identified seven general concerns that cause people to fear death:

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44. *See* Beyer, *supra* note 39, at 419; Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 348 (1979) (explaining that "facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life"); Shaffer, *supra* note 14, at 377 ("[D]eath is an unpleasant fact to modern man.").

45. *See* ROBERT FIRESTONE & JOYCE CATLETT, BEYOND DEATH ANXIETY xi (2009) (explaining that sadness, anger, and fear are the appropriate emotions caused by facing one's mortality); Eric Strachan et al., *Coping with the Inevitability of Death: Terror Management and Mismanagement*, *in* COPING WITH STRESS: EFFECTIVE PEOPLE AND PROCESS 120 (2001) (explaining that because "[h]umans are self-conscious and capable of infinite abstraction . . . we are aware of the inevitability of death, which is terrifying for an animal born with an innate desire for continued life," and adding that "[d]eath . . . is unknown, which is terrifying").

46. *See* ROBERT KASTENBAUM, THE PSYCHOLOGY OF DEATH 130 (3d ed. 2000) ("There are some weak indication that people in favorable socioeconomic circumstances report relatively lower levels of death anxiety."); Rebecca Helen Lehto & Karen Farchaus Stein, *Death Anxiety: An Analysis of an Evolving Concept*, 23 RES. & THEORY FOR NURSING PRAC. 23, 31–32 (2009) ("[D]eath anxiety is a multidimensional construct related to fear of and anxiety related to the anticipation and awareness of the reality of dying and death that includes emotional, cognitive, and motivational components that vary by developmental stage and sociocultural life occurrences.").

47. *See* Shaffer, *supra* note 14, at 377 (explaining that "[t]he testamentary experience" is "taboo-defying," and that "[p]eople going through . . . [t]aboo-defying experiences . . . tend to be upset"); s*ee also* Lehto & Stein, *supra* note 46, at 24 ("Confronting death and the anxiety generated by knowledge of its inevitability is a universal psychological quandary for humans.").

48. *See In re* Trusteeship Agreement with Nash, 122 N.W.2d 104, 107 (Minn. 1963) (noting that "every testator's circumstances and plan of disposition is unique"); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 453 (2001) ("[T]hose who leave wills" have "unique circumstances.").

49. Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L. REV. 630, 652 (1992).

(1) they can no longer have any life experiences;
(2) they may be uncertain as to what will happen to them if there is a life after death;
(3) they may be afraid of what will happen to their bodies after death;
(4) they realize they will no longer be able to care for their dependants;
(5) they realize that their death will cause grief to their relatives and friends;
(6) they realize that all their plans and projects will come to an end; and
(7) they may be afraid that the process of dying will be painful.[50]

Studies analyzing these considerations in the context of estate planning suggest that many testators are burdened by the same worries during the preparation of a testamentary scheme and the exercise of testamentary power.[51] Moreover, the anxiety of no longer providing for the needs of one's family and the realization that one's life work will come to an end are of particular concern for many testators.[52]

Death anxiety's potential severity is evident in the effort that many people expend to avoid activities that require consideration of death.[53] Indeed, "most [people] prefer to remain oblivious to the angel of death resting on [their] shoulders,"[54] and as a result, many ignore their own mortality.[55] For example, a relatively small number of adults opt into organ-donor programs, despite a large percentage of the public approving of organ donation.[56] A variety of explanations for this phenomenon have

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50. Beyer, *supra* note 39, 419–20.

51. *See, e.g.*, *id.*; Shaffer, *supra* note 14, at 378–79.

52. *See* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 985 (1987).

53. *See* Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 584 (2003) ("[P]eople delay beginning estate tax liability reduction activities" because "such activities require contemplating one's own death."); Barbara H. Fried, *Who Gets Utility from Bequests? The Distributive and Welfare Implications for a Consumption Tax*, 51 STAN. L. REV. 641, 654 (1999) ("One also suspects that many people feel a strong aversion to annuitizing their wealth, arising in part from an unwillingness to face the prospect of old age and death 'rationally.'"); Louise Harmon, *Fragments on the Deathwatch*, 77 MINN. L. REV. 1, 116 (1992) ("[A] sign of the taboo nature of death, even in the medical profession, is the avoidance of the dying person. Not only do health care workers not want to talk *about* a patient who is dying, but often they do not want to talk *to* a patient who is dying. Of course, this kind of avoidance behavior is not confined to health care workers; it is just a manifestation of what is come to be called 'death anxiety.'").

54. Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 11 (1989).

55. *See* KASTENBAUM, *supra* note 46, at 128; *see also* Shaffer, *supra* note 14, at 377 (explaining that "personal death is a thought modern man will do almost anything to avoid").

56. *See* UNIF. ANATOMICAL GIFT ACT, prefatory note, (2007); Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANNALS HEALTH L. 67, 67–68 (2008); Cohen, *supra* note 54, at 9.

been suggested,[57] but the public's general reluctance to acknowledge the inevitability of death is a primary reason for low organ-donation rates.[58] Other activities that people avoid as a defense mechanism for death anxiety include end-of-life medical planning[59] and preparation for retirement.[60]

Similarly, many people evade thoughts of mortality by refusing to prepare an estate plan and execute a will.[61] As the sixteenth-century essayist Michel de Montaigne observed, "You can frighten . . . people by mentioning death . . . and since it is mentioned in wills, never expect them to draw one up before the doctor has pronounced the death-sentence."[62] Everyone who regularly plans for others' deaths, even professional estate planners and probate lawyers, may be reluctant to execute wills because of the resulting contemplation of mortality.[63] The effects of death anxiety, however, were manifest in the avoidance of estate planning long before the days of Montaigne. For example, in "ancient times," some individuals held irrational beliefs like the fear that death closely and attentively follows those who execute wills.[64] Not surprisingly, this ubiquitous fear of death continues to affect estate planning in modern times, as the avoidance of acknowledging mortality contributes to today's high rates of intestacy.[65]

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57. *See* Clamon, *supra* note 56, at 68; Cohen, *supra* note 54, at 9.

58. *See* Cohen, *supra* note 54, at 10.

59. Ben Kusmin, Note, *Swing Low, Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives*, 32 AM. J.L. & MED. 93, 110–11 (2006).

60. *See* Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?*, 55 U. CHI. L. REV. 790, 818 (1988).

61. *See* Beyer, *supra* note 16, at 778 ("[M]any individuals procrastinate in making a will as a conscious or unconscious defense against admitting mortality."); G. Warren Whitaker, *Classic Issues in Family Succession Planning*, PROB. & PROP. 32, 37 (Mar.–Apr. 2003) ("[I]t should not be surprising when a client with significant succession issues refuses to do any planning, or when a client asks his estate planner to prepare his or her will quickly and then allows it to languish unexecuted for months.").

62. MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 93 (M. A. Screech trans., Penguin Books 1991) (1580).

63. Beyer, *supra* note 39, at 419. Professional estate planners may also have difficulty explicitly mentioning the possibility of their client's death; *see* Shaffer, *supra* note 40, at 355–62 ("These clients and lawyers (and I should emphasize that I am reporting on the conduct of lawyers as well as the conduct of clients) evaded and tended to deny the reality of the clients' deaths.").

64. Beyer, *supra* note 39, at 419; *see also* Hirsch, *supra* note 39, at 1048 ("For centuries now, would-be testators have harbored the fear that if they executed their wills, the documents would become relevant in short order.").

65. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 71 (8th ed. 2009). Other factors may contribute to a person dying intestate, including a "lack of information about the probate system and an unfounded assumption that a person's 'family' automatically inherits the person's property." Susan N. Gary, *The Parent-Child Relationship under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 650 (2002). Of course, death anxiety, procrastination, and ignorance are not the only reasons that one may die intestate. For example, as part of their "gypsy style of life" in which they

Another potential consequence of death anxiety is the deterioration of the testator's decision-making capabilities. Montaigne observed this consequence of death anxiety five centuries ago when he exclaimed, "[I]n the midst of pain and terror [caused by the acknowledgment of death], God only knows what shape [the testator's] good judgement kneads [the will] into!"[66] Modern legal scholars have confirmed Montaigne's observation and have reported that "[t]hinking about unpleasant facts" such as the inevitability of death "can bias decisionmaking by inducing fear or anxiety,"[67] especially in the context of preparing an estate plan and executing a will.[68]

Perhaps the most significant way that death anxiety affects a testator's decision-making process is that it provides an incentive to make hastily considered decisions regarding his testamentary scheme. Oftentimes, people cope with the anxiety that accompanies significant choices by quickly making difficult decisions, thereby abbreviating the stressful experience.[69] As one psychologist has explained, stressors such as death anxiety can "impair decision making [because,] [u]nder stress, people who normally consider all aspects of a situation before making a decision may act impulsively."[70] This truncated decision-making process is characterized by an erratic method of selecting information for consideration, an inadequate amount of time spent considering the relevant information and evaluating alternatives, and the absence of reevaluation after

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are "insulated from society," the "Hell's Angels don't find it necessary to leave wills, and their deaths don't require much paperwork . . . . A driver's license expires, a police record goes into the dead file, a motorcycle changes hands and usually a few 'personal cards' will be taken out of wallets and dropped into wastebaskets." HUNTER S. THOMPSON, HELL'S ANGELS: A STRANGE AND TERRIBLE SAGA 143–44 (Modern Library 1999) (1966).

66. MONTAIGNE, *supra* note 62, at 93.

67. Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 234 (2008); *see also* Christina Cooley, *Maximizing Patient Autonomy through Expanded Medical Surrogacy Mediation*, 30 LAW & PSYCHOL. REV. 229, 235 (2006) ("The psychological reluctance of people to confront their own mortality along with grief in facing death, denial, anxiety, and loneliness, may also severely affect decision-making abilities."); Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or A Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401, 415–18 (2007) ("[S]tressors on the psyche are linked to cognition and capacity for decision making. Cognitive effects of stress are significant and include narrowing of attention or perceptual tunneling, reduced working memory, and rigidity.").

68. *See* Marvin B. Sussman et al., *Will Making: An Examination of Client and Lawyer Attitudes*, 23 FLA. L. REV. 25, 49 (1970) ("[T]he individual who is faced with the possibility of imminent death may make hasty and short-sighted decisions regarding the provisions of his will.").

69. *See* Willis, *supra* note 67, at 234.

70. DOUGLAS A. BERNSTEIN & PEGGY W. NASH, ESSENTIALS OF PSYCHOLOGY 397 (4th ed. 2007); *see also* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 152 (2007) ("Pressure and stress might disrupt optimal decision making. When individuals encounter a sufficiently high degree of stress, they are likely to fail to optimally consider their options and actions.").

the decision has been made.[71] Ultimately, this abridged decision-making process can result in the decision-maker acting carelessly and often produces bad decisions.[72]

This defense mechanism for death anxiety and its negative consequences are easily applicable to the estate-planning context.[73] For instance, by quickly making decisions concerning an estate plan, the testator can shorten his confrontation with mortality in an attempt to reduce his fear and anxiety of death. But while using this shortened decision-making process, the testator may not fully consider the factors that typically influence a testamentary scheme, such as relationships with friends and relatives or the extent and nature of property owned. In sum, death anxiety's influence on the decision of whether to plan for the distribution of one's property upon death, as well as its effect on the decision-making capabilities of those who do prepare estate plans, illustrates the potential negative consequences of confronting death through the estate-planning process. The death anxiety that stems from the testator's inevitable confrontation with death is therefore a primary antitherapeutic consequence of the estate-planning process.

B. Estate Disputes and Familial Conflict

In addition to the anxiety caused by the recognition of mortality,[74] a testator may also experience fear and anxiety because of the possibility of an estate dispute.[75] A recent poll found that 18% of wealthy Ameri-

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71. *See* Andrei C. Miu et al., *Anxiety and Decision-Making: Toward a Neuroeconomics Perspective*, *in* 20 ADVANCES IN HEALTH ECONOMICS AND HEALTH SERVICES RESEARCH: NEUROECONOMICS 55, 66 (2008) (describing the differences between vigilant decision-making and hypervigilant decision making). "This kind of decision-making, although originally acknowledged as saving time and effort, was nonetheless viewed as a defective coping pattern that interrupted the cognitive process required for optimal decision-making. Stress tended to increase the use of hypervigilant decision-making and the frequency of error in logical analogy tasks." *Id.* (citations omitted).

72. *See* BERNSTEIN & NASH, *supra* note 70, at 397; Willis, *supra* note 67, at 234.

73. *See supra* notes 66–68 and accompanying text.

74. *See supra* Part III.A.

