WASTE NOT, WANT NOT: CAN THE PUBLIC POLICY DOCTRINE PROHIBIT THE DESTRUCTION OF PROPERTY BY TESTAMENTARY DIRECTION?

INTRODUCTION

In ancient times, people were buried with items of personal property ranging from simple bowls or plates to expensive jewelry and furniture.[1] Masters often ordered their favorite slaves, pets, or working animals killed so that they would follow them into the afterlife.[2] Property owners expected the comforts of their previous lives to accompany them into death, effecting this result by ensuring the destruction of their property when they died.[3] The idea of property ownership was so important to ancient peoples that it did not even cease at death, and the significance of property and its ownership has only increased over time.[4] It is perhaps for this reason that, despite the customary historical practice of destroying one's property at death, most courts have struck down modern attempts to do the same.[5]

If an individual writes a last will and testament, that document reflects his wishes concerning the disposal of his property. The law requires that wills be read and construed in such a way as to fulfill the testator's intent.[6] This policy ensures that a person feels confident when writing a will that his wishes will be carried out exactly the way he intended.[7] Despite this premise of personal freedom, however, the law refuses to enforce provisions of wills that are contrary to public policy.[8]

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1. *See generally* ROBERT PHILPOTT, BURIAL PRACTICES IN ROMAN BRITAIN: A SURVEY OF GRAVE TREATMENT AND FURNISHING (1991) (discussing and describing burial and funerary practices during A.D. 43-410 in Roman Britain); Annabel Kelsey Snow, The Silent Majority: A Study of the Principal Death and Burial Customs Known to Mankind (1941) (unpublished M.A. thesis, Duke University) (on file with the Duke University Library) (discussing and describing practices and methods of many ancient societies dealing with death).

2. *See infra* notes 56-57, 98 and accompanying text.

3. *See* Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 77 (1999).

4. The change from a nomadic lifestyle to a more stationary lifestyle among ancient peoples was due to a transformation from a hand-to-mouth existence to a more settled way of life, allowing individuals free time to create objects with uses beyond mere survival. AN ENCYCLOPEDIA OF WORLD HISTORY 14 (William L. Langer ed., 5th ed. 1980). Eventually the wealth and quality of a society came to be judged by the amount and quality of items it had time to create, indicating the beginning of a concentration on the value of private property, leading to more complex social organization. *Id.* This change took place during the Neolithic period, which is believed to have begun in western Europe in approximately 5000 B.C., although these changes did not reach Asia or Africa until a much later date. *Id.*

5. *See infra* Part II.

6. 80 AM. JUR. 2D *Wills* § 1140 (1975). This concept is without doubt the most important and fundamental of the cannons of will construction. *Id.*

7. *See generally* 80 AM. JUR. 2D *Wills* § 1174 (1975) (describing presumptions operating in favor of testator's intent).

8. 79 AM. JUR. 2D *Wills* § 65 (1975).

For centuries, testators have used testamentary devices to direct the disposition of their property upon their deaths. Testators sometimes complete their wills with either clearly benevolent or malevolent intent. For example, several of the most prestigious prizes and awards in the world have been created by clauses in benefactors' wills.[9] Also, other bequests of a more immediately charitable nature are quite common.[10] Conversely, testators have used wills in attempts to accomplish goals with petty, less philanthropic origins. For example, a wealthy Finnish landowner drafted a will devising all of his property to the Devil.[11] Although seemingly petty or vengeful wills have a negative effect on only a limited number of people (either those named in the will or those left out of it), they are often disallowed by courts claiming that the wills actually have a negative impact on society as a whole.

Other kinds of wills, though, arguably do have a negative effect on all of society. A will that orders the destruction of any property is considered the epitome of waste.[12] Most courts refuse to uphold destruction clauses in wills, citing to the doctrine of waste as justification, and subrogating the testator's intent to the interests of the state or beneficiaries.[13] This policy directly

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9. *See* ROBERT S. MENCHIN, THE LAST CAPRICE: A BOOK OF WILLS, ODD AND CURIOUS, OF THE FAMOUS AND INFAMOUS 87-89 (1963). Cecil Rhodes established the Rhodes Scholarships in the last of his six wills, intending to promote Anglo-Saxon supremacy in the world. *Id.* at 87. Alfred Nobel ordered the residuary of his estate invested in "safe securities," the interest to be awarded annually to those people who had "conferred the greatest benefit on mankind" during the preceding year through (1) a chemical discovery or improvement, (2) a discovery or invention in physics, (3) a medical discovery, (4) outstanding work in literature with an "idealistic tendency," and (5) the greatest work toward "fraternity among nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses." *Id.* at 88. Ironically, in addition to being known for establishing the world's most prestigious award for peace, Nobel also invented dynamite and nitroglycerine. *Id.*

10. Many testators devise their property either in trust or outright to a charity or charitable cause, and receive a subsequent estate tax deduction under § 2055 of the Internal Revenue Code. *See* JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS, AND ESTATES 1074-75 (5th ed. 1994).

11. It is unclear precisely what legal standard the court used when refusing to uphold this will, although clearly finding the beneficiary would create some difficulty for the court. *See* MENCHIN, *supra* note 9, at 33. In another will with a negative effect, a German professor left all his property to his sole surviving relative, on the absolute condition that the relative wear nothing but white linen clothing every day of the year, not supplemented in the winter months by any additional undergarments. *See* VIRGIL M. HARRIS, ANCIENT CURIOUS AND FAMOUS WILLS 159 (1981). Furthermore, a will was upheld against the widow and children of the beneficiary of that will, which required the beneficiary to acquire the testator's consent to his marriage in writing if he married during the testator's life, additionally ordering him to not marry a domestic servant. *See id.* at 183-84. The widow was a housekeeper, and was subsequently stripped of the legacy given to her beneficiary-husband in the will, who had died soon after receiving it. *See id.*

12. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975). "A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society." *Id.* Query, however, how much of society's resources are wasted during the litigation and administration of contested probate matters.

13. *Id.* at 214 (refusing to allow destruction of testator's home).

contradicts the rule that a will be read to give effect to the testator's intent, allowing testators complete control over the disposition of their property.[14]

Courts generally cite reasons of prevailing "public policy" as the basis for invalidating the testator's intent in cases where the testator has ordered items of his property destroyed.[15] In several cases, however, courts have allowed the destruction of some items of property under the provisions of a will, citing the testator's right to dispose of his property as he pleases as the reason underlying the decision.[16] Most often when the property to be destroyed is a pet or other animal, human sentimentality ensures that the testator's wishes are highly publicized and publicly decried, generally guaranteeing that the animal is not destroyed.[17] Subsequently, using public policy as the standard for deciding cases when the destruction of property is at issue creates weak precedent based only on subjective concepts of property and other criteria.

The historical context of property and wills is particularly important when examining modern court decisions affecting the destruction of property. In Part I, this Note examines the history of property and wills. Part II describes modern court decisions about wills ordering the destruction of both animate and inanimate property. Part III examines those courts' stated public policy rationales and compares modern theories of will construction and property, arguing that an amorphous public policy rationale is a weak basis for forbidding testamentary destruction of property. Because there are so few published opinions in this area of law, courts freely cite to the decisions of other jurisdictions as support for their own rulings.[18] To date, the most recent case prohibiting the destruction of property by testamentary order is from Vermont, and, therefore, the analysis and conclusions of this Note will rely on Vermont law as the legal standard.

I. THE ANCIENT LAW OF WILLS AND TRADITIONAL NOTIONS OF PROPERTY

The idea that an individual has the ability to dispose of his property at death is an ancient one.[19] Heirship and the concept of selecting devisees have

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14. 80 AM. JUR. 2D *Wills* § 1140 (1975).