75. *See* John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 85 (1978) ("The testator who has cause to fear that his physical and mental condition will be made the basis for extornationate post-mortem litigation challenging his testamentary capacity has a moral claim on the legal system to provide him with the means of preventing the depredation."); Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 564 (2008) (explaining that testators may anticipate or fear discord over the provisions of their wills).

One form of estate dispute is a will contest, which is a challenge of a will's validity that is usually based upon allegations of inadequate mental capacity or undue influence. *See* Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 8 (2000) ("Most will contests occur because of undue influence or lack of testamentary capacity claims, although they may obviously involve lack of proper execution, forgery, altered documents, revocation, mistake, fraud, duress and insane delusion."); Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22

cans fear that their families will fight over their fortunes once they are gone.[76] Numerous high-profile estate disputes have littered newspaper headlines in recent years and illustrate the legitimacy of these fears.[77] These concerns are not limited to large estates, however, as many estate disputes are waged even when little material value is at stake.[78] Furthermore, although some testators, such as Ishmael (who was a bachelor and an orphan),[79] may have little to fear because they have no relatives to disinherit and therefore no relatives to disappoint, even previously amicable families can turn astringent when a relative's estate is at issue.[80]

The root of a testator's anxiety regarding a potential estate dispute may vary. For example, the testator may fear the family conflict that accompanies almost all estate litigation.[81] Estate disputes are often brought by family members of the decedent who may be motivated by a variety of factors, such as perceived unfair treatment by the testator's distributive scheme, complicated family dynamics, or strained familial relation-

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REAL PROP. PROB. & TR. J. 607, 646–52 (1987) (reporting that 74% of will contests involved allegations of undue influence or lack of testamentary capacity, and 14% of will contests brought challenges based upon lack of adherence to required formalities).

76. *See* Jennifer Harper, *Splitting Heirs Over Wealth: But Children Usually Inherit Most of It*, WASH. TIMES, June 18, 2006, at A1.

77. *See* Dean Praetorius & Nathalie Tadena, *Celebrity Estate Disputes from Michael Jackson, Steve McNair to Anna Nicole Smith*, ABC NEWS (June 22, 2009), http://abcnews.go.com/Business/story?id=8129259&page=1. "Will contests rarely occur, perhaps on the order of one in one hundred or so cases." Schoenblum, *supra* note 75, at 614. But a testator's fears are not unfounded because the millions of probates that occur each year make a "one-in-a-hundred litigation pattern[]" a "very serious" problem. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994). Furthermore, "the devastation to family relationships that often accompanies a will contest gives the problem weight beyond its numbers." Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 222 (2002); *see also* Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 264 (1998) ("Testators . . . have legitimate reasons for wanting to avoid contests and their concomitant results.").

78. *See* Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 61–62 (2006).

79. *See* AUGUST NIGRO, THE NET OF NEMESIS, STUDIES IN TRAGIC BOND/AGE 91 (2000).

80. *See* RALPH WALDO EMERSON, *Fortune of the Republic*, *in* THE POLITICAL EMERSON, ESSENTIAL WRITINGS ON POLITICS AND SOCIAL REFORM 185, 195 (David M. Robinson ed., 2004) ("When it comes to divid[ing] an estate, the politest men will sometimes quarrel."); McMullen, *supra* note 78, at 61 ("Family members often fight over the estates of their departed loved ones. It is a safe guess, however, that many of these decedents had confidently assumed that their own families would *not* fight . . . .").

81. *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 397 (1997) ("Persons planning the transfer of property after death . . . view family harmony as a tangential, but important goal."); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 637–38 (2000) ("Many, if not most, cases arising in probate, trust, and guardianship involve families whose relationships could be irreparably shattered by bitter and prolonged litigation.").

ships caused by the grief of losing a loved one.[82] But regardless of the underlying personal reasons for challenges over decedents' estates, "[s]uch contests often breed irreconcilable family feuds."[83] Relatives are frequently pitted against each other, old family disputes are renewed, and familial relationships are irreversibly damaged.[84] Therefore, because the preparation of an estate plan can lead to family conflict that spans generations, the testator may experience antitherapeutic effects from the estate-planning process.

In addition to straining familial relationships, an estate dispute can bring public scrutiny and invasion of privacy, both of which may exacerbate family conflict and can cause the testator added fear and anxiety during the estate-planning process.[85] Because the testator's mental competency is at issue in the majority of estate disputes,[86] estate litigation often involves investigations into the testator's unique and deeply personal characteristics.[87] As the Supreme Judicial Court of Massachusetts explained, "Contests over the allowance of wills frequently, if not invariably, result in minute examination into the habits, manners, beliefs, conduct, idiosyncrasies, and all the essentially private and personal affairs of the testator . . . ."[88]

Scrutiny of the testator's private life may generate criticism and ridicule of the decedent and can be embarrassing and hurtful for the decedent's family.[89] Indeed, most people, even those who believe that they have nothing to hide, do not want their personal affairs scrutinized in a public forum.[90] In the context of estate disputes, the potential damage to testators' reputations is especially acute because they invariably lack the

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82. *See* Gary, *supra* note 81, at 415–23; Stimmel, *supra* note 77, at 199–201; *see also* Ronald Chester, *Mediation and Jury Trials as Means of Resolving Will Contests*, 1 PEPP. DISP. RESOL. L.J. 267, 267 (2001) (noting that "will contests are family disputes first and legal and financial ones second").

83. Donegan v. Wade, 70 Ala. 501, 505 (1881).

84. *See* Gary, *supra* note 81, at 397; Radford, *supra* note 81, at 637–38; Yolanda Vorys, Note, *The Best of Both Worlds: The Use of Med-arb for Resolving Will Disputes*, 22 OHIO ST. J. ON DISP. RESOL. 871, 874–75 (2007).

85. *See* Love & Sterk, *supra* note 75, at 567.

86. *See* Collins, *supra* note 75, at 8.

87. *See* Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 636 (1994); *see also* Beyer et al., *supra* note 77, at 264–65.

88. Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928).

89. *See* Begleiter, *supra* note 87, at 636 (explaining that "the publicity surrounding a will contest" is characterized by "ridicule, contempt, and criticism"); Love & Sterk, *supra* note 75, at 567 ("A testator whose dispositions depart from social norms may fear a contest because the trial will expose his or her personal life, and that of his family, to public humiliation or ridicule."); *see also Rudd*, 160 N.E. at 886 ("[S]uspicions or beliefs in personal insanity, mental weakness, eccentricities, pernicious habits, or other odd characteristics centering in or radiating from the testator, may bring his family into evil repute and adversely affect the standing in the community of its members.").

90. *See* Begleiter, *supra* note 87, at 636.

opportunity to defend themselves after their death.[91] The U.S. Supreme Court acknowledged this concern when it observed over one hundred years ago that estate disputes "not infrequently [bring] to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial."[92] Therefore, because it provides a medium for the public airing of the "dirty laundry" of testators and their families,[93] the possibility of a will contest may cause testators stress and anxiety during the estate-planning process.

In sum, an estate dispute "may bring sorrow and suffering to many concerned."[94] A challenge to the validity of a will or another estate-planning document can tarnish "the fair reputation of the dead" and disrupt "the peace and harmony of the living."[95] The potential for both familial conflict and public scrutiny are two possible sources of fear and anxiety for testators, but they may also worry about a variety of other negative consequences of an estate dispute, including the financial depletion of their estates and the frustration of their desired distributive schemes.[96] As a result, while preparing and implementing an estate plan, testators may experience fear and anxiety from the possibility that an estate dispute and its negative consequences will plague the administration of their estates.

C. Fear of Probate

In addition to death anxiety[97] and anxiousness regarding estate disputes and familial conflict,[98] testators may worry about the administra-

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91. *See* Alper v. Alper, 65 A.2d 737, 740 (N.J. 1949) (explaining that will contests provide the opportunity for contestants to "besmirch[] the reputation of the testator when he is no longer alive to defend himself"); *Rudd*, 160 N.E. at 886 (explaining that the testator "is not alive and cannot explain what may without explanation be given a sinister appearance"). "For most decedents, the fact that the spectacle would not occur until after [their] death[s] would provide small solace." Love & Sterk, *supra* note 75, at 553.

92. Smithsonian Inst. v. Meech, 169 U.S. 398, 402 (1898); *see also* Begleiter, *supra* note 87, at 637 ("The recognition of the importance of this factor to testators by the United States Supreme Court is quoted in almost every case involving a no-contest clause.").

93. Love & Sterk, *supra* note 75, at 567 ("A testator . . . may fear a [will] contest because . . . [of] the prospect that the family's dirty laundry will be aired in public."); *see also* Begleiter, *supra* note 87, at 636–39 (describing the scrutiny under which a testator's life is examined during a will contest under the heading of "Family Antagonism and the Airing of Dirty Linen in Public").

94. *Rudd*, 160 N.E. at 886.

95. *Id*.

96. *See* Love & Sterk, *supra* note 75, at 539 (explaining that preservation of family harmony, conservation of estate assets, and avoidance of airing the family's dirty laundry are "objectives common to many testators").

97. *See supra* Part III.A.

98. *See supra* Part III.B.

tion of their estates after they are gone. Specifically, many people planning for the disposition of their estates have concerns regarding the probate process.[99] Over the past several decades, the probate process has drawn criticism from legal scholars for being cumbersome and inefficient.[100] As Professor John Langbein explained, "The probate system has earned a lamentable reputation for expense, delay, clumsiness, make-work, and worse."[101] Fueled by businesses' marketing services to avoid the probate process,[102] those who desire to make estate plans now frequently harbor their own concerns regarding the probate process.[103]

These concerns fall within three general categories.[104] First, testators are often concerned with the length of the probate process.[105] These concerns are not unfounded as "administration of an estate typically lasts for many months or even years."[106] Testators realize that their families will be coping with their deaths during the probate process,[107] and many are anxious to circumvent probate in order to shield their families from the time-consuming distractions of the process.[108] Second, testators often fear the administrative costs that accompany the probate process,[109] which include "probate court fees, the commission of the personal representative, the attorney's fees, and, sometimes, appraiser's and guardian

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99. *See* THE COLUMBIA RETIREMENT HANDBOOK 220 (Abraham Monk ed., 1994) ("Estate planning clients frequently have an exaggerated fear of the probate process . . . ."). Probate is the judicially administered process by which a decedent's debts are paid and legal title of probate assets is transferred to the estate beneficiaries. *See* DUKEMINIER ET AL., *supra* note 65, at 39.

100. *See, e.g.*, PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS (2003) ("The American probate process has long been perceived as slow, expensive, and corrupt."); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 542 (2000) (describing the probate system as "time-consuming and costly, or even in some venues a modern form of grave-robbery").

101. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984).

102. *See* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 208–09.

103. *See* THE COLUMBIA RETIREMENT HANDBOOK, *supra* note 99, at 220.

104. John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 48 (2009) ("Delay, expense, and lack of privacy are three universal criticisms of probate.").

105. *See id*.

106. WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES 630 (4th ed. 2010); *see also* DUKEMINIER ET AL., *supra* note 65, at 440.

107. *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 437–38 (2009) (describing practitioner accounts of clients' concerns regarding their families enduring the probate process); *see also* Denise Johnson et al., *Working Group on the Restructuring of, and Access to, the Judiciary*, 34 VT. B.J. 38, 40 (2009) (explaining that the "probate court must accommodate a largely pro se clientele in various stages of stress or grief").

108. *See* Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 531 (2006) (citing delay as a reason that many people attempt to avoid probate).

109. *See* Martin, *supra* note 104, at 50 ("A second universal criticism of probate is expense.").

ad litem's fees."[110] These expenses can mount quickly,[111] and some testators consequently worry that probate costs will consume a large portion of their estates.[112] Finally, some testators are concerned with privacy issues, which can arise even absent an estate dispute.[113] Because the testator's will is a public record, free to be viewed by anyone,[114] some testators fear public scrutiny of their financial and familial matters.[115]

In sum, while preparing an estate plan, the testator may harbor fears of the probate system because it can cause lengthy delays in the administration of the estate, excessive administrative costs, and invasions of privacy.[116] The anxiety that these concerns produce is exemplified by the time, money, and effort that many people expend to avoid the probate process. Fear of probate is therefore a potential negative psychological effect of preparing an estate plan. When taken together with death anxiety[117] and concerns regarding estate disputes and familial conflict,[118] these fears comprise the antitherapeutic consequences of the estate-planning process.