15. *E.g., Eyerman*, 524 S.W.2d at 214.

16. *E.g., In re* Estate of Beck, 676 N.Y.S.2d 838, 840-41 (Sup. Ct. 1998). *See also infra* Part III.B.

17. *See e.g., In re* Brand's Estate, No. 28473, slip op. at 7 (Vt. Chit. Prob. Ct. Mar. 17, 1999).

18. *See, e.g., id.* at 6.

19. *See* Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 415 (1988). It is commonly accepted that the first evidence of the power of testation is found in biblical accounts within the Book of Genesis. *Id.* The courts have also recognized the ancient roots of that power, citing to Genesis. *E.g., In re* Maginn, 122 A. 264, 267 (Pa. 1923).

existed since at least Biblical times.[20] Written wills[21] existed in ancient Mesopotamia, where they were recorded on clay tablets rather than paper.[22] Other records depict the ceremonial testation process undertaken in the Fourth Egyptian Dynasty.[23] Most of our society's present understanding of testation and will writing derives from ancient law and practice. Notwithstanding this ancient practice, with the corresponding expectation that property would be destroyed at its owner's death, present day courts claim that public policy militates against a testator's attempt to do the same.

Today's American method of testamentary disposition has its roots primarily in Roman law.[24] Despite these roots, American courts refuse to embrace or even accept the practice of testamentary destruction of property. Consequently, in order to understand the testamentary practices of present day society, it is necessary to explore the historical customs and laws of death, dying, and property. For example, in many ancient civilizations, it was common to render large quantities of property useless at the death of their owner by burying the items with the deceased or by destroying the property outright.[25]

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20. In Genesis 15:3, Abraham declared that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir." DUKEMINIER & JOHANSON, *supra* note 10, at 2. The words are an interpretation by Blackstone, because there is no commonly accepted translation from the original Hebrew of that Biblical passage. *Id.* Many scholars, however, dispute Blackstone's claim that servants received property in the absence of more traditional heirs. *Id.* (citing Richard H. Hiers, *Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J. L. & RELIGION 121, 127 (1994)). Eliezer never took under Abraham's declaration, though, because Abraham and Sarah eventually parented Isaac. DUKEMINIER & JOHANSON, *supra* note 10, at 2 n.1 (citing *Genesis* 17:15). Isaac has his own place in the development of Biblical property law. *See infra* notes 32-37 and accompanying text.

The distinction between "heirs" and "devisees" is important because statutes define "heirs" and their shares of an estate, whereas "devisees" receive property from the decedent at his discretion. The differentiation serves to highlight a testator's greater or lesser ability to dispose of his property as he chooses, and will be touched on throughout this Note.

21. The terms "will" and "testament" are used interchangeably in this Note, disregarding the distinction made in early English law between the "will" as dealing only with devises of land and the "testament" as dealing only with devises of personalty. *See* 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §§ 2.8-2.9, at 47-49 (1960) [hereinafter PAGE ON WILLS]. Additionally, in order to avoid confusion, gender distinctions often made in the endings of words such as testator/testatrix and executor/executrix are disregarded. No gender bias is intended or should be implied from this choice.

22. Russ VerSteeg, *Early Mesopotamian Commercial Law*, 30 U. TOL. L. REV. 183, 214 n.17 (1999).

23. *See* Beyer, *supra* note 19, at 416. The Fourth Egyptian Dynasty spans the years from approximately 2900-2750 B.C. *Id.*

24. HARRIS, *supra* note 11, at xii. In its own turn, Roman society and law was heavily influenced through interaction with the Etruscans, Italians, Spaniards, Africans (especially Egyptians), and eventually the Germanic tribes who precipitated the end of the Roman empire in 476 A.D. H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 1-4 (3d ed. 1972).

25. *See* PAGE ON WILLS, *supra* note 21, § 2.1, at 31.

The Christian Bible and the myths surrounding its characters are evidence of some of the first testamentary dispositions.[26] The Bible states that seventy legions of angels brought Adam sheets of paper and "quill pens, nicely nibbed, all the way from Paradise" with which to write his will, wherein he employed the Archangel Gabriel as a witness.[27] Noah reportedly left a written testament, "witnessed under seal,"[28] dividing the world into three shares, one for each of his sons.[29] Also, in a testamentary device allegedly written by Job but not discovered until 1839,[30] millennia after it was written, Job recognized his wife for selling her hair to earn money to buy bread for her husband because they were suffering from extreme poverty.[31]

The Book of Genesis provides some of the most concrete evidence of early testamentary acts.[32] The elderly Isaac called his first-born son Esau to him, with the intent of passing leadership of the family with all the attendant rights and responsibilities, saying, "behold now, I am old, and know not the day of my death."[33] In spite of his intent, Rebekah and Jacob, Isaac's younger son, tricked Isaac into bestowing the blessing upon Jacob rather than Esau.[34] Isaac blessed Jacob in Esau's place, saying "God give of the dew of heaven, and the fatness of the earth, and plenty of corn and wine: Let people serve thee, and nations bow down to thee: be lord over thy brethren, and let thy mother's sons bow down to thee."[35] In effect, this "blessing" was a bequest of property from Isaac to his sons, at his discretion.[36] Esau eventually discovered his brother's trick and told Isaac, who refused to correct the

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26. *See generally* Beyer, *supra* note 19 (explaining origins of law of wills).

27. HARRIS, *supra* note 11, at 10. Needless to say, the authenticity of this will has not been determined. *See id.*

28. Beyer, *supra* note 19, at 415 n.12.

29. HARRIS, *supra* note 11, at 10. Again, the author points out that the validity of this will is highly suspect. *See id.*

30. The will was discovered by Cardinal Angelo Mai (1782-1854), a noted religious scholar. 9 NEW CATHOLIC ENCYCLOPEDIA 79 (Editorial Staff at the Catholic University of America eds., n.d.). He is responsible for discovering over 359 "lost" texts by both pagan and Christian authors. *Id.* He was also instrumental in the creation and maintenance of the Vatican Library, ultimately becoming the first Vatican librarian. *Id.*

31. HARRIS, *supra* note 11, at 10.

32. *Genesis* 27:1-46, 28:1, 48:1-22, 49:1-33.

33. *Id.* at 27:1-4.

34. *Id.* at 27:6-23. Rebekah was mother to both Esau and Jacob. *Id.* at 27:42. The reason she tricked Isaac into blessing Jacob rather than Esau, the first-born, is unclear, although Rebekah favored Jacob over Esau.

35. *Id.* at 27:28-29.

36. *See* Beyer, *supra* note 19, at 416 (citing 1 J. SCHOULER, LAW OF WILLS, EXECUTORS, AND ADMINSITRATORS § 13, at 12 (5th ed. 1915)).

testamentary error.[37] Isaac's refusal is an indication of the extreme solemnity with which ancient people regarded deathbed declarations.[38]

Later in the Book of Genesis, another deathbed testament is described.[39] A dying Jacob gave his grandsons a blessing, bestowing upon them land given to him by God for "thy seed after thee for an everlasting possession."[40] Jacob also blessed his son Joseph, saying, "Behold, I die: but God shall be with you and bring you again unto the land of your fathers. Moreover, I have given to thee one portion above thy brethren, which I took out of the hand of the Amorite with my sword and with my bow."[41] Acknowledging each of his sons and ascribing to each of them a symbolic emblem and a prophecy,[42] Jacob created the twelve tribes of Israel.[43] Jacob then instructed his family that he was to be buried in a grave dug for him in Canaan.[44] The act of dividing his property amongst his children and giving Joseph a larger portion is clearly testamentary in nature. Additionally, Jacob's burial instructions parallel a modern custom where a testator includes instructions for the disposal of his body in his will.