IV. THERAPEUTIC CONSEQUENCES OF ESTATE PLANNING

Although the estate-planning process can cause death anxiety and other antitherapeutic consequences,[119] many testators experience peace and satisfaction from preparing and implementing estate plans.[120] For example, Ishmael drew comfort from his testamentary experience aboard the *Pequod*, and he was not alone in using his estate plan as a source of contentment while at sea.[121] While Ishmael's actions may appear idiosyncratic, the use of the estate-planning process as a distraction from the perilous environment in which sailors worked was not an isolated occur-

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110. DUKEMINIER ET AL., *supra* note 65, at 45–46.

111. *See id*.

112. *See* Gary, *supra* note 108, at 541; Ellen Sugrue Hyman & William Josh Ard, *Trust Mills and the Unauthorized Practice of Law*, 86 MICH. B.J. 26, 28 (2007) (Members of the public have "concerns that they will lose their hard-earned money through the onerous costs of . . . probate."); Martin, *supra* note 104, at 50.

113. *See* Martin, *supra* note 104, at 51–52.

114. *See* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 721–22 (2006).

115. *See* Gary, *supra* note 108, at 531 (citing the "desire for privacy" as a major factor in the decision to avoid probate); Martin, *supra* note 104, at 51–52 ("Lack of privacy is a third significant objection to traditional probate.").

116. *See* Martin, *supra* note 104, at 48–52.

117. *See supra* Part III.A.

118. *See supra* Part III.B.

119. *See supra* Part III.

120. *See* Shaffer, *supra* note 40, at 368 ("[C]lients find the experience of realistic, informed 'estate planning' therapeutic.").

121. MELVILLE, *supra* note 5, at 248.

rence aboard whaling ships.[122] As Ishmael described, "It may seem strange that of all men sailors should be tinkering at their last wills and testaments, but there are no people in the world more fond of that diversion."[123] The use of testamentary power as a therapeutic tool was so common that sailors often amended their wills on multiple occasions while at sea, as Ishmael himself did three times prior to his encounter with the Whale.[124] Ishmael's account is silent as to the precise source of his contentment;[125] however, several aspects of the estate-planning process may explain the therapeutic nature of his testamentary experience.

A. Freedom of Testation

Subject to limited exceptions, testators enjoy broad freedom to craft their estate plans as they choose.[126] For example, Ishmael took advantage of this liberty when he bequeathed his entire estate to his friend, Queequeg.[127] Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession.[128] A number of policies underlie freedom of testation,[129] including that the doctrine fosters the testator's autonomy by allowing him to make significant decisions concerning the distribution of his estate.[130] This opportunity for

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 248–49. Some have suggested that Ishmael's satisfaction stemmed from his achieving a kind of immortality through the writing of his will. *See, e.g.*, EDWIN S. SHNEIDMAN, A COMMONSENSE BOOK OF DEATH: REFLECTIONS AT NINETY OF A LIFELONG THANATOLOGIST 150 (2008); Tony Tanner, *Introduction* to HERMAN MELVILLE, MOBY DICK xxv (Oxford Univ. Press 1998) (1851). In his novel, *The Dharma Bums*, Jack Kerouac provides another literary example of a character that derives ambiguous pleasure from testamentary power. When Henry Morley is called "crazy" by Ray Smith, who is the fictional representation of Kerouac and the story's narrator, he responds by saying, "I dunno, maybe I am, but if I am I'll leave a lovely will anyway." JACK KEROUAC, THE DHARMA BUMS 31 (Penguin Books 2006) (1958).

126. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975); *see also In re* Caruthers' Estate, 151 S.W.2d 946, 948 (Tex. Civ. App. 1941) ("A testator's right to bestow his property by will at death is as absolute as his right to convey it during his life time.").

127. MELVILLE, *supra* note 5, at 248.

128. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention."); Langbein, *supra* note 126, at 491 ("The first principle of the law of wills is freedom of testation.").

129. *See* Adam J. Hirsch & William K. S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992) (providing a comprehensive description of the various rationales for allowing testamentary freedom).

130. *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1754 (1992); *see also* Wisnom, *supra* note 34, at 1354–55 ("[I]t is not a surprise that the

self-determination can have therapeutic consequences for the testator because psychological welfare generally improves when one is allowed to make important choices autonomously.[131] As Winick explained, "[I]f given meaningful choices, individuals will perceive themselves as in control of their lives rather than as mere passive victims of forces they can neither understand nor control."[132] Consequently, "people [generally] feel better about making their own decisions rather than having them imposed upon them by another."[133]

The most basic therapeutic consequence of the autonomous decision-making permitted by testamentary freedom is the testators' satisfaction of knowing that they have wide latitude to prepare an estate plan that best fulfills their preferences. Although state legislatures attempt to craft intestacy statutes in a way that mimics most individuals' testamentary preferences,[134] all testators are unique and best know their own distinct needs and desires.[135] As such, a testator whose preferences differ from the default distributional scheme of intestacy will find satisfaction in testamentary freedom. As Winick further explained, "An individual's choices from the menu of life are inevitably bound to prove more self-satisfying and suitable than any made by an impersonal bureaucrat or even an enlightened philosopher king."[136] Therefore, because testators best know their unique testamentary preferences, they can receive therapeutic benefit from the ability to freely construct the substance of their estate plans in a way that matches those preferences.

Of the various preferences that testators can satisfy through freedom of testation, perhaps the most urgent and universal is the care of their families after the testators' own deaths.[137] Because testamentary

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concept of autonomy is a factor in probates, since writing a will is the mechanism by which an individual determines how and to whom his property will be distributed.").

131. Beyer, *supra* note 16, at 779 ("Estate planning . . . permits persons to exercise increased self-determination and consequently provides them with a sense of control over their environment and destiny."); Winick, *supra* note 130, at 1766–67; Winick, *supra* note 15, at 191 ("[S]elf-determination is therapeutically advantageous."); Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 113 (2000) ("Exercising a degree of control and self-determination in significant aspects of one's life may be an important ingredient of psychological wellbeing."); Wisnom, *supra* note 34, at 1353.

132. Winick, *supra* note 130, at 1766.

133. Winick, *supra* note 131, at 112–13.

134. *See* DUKEMINIER ET AL., *supra* note 65, at 75.

135. *See* Baron, *supra* note 49, at 652.

136. Winick, *supra* note 130, at 1756.

137. *See* Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 913 (1999) ("Most testators are bent on providing for their families."); Shaffer, *supra* note 14, at 385 (explaining that the "general impression" that testators' most pressing concern is planning for the care of their families is confirmed in tests of "wills clients"); Sussman et al., *supra* note 68, at 49 (reporting results from a study that showed "[t]he principal

freedom allows testators to prepare their estate plans as they choose, they can distribute their estates to relatives, which both helps meet familial needs and provides the testators the satisfaction of knowing that they have taken steps to meet those needs. Indeed, many testators feel a profound moral responsibility to provide financial support to family members through their estate plans, and satisfying this moral obligation can provide great comfort.[138] Unsurprisingly, most testators fulfill this perceived moral duty and distribute the bulk of their estates within the family.[139] Therefore, because testamentary freedom can provide comfort and satisfaction to testators by allowing them to make autonomous choices regarding the distribution of their estates, freedom of testation is one therapeutic consequence of the estate-planning process.

B. Lawyers as Counselors

Another potentially therapeutic aspect of estate planning is the role of estate-planning attorneys who, in addition to acting as legal representatives, can provide personal support to their clients. Consider, for example, Ishmael's testamentary experience aboard the *Pequod*. Unlike the typical testator who engages a lawyer during the estate-planning process,[140] Ishmael lacked access to an attorney while at sea.[141] Nonetheless, Ishmael asked his crewmate, Queequeg, to accompany him below deck and take part in the testamentary experience.[142] As Ishmael recalled, "I say, I thought I might as well go below and make a rough draft of my will. 'Queequeg,' said I, 'come along, you shall be my lawyer, executor,

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reason why individuals [make] wills [is] their desire to protect the well-being of members of their immediate families").

In addition to the inability to provide continuing support to their families, a second consequence of death that troubles many testators is the realization that their "plans and projects [will] come to an end." Shaffer, *supra* note 52, at 984. An estate plan, however, can be viewed "as a method to prolong experience through continuation of projects." Shaffer, *supra* note 14, at 380. A financial bequest to family members may satisfy the testator's desire for the continuation of projects, but other bequests may also serve this purpose, such as gifts to provide for the care of a beloved pet. *See generally* Breahn Vokolek, Comment, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. REV. 1109 (2008).

138. *See* Shaffer, *supra* note 14, at 387–88; Sussman et al., *supra* note 68, at 36.

139. CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 207 (1987).

140. *See* Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 977–80 (2010) ("[L]awyers dominate the will-production market, and most testators turn to them for advice in drafting their wills.").

141. But in certain regards, the sailors onboard the *Pequod* had to act as their own lawyers. *See* MELVILLE, *supra* note 5, at 432 ("But though no other nation has ever had any written whaling law, yet the American fisherman have been their own legislators and lawyers in this matter."); *see also* Robert C. Deal, *Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling*, 37 ECOLOGY L.Q. 199, 200–01 (2010).

142. MELVILLE, *supra* note 5, at 248.

and legatee.'"[143] Ishmael's putative estate-planning attorney had no legal training and could not offer advice regarding the technicalities of will execution; however, Queequeg could provide companionship and psychological support. Like Ishmael's trusted friend, a formally trained lawyer can assist the testator with more than mere legal issues, and in doing so, the estate-planning attorney can be a therapeutic agent for the client.

A lawyer's duties have long included responsibilities outside the realm of traditional legal services,[144] and while providing legal representation, a lawyer frequently gives advice regarding nonlegal issues.[145] For example, some clients' legal problems may be closely tied to corresponding nonlegal issues.[146] But in an effort to obtain psychological support regarding largely personal issues, other clients may seek assistance with problems that have little or no legal consequences.[147] As a result, lawyers often address more than just the legal aspects of their clients' problems.[148] When the representation of a client focuses on these nonlegal issues, the lawyer's services are commonly classified as counseling.[149]

Certain considerations may dissuade lawyers from providing counseling services,[150] but many do spend a large portion of their time coun-

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143. *Id.*

144. *See* Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 365 (2005) (explaining that "[a]s they have for centuries," "[l]awyers must often be more than lawyers" in today's legal market); Margaret Keeney Rosenheim, *The Lawyer as a Family Counselor: As the Social Worker Sees Him*, 22 U. KAN. CITY L. REV. 28, 28 (1953) (explaining that "counseling in the law" has been "importan[t] from time immemorial").

145. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

146. *See* Gantt, *supra* note 144, at 366.

147. *See* Robert C. Mussehl, *From Advocate to Counselor: The Emerging Role of the Family Law Practitioner*, 12 GONZ. L. REV. 443, 446 (1976) (explaining that clients "consult lawyers about matters which have little to do with legal issues and instead simply seek emotional support").

148. Gantt, *supra* note 144, at 365 (explaining that lawyers often address the "moral, economic, and other nonlegal factors affecting their [clients'] situations").

149. *See* Thomas L. Shaffer, *Lawyers, Counselors, and Counselors at Law*, 61 A.B.A. J. 854, 854 (1975) (explaining that a lawyer's counseling services often involve "subject matters that do not result in documents, lawsuits, or negotiations with third persons"); Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 7 (1965) ("Although persons going into practice of law have many and diverse interests, there will be thrust upon all of them to some degree, tasks which are best described as counseling.").

150. *See* Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 193–94 (2009) (suggesting that lawyers "may fear professional consequences for practicing psychology without a license," and that "[t]hey may believe that their lack of training and experience could hurt . . . the client").

seling clients on nonlegal issues.[151] For example, divorce attorneys are often charged with counseling responsibilities because, while preparing for divorce, clients are dealing with a wide array of psychological issues.[152] The emotionally charged nature of divorce therefore provides lawyers with a ripe opportunity to be therapeutic agents for their clients.[153]

Similar to divorce, which signals the "death of a marriage,"[154] the preparation and implementation of an estate plan foreshadows the death of the testator and can negatively affect the client's emotional and psychological well-being.[155] For instance, while preparing an estate plan and executing a will, the testator must confront the inevitability of death, which can cause death anxiety.[156] Estate-planning lawyers thus have the opportunity not only to guide testators through the estate-planning process, but also to be therapeutic agents for their clients by addressing the negative psychological consequences of preparing an estate plan.[157]

The lawyer's services should not replace those of a mental health care professional,[158] but the lawyer should be aware of the client's psychological issues and "explore with the client the need to find appropriate ways to resolve them so that the client can move forward."[159] While aiding their clients during the estate-planning process, lawyers can inquire about testators' potential death anxiety and discuss the specific

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151. *See* Mussehl, *supra* note 147, at 446; Shaffer, *supra* note 149, at 854. One somewhat outdated study found that "[t]he average lawyer spends about a third of his time counseling," and an older study suggested that some lawyers may "spend as much as 80 percent of their professional time . . . counseling." Shaffer, *supra* note 149, at 854.

152. *See* Mussehl, *supra* note 147, at 443 ("The client is often confused, frightened, and suffering emotional hurt."); *see also* Gibson v. State, 921 S.W.2d 747, 765 (Tex. Ct. App. 1996) ("Divorce brings out the worst in every individual; anxiety, emotion, anger, and revenge run rampant.").

153. Mussehl, *supra* note 147, at 443 ("The lawyer, acting in a powerful and trusted capacity, is in a prime position to direct either a destructive or a constructive course of action for the client.").

154. Esther Oshiver Fisher, *A Guide to Divorce Counseling*, 22 FAM. COORDINATOR 55, 55 (1973) (explaining that "the husband and wife together with their children are the mourners, the lawyers are the undertakers, the court is the cemetery where the coffin is sealed and the dead marriage buried").

155. *See supra* Part III.

156. *See supra* Part III.

157. Shaffer, *supra* note 14, at 376 ("Lawyers who advise clients and draft documents in the 'estate planning' practice are counselors in more than the traditional legal sense. They are counselors in the therapeutic or developmental sense."); Richard Susskind, *How the Traditional Role of Lawyers Will Change*, TIMES ONLINE (Nov. 5, 2007) ("Private client lawyers (for example, those who advise on divorces and draft wills) tell me that their job is not really about law; rather, they insist, they are experienced counselors, confidantes, therapists even, in whom their clients have unwavering faith in relation to their personal problems.").

158. *See* Kathryn Webb Bradley, *Knowing Law's Limits: Comments on "Forgiveness: Integral to Close Relationships and Inimical to Justice?"*, 16 VA. J. SOC. POL'Y & L. 322, 332 (2009).

159. *Id.*; *see also* Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 441 (1998).

concerns that may contribute to clients' fears, such as the responsibility to fulfill familial needs and the desire to continue important plans and projects.[160] After this discussion, the lawyer can alleviate some of the client's anxiety by preparing an estate plan that meets the client's specific needs.[161] Furthermore, death anxiety often impairs testators' decision-making processes by drawing their attention from the significant decisions and relevant information that affect estate plans.[162] The estate-planning lawyer, however, can encourage the testator to remain focused on the important issues at hand and to consider carefully all relevant information when making testamentary decisions.[163]

Although a testator's most common fears relate to the consequences of death, the testator may also harbor anxieties regarding potential estate disputes, familial conflicts,[164] and probate-administration issues.[165] The testator's lawyer can ease these concerns by suggesting estate-planning techniques aimed at reducing the possibility of an estate dispute[166] or by facilitating constructive discussions between the testator and potentially disappointed relatives.[167] The lawyer can also reduce some of the testa-

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160. *See supra* Part III.A.

161. Shaffer, *supra* note 14, at 397 ("Lawyers who understand these anxieties are able to help their clients leave the law office realistically consoled by the discovery that law provides ways" to alleviate these concerns, including means "to feed one's children, to continue one's business, and to rob death of some of its ability to frighten the living."); *see also* Beyer, *supra* note 39, at 420 ("[T]actful counseling by the attorney during the entire estate planning process[] may make it easier for clients to cope with the inevitability of death.").

162. *See supra* Part III.A.

163. *See* Sussman et al., *supra* note 68, at 37 ("Where the client perceives the immediacy of death, it may be important for the attorney to determine if the client's plans are well considered and satisfactory for the foreseeable future."); *see also* Shaffer, *supra* note 14, at 377 (explaining that testators who seek counsel from an estate-planning lawyer are "better able to make choices"). Indeed, "in subtle and unobtrusive ways [the lawyer can] influence[] his client to make the right decision[s]." Sussman et al., *supra* note 68, at 41.

164. *See supra* Part III.B.

165. *See supra* Part III.C.

166. "Testators benefit significantly when issues of conflict are resolved during the estate planning process. For instance, testators gain peace of mind by knowing there will be greater likelihood of family harmony after they pass . . . ." Paul Fisher, *The Power Tools of Estate Conflict Management, Recharging the Culture of Estate Conflicts, Part 2*, PROB. & PROP., at 42, 42–43 (July–Aug. 2010) (suggesting methods of avoiding estate disputes).

167. *See* Patry et al., *supra* note 159, at 441–42. Patry et al. states the following:

> For example, consider the situation of elderly parents with two adult children, one of whom functions marginally because of a history of drug and alcohol problems. If, in drafting a will, the parents leave funds outright to one child, but leave the money in a trust to the one with drug problems, the parents may be creating a situation of hurt and hard feelings. A lawyer . . . [can] discuss with the clients possible strategies of dealing with—and minimizing—the law-related psychological distress. For instance, the clients might speak now with the adult children, or they might specify in the will why they are taking the indicated action, and so forth.

Id.

tor's fears of probate by explaining the intricacies of the probate process and by providing the testator with realistic estimates of the delay and expense of the process.

All told, the responsibilities of the estate-planning lawyer inherently include providing counseling services with respect to nonlegal issues.[168] Although the estate-planning process can produce negative psychological consequences,[169] lawyers who fulfill their counseling responsibilities can reduce these negative effects by providing emotional support, encouraging testators to focus on the task at hand, and reminding testators that the law provides ways to address their concerns.[170] If clients show signs of extreme death anxiety or other severe emotional consequences resulting from the antitherapeutic aspects of estate planning, lawyers can direct them to mental-health professionals who can better address their psychological issues.[171]

C. The Will-Execution Ceremony

Although in recent years various legal instruments such as revocable trusts have become part of the estate-planning process,[172] a will is still an important component of most estate plans.[173] As such, many

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168. *See* Shaffer, *supra* note 14, at 377 (explaining that estate-planning lawyers cannot avoid being counselors).

169. *See supra* Part III.

170. *See* Shaffer, *supra* note 40, at 368 ("[T]he professional relationship between wills client and lawyer, when pursued candidly and with realistic and thorough consideration of what is involved, helps to allay [the testator's] anxiety about death."); Shaffer, *supra* note 14, at 377.

171. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 (2006) ("Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work . . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."); Shaffer, *supra* note 149, at 854 ("We need to learn how to recognize . . . how to respect the competence of other counselors, how to refer a client to them with ease and with some assurance that the client will follow our advice."). *See generally* Carol M. Suzuki, *When Something Is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209 (2009).

172. *See* Langbein, *supra* note 101, at 1109–13 (describing the rise of the will substitutes). Langbein further notes,

> Either by declaration of trust or by transfer to a third-party trustee, the appropriate trust terms can replicate the incidents of a will. The owner who retains both the equitable life interest and the power to alter and revoke the beneficiary designation has used the trust form to achieve the effect of testation. Only nomenclature distinguishes the remainder interest created by such a trust from the mere expectancy arising under a will. Under either the trust or the will, the interest of the beneficiaries is both revocable and ambulatory.

Id.

173. Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 160–62 (2008) ("[A] revocable trust will not eliminate the need for a will; a will is still strongly advised under any plan to address any property missed, either now or in the future, by any nonprobate technique being utilized."); *see also* Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 63 n.1 (2009) ("Today, of

people follow Ishmael's lead and execute wills when preparing for the disposition of their property upon death. While reflecting on his experience with the will-execution process, Ishmael described the creation of his will as a "ceremony."[174] Likewise, legal scholars have consistently characterized the will-execution process as "ritualistic"[175] and "ceremonial."[176] This description stems from the formalities of will execution, which generally require that a will be written, signed, and attested by at least two witnesses.[177] These formalities not only show the testator's intent to create a will but also transform the will-execution process into a ceremony or a ritual that can have therapeutic consequences for the testator.

One purpose of many ceremonies is to publicly signify the importance of the participants' decisions, actions, or achievements.[178] Marriage, for example, is a momentous occasion, and one purpose of an elaborate wedding ceremony is to provide a physical setting that symbolizes the significance of the couple's decision to marry.[179] The exchange of rings, the recitation of vows, and the presence of witnesses all represent and impress on the wedding couple the significance of the event.[180] Like the decision to marry, the important choices that a testator makes while creating an estate plan and executing a will warrant the acknowledgment and validation of a meaningful setting in which to finalize those decisions.[181] As one scholar has explained, "The estate planning

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course, a large variety of will substitutes compete with and often even replace the will. Even so, the will remains important for many estates." (citations omitted)).

174. MELVILLE, *supra* note 5, at 249.

175. *See, e.g.*, Joseph Karl Grant, *Shattering and Moving Beyond the Guttenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 131 (2008); Susan Tracey Stearns, Note, *Compressing Testamentary Intent Into Inter Vivos Delivery: What Makes a Conveyance Effective?*—In re Estate of O'Brien, *109 Wash.2d 913, 749 P.2d 154 (1988)*, 64 WASH. L. REV. 479, 481 n.22 (1989).

176. *See, e.g.*, Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 111 (2006); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4 (1941).

177. *See* DUKEMINIER ET AL., *supra* note 65, at 225.

178. JOHN SKORUPSKI, SYMBOL AND THEORY: A PHILOSOPHICAL STUDY OF THEORIES OF RELIGION IN SOCIAL ANTHROPOLOGY 94 (1976) ("[T]he general characteristic of [a] ceremony" is "that of making something out as proper and as socially on record."). For example, the graduation ceremony is recognition of the significant achievements of the graduates. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992). Similarly, corporate management may use ceremonies to signify important business milestones. *See* RICHARD L. DAFT & PATRICIA G. LANE, MANAGEMENT 78 (9th ed. 2009).

179. *See* JAMES L. GOLDEN ET AL., THE RHETORIC OF WESTERN THOUGHT 20 (8th ed. 2003); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 240–41.

180. *See* Scott, *supra* note 179, at 241–42.

181. *See Estate Planning for Human Beings*, 3 U. MIAMI INST. ON EST. PLAN. § 69.1902 (P. Heckerling ed., 1969) [hereinafter *Estate Planning*] (statement of Dean Willard H. Pedrick, panel-

process . . . ought to be a high ceremonial occasion because a client should be getting great intangible satisfaction about the[] significant decisions that he has made [and] that were embodied in the instruments [that] he leaves behind."[182] Accordingly, the ceremonial quality of will execution signifies the importance of the testator's actions,[183] and the testamentary process consequently serves as a therapeutic experience for the testator.[184]

In addition to signifying the importance of the testamentary act, the will-execution ceremony gives testators a context through which to cope with their inevitable confrontation with death. Indeed, many ceremonies give participants a structured framework in which to organize and reflect on their thoughts and emotions,[185] a quality that can have positive psychological consequences.[186] This therapeutic quality of ritual is perhaps best exemplified by the funeral ceremony, which has often been described as a therapeutic experience for the surviving friends and family of the deceased.[187] Whatever form the ceremony takes, the funeral achieves these therapeutic results by "help[ing] those . . . who remain to organize [their] relationship with the deceased [and] to remember the deceased within a framework."[188] Furthermore, the funeral's therapeutic effect lasts beyond the end of the service, as the ceremonial nature of the

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ist); John A. Warnick, *The Ungrateful Living: An Estate Planner's Nightmare—The Trial Attorney's Dream*, 24 LAND & WATER L. REV. 401, 422–23 (1989) (explaining that "the ceremonial aspect" of will execution "may be important in fulfilling the clients unexpressed expectations").

182. *Estate Planning*, *supra* note 181, § 69.1902.

183. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1064–65 (1996) ("The arcane minuet of the will-execution ceremony, like the marriage ceremony, serves to impress upon the testator that on this occasion her words count, that this is no time for idle banter.").

184. *See* Beyer, *supra* note 39, at 420.

185. *See* KEVIN CROTTY, THE POETICS OF SUPPLICATION: HOMER'S *ILLIAD* AND *ODYSSEY* 17 (1994) (explaining that ceremonial formalities "owe their significance in the first instance to their ability to impress a distinctive shapeliness on life and, with it, a greater density of meaning than is possible in the less structured, everyday course of events"); ANJALI GERA, THREE GREAT AFRICAN NOVELISTS: CHINUA ACHEBE, WOLE SOYINKA & AMOS TUTUOLA 26 (2001) ("[C]eremonies provide a framework for experiencing reality.").

186. *See* CROTTY, *supra* note 185, at 17 (explaining that formalities "enable [the ceremony] to be an enlightening experience for its participants").