Scholars cite this Biblical evidence more frequently than any other ancient culture's testamentary habits. Despite this practice, ancient Egyptian wills are perhaps just as important to the study of the modern law of wills because they were written testaments instead of more traditional oral testaments.[45] Egyptian wills are remarkable in that they were written in a style which "might almost be granted probate today."[46]

An example of this characteristic, a will written by a man named Sekhenren was dated 2550 B.C.[47] The document is simple, and leaves all his

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37. *Genesis* 27:32-33.

38. *See* Beyer, *supra* note 19, at 416 (quoting SCHOULER, *supra* note 36, § 13, at 12 n.8.)

39. *Genesis* 48:21-22, 49:1-33.

40. *Genesis* 48:4. This is similar to the traditional language bestowing a fee simple interest in land: "To A and his heirs." In feudal England until 200 years after the Norman Conquest, this language ensured that the land would pass from A to his heirs, and then to A's heir's heirs, and so on. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 200 (4th ed. 1998).

41. *Genesis* 48:21-22.

42. HARRIS, *supra* note 11, at 11.

43. *Genesis* 49:1-28.

44. *Id.* at 49:29-33. Joseph needed to seek the approval of Pharaoh in order to bury Jacob as he was instructed. *Id.* at 50:4-5. Pharaoh granted that approval, indicating a process similar to that of today's probate courts. *Id.* at 50:6.

45. HARRIS, *supra* note 11, at 12.

46. *Id.* (citations omitted). *See also* Beyer, *supra* note 19, at 416 & n.24 (quoting J. ROOD, A TREATISE ON THE LAW OF WILLS § 12 (describing wills from the reign of Amenemhat III so closely resembling those in use today that "you might almost suppose they were drawn yesterday.")).

47. *See* HARRIS, *supra* note 11, at 12 (citations omitted). The precise date on the will is actually in the year 44, second month of Pert, day 19. *Id.* The date has been estimated to be in the 44th year of the reign of Amenemhat III, or approximately 2550 B.C. *Id.* This is credited as being the first written will. *Id.*

property and goods to his brother, a priest of Osiris, the God of the Dead.[48] A more detailed document bears the date of 2548 B.C., during the reign of Amenemhat IV, bequeathing the testator's property to his wife Teta, for her life.[49] While the will forbids Teta from destroying the houses built for the testator by his brother, it empowers her to give them to any of her children, as she chooses.[50] The will also appoints a guardian for the couple's infant children.[51] The drafter of the will wrote it on papyrus, created a detailed attestation clause, and ensured that two slaves witnessed the device.[52] This document created what today could be considered a trust of sorts or a specific power of appointment.

While these wills and others from the same general time period contain many of the characteristics of modern wills, it is doubtful that they contain all the characteristics the American legal community considers important to the formation of a will.[53] For example, although wills in the past were used to allow the testator to circumvent statutory schemes of descent and guide the disposal of his property, there is no indication that ancient wills meet today's requirements of secrecy or revocability.[54] Additionally, ancient Egyptian wills may have had some effect prior to the death of the testator, unlike those of present day.[55]

Furthermore, ancient burial practices differ from burial practices of today, affecting many of the principles intrinsic to the concept of testamentary intent. For example, in ancient Egypt it was commonplace to embalm and bury sacred animals,[56] tools, food, jewelry, and other items with the deceased.[57] While there is no implication that a testator ordered the burial of his property in his will, the ancient Egyptians had different ideas about the disposal of property at death than our legal system does today. Consequently, it is apparent that public policy in ancient times actually required that property

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48. *Id.*

49. *Id.* at 12-13.

50. *Id.* at 13.

51. *See id.*

52. *See id.* An attestation clause is an important part of any will, indicating that all the formalities of a will's execution were adhered to. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 226 n.12. This is an especially important consideration when many years may pass between the time that a will is executed and the time it is admitted to probate. *See id.* The attestation clause establishes a prima facie case that the will was duly executed, eliminating the need to rely on the imperfect (or unavailable) memories of the witnesses in the event that there is a question about the validity of the will or the propriety of its execution. *See id.*

53. *See* PAGE ON WILLS, *supra* note 21, § 2.4, at 35.

54. *See id.*

55. *See id.*

56. *See* Snow, *supra* note 1, at 25 (quoting GRAFTON ELLIOT SMITH & WARREN R. DAWSON, EGYPTIAN MUMMIES 52 (1924)).

57. *Id.* at 23 (quoting WARREN R. DAWSON, 15 ENCYCLOPEDIA BRITANNICA 954 (14th ed. 1932)).

be buried with the deceased, whether it was an inanimate item or a favorite pet.

In contrast to ancient Egypt, ancient Greece had a highly limited concept of testation and property. Except in Athens, wills were not even permitted.[58] The laws of Solon are credited with introducing the will into Athenian society.[59] Prior to Solon's infusion of such new ideas, ancient Greek law required that the decedent's estate pass to his children, or, in the absence of lineal descendants, to his collateral heirs.[60] The great scholar Blackstone decries Solon's meddling, claiming that the ability to devise property created problems of "excess wealth in some," ending in a "total subversion of [the Greek] state and nation," but admits that the power of testation if "prudently managed, has . . . a peculiar propriety."[61]

Athenian law limited the ability to draft wills to situations when the testator was childless, or when the children reached a certain level of maturity.[62] If only daughters survived, bequests could be made to future sons-in-law, provided that the marriage actually occurred.[63] Aristotle's will provides an example of conditional bequests to future sons-in-law and accomplishes many of the same goals as a will written today.[64] Aristotle appointed an executor, Antipater, to "execute generally my last wishes and . . . have the administration of everything."[65] Further, Aristotle provided for his daughter's marriage to a man named Nicanor as soon as she is marriageable, and stated that if she died before that marriage or before she has children, Nicanor would inherit all Aristotle's possessions.[66] He also provided

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58. *See In re* Garland, 76 S.E. 486, 487 (N.C. 1912).

59. PAGE ON WILLS, *supra* note 21, § 2.4, at 36.

60. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 374 (1978) [hereinafter BLACKSTONE'S COMMENTARIES]. Descendants are generally the children, grandchildren, great-grandchildren, and so on of the testator, although the word should be more clearly defined for use in a legal document. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 792. Collateral heirs are divided into first-line ("descendants of the decedent's parents, other than the decedent and the decedent's issue") and second-line ("descendants of the decedent's grandparents, other than the decedent's parents and their issue") collaterals. *Id.* at 85.

61. BLACKSTONE'S COMMENTARIES, *supra* note 60, § 2.4, at 36. If Blackstone were to write today on the concept of testation as it has evolved to the present, it is likely that he would point to any beneficiary's expectation of receiving the maximum possible value of the decedent's estate as indicative of an expectation of "excess wealth in some." Clearly, the concept of public policy pursued by the courts does not seek to support an expectation by the beneficiary that he may receive the maximum possible benefit from the decedent's estate. Even beneficiaries already included in a will may not operate under the expectation that they will receive anything from a testator, as one of the primary principles behind a will is that it is revocable and changeable at any time.

62. PAGE ON WILLS, *supra* note 21, §2.4, at 36.

63. *Id.*

64. HARRIS, *supra* note 11, at 14. He drafted the will in 322 B.C. *Id.*

65. *Id.*

66. *Id.*

for a woman named Herpylis,[67] giving her, in addition to "the presents she has already received," a talent of silver, slaves, "the youth Pyrrhaeus," and her choice of several places to live.[68] Additionally, Aristotle gave some slaves to his heirs, while he freed others. He instructed that the children of slaves he owns shall pass into the service of his heirs, but "shall be freed if they [deserve] it" when they become adults.[69] Finally, Aristotle ordered several statues built and others, which he already commissioned as gifts for the gods, to be placed in the appropriate temples.[70]

Virgil also wrote a will that survives today, dated 10 B.C.[71] The most notable part of his will is the clause ordering the Aeneid burned.[72] After his executors and friends informed him that the Emperor Augustus would never permit it to be destroyed, Virgil instead bequeathed the Aeneid to some of his associates upon the condition that if he should die before revising it to his satisfaction, it would be published just as it was, imperfect and incomplete.[73] Interestingly, in this case, the ancient Greeks exhibited the same refusal to honor a testator's intent to destroy personal property as the courts do today.

Other classic cultures recognized the right of testation, but based it on different foundations. In large part, Roman law superseded Greek law, and the Roman testamentary doctrines have little to do with the Greek methods.[74] Roman law did not permit the writing of wills until the Laws of the Twelve Tables were compiled, giving the right of testation to Roman citizens.[75] Once that ability was acknowledged, however, there were two methods for making a will under early Roman law.[76]

The first procedure, known as the *testamentum calatis comitiis*, required the testator to declare his estate plan in front of an assembly of the people, called the *comitia calata*, who were required to give their consent to the arrangement set forth.[77] The second method of making a will, the *testamentum in procinctu*, was available only to soldiers, who could make their wills by standing in the line of battle and declaring their wishes in front

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67. *Id.* It is unclear exactly who Herpylis was.

68. *Id.*

69. *Id.*

70. *Id.* at 16.

71. *Id.*

72. *Id.* The clause reads "Ut rem emendatam imperfetamque." *Id.*

73. *Id.*

74. PAGE ON WILLS, *supra* note 21, § 2.5, at 36 & n.6.

75. BLACKSTONE'S COMMENTARIES, *supra* note 60, at 491. *See also In re* Garland, 76 S.E. 486, 487 (N.C. 1912).

76. *See* PAGE ON WILLS, *supra* note 21, § 2.5, at 36.

77. *Id.* It is unclear whether this process created a sort of "private statute" to honor the wishes of the testator, or whether the act of declaring intent in front of the assembly was merely a form of publication. *Id.* at 36-37.

of their comrades.[78] Julius Caesar first granted the soldier's privilege to make this type of will, which was later made a permanent right by his successors' adherence to the practice.[79] Although similar to present day wills in some ways, it is not clear to what extent either the *testamentum calatis comitiis* or the *testamentum in procinctu* was revocable.[80]

As Roman law continued to evolve with the growth and change of the Roman Empire, a new type of will was created.[81] This kind of will, referred to as the *testamentum per aes et libram*, bears a strong resemblance to a third party beneficiary contract or a trust.[82] To execute this will, the testator sold his estate to a third party, who enforced the wishes the seller declared in writing, called a *nuncupatio*.[83] The magistrate, or *praetor*,[84] careful to ensure that the *nuncupatio* indicated the testator's intent, enforced the *nuncupatio* only if seven witnesses sealed it.[85] This type of will was revocable.[86] Eventually, it became clear that the writing was a mere formality, and the *praetor* enforced the intent of the testator even if the property transfer, referred to as a *mancipatio*, was omitted.[87]

Further additions to the Roman law of wills appeared over the years. Justinian enacted legislation requiring the testator and witnesses to sign a

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78. *Id.* The requirement that the soldier be "standing in the line of battle" was generally interpreted very strictly, most often requiring that the soldier actually be in battle or preparing for battle. *See* R.H. Helmholz, *The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills*, 20 SYRACUSE J. INT'L L. & COM. 147, 149-50 (1994).

79. *See* Helmholz, *supra* note 78, at 148. This type of Soldier's Will survived in England beyond the passage of the Statute of Wills in 1540 and the Statute of Frauds in 1671, with minor modifications. *See id.* at 148.

80. PAGE ON WILLS, *supra* note 21, § 2.5, at 36.

81. *See* Beyer, *supra* note 19, at 417.

82. *See* PAGE ON WILLS, *supra* note 21, § 2.5, at 37. The writing is accompanied by a declaration by the testator wherein he repeats the writing. *See* JOLOWICZ & NICHOLAS, *supra* note 24, at 243.

83. *Id.*

84. The *praetor* was the most important of the senior magistrates in Roman law, in the context of jurisprudential development. JUSTINIAN, THE DIGEST OF ROMAN LAW: THEFT, RAPINE, DAMAGE AND INSULT 13-14 (Betty Radice ed. & C.F. Kolbert trans., Penguin Books 1979). The magistrates wrote edicts at the beginning of their terms of office, explaining how they intended to carry out their duties. *Id.* The *praetor* had power over the procedures and remedies of the law, so merely by issuing his edict, the *praetor* was able to change the way laws were implemented. *Id.* at 14. The *praetors* learned that they could create a new cause of action, essentially amending a law without creating a new one, stretching the boundaries of the law as it was written. *Id.* There were two praetors in any given year, holding office together. *Id.* at 15.

85. *See id. See also* HARRIS, *supra* note 11, at xii (indicating that the Romans may also have undertaken other precautions against forgery).

86. PAGE ON WILLS, *supra* note 21, § 2.5, at 37.

87. *Id.* A *mancipatio* is a type of property transfer that involved solemn ceremonies, and was usually done to accomplish the transfer of land and its accompanying slaves, animals, and other equipment. *See* JOLOWICZ & NICHOLAS, *supra* note 24, at 133.

testamentary instrument, and that the seals of witnesses include their names.[88] Also, holographic wills were only allowed in exceptional cases.[89] Authenticating a holographic will in ancient Rome involved a detailed process of handwriting comparison set forth by law.[90] Clearly, the Roman legal system evolved toward an understanding that it is important for testators to be able to dispose of property at death as they desire, rather than as the state dictates.

Unlike ancient Rome, other societies did not have wills or other testamentary instruments.[91] According to accounts by Tacitus, the Germanic tribes were unaware of wills in 200 A.D.[92] The reason for this difference from other ancient societies is unclear. Scholars speculate that Germanic tribes did not have concepts of wills or testation because the German system of folk law was originally unwritten.[93] Despite the absence of actual testamentary instruments, however, there is still evidence of a "comprehensive scheme of descent."[94]

Norwegian law from approximately the same period indicates that wills were an integral part of the legal system.[95] Men could revoke a will only once, the second being irrevocable, whereas women could revoke twice, with the third being irrevocable.[96] The Norse also used property as a part of their burial customs, which required cremation of their dead.[97] More interestingly, however, the ceremonies required that "the arms of the dead, and sometimes his horse, [be] given to the flames" during the cremation.[98] A common method of performing the ceremony included placing the objects to be burned with the body of the deceased on the deck of his ship, which was set afloat and then set afire.[99] These societies not only recognized both the value and

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88. PAGE ON WILLS, *supra* note 21, § 2.5, at 37.

89. *See* Hemholz, *supra* note 78, at 153. Generally, "[a] holographic will is a will written by the testator's hand and signed by testator; attesting witnesses are not required." DUKEMINIER & JOHANSON, *supra* note 10, at 248. Holographic wills have their origins in Roman law, and came to America via a Virginia statute in 1751 and the Code Napoleon-based civil law in Louisiana. *See id.* Approximately fifty percent of the states in the United States permit holographic wills, but the exact requirements for acceptance vary by state. *See id.*

90. *See id.* at 154.

91. *See* PAGE ON WILLS, *supra* note 21, § 2.6, at 37.