187. *See* JAMES K. CRISSMAN, DEATH AND DYING IN CENTRAL APPALACHIA: CHANGING ATTITUDES AND PRACTICES 95 (1994) ("Most contemporary psychiatrists, psychologists, grief counselors, funeral directors, members of the clergy, and other experts in the area of thanatology maintain that emotional expression during the wake and funeral is therapeutic."); *see also* DAVID HENDIN, GRIEF AND BEREAVEMENT, *in* GROWING OLD IN AMERICA 184 (Beth B. Hess ed., 1980) (explaining that a funeral "is a ceremony [that] assuages the grief of the survivors and is a comfort to them in their loss"); WALTER W. WHITAKER III, THE CONTEMPORARY AMERICAN FUNERAL RITUAL, *in* RITUAL AND CEREMONIES IN POPULAR CULTURE 324 (Ray B. Browne ed., 1980) ("The first and foremost [purpose of the funeral] is, of course, its capacity for enabling us to handle our grief.").

188. WHITAKER, *supra* note 187, at 316.

funeral can provide a lasting memory on which those in mourning can reflect and take comfort.[189]

Like the funeral ceremony, which helps survivors cope with the decedent's death, the will-execution ceremony can provide testators with a structured framework through which to process the anxiety, fear, stress, or other negative psychological consequences of preparing for their own death. While participating in the will-execution ceremony, instead of dwelling solely on their own mortality, testators must focus on the requirements of testamentary formality. As a result, the testator's thoughts are drawn away from the fear and anxiety that accompany the consideration of death, and are instead focused on the positive aspects of estate planning,[190] such as the preparation for the future, the fulfillment of familial needs, and the distribution of the estate according to the testator's wishes.[191] Additionally, like the funeral ceremony, which can provide friends and family members a comforting memory of their relationship with the deceased, the will-execution ceremony can provide testators with a lasting reminder that they have prepared for death, which can comfort them long after the ceremony is over.[192]

In addition to creating an environment that both signifies the importance of testators' decisions and provides a structured context in which to process their thoughts and emotions, the will-execution ceremony can bolster testators' decision-making capabilities.[193] As previously dis-

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189. *See* Robert J. Grindle, Note, *Frenzy-Free Funerals: The Least America Owes Its Fallen Heroes*, 84 CHI.-KENT L. REV. 637, 652 (2009) (stating that to deal with the emotions evoked by the death of a friend or family member, "the funeral serves a coping function and may form a lasting memory surrounding the death of a loved one").

190. Kelly A. Hardin, Note, *An Analysis of the Virginia Wills Act Formalities and the Need for a Dispensing Power Statute in Virginia*, 50 WASH. & LEE L. REV. 1145, 1153 n.51 (1993) ("Because making a will is often a traumatic event, testators may need the formalities to help them avoid distractions . . . ."); *see also* CROTTY, *supra* note 185, at 18 (explaining that "in highly emotional situations" ceremonies "can enable the one afflicted to get out from under the immediate throes of emotion"). In his nonfiction account of Spanish bullfighting, Ernest Hemingway provided an example of a ceremony that focuses attention away from traumatic events, which in the context of bullfighting is the tragic death of the horses. ERNEST HEMINGWAY, DEATH IN THE AFTERNOON 16 (Scribner 1999) (1932). As he described:

> I believe that the tragedy of the bullfight is so well ordered and so strongly disciplined by ritual that a person feeling the whole tragedy cannot separate the minor comic-tragedy of the horse so as to feel it emotionally. If they sense the meaning and end of the whole thing even when they know nothing about it; feel that this thing they do not understand is going on, the business of the horses is nothing more than an incident.

Id.

191. *See supra* Part IV.A.

192. The ceremonial nature of the will-execution process "fix[es] the event in the memory of [the witnesses] who may survive." Langbein, *supra* note 126, at 517. Likewise, the ceremony can provide testators with a lasting memory of their planning and preparation for death.

193. Lydia A. Clougherty, *An Analysis of the National Advsiory Committee on the Uniform State Laws' Recommendation to Modify the Wills Act Formalities*, 10 PROB. L.J. 283, 284 (1991)

cussed, the fear and anxiety that accompanies testators' contemplation of mortality can impair their decision-making processes by taking their attention away from important decisions.[194] The ceremonial nature of the will-execution process, however, can improve the testator's decision-making process in two ways.

First, because testators do not often participate in ceremonies,[195] the testamentary ritual is distinguished from the mundane and relatively inconsequential tasks of daily life.[196] The will-execution ceremony therefore impresses on testators the importance of their actions and decisions[197] and consequently improves testators' decision-making processes by encouraging them to contemplate their testamentary choices and to carefully consider all relevant information.[198] Second, by providing testators with a framework through which to cope with their fears and anxieties, the will-execution ceremony draws their thoughts away from the psychological distractions that hinder their decision-making processes.[199] As a result, testators can focus on the testamentary decisions they must make. The ritualistic nature of the will-execution process can therefore improve the testator's decision-making capabilities both by stressing the importance of the testator's decisions and by reducing the testator's psychological distractions.

Altogether, the ritualistic characteristics of the will-execution process can have positive psychological consequences for the testator. The testator can take satisfaction from the formal setting in which the testamentary act takes place,[200] and the structured process of the ceremony can provide the testator a framework through which to cope with the

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("There is a great need for formalities to accompany will execution because the psychological effects of drawing up a will inhibit the desired circumspective frame of mind, that of clear intent and deliberate estate planning.").

194. *See supra* Part III.A.

195. *See Estate Planning*, *supra* note 181, § 69.1902 (statement of Dean Willard H. Pedrick, panelist).

196. *See* Kusmin, *supra* note 59, at 99; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 544 (1990).

197. *See In re* Estate of Bilivskoy, 382 N.W.2d 729, 730 (Mich. Ct. App. 1985); Langbein, *supra* note 126, at 495.

198. *See, e.g.*, Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) ("A formality may . . . perform a cautionary or deterrent function by acting as a check against inconsiderate action."); C. Douglass Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism, Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 261 (1991) ("A secondary aspect of formality is its tendency to induce deliberation and reflection on the part of the testator.").

199. *See* Hardin, *supra* note 190, at 1153 n.51; *see also* Clougherty, *supra* note 193, at 285 ("The formalities safeguard against psychological distractions which may disturb the testators deliberate and accurate estate planning.").

200. *See supra* notes 178–84 and accompanying text.

stress and anxiety that accompanies the contemplation of death.[201] Furthermore, by impressing on testators the importance of their decisions and by relieving some of the anxiety of preparing an estate plan and creating a will,[202] the will-execution ceremony can improve testators' decision-making processes. The positive psychological effect of the will-execution ceremony is therefore one of the estate-planning process's therapeutic qualities.[203]

D. Testamentary Self-Expression

An additional therapeutic aspect of estate planning is the testator's opportunity for self-expression.[204] An estate plan is inherently expressive. By preparing an estate plan and implementing that plan through the execution of a will and other estate-planning documents, testators communicate to their friends, family, and community how they would prefer to dispose of their estates.[205] Moreover, testators can also express their thoughts, feelings, and emotions through their desired plans of distribution.[206] This type of self-expression often takes the form of a testamentary bequest, in which the act of giving, not the testator's words, is the medium of self-expression.[207] For example, the testator can express love by giving a close friend or relative a portion of his or her estate, just as Ishmael did when he bequeathed his entire estate to Queequeg, his trusted

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201. *See supra* notes 185–92 and accompanying text.

202. *See supra* notes 193–99 and accompanying text.

203. Beyer, *supra* note 39, at 420 ("A proper ceremony, coupled with sensitive and tactful counseling by the attorney during the entire estate planning process, may make it easier for clients to cope with the inevitability of death."); Shaffer, *supra* note 14, at 382 ("Data . . . indicate[] that will-preparation actually reduces fear of death and has a constructive or even therapeutic effect on death anxiety.").

204. Baron, *supra* note 49, at 648–49 ("To the extent that a will is an expression of autonomy and self-determination, what it can be expected to communicate is the testator's unique and personal ideas . . . ."); Brashier, *supra* note 173, at 63 n.1 ("[T]he will is far more likely than most informal will substitutes to reveal unique aspects of the testator's personality.").

205. Baron, *supra* note 49, at 650 ("The testator cannot carry out his own commands, but instead is dependent on others to read the will and put its commands into effect. The testator thus must by necessity write *for others*.").

206. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 61 (2009) ("Wills have an expressive function and tell the story of the testator; a will can express love or anger, or disgust or praise. The will gives permanent voice to the testator's wants."); Hacker, *supra* note 140, at 979 ("[A] bequethal encompasses the giver's preferences, decisions, and personality, as well as possibly reflecting the recipients' gratitude, disappointment, remembrance, and, hopefully, respect for the giver's choices and wishes.").

207. Deborah A. Batts, *I Didn't Ask To Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1224 (1990) ("[G]iving expresses love."); Edward C. Halbach, Jr., *An Introduction to Death, Taxes and Family Property*, *in* DEATH, TAXES AND FAMILY PROPERTY 1, 3 (1977) (noting it is argued that giving and bequeathing express affection).

friend and fellow crewmate.[208] In addition to expressing positive emotions through their testamentary schemes, testators can express negative feelings by excluding certain individuals from their estate plans, such as a disfavored child[209] or an unloving spouse.[210] Regardless of whether the testator's expressed feelings are positive or negative, the expression of these emotions through testamentary gifts can be an act of great satisfaction.[211]

Another type of self-expression that is communicated through an estate plan and that can provide satisfaction to the testator is the opportunity to shape one's posthumous reputation. While alive, many people are concerned about how the public perceives them, and they derive contentment from projecting a particular identity to society.[212] Consequently, many people "employ various and sundry strategies to highlight, and even to edit, aspects of their identities, signaling how they wish others to perceive them,"[213] such as wearing a certain style of clothing or driving a particular make of car. Similarly, the exercise of testamentary power can also serve as an important self-expressive tool that can shape one's public perception.[214] Indeed, by providing for certain individuals, institutions, or causes in their estate plans, testators can make one last attempt to mold their public perceptions.[215] Just as the testator receives pleasure from making others happy through testamentary gifts, the act of shaping one's posthumous reputation through the substance of an estate plan can be therapeutic for the testator.

The creation of the Nobel Prizes by a bequest of Alfred Nobel illustrates how an estate plan can shape posthumous reputation and provide

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208. *See* MELVILLE, *supra* note 5, at 248.

209. *See* Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749, 752 n.14 (1994) (describing a mother's will that left a nominal sum to two daughters because "of their unfilial attitude toward a doting father").

210. *See, e.g.*, Brown v. Du Frey, 134 N.E.2d 469, 470–71 (N.Y. 1956) (involving a wife who disinherited her husband and who explained in her will that she "[did] so intentionally because of the fact that during [her] lifetime he abandoned [her], made no provision for [her] support, treated [her] with complete indifference and did not display any affection or regard for [her]").

211. "When a testator bequeaths to persons, the satisfaction she derives from the transfer . . . stems from what the economists, in their inimitable fashion, dub an interdependent utility function: Making her loved ones happy also makes the testator happy." Adam J. Hirsch, *Bequests For Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 52–53 (1999). In the case of disinheritance, the testator can similarly take satisfaction from making unhappy those whom he dislikes.

212. *Id.* at 53.

213. *Id.*

214. *Id.* at 53–54 ("An estate plan can serve as the final move in this social game, communicating to survivors how individuals prefer to be remembered.").

215. *See id.* (adding that through "[b]equests to persons . . . a testator might hope to win posthumous recognition as a devoted parent, a benevolent employer, [or] a loyal friend," and explaining further that "bequests for social purposes [are] far more flexible, allowing a testator to define her character with precision").

satisfaction to the testator. Nobel was a chemist, inventor, and manufacturer whose work involved various explosives, including nitroglycerine, a highly volatile and combustible compound.[216] Inspired by the death of his younger brother Emil in an explosion at one of his family's plants,[217] Nobel developed a technique of stabilizing nitroglycerine by mixing it with earth from the banks of a nearby river thus making the explosive safer to transport and use.[218] Although he originally considered the name "Nobel's Safety Powder," Nobel's invention eventually became known as dynamite.[219]

Like the death of Emil—which contributed to Nobel's development of dynamite—the loss of Nobel's older brother Ludvig as a result of a heart attack provided the impetus for another of Nobel's most noteworthy legacies.[220] When media coverage of a death within the Nobel family emerged, one newspaper erroneously reported that Nobel himself had died and ran a highly critical obituary that described Nobel as the "merchant of death."[221] Roused by this unique glimpse at his posthumous reputation, Nobel aimed to reshape his public perception, and his chosen means to do so was through his estate plan.[222] As one biographer described, "[Nobel] became so obsessed with his posthumous reputation that he rewrote his last will, bequeathing most of his fortune to a cause upon which no future obituary writer would be able to cast aspersions."[223] The cause to which Nobel bequeathed not only the bulk of his fortune but also his family name is known as the Nobel Prizes, which

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216. *See* KENNE FANT, ALFRED NOBEL: A BIOGRAPHY 93 (1991).