92. *Id.*

93. *See id.* § 2.7, at 39.

94. *Id.* § 2.6, at 37-38.

95. *Id.* at 38.

96. *Id.*

97. *See* Snow, *supra* note 1, at 48.

98. *Id.* (quoting TACITUS, GERMANIA (John Aiken trans., Princeton 1849)).

99. Snow, *supra* note 1, at 48. Norse myth describes the burial rites of Baldur, and while parts of the description are more believable than others, the general premise is acceptable as fact:

> With scarcely any sound they . . . carried the body tenderly to the sea-shore and laid it upon the deck of that majestic ship called Ringhorn, which had been *his*. . . .

importance of wills and the power of testation, but also found it appropriate to allow the destruction of valuable property and animals upon the death of the property owner.

Prior to the Norman Conquest of England in 1066 A.D.,[100] there were two methods of disposing of property.[101] The first, called the *post obit gift*, involved some ceremonial procedures.[102] The other method, a deathbed disposition, was typically undertaken in the company of a priest as part of the testator's last confession.[103] Shortly before the Conquest, at the end of the Germanic period in England, the two forms merged to form a *cwide*.[104]

After the Conquest, English law began to take a form more similar to what we know today. Until the Statute of Wills[105] was passed in 1540, the royal courts dealt with issues of real property, while the ecclesiastical courts handled matters of personal property.[106] The royal courts had long since determined that real property could not pass by will, although it was an acceptable method of disposition for personal property.[107] The testator

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> Nanna came, Baldur's fair young wife; but when she saw the dead body of her husband her own heart broke with grief, and the Aesir [the chief gods of the Teutonic Pantheon] laid her beside him on the stately ship. After this Odin stepped forward, and placed a ring on the breast of his son, . . . [the gods] set the ship floating; and, then . . . Odin lighted the funeral pile of Baldur and Nanna.

Id. at 48-49 (quoting A. & E. KEARY, THE HEROS OF ASGARD, TALES FROM SCANDINAVIAN MYTHOLOGY 248-49 (1893)) (first of two alterations in the original).

100. PAGE ON WILLS, *supra* note 21, § 2.8, at 47.

101. Beyer, *supra* note 19, at 417.

102. *Id.*

103. *Id.*

104. *Id.* The *cwide* had several requirements, such as being in writing, the prior approval of the king, "getting a bishop to set his cross to the document," and ensuring the document existed in duplicate or triplicate. *Id.*

105. The official name if this statute is "32 Henry VIII," although it is more commonly referred to as the Statute of Wills. *See In re* Wilkins' Estate, 94 P.2d 774, 775 (Ariz. 1939).

106. *See* Beyer, *supra* note 19, at 417. There was a time after the Conquest, however, when wills were forbidden in England. *See* HARRIS, *supra* note 11, at xii (citing Lord Rosebery in an address on the character of Byron). *See also* PAGE ON WILLS, *supra* note 21, § 2.9, at 50 (noting that the concepts underlying the extortion inherent in the feudal system denied validity to wills).

107. *See* PAGE ON WILLS, *supra* note 21, §§ 2.8-2.9, at 48-51. The reason for this restriction appears to have been an effort to prevent undue influence by members of the clergy. *See id.*

The emergence of the concept of equitable title as separate from legal title, however, led to the creation of a scheme to get around the prohibition against devising land. *See id.* § 2.12, at 53-54. In order to defeat the restriction, a person would convey the land to a third party to hold for the grantor for life, and then to such use as the grantor might appoint. *See id.* at 54. The grantor was then free to make the appointment in any manner he wished, usually accomplishing this appointment by a document that did not take effect until the death of the grantor. *See id.* The Statute of Uses was passed in 1535 to combat this subterfuge, stating that if a person was seised of land to the use of another, the person who had the use of the land possessed both the equitable and legal titles. *See id.* § 2.13, at 55. This effort to prevent the separation of the legal and equitable titles in land revolutionized the laws of conveyance, providing the foundation for most of the present day law of trusts, but failed miserably at preventing the effective devise of land. *See id.* at 55-56.

executed his will in a candlelit church, accompanied by chanting, and received the blessing of the church upon the document embodying his testamentary intent.[108] After the Statute of Wills was passed, the requirements for a will became clearer, requiring that the instrument be in writing, but not that it be witnessed or signed by the testator.[109] In 1676, the Statute of Frauds[110] was enacted, in response to the many abuses and frauds which had occurred in the previously less stringent environment.[111]

Section 5 of the Statute of Frauds added many of the will requirements and processes of will-making that are common in the United States today.[112] Over time, each state adjusted the English law of wills to suit its own purposes.[113] Changes in the English law, however, continued to affect American law. For example, the Wills Act of 1837 reduced the number of necessary witnesses to two, required the will to be signed at the end of the document, and, perhaps most importantly, standardized the laws of personal and real property.[114]

Today, the ability to dispose of one's property at death is considered a valuable right, one that is "a separate and identifiable stick in the bundle of rights called property."[115] It is a right or privilege granted by statute in every American jurisdiction.[116] The testator may dispose of his property in any way not inconsistent with the laws or policy of the state.[117] The strict laws of inheritance, which centuries ago more or less precluded the disposition of property, have devolved into a system of intestate succession, only providing for the distribution of the decedent's property when he does not create a will.[118] An average individual today might believe that wills are "to make other people happy,"[119] or to prevent family members from "killing each

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108. Beyer, *supra* note 19, at 418.

109. *See id.*

110. The official title of this statute is "29 Charles II," but it is commonly referred to as The Statute of Frauds. *In re Wilkins'*, 94 P.2d at 775.

111. Beyer, *supra* note 19, at 418.

112. "A devise of land shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses . . . ." *Id.*

113. *Id.*

114. *Id.* at 418-19.

115. Hodel v. Irving, 481 U.S. 704, 716 (1987).

116. *See* 79 AM. JUR. 2D *Wills* § 54 (1975). The right to make a will is merely a statutory right, and does not rise to the level of a natural right, and as such may be limited, abolished, or restricted by the legislature. *See* PAGE ON WILLS, *supra* note 21, § 1.7, at 26.

117. *See* 79 AM. JUR. 2D *Wills* § 65 (1975).

118. *See* Mark Evans Harden & Barbara A. Lindsay-Smith, *Beware Migrating Spouses, Texas Keeps a Quasi-Community Property Statute: It Could Be a Long Cold Winter*, 3 TEX. WESLEYAN L. REV. 91, 99 (1996).

119. Interview with Sharon Sykas, in Stratham N.H. (Nov. 25, 1999).

other" over the distribution of an individual's property after his death.[120] However, a system of intestate succession as set up by the state is generally recognized as the necessary, but not a preferred, method of disposing of property after death.[121]

II. PRESENT DAY LAW OF WILLS AND DESTRUCTION OF PROPERTY

The right of a testator to dispose of his property at death in the manner in which he desires is not absolute.[122] His right is limited by the actions of the legislature, which is capable of defining and limiting that statutory right.[123] However, "[t]he fact that the disposition of the testator's property made by the will is capricious, unjust, spiteful, eccentric, revengeful or injudicious does not of itself render the will invalid."[124] Despite this general rule, wills that order the destruction of property are rarely upheld.[125] Interestingly, courts do not distinguish between the types of property different testators attempt to destroy.[126] It is important to remember that the intent of the testator is paramount, regardless of how odd, silly, or even selfish their desire may appear to others. This Part explores the courts' treatment of testamentary desires to destroy two different kinds of property, animate and inanimate.