217. *See id.* at 62.

218. *See id.* at 93–94.

219. *See id.* at 134.

220. *See id.* at 207.

221. *Id.*; *see also* ROY J. HARRIS JR., PULITZER'S GOLD: BEHIND THE PRIZE FOR PUBLIC-SERVICE JOURNALISM 35 (2007) ("[S]ome French newspapers mistakenly reported Nobel's demise after they confused him with his brother Ludvig. 'Le Marchand de la Mort Est Mort,' one paper proclaimed: 'The Merchant of Death is Dead.'").

222. *See* MICHAEL EVLANOFF, THE LONELIEST MILLIONAIRE 7 (1969) ("He would draw up a plan that would convince the nations of the world that the real Alfred Nobel cherished above all these three: Love, learning and compassion."); FANT, *supra* note 216, at 266 ("In order to calm his conscience, he created his Nobel Prizes."); RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 87 (2010) ("[I]t was reputedly the erroneous publication of an obituary that prompted Alfred Nobel to establish his eponymous charitable foundation.").

223. FANT, *supra* note 216, at 207. *But see* CRAIG SILVERMAN, REGRET THE ERROR: HOW MEDIA MISTAKES POLLUTE THE PRESS AND IMPERIL FREE SPEECH 169 (2007). Specifically, Silverman quoted "a senior curator at the Nobel Museum in Sweden" as saying,

> It would be interesting to find the first mention of the obituary being one reason for Alfred Nobel's decision to form a Prize, but so far we have only found rather late statements that this should be the case. So far we have to conclude that this is only one among many rumors that tend to grow around famous historical persons.

Id.

annually rewards individuals who make notable contributions to the fields of science, literature, and world peace.[224] The creation of the Nobel Prizes through the terms of his estate plan provided Nobel with peace of mind of knowing that dynamite's devastation would not be his sole enduring legacy.[225]

Although the expressive quality of the testator's preferred distributional scheme may be somewhat implicit, the testator's self-expression can also take on a more explicit form. Specifically, testators can use the words of their estate-planning documents to directly express their feelings and emotions.[226] Like the expression of emotions through the act of giving, testamentary self-expression through words can relate to both positive and negative feelings. For example, testators who feel a particular fondness for a close friend or family member can include words of

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224. The Nobel Prizes, http://nobelprize.org/nobel_prizes (last visited Oct. 4, 2011).

225. FANT, *supra* note 216, at 218 ("It must have given [Nobel] certain satisfaction to formulate his will the way he did.").

226. Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 380–81 (2011) ("Often the final significant written communication by its author, a will has the potential to be a monument—or indeed a testament—to the decedent's loved ones, to express her vision for the future or her version of the past.").

The will of Ludwig van Beethoven illustrates that a will can serve as a self-expressive tool. Beethoven, the great German composer and pianist, feared that his worsening deafness would impede his musical career, and as a result of his illness, he experienced severe despair and thoughts of suicide. *See* LEWIS LOCKWOOD, BEETHOVEN: THE MUSIC AND THE LIFE 118–21 (2005). With these concerns in mind, the composer traveled to the small Austrian town of Heiligenstadt in hope that seclusion would prove therapeutic. *See* ALEXANDER WHEELOCK THAYER ET AL., THAYER'S LIFE OF BEETHOVEN 303 (10th ed. 1991). His time there not only influenced his future compositions but also inspired Beethoven to draft his will. *See* LOCKWOOD, *supra*, at 121–22 (drawing connections between the Heiligenstadt Testament and Beethoven's later work). Known as the Heiligenstadt Testament, Beethoven's will bequeathed his entire estate to his two brothers and extensively described the psychological turmoil that he experienced as a result of his deafness. *See* TIM BLANNING, THE TRIUMPH OF MUSIC 99–100 (2008).

In his will, Beethoven recalled instances in which others heard music and sounds that he could not, and he described the intense emotions evoked by these occurrences. As he recounted, "[W]hat a humiliation for me when someone standing next to me heard a flute in the distance and I heard nothing or someone heard a shepherd singing and again I heard nothing." LOCKWOOD, *supra*, at 119. Beethoven's condition placed him on the brink of suicide, as the composer described, "Such experiences brought me close to despair; a little more of that I would have been at the point of ending my life." *Id.* Similarly passionate descriptions of Beethoven's anguish fill the text of the Heiligenstadt Testament.

Fortunately, the expression of these thoughts and feelings in his will proved therapeutic for Beethoven. BARRY COOPER, BEETHOVEN 130 (2000) ("Beethoven's decision to reject suicide and overcome his feelings of despair by writing them down [in the Heiligenstadt Testament], can be seen as a turning point in his life."); CHARLES P. MITCHELL, THE GREAT COMPOSERS PORTRAYED ON FILM, 1913 THROUGH 2002 17 (2004) ("Simply expressing his deepest thoughts [in the Heiligenstadt Testament] had a therapeutic effect for the composer."). As one historian described, "Beethoven's sheer act of writing the Heiligenstadt Testament . . . seems to have granted its author the will to go on with life, turning even the defeat of deafness into a victory of will." ALESSANDRA COMINI, THE CHANGING IMAGE OF BEETHOVEN: A STUDY OF MYTHMAKING 76 (2008).

love, affection, or gratitude in their wills.[227] Conversely, testators who feel wronged by a family member or other acquaintance can express disgust or detestation through their testamentary words.[228]

The benefit that all testators can experience as a result of this form of testamentary self-expression is exemplified by the recent trend of estate-planning practitioners and trusts-and-estates scholars recommending that testators include more expressive language in their estate-planning documents.[229] For example, some scholars suggest that testators prepare ethical wills along with their other estate-planning documents.[230] An ethical will is not a legal document governing the disposition of the testator's property.[231] Instead, an ethical will is a separate document that serves as "a very personal form of communication" that is used "to share . . . values, important life lessons, wisdom, [and] family history with loved ones."[232] The preparation of an ethical will encourages careful self-reflection, including consideration of the author's life experiences,

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227. *See, e.g.*, Dykes v. Dykes, 741 S.W.2d 256, 256 (Ark. 1987) ("My children know that my wife and I love them dearly, and I am certain that they realize that she will dispose of any property of mine in a manner which is consistent with the love and affection we feel for the children.").

228. Whitcombe, *supra* note 209, at 749. Whitcombe states,

> For hundreds of years, the dead have taken advantages of a unique and singular opportunity to avenge themselves upon the living. Despite the sage advice that says "men should not sin in their graves," the dead have reached out from beyond the grave to insult those who offended them in some way during life.

Id.

229. *See, e.g.*, Gordon, *supra* note 226, at 381; Hacker, *supra* note 140, at 980.

230. *See, e.g.*, David Gage et al., *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 531 (2004); Zoe M. Hicks, *Is Your (Ethical) Will In Order?*, 33 ACTEC L.J. 154 (2007); Steven Keeva, *A Legacy of Values*, 91 A.B.A. J. 88 (2005); Suzanna de Baca, *Ethical Wills: How to Add Morals to Estate Planning*, FAMILIES IN BUS., Nov./Dec. 2007, at 62.

231. *See* Hicks, *supra* note 230, at 154–55 (explaining nature and history of ethical wills). Specifically, Hicks noted,

> Ethical wills date back thousands of years and seem to have roots in the Bible itself. Old Testament patriarchs conveyed the ideals closest to their hearts, motivating values, and events in their life's experiences before they passed away . . . . Although Biblical ethical wills were in the mode of "Now gather around, children, because I have something to tell you before I leave this earth," modern ethical wills are almost always written (and occasionally video-taped). Modern ethical wills are usually found in one or more letters written to the family and kept with traditional wills.

Id.

232. Lewis D. Solomon & Lewis J. Saret, *Ethical Wills: Adding Values to the Estate Plan*, D.C. EST. PLAN. COUNCIL EST. PLAN. NEWSL., Fall–Win. 2005, at 7, http://www.lewissaret.com/2010/03/ethical-wills-a.html; *see also* Hicks, *supra* note 230, at 154 (explaining that "[e]thical wills can include many things, such as the wisdom, values, and beliefs of a parent or grandparent, their purposes for certain actions taken, expressions of love and affection, hopes and blessings for the family, exhortations to carry on charitable work, or to care for certain relatives," and that "[t]hey can include reminders of heritage, expressions of gratitude, and statements of spiritual belief").

morals, and beliefs, as well as relationships with friends and family,[233] and it can provide great satisfaction to the author.[234] Indeed, "[e]thical wills help clients engage in a profoundly significant process by putting down what really matters to them and help give them a feeling that they're doing something eminently worthwhile."[235] This form of testamentary self-expression and its therapeutic effects, however, need not be confined to a separate ethical will, as the testator's expressive language is often included in the testator's traditional estate-planning documents.[236]

In addition to the satisfaction derived directly from the act of preparing an ethical will or including expressive language in other estate-planning documents, testamentary self-expression can be therapeutic for the testator because the testator's emotionally expressive statements often ease familial conflict during the administration of the estate.[237] As discussed previously, testators may worry that their estate plans will cause tension between surviving family members.[238] But this antitherapeutic consequence of estate planning can be diminished by the inclusion of expressive language in the testator's estate plan that explains the reasoning behind seemingly inequitable bequests.[239] This form of self-expression shows the testator's careful consideration regarding estate-planning decisions, and it can bolster respect for the testator's wishes among disappointed heirs.[240] Testamentary self-expression therefore has therapeutic potential for the testator because it can reduce the likelihood of familial conflict.

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233. BARRY K. BAINES, ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER 2 (2d ed. 2006) ("I strongly believe that those who wish to reflect on and share life's experiences will find an ethical will a useful tool."); Gage et al., *supra* note 230, at 531. (explaining that in an ethical will, the testator "describe[s] the people, values, and experiences that have meant the most to them and of which they want their children to be aware").

234. *See* BAINES, *supra* note 233, at 26–27 (explaining that "writing an ethical will adds a transcendent dimension to our presence on this planet by providing a link to future generations," and adding that "[i]t is a way to transform values and beliefs into a legacy, which may well be accompanied by a profound sense of satisfaction, completion and continuation, all at the same time").

235. Keeva, *supra* note 230, at 88 (adding that the exercise of creating ethical wills makes the authors realize that "they have something to offer, namely new meaning and purpose in their lives"); *see also* MARY POLCE-LYNCH, NOTHING LEFT UNSAID: CREATING A HEALING LEGACY WITH FINAL WORDS AND LETTERS 26 (2006) ("When I finished writing it, I felt an incredible peace of mind [and] a sense of accomplishment . . . .").

236. Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. PROB. & TR. J. 505, 505 (2008) ("This document can be separate from the will, or the language can be incorporated in a formal will or other document disposing of property."); Hicks, *supra* note 230, at 162 ("Many ethical wills are woven into traditional wills.").

237. *See* Gordon, *supra* note 226, at 409–10; Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER'S ADVISOR 253, 308–09 (2007).

238. *See supra* Part III.B.

239. *See* O'Sullivan, *supra* note 237, at 308–09.

240. *See id*.

Whether a testator's self-expression is contained in an ethical will or a more traditional estate-planning document, testamentary self-expression can be psychologically beneficial for the testator. "By encouraging testators to add greater expression—be it descriptive detail, explanation, narrative, or statements of individual philosophy to their wills—we allow those testators to define themselves, to think mindfully about death, and to take control of their personal legacies."[241] This opportunity for self-expression therefore stands alongside the freedom of testation,[242] the role of the estate-planning attorney,[243] and the ritualistic nature of the will-execution ceremony[244] as a therapeutic aspect of the estate-planning process.

V. APPLYING THE FRAMEWORK: MILITARY WILLS

Once the positive and negative psychological consequences of the law have been identified,[245] the second step of a therapeutic jurisprudential analysis is to use the framework established in the first step of the analysis to identify ways to maximize the law's therapeutic potential.[246] To demonstrate how this second step can be applied in the context of estate planning, this Part examines a particularly specialized aspect of the estate-planning process: the execution of wills by soldiers and sailors. The application of the therapeutic jurisprudential framework to the law governing military wills suggests that certain reforms of the law of succession would maximize the overall therapeutic potential of the law. Furthermore, by illustrating the potential for therapeutic jurisprudence to serve as an insightful analytical tool, an analysis of the law governing the wills of soldiers and sailors demonstrates that the therapeutic jurisprudential framework should be applied to other aspects of the estate-planning process, as well as more broadly to other areas of the law of succession.