A. Real and Personal Property

One of the earliest modern cases where a testator ordered inanimate property destroyed is *In re Scott's Will*.[127] The testator added a codicil to his will, revoking the bequest of the residue of his estate to Rice County, which had been made in order to lower the amount the County should collect from

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120. Interview with Benjamin Sykas, in Stratham, N.H. (Nov. 25, 1999).

121. *See* Harden & Lindsay-Smith, *supra* note 118, at 99.

122. *See supra* notes 115-17 and accompanying text. He may, however, destroy his property during his life, if he wishes. There is nothing to stop an individual from burning his home while he is alive, as long as he obtains the proper municipal burning permits. Jeffery Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 754 n.146 (1990). Likewise, a person may bring a pet or other animal to a veterinarian and have it destroyed humanely. The law relies on people's self-interest and the fact that a living person must live with the ramifications of his actions to prevent people from destroying property during life. *See* Hirsch, *supra* note 3, at 73. This reliance is misplaced in the case of the very rich, as the result of the destruction of property even with a high value may not deter them from acting capriciously. *See id.* Cleopatra, for example, dissolved pearls in wine and drank them for her own amusement and to impress the Romans, because she knew she possessed more wealth than she could ever spend. *See id.*

123. PAGE ON WILLS, *supra* note 21, § 3.11, at 88, 91.

124. *Id.* at 89-90.

125. *Id.* at 94. *See also infra* Part II.A.

126. *See infra* Part II.A.

127. *See In re* Scott, 93 N.W. 109 (Minn. 1903).

the taxpayers in the county.[128] The testator indicated in the codicil what was to be done with the residue of his estate in lieu of the bequest to the County: "It is my will, and I hereby direct, that my executor above named shall, after paying all my just debts and expenses, shall [sic] destroy all the rest and residue of the money or cash or other evidence of credit that to me or my estate may belong."[129] The residue of the estate included both real and personal property, and the personal property exceeded $43,000 in value.[130] Mr. Scott died leaving a brother, sister, and the children of a deceased brother as heirs.[131]

Subsequently, the residue was assigned to Mr. Scott's heirs-at-law, the district court affirmed the decree of the trial court, and Rice County appealed to the Minnesota Supreme Court.[132] In its ruling, the Minnesota Supreme Court "assume[d], for the purpose of this decision, that the direction in the codicil to the executor to destroy all the residue of the money or cash or evidences of credit belonging to the estate was void."[133] This statement illustrates the court's view that the testator did not have the ability to dispose of his property in so wasteful a manner.

Conversely, rather than destroy property, some testators wish to "take cherished property with them" by interring it in a manner similar to that of the ancient Egyptians.[134] In the 1974 case of *In re Meksras Estate*, the testator wished to be buried with her jewelry.[135] The court refused to allow this provision on the grounds that it tended to encourage grave robbery.[136] The court did not refuse to uphold the clause in the testator's will because burying the jewelry would be wasteful or against public policy, as is usually the case with the destruction of inanimate property, illustrating a heightened respect for testamentary freedom.[137]

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128. *See id.*

129. *Id.*

130. *Id.*

131. *Id.* Mr. Scott left no wife or children. *See id.*

132. *Id.*

133. *Id.* The court ruled only on the question of whether the codicil absolutely revoked the bequest to Rice County, or whether it was revoked only by implication, subject to the validity of the alternate disposition of the property (its destruction). *Id.* at 109-10. The court determined that the language of the codicil indicated an absolute indication that the testator's heirs at law receive no part of the residue of the estate, and that Rice County also should have no interest in the property. *Id.* at 110.

134. Hirsch, *supra* note 3, at 70 n.163.

135. *Id.*

136. *Id.*

137. *See infra* Part II.A.

> In order to conserve and protect the deceased's property, the courts will refuse to enforce destructive provisions in the will, such as those that provide for the burning of money, or that the testator's house should be boarded over and left vacant for a long period, or that the his farm should go uncultivated and unworked; and of

In a similar case, Sandra Ilene West of Beverly Hills, California devised her multi-million dollar estate to her brother-in-law, on the condition that he bury her in her baby-blue Ferrari, dressed in a lace negligee and seated in the driver's seat.[138] The court ordered her buried in this way, next to her husband in a cemetery in San Antonio, Texas,[139] calling the request "unusual, but not illegal."[140] Courts are unable to state with any conviction one reason other than the abstract, amorphous public policy rationale for refusing or permitting the destruction of property at death. The testators' intent in these cases appears to stem from a desire that no one else be allowed to possess *their* property, or perhaps an honest belief that they could take the items with them.

Other testators desired to destroy property of exceedingly personal value, apparently for reasons of privacy, rather than mere selfish whim. For example, Jacqueline Susann,[141] author of the novel *Valley of the Dolls*[142] ordered her executor to destroy her diary so that its contents would never be public and, therefore, embarrassing to those in it.[143] Her executor complied with this request, destroying the diary that the Internal Revenue Service eventually valued at $3.8 million.[144] Similarly, Franz Kafka bequeathed his diary and other personal papers to a friend, Max Brod, asking him to "burn everything."[145] Mr. Brod refused to do so, saying that the unpublished personal papers were of great literary value.[146] Perhaps most notably, Justice Hugo L. Black[147] of the United States Supreme Court destroyed his own notes of the Court conferences he had attended over the years, wishing to be certain

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course gifts given for illegal purposes will also be declared void.
PAGE ON WILLS, *supra* note 21, § 3.11, at 94.

138. *See* DUKEMINIER & JOHANSON, *supra* note 10, at 410 n.19.

139. *See id.*

140. Hirsch, *supra* note 3, at 70 n.163 (quoting *Notes on People*, N.Y. TIMES, Apr. 13, 1977, at C2). The court in this case did not echo the concerns about grave robbery set forth by the court in *In re Meksras Estate*. *See supra* notes 135-37 and accompanying text.

141. Born in Philadelphia, Pensylvania in 1921, Jacqueline Susann worked as an actress and published *Valley of the Dolls* in 1966 and *The Love Machine* in 1969. 65-68 CONTEMPORARY AUTHORS 577 (Jane A. Bowden ed., 1977).

142. The novel was about the conflict between the female fantasy of travel, striking it rich, meeting wonderful men, and the reality of becoming addicted to pills, committing suicide, and making a mess out of life. *Id.* Susann's second best seller, *The Love Machine*, describes the triumph of integrity over hedonism and ambition. *Id.* at 578.

143. *See* Hirsch, *supra* note 3, at 76 n.157 (quoting *Tax Report*, WALL ST. J., Aug. 29, 1979, at A1).

144. *Id.* The estate was billed accordingly for the taxes on that piece of "literary property." *Id.* Additionally, the estate was fined $1.5 million as a fraud penalty. *See Tax Report*, WALL ST. J., Aug 29, 1979, at A1.

145. DUKEMINIER & JOHANSON, supra note 10, at 36.

146. *Id.*

147. Justice Black, a Democrat, was appointed to the Court in 1937 and resigned from the Court in 1970. BLACK'S LAW DICTIONARY 1721-1724 (7th ed. 1999).

that the notes were not published posthumously against his wishes.[148] Curiously enough, Justice Black's actions were perfectly proper when he destroyed his papers before he died, but the same wish probably would not have been honored if he had died before destroying the papers. In cases of this nature, it seems clear that the testators were merely attempting to prevent the public availability of highly personal documents that might be damaging to others.

Part of the reason that the destruction of highly personal property appears to be a privacy issue rather than an economic one is because, on purely economic grounds, it is possible to mount several strong arguments against allowing these types of requests to be honored.[149] First, destroying property reduces the value of the testator's estate by the value of the item destroyed, if it is determined to have a cash (rather than purely sentimental) value. This reduction might have an adverse effect on an heir who was expecting the estate to have a specific value.[150] Secondly, the estate may take an actual financial hit, as in the case of Jacqueline Susann's diary, where the estate was taxed and penalized even on a piece of property that no longer existed. Clearly, depending on the overall liquidity of the estate, this could have negative financial ramifications for the testator's heirs and/or devisees.

The case that is most often cited as an example of a wasteful desire of a testator is *Eyerman v. Mercantile Trust Co.*[151] The testator's will ordered her house razed, the underlying property sold, and the resulting money designated as part of the residue of her estate.[152] The plaintiffs were adjoining property owners and trustees from the subdivision where the house was located.[153] The lower court upheld the will provision, but the Missouri Court of Appeals

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148. *See* DUKEMINIER & JOHANSON, supra note 10, at 36. Justice Black believed that publishing the notes of the Justices would impede free discussion and debate at the conferences, harming the pursuit of justice. *See id.*

149. The historical value of items such as Justice Black's conference notes is intangible, and it could be argued that the notes are priceless, just as one might argue they were worthless. *Id.*

150. Any heir-apparent or devisee-apparent, however, who is waiting for the testator to die, expecting or depending on a certain amount of money will probably be disappointed anyway. Heirs are created by law, and do not exist until the deceased actually dies. *See* DUKEMINER & JOHANSON, *supra* note 10, at 131. Devisees are created by the testator's will, but because a will may be revoked at any time, they also do not actually exist until the testator dies. An expectancy exists when there is someone who would benefit if the individual were to die immediately. *See id.* Expectancies are not legal interests, and therefore cannot be transferred at law. *See id.* A purported transfer of an expectancy my be enforceable at equity, if it has been transferred for adequate consideration and the court views the deal as fair. *See id.* The most famous transfer of an expectancy was the sale of Esau's birthright to Jacob, in exchange for food. *Genesis* 25:29-34; *see also* DUKEMINER & JOHANSON, *supra* note 10, at 131 n.15.

151. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975).

152. *Id.* at 211.

153. *Id.* The plaintiffs have standing even though they will not benefit from failure to uphold the will because the causes of action are (1) private nuisance, (2) enforcement of restrictive covenants, and (3) public policy. *See id.* at 212.

reversed, explaining that the destruction of the house would be contrary to public policy.[154] Crunching numbers, the court determined the value of the land and the house to be $40,000, the value of the land without the house to be $5,000, and the cost of demolition of the house to be $4,350, resulting in a loss to the estate of about $39,350 or the exchange of a $40,000 asset for $650.[155] Additionally, the court said, the adjoining property values would depreciate by $10,000, and that the cost of building another house of "comparable size and architectural exquisiteness" would be $200,000.[156]

"To allow an executor to exercise such [destructive] power stemming from apparent whim and caprice of the testat[or] contravenes public policy."[157] The court emphasized the loss in value of neighboring property, the area's designation as a landmark, and the city's need for dwelling places in its public policy-based decision.[158] In *Eyerman*, the court's cited public policy reasons are not strong enough to justify contravening the testator's clear and unambiguous intent.[159] The ruling has also been criticized because the case may be read as expanding the doctrine of public policy to "factual situations not previously held to be clearly in violation of the public interest."[160]

In a case following closely on the heels of *Eyerman*, a different decision resulted. Frances Bean Vair died on April 28, 1975, with no spouse or children surviving her, and her will instructed her executors to destroy the home where she had lived for decades.[161] The conflict in the case arose from a request by the plaintiff-executors for an explanation of their rights and duties with regard to the destruction of the house.[162] In distinguishing this case, the court noted that in *Eyerman* neither the testator nor the witnesses gave reasons for the testator's desire, but that in the present case testimony as to the testator's intent indicated that she wanted to destroy her home to

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154. *Id.* at 218. One justice dissented, saying that in light of the fact that the "record is utterly silent as to her motives," and following the rule that a owner-testator may deal with her property in any way she wishes, the request ought to be upheld except where it would "substantially impair another's right to peaceably enjoy his property." *Id.* at 218, 220-21 (Clemens J., dissenting).

155. *See id.* at 213.

156. *Id.* The ability to build a house of comparable size and design is important because of the historical nature and architectural significance of the property and its environs, any flaw in which would detract from the area and its value. *See id.* at 13-214.

157. *Id.* at 214.

158. Teresa Wear, *Wills—Direction in Will to Destroy Estate Property Violates Public Policy*, 41 MO. L. REV. 309, 313 (1976). As will be discussed, public policy has its roots in statute, the Constitution, and judicial decisions. *See infra* Part III.

159. Wear, *supra* note 158, at 313.

160. *Id.* at 314.

161. Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 815 (Ohio 1976).

162. *Id.* at 814.

prevent its non-residential use.[163] The court found that "[t]he razing of the Vair house will not . . . be a first step toward the deterioration of an exclusively residential neighborhood, but rather would be an effective means of preventing a beloved home from debasement."[164] So saying, the court refused to enjoin the executors from destroying the home at the testator's request.[165]

Another case, *In re Pace,* following the rule of *Eyerman*, refused a testator the ability to order the buildings on two pieces of property razed,[166] and also voided the testator's requirement that the land only be sold subject to a restrictive covenant.[167] The court cited *Eyerman,* calling this testator's request capricious.[168] Additionally, the court concluded that the estate and beneficiaries would be harmed by the request in two ways. The buildings were in good physical condition, and had an estimated worth of $50,000.[169] Therefore, the estate would be forced to pay estate taxes on $50,000 of property that must subsequently be destroyed.[170] Further, the court decided that beneficiaries would be harmed by the depletion of the trust fund set to bear the cost of the demolition, grading, and upkeep of the empty land, without the possibility of rental income.[171] Repeating the rule that trusts are

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163. *Id.* at 818. One by one, the other homes in the neighborhood had been turned into nursing homes and doctor's or business offices. *Id.* at 816. Considering the expense of upkeep, location, and size of the home, the testator felt that it had no future as a residential building without commercial uses, and wanted it destroyed. *Id.*

164. *Id.* at 818.

165. *Id.* The court also gave the executors the ability to sell the house to any responsible historical society with restrictions in the deed requiring that the home would never be converted to any other use, feeling that this would carry out the intent of the testator. *Id.* at 819. It is unclear whether the executors eventually razed or sold the house.

166. *In re Pace,* 93 Misc. 2d 969, 971 (N.Y. 1977). "The testator excepted the garage and tool shed from destruction." *Id.*

167. *Id.* at 977.

168. *Id.* at 974.

169. *Id.*

170. *Id.* at 975.

171. *Id.* The provisions of the will requiring the demolition of the buildings and setting up the trust are as follows:

> Fifth. I give, devise and bequeath the sum of $50,000 and premises now known as 154 Owasco Street and 156 Owasco Street . . . unto Marine Midland Bank-Central, In Trust, Nevertheless, for the following uses and purposes, namely:
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> . . .
>
> B. I direct said trustee to cause all buildings on said [property], other than the existing garage and tool shed, to be razed to the ground, the land graded, filled, and seeded and the premises maintained in an neat and attractive condition. The trustee shall use as much of the income from the savings account as necessary, and principal if and when income is insufficient to the payment of taxes and, if economically feasible, public liability insurance covering the premises, to the razing of the buildings and for the subsequent grading, filling, seedings and maintenance as aforesaid.

to be established for benevolent purposes, the court stated that the trust would clearly not benefit anyone.[172] The court found the testator's intent to be an impermissible desire to "memorialize the property by having it remain vacant for the terms of the trust."[173]

The rule in *Pace* walks a thin line very close to the possibility of expanding the public policy doctrine to "factual situations not previously held to be clearly in violation of the public interest" as critics of the *Eyerman v. Mercantile Trust Co.* decision warn.[174] The *Pace* court did not use testimony or other evidence to determine the intent of the testator, as the court did in *National City Bank v. Case Western Reserve University*. Furthermore, upon deciding that the testator's intent was "apparently to memorialize the property,"[175] the court concluded that having a neat and well-kept space in a mixed residential area did not comport with public policy.