A. The Privileged Status of Military Wills

Normally, the will-execution process can be difficult because the law mandates that the testator comply with various formalities to validly execute a will.[247] In all American jurisdictions, these formalities general-

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241. Gordon, *supra* note 226, at 428.

242. *See supra* Part IV.A.

243. *See supra* Part IV.B.

244. *See supra* Part IV.C.

245. *See supra* Parts III–IV.

246. *See* Schultz, *supra* note 30, at 54.

247. *See* DUKEMINIER ET AL., *supra* note 65, at 226 (warning that "these basic requirements for execution of wills vary considerably in detail from state to state").

ly require that a will be written, signed by the testator, and attested by at least two witnesses.[248] Other formalities are also required in some states. For example, some jurisdictions require that the testator and the attesting witnesses be in each others' presence during the will-execution ceremony.[249] Other formalities include publication, where the testator must announce to the attesting witnesses that the document before them is the testator's will,[250] or subscription, where the testator must sign at the end of the document.[251]

Under certain circumstances, the law in some jurisdictions reduces these formal burdens for testators performing military or maritime service.[252] For example, the English Wills Act of 1837 provides that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."[253] As this provision illustrates, the general prerequisite for the reduced formality of military wills is that the testator be in "actual military service" or "at sea." The specifics of this requirement vary from state to state, with some states restricting the application of the provision to military personnel serving during a time of formally declared war and other states construing the actual military service requirement more liberally.[254]

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248. *See id*.

249. *See id.* at 233.

250. *See id.* at 243 n.12.

251. *See id.* at 237.

252. *See* Patricia Critchley, *Privileged Wills and Testamentary Formalities: A Time to Die?*, 58 C.L.J. 49, 49 (1999); Steven F. Lancaster, *Probate and the Military: What's It All About?*, 85 MIL. L. REV. 5, 12–13 (1979).

253. Wills Act, 1837, 7 Wm. 4 & 1 Vict., c. 26, § 11 (Eng.). Several U.S. states have similar provisions. *See, e.g.*, MASS. GEN. LAWS ch. 191, § 6 (2011) ("A soldier in actual military service or a mariner at sea may dispose of his personal property by a nuncupative will."); N.H. REV. STAT. ANN. § 551:15 (2011) ("A soldier in actual military service, or a mariner or seaman when at sea, may dispose of his movables and personal estate as he might heretofore have done."); VT. STAT. ANN. tit. 14 § 7(a) (West 2011) ("The provisions of this chapter shall not prevent a soldier in actual military service, or a mariner or seaman at sea, from disposing of his or her wages or other personal estate as he or she might otherwise have done."); VA. CODE ANN. § 64.1-53 (West 2011) ("[A] soldier being in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as he might heretofore have done . . . .").

254. *See* Lancaster, *supra* note 252, at 13; *see also* Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196 MIL. L. REV. 91, 125 n.174 (2008). For instance, New Jersey has held that a soldier who has embarked to join his unit in active combat is in actual military service. *See In re* Knight's Estate, 93 A.2d 359 (N.J. 1952). But Rhode Island does not apply the privilege to mariners embarked as passengers on vessels traveling through a war zone en route to take command of another vessel. *See* Warren v. Harding, 2 R.I. 133 (1852). In some states, a Soldier's will is only privileged if executed in fear of impending death. *See, e.g.*, *In re* Hickey's Estate, 184 N.Y.S. 399 (Sur. Ct. 1920). *But see* Ray v. Wiley, 69 P. 809 (Okla. 1902). (Other states have no such requirement.).

In addition to variations regarding the actual military service requirement, states differ in the extent to which the formal burdens of will execution are reduced for military personnel.[255] Some states authorize oral wills for soldiers and sailors, thereby eliminating the need for the testator to write and sign a testamentary document.[256] Other states require a written document but eliminate the requirement that the will be attested by witnesses.[257] Still more variation exists in the limitations placed on the type and amount of property that can be distributed pursuant to the relatively informal wills of soldiers and sailors.[258] For example, most states limit the property passing via an informal military will to personal property not exceeding a specified value.[259] But at least one state permits a soldier to distribute an unlimited amount of both personal and real property by the terms of an informal military will.[260]

Several explanations for the reduced formality of military wills have been proposed.[261] But the traditional rationale is that men and women on the battlefield and at sea lack the opportunity and means to comply with the traditionally required formalities.[262] As the New York Supreme Court for New York County explained:

> [T]he utter inability, oftentimes, to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem, at all times, to have made [the wills of soldiers and sailors] a proper exception to the operation of a rule, which the wisdom of later times, has found it expedient, if not absolutely obligatory, to apply to all others.[263]

Thus, the law in some jurisdictions grants the wills of soldiers and sailors a privileged status by recognizing them as validly executed wills despite noncompliance with the ordinarily required formalities.

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255. *See* Bamberger, *supra* note 254, at 125.

256. *See id.*; *see also* MASS. GEN. LAWS ch. 191, § 6 (2011) ("A soldier in actual military service or a mariner at sea may dispose of his personal property by a nuncupative will.").

257. *See* Bamberger, *supra* note 254, at 125; *see also* MD. CODE ANN., EST. & TRUSTS § 4-103 (West 2011) ("A will entirely in the handwriting of a testator who is serving in the armed services of the United States is a valid holographic will if signed by the testator outside of a state of the United States, the District of Columbia, or a territory of the United States even if there are no attesting witnesses.").

258. *See* Bamberger, *supra* note 254, at 125.

259. *See id.*; *see also* WASH. REV. CODE § 11.12.025 (2011) (limiting oral wills by military personnel to the disposition of personal property not exceeding $1,000).

260. *See* MISS. CODE ANN. § 91-5-21 (2011).

261. *See* Critchley, *supra* note 252, at 53–55.

262. *See* Tobias Weiss, *The Formalities of Testamentary Execution by Service Personnel*, 33 IOWA L. REV. 48, 52 (1947) ("The service will has been shorn of the usual formal requirements, it has often been stated, because the service testator lacks the qualified sources of advice and the opportunities for making formal wills enjoyed by the non-service testator.").

263. Hubbard v. Hubbard, 12 Barb. 148, 155 (N.Y. Gen. Term 1851).

B. The Therapeutic Consequences of the Privileged Status

Despite the pervasive traditional explanation of the privileged status of military wills, a secondary justification may also explain the relatively informal method of will execution provided to service personnel.[264] Although combat preparedness requires a proper level of morale, the hazardous surroundings of the battlefield can diminish a soldier's psychological well-being. Like Ishmael, who endured the perilous conditions aboard the *Pequod*, military personnel at war face a dangerous reality in which the thought of death is never far from their minds.[265] The law may therefore provide service personnel a relatively easy method of will execution, in part because the execution of a will can bolster morale by improving the psychological state of the testator. This boost in morale may in turn contribute to the overall combat effectiveness of the troops.[266]

This therapeutic rationale recognizes that the wills of soldiers and sailors enjoy a privileged status because military personnel have limited opportunity to reap some of the psychological benefits of the estate-planning process. First, soldiers at war are unlikely to have access to an attorney who can assist them with the estate-planning process.[267] Consequently, an estate-planning attorney has a limited ability to serve as a therapeutic agent for active-military personnel.[268] Second, as the traditional justification of the privileged status also recognizes, soldiers and sailors often lack the time and means to complete the will-execution ceremony.[269] As a result, during the course of active service, military per-

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264. *See* Critchley, *supra* note 252, at 55 ("It could be argued that it is important for morale to allow members of the armed forces, who are acutely aware of the risk of their death, to make provision for that event in whatever manner best suits them."); Weiss, *supra* note 262, at 48 ("The leaders of the armed forces regard it as a factor contributing to the maintenance of proper morale and consequent combat effectiveness, to provide those forces with an adequate channel and opportunity for making a testamentary disposition."); *see also* Bamberger, *supra* note 254, at 119 (suggesting that federal legislation governing military-testamentary instruments "could be characterized as tending to the psychological readiness of Soldiers during deployment"); Edwin A Wahlen, *Soldiers' and Sailors' Wills: A Proposal for Federal Legislation*, 15 U. CHI. L. REV. 702, 709 (1948) (proposing federal legislation governing the wills of military personnel that would "enhance the morale of troops").

265. *See* Critchley, *supra* note 252, at 55 (explaining that service personnel are "acutely aware of the risk of their death"); Weiss, *supra* note 262, at 48 ("In war, the common hazards of life are magnified and multiplied by subtle and ingeniously effective instruments of devastation developed by the unloosed imagination of a mankind mobilized for massacre.").

266. For example, Weiss, writing at the end of World War II, stated that "[o]f great[] contemporary significance is the official organized interest of the armed forces . . . in the frame of mind or morale of their members," and "the effect on that state of mind of the assurance that, regardless of the restraints circumstances may impose, the power of testamentary determination will nevertheless be preserved, is deemed not inconsequential." Weiss, *supra* note 262, at 53.

267. *See id.*

268. *See supra* Part IV.B.

269. *See* Weiss, *supra* note 262, at 52.

sonnel have a reduced opportunity to benefit from the positive psychological consequences of the will-execution ceremony.[270]

Conversely, the privileged status of military wills increases the opportunity for military personnel to benefit from the other therapeutic consequences of the estate-planning process—namely, the psychological benefits of testamentary freedom[271] and self-expression.[272] Indeed, by reducing the formal burdens of will execution, such as eliminating the need for armed-service members to locate witnesses for attestation, the law makes it easier for military personnel to exercise testamentary freedom and to express love and affection for friends and family through testamentary bequests. A therapeutic jurisprudential analysis therefore suggests that because military personnel have a diminished opportunity to enjoy the therapeutic consequences of consulting an estate-planning attorney and completing the will-execution ceremony, the law provides these testators with a greater opportunity to experience the psychological benefits of testamentary freedom and self-expression.

C. Evaluating Reforms of the Law of Military Wills

The therapeutic rationale of the privileged status of military wills is analytically valuable because it can be used to evaluate potential reforms of the law governing the wills of soldiers and sailors. For example, in recent decades, the number of states bestowing a privileged status upon military wills has dwindled.[273] In 1979, twenty-nine states and the District of Columbia had laws that reduced the formal requirements of military wills.[274] But by 2008, the number of American jurisdictions granting this privileged status had dropped to nineteen.[275]

Based on this trend, one potential widespread reform is simply to eliminate the privileged status, thereby mandating that the same formal burdens apply to the wills of both soldiers and civilians. But when analyzed from a therapeutic jurisprudential perspective, the merits of this reform are lacking. Because the privileged status increases the likelihood

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270. *See supra* Part IV.C.

271. *See supra* Part IV.A.

272. *See supra* Part IV.D.

273. *See* Bamberger, *supra* note 254, at 124–25.

274. *See* Lancaster, *supra* note 252, at 60–62 (listing Alabama, Alaska, California, the District of Columbia, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia as the American jurisdictions that conferred a privileged status to military wills in 1979).

275. *See* Bamberger, *supra* note 254, at 124–25. Between 1979 and 2008, Alabama, Alaska, California, Kentucky, Maine, Michigan, Nevada, New Jersey, South Dakota, and Texas removed the privileged status of military wills. *See id.* at 124 n.170.

that certain military personnel will experience the therapeutic consequences of estate planning when they otherwise would have little opportunity to do so,[276] the elimination of the privileged status reduces the overall therapeutic potential of the estate-planning process. Thus, a therapeutic jurisprudential analysis suggests that the privileged status of military wills should be maintained.

Another potential reform is to limit the application of the privileged status. Indeed, because several jurisdictions broadly construe the active-military-service requirement,[277] some military personnel reap the benefits of the privileged status despite not facing the dangers of active war, having both access to legal assistance and ample opportunity to comply with the formalities of will execution.[278] Therefore, one way to limit the application of the privileged status would be to narrow the active-military-service requirement by limiting the privileged status to the wills of testators who truly lack the opportunity and means to comply with the traditional will formalities.

A therapeutic jurisprudential analysis of this reform suggests that restricting the application of the privileged status would increase the law's therapeutic potential. Unlike the complete elimination of the privileged status, a more robust active-service requirement would maintain the privileged status for those testators who are unable to enjoy the therapeutic consequences of completing the will-execution process. By contrast, military personnel who have an opportunity to comply with the traditional will formalities would be required to do so, as they would have the ability to reap the full psychological benefit of the will-execution ceremony.[279] As a result, limiting the application of the privileged status of military wills would increase the law's overall therapeutic potential.