Despite its dependence upon the questionable public policy doctrine, the court makes a valid point in dicta, defining the testator's wishes as "capricious in that they are not something which the testator would have done while alive."[176] This explanation neatly forestalls an argument in support of the demolition of the property on the grounds that the testator could have accomplished the demolition while alive. However, it is difficult to see how public policy is served where the court acts to protect the value of the estate, and thus the beneficiaries, at the expense of the testator's express desires.

B. Animals

In re Capers' Estate[177] is one of the first reported modern cases in which a testator ordered her pets destroyed upon her death. Ida M. Capers dearly loved her dogs, two Irish Setters named Brickland and Sunny Birch.[178] The fifth clause in her will, however, ordered the dogs destroyed: "I direct that any dog which I may own at the time of my death be destroyed in a humane

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> C. . . . When all of such children of John D. Underhill and Gretchen Underhill are dead, the trust shall terminate, the real estate shall be sold. . . . At the time of the conveyance of No. 156 Owasco Street, the deed shall contain a covenant running with the land permanently forbidding the construction of any garage on [the property] other than one in line with and no farther west than the west line of the garage or garage foundation now standing on No. 154 Owasco Street.

Id. at 971.

172. *Id.* at 976.
173. *Id.* at 977.
174. *See supra* notes 159-60 and accompanying text.
175. *In re Pace*, 93 Misc. 2d at 977.
176. *Id.* at 976.
177. *In re* Caper's Estate, 34 Pa. D. &. C.2d 121 (1964).
178. *Id.* at 121, 128.

manner and I give and grant unto my Executors hereinafter named full and complete power and discretion necessary to carry out the same."[179] The executors filed a petition for declaratory judgment, requesting the court to define their rights and duties under the will.[180] In a long opinion, drawing heavily on outside sources, the court refused to allow the dogs to be destroyed.[181]

The *Capers' Estate* court treated the destruction order as a "lapsed and void" devise under section fourteen, subsection nine of the Wills Act of 1947, finding the dogs to be included as property in the residue of the estate.[182] The Western Pennsylvania Humane Society was the beneficiary under the residuary clause, and the dogs subsequently passed to them.[183] Next, the court adopted a resolution giving the dogs to Mr. and Mrs. Miller, who had cared for the dogs since the testator's death, subject to an agreement between the Humane Society and the Millers.[184] In its decision, the court relied primarily on the importance of pet dogs within society[185] and testimony as to the testator's intent.[186] The court did not refer to the doctrine of waste, as the

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179. *Id.* at 122.

180. *Id.*

181. *Id.* at 141.

182. *Id.* at 139.

183. *Id.* at 141.

184. *Id.*

185. The court found compelling Senator George G. Vest's address to the jury in a case he was advocating on behalf of a client who was suing a neighbor for killing a pet dog:

> The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and good name, may become traitors to their faith. . . . Gentlemen of the jury, a man's dog stands by him, in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry wind blows and the snow drives fiercely if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. . . . When all other friends desert, he remains.

Id. at 122-23 (quoting Senator George G. Vest).

George Graham Vest lived from 1803-1904, serving as the U.S. Senator from Missouri from 1879-1903, and it is believed that he argued and won the case in which he gave the speech in 1855. *See George Graham Vest Speech—A Tribute to Dogs*, *at* http://www/historyplace.com/speeches/vest.htm (last visited May 10, 2001).

186. The court also took into account testimony by Dr. John P. Childress, the dogs' veterinarian, as to the health of the dogs and the testator's intent behind the destructive provision in her will. *In re Caper's Estate*, 34 Pa. D. & C.2d at 126. The doctor testified that the dogs were in excellent health and that they were slightly less than halfway through their expected sixteen-year life span. *Id.* at 127. Additionally, he testified that Miss Capers had taken extremely good care of the dogs, sending them in a taxicab to the doctor's office when she could not bring them herself; providing a car for the use of the dogs; and setting apart the basement of her home for their bathing, grooming, and other needs. *Id.* Miss Capers was said to be upset when the dogs had health problems, and her "biggest concern" was that there would be no one to care for the dogs when she passed away. *Id.* at 128. The doctor said that he felt the

courts did in the cases concerning real and inanimate personal property.[187]

A California case from 1980 provides another example of a testator's desire to destroy her pet dog, called Sido by the court,[188] through a provision in her will.[189] The attorney for the San Francisco Society for the Prevention of Cruelty to Animals received three thousand letters requesting that the dog be saved, and two hundred requests to adopt him.[190] Although the California Probate Code allows a person to dispose of his property by will, the court explained that word "dispose" does not mean "destroy" or "damage," and held the provision to be invalid as it "seeks to do under the will that which the law does not permit."[191]

Further, the court stated that the provision violates public policy, and that the will seeks to perform an illegal act under the statutes dealing with stray animals.[192] In California, stray or abandoned dogs may be destroyed under specific conditions set out by statute, under the jurisdiction of the Animal Control Officer.[193] Sido, though, was not a stray or abandoned dog.[194] Therefore, the court held that carrying out the testator's order would be illegal in addition to being contrary to public policy.[195] In the end, the dog passed under the residuary clause to Pets Unlimited, who allowed it to stay in its custodial home, subject to inspection by the court.[196]

The New York Surrogate's Court disposed of a similar case in a much more perfunctory manner.[197] In that case, the testator ordered the destruction of her pet cats, Pretty Penny and Angel Boy.[198] The court implied that the testator was aware of some circumstances which prompted her to include this provision in her will, but that the circumstances had changed since the will was written.[199] Referring to such changed particulars, the court stated "the testat[or] would have preferred her friends to assume the care of said cats."[200]

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reason for the destructive provision in the will was this concern. *Id.* at 128.

187. *See supra* Part II.A.

188. Rep. Tr. at 6, Smith v. Avanzino, No. 225698 (S.F. County Super. Ct., Cal., June 17, 1980).

189. This is not set out explicitly in the record, though it is implied throughout. *Id.* at 7.

190. *Id.* at 5.

191. *Id.* at 10.

192. *Id.*

193. *Id.* at 11.

194. *Id.*

195. *Id.* Additionally, the court believed the testator's intent was to prevent any harm coming to the dog, due in part to the fact that Pets Unlimited (from whence the dog had originally come) was named as the residual and principal beneficiary of the estate, which the judge estimated would be in six figures. *Id.* at 12-13.

196. *Id.* at 17.

197. *In re* Reed, No. 206602 (N.Y. Nassau County Sur. Ct. Mar. 12, 1981).

198. *Id.*

199. *Id.*

200. *Id.*

The court construed that section of the will to put the cats into the care of the testator's neighbors.[201] There was no discussion of public policy, or the legality of such an order in a will. Instead, the judge narrowly tailored the decision to center specifically on the testator's intent and presumed desires.

Testamentary orders of this sort do not confine themselves to the United States. In Canada in 1992, a man named Clive Wishart died, leaving a will ordering that his horses Barney, Bill, Jack, and King be shot by the Royal Canadian Mounted Police.[202] The court, first inferring that the testator intended to prevent the mistreatment of the horses, concluded that he would actually prefer that they lived