Thus, a therapeutic jurisprudential analysis suggests that maintaining the privileged status of military wills and more strictly applying the active-service requirement would maximize the law's therapeutic potential. But therapeutic jurisprudence does not necessarily demand that the law should be shaped in this way.[280] Indeed, therapeutic jurisprudence acknowledges that a number of policy considerations should be included in the analysis of legal reform.[281] Instead of mandating the most therapeutic result, therapeutic jurisprudence simply proposes that therapeutic considerations be evaluated alongside other policy considerations.[282]

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276. *See supra* Part V.B.
277. *See supra* note 254 and accompanying text.
278. *See* Critchley, *supra* note 252, at 55–56.
279. *See supra* Part IV.C.
280. *See supra* notes 32–33 and accompanying text.
281. *See supra* notes 32–33 and accompanying text.
282. *See supra* notes 32–33 and accompanying text.

With respect to the reform that eliminates the privileged status of military wills, no other policy considerations appear to have been considered by the state legislatures that adopted the reformed rules.[283] In fact, the elimination of the privileged status has generally been part of larger reforms of each state's probate code, and no careful analysis of the policy considerations underlying the privileged status of military wills seems to have been undertaken before such reforms were adopted.[284] That is not to say that no legitimate policy considerations support the abolishment of the privileged status. In fact, proponents of reform have argued that modern military personnel have ample means and opportunity to execute formal wills and as such the privileged status is not needed.[285] But policymakers in the states that have eliminated the privileged status do not appear to have relied upon this policy consideration when implementing the reform.[286]

Conversely, legitimate policy considerations appear to drive the reform movement with respect to the narrowing of the active-service requirement. For example, proponents may urge the adoption of the reform out of concern that a lax active-service requirement undermines the primary purpose of testamentary formality; namely, ensuring that the will accurately and reliably reflects the testator's true testamentary intent. Indeed, if an informal will reflects testamentary intent less reliably, then the privileged status should be limited to those testators who will actually benefit from the privileged status.

Therefore, as the analysis of both reforms illustrates, therapeutic jurisprudence simply suggests that therapeutic consequences should be considered together with other policy considerations during the legal-reform process. In some cases, a variety of policy considerations will trump therapeutic concerns, but in other instances, therapeutic jurisprudence will illuminate the necessity for reform.

D. Applying the Framework Beyond Military Wills

As the analysis of the law governing the wills of soldiers and sailors demonstrates, the therapeutic jurisprudential framework of estate planning developed in this Article can provide fresh insights into the law of

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283. *See* Bamberger, *supra* note 254, at 124–25.

284. *Id.* ("Little evidence explains this phenomenon, except that many of these provisions were repealed in the context of adopting the UPC (which does not include such a provision) or recognizing holographic wills (which may have been seen as an effective substitute).").

285. *See* Critchley, *supra* note 252, at 57 (explaining that "the call made by many writers for the abolition of the privilege as an unjustifiable anachronism may [be] attractive" because "it appears that the privilege is now rarely invoked, which in fact suggests that the privileged testators are having no significant problems with the ordinary . . . formalities").

286. *See* Bamberger, *supra* note 254, at 124–25.

succession and can serve as a valuable analytical tool for evaluating proposals for legal reform. But the therapeutic jurisprudential analysis of military wills only begins to realize the full analytical potential of therapeutic jurisprudence as applied to the law of succession. Indeed, the therapeutic jurisprudential framework of estate planning can be used to analyze a wide array of laws that affect testators' psychological well-being as they navigate the estate-planning process.

For example, the therapeutic jurisprudential framework of estate planning can be used to analyze the nonprobate system. In recent decades, the will's place in the estate-planning process has diminished, and the prevalence of a variety of nonprobate transfers such as life insurance and revocable trusts has increased.[287] Nonprobate transfers, however, generally have fewer formal requirements and typically require less legal assistance than traditional wills.[288] But as the therapeutic jurisprudential framework of estate planning suggests, both the estate-planning lawyer and the will-execution ceremony have therapeutic qualities.[289] Therefore, because the rise of the nonprobate system likely affects the overall therapeutic potential of the estate-planning process, a comprehensive therapeutic jurisprudential analysis of the nonprobate revolution is warranted and may illuminate potential areas of reform.

Likewise, a number of other areas of estate planning raise issues for which therapeutic jurisprudence can serve as an important analytical tool. For example, in recent years, scholars have proposed either adding or eliminating various restrictions on testamentary freedom. Professor Terry Turnipseed suggests abolishing the forced spousal share,[290] which traditionally provides a portion of the decedent spouse's estate to the surviving spouse regardless of the terms of the will.[291] Turnipseed therefore argues for the expansion of testamentary freedom. Conversely, Professor Deborah Batts suggests placing a new restriction on testamentary free-

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287. Langbein, *supra* note 101, at 1108. Langbein states,

> Probate, our court-operated system for transferring wealth at death, is declining in importance. Institutions that administer noncourt modes of transfer are displacing the probate system. Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will.

Id.

288. *Id.* at 1116 n.34 ("[S]ome people who are uneasy about dealing with lawyers and legal formality may be more comfortable in the attestation-free, fill-in-the-blank world of the mass will substitutes . . . .").

289. *See supra* Part IV.C–D.

290. *See, e.g.*, Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 770–92.

291. *See* DUKEMINIER ET AL., *supra* note 65, at 476–77.

dom—namely, a forced heirship for the testator's children.[292] Whereas the law of wills traditionally permits testators to omit their children from estate plans,[293] Batts argues that under certain circumstances the testator's children should receive a mandatory portion of the estate regardless of the terms of the parent's will.[294] Both of these proposals raise issues that therapeutic jurisprudence is well-equipped to address. Indeed, because the therapeutic jurisprudential framework of estate planning suggests that testamentary freedom positively affects the testator's psychological well-being,[295] therapeutic jurisprudence can provide a unique perspective on reform proposals that either expand or restrict testamentary freedom.

In addition to analyzing how the estate-planning process affects the psychological well-being of the individual testator, therapeutic jurisprudence can also be used to analyze other aspects of the law of succession. For example, the process of administering the decedent's estate can have psychological consequences for the decedent's friends and family.[296] Therapeutic jurisprudence can therefore shed light on how to alter the probate process so as to minimize the system's negative psychological impact on the decedent's loved ones.[297] As previously discussed, one of the few contexts in which therapeutic jurisprudence has been explicitly applied to the law of succession is the proposal to implement a mediation process to settle estate disputes and thus positively affect the psychological well-being of the testator's family.[298]

Finally, therapeutic jurisprudence can also be used to analyze areas of the law of succession that have psychological consequences that extend beyond the testator or the decedent's friends and family. For instance, the default distributional scheme of intestacy, which directs the estate to the decedent's family members in the absence of a will,[299] can have psychological consequences for broad segments of the population

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292. *See* Batts, *supra* note 207, at 1253–63. Other scholars have made similar proposals. *See, e.g.*, Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 170–72 (1994); Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 519–20 (1964).

293. *See* DUKEMINIER ET AL., *supra* note 65, at 519–20.

294. *See* Batts, *supra* note 207, at 1254–55.

295. *See supra* Part IV.A.

296. *See* Wisnom, *supra* note 34, at 1354–56.

297. *See id.* at 1358–61.

298. *See supra* notes 37–38 and accompanying text.

299. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQUALITY 1, 27 (2000) ("Intestacy statutes attempt to distribute a decedent's property to the decedent's family, either because the intestacy statute strives to approximate the decedent's wishes or because society has decided that intestacy statutes should benefit and strengthen families if a decedent does not express a contrary wish in a will.").

because intestacy statutes are viewed as signaling societal approval or disapproval of certain relationships.[300] The exclusion of some familial relationships, such as same-sex domestic partners, from triggering rights of property distribution in the absence of a will therefore stigmatizes and diminishes the value of these relationships.[301] But the inclusion of same-sex partnerships and other currently unrecognized familial relationships in the default distributional scheme of intestacy would signal societal approval of such relationships, and would produce positive psychological consequences for those involved in these relationships.[302]

These examples illustrate possible applications of the therapeutic jurisprudential framework to the law of succession and the potential of therapeutic jurisprudence to serve as an insightful analytical tool. The therapeutic jurisprudential framework of estate planning developed in this Article can be used to analyze a variety of estate-planning issues, and therapeutic jurisprudence can be applied more broadly to all areas of the law of succession. Indeed, because the law of succession operates within a variety of emotionally charged contexts, such as the estate-planning and probate processes,[303] therapeutic jurisprudence is particularly equipped to aid the study of the law of succession. Until now, the relevance of therapeutic jurisprudence to the estate-planning process has largely been ignored.[304] Aiming to spur widespread therapeutic jurisprudential analysis of the law of succession, this Article has developed a therapeutic jurisprudence framework of the estate-planning process and demonstrated therapeutic jurisprudence's broad analytic potential.

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300. Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC L.J. 171, 172 (2008) ("[I]ntestacy statutes serve an expressive function, indicating society's view of who 'counts' as a family member."); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064 (1999) (explaining that, because intestacy statutes do not recognize same-sex relationships, "they devalue[] gay men and lesbians and their relationships").

301. *See* Gary, *supra* note 299, at 72 n.482; Spitko, *supra* note 300, at 1064.

302. *See* Gary, *supra* note 299, at 72 n.482 (arguing that intestacy laws should be reformed to further "[a] policy of supporting the family," which includes "not only the economic spoils of the decedent's estate, but also the psychological support that comes with being recognized as a family under the law"). This type of argument has been applied in support of other legal reform proposals. *See, e.g.*, F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 580 ("[R]ecognizing same-sex marriage would place a seal of societal approval on homosexual relationships."); Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 778 (2010) (arguing that recognition of a cohabiting-parent evidentiary privilege "would signal that same-sex relationships . . . are worthy of greater societal respect").

303. *See* Winsom, *supra* note 34, at 1354.

304. *See supra* notes 34–40 and accompanying text.

VI. CONCLUSION

A therapeutic jurisprudential analysis reveals that the estate-planning process can be an unsettling experience because testators must contemplate their own mortality.[305] But the analysis also suggests that completing an estate plan and "facing the inevitability of death . . . can have many psychological rewards."[306] Indeed, "the 'estate planning' experience is one way the client can be helped in his personal reconciliation to death."[307] Several aspects of the estate-planning processes contribute to the overall therapeutic nature of the testamentary experience, including the doctrine of testamentary freedom, the counsel of an estate-planning attorney, the ritualistic nature of the will-execution ceremony, and the opportunity for testamentary self-expression.[308]

Although the therapeutic potential of estate planning seems apparent, the process's psychological consequences have largely been overlooked. As a result, a longstanding opportunity to apply therapeutic jurisprudence to the estate-planning context has generally been ignored. Seeking to seize this opportunity and spark widespread therapeutic jurisprudential analysis of the law of succession, this Article has developed a therapeutic jurisprudential framework of the estate-planning process.[309] As the examination of the privileged status of military wills illustrates,[310] this Article's framework can be used to analyze a broad spectrum of estate-planning issues, and can ultimately provide fresh insights into the merits of potential legal reform in areas such as nonprobate transfers, testamentary freedom, estate administration, and intestacy.[311]

In sum, the process of preparing and implementing an estate plan is potentially both unsettling and psychologically rewarding. But as this Article demonstrates, therapeutic jurisprudence can serve as an insightful analytical tool to evaluate the law of succession and to bolster the overall therapeutic potential of the estate-planning process. Ishmael's experience of executing a will in the midst of Captain Ahab's search for the Great White Whale[312] exemplifies estate planning's therapeutic potential. After finalizing his estate plan following a near-fatal encounter at sea, the sailor described his state of mind: "I looked round me tranquilly and contentedly, like a quiet ghost with a clean conscience sitting inside the bars

305. *See supra* Part III.A.
306. Beyer, *supra* note 16, at 778–79.
307. Schaffer, *supra* note 14, at 378.
308. *See supra* Part IV.
309. *See supra* Parts III–IV.
310. *See supra* Part V.A–C.
311. *See supra* Part V.D.
312. *See supra* notes 5–13 and accompanying text.

of a snug family vault."[313] After his testamentary experience, Ishmael was poised to face confidently the dangerous realities of his current surroundings.[314] Like Ishmael, all testators can receive contentment from the preparation and implementation of an estate plan. Legal scholars and policymakers should therefore use this Article's therapeutic jurisprudential framework to evaluate potential reforms of the law of succession to ensure that the estate-planning process is a source of comfort and satisfaction for those preparing for the inevitability of death.

313. MELVILLE, *supra* note 5, at 249.

314. *Id.* ("Now then, thought I unconsciously rolling up the sleeves of my frock, here goes for a cool, collected dive at death and destruction, and the devil fetch the hindmost.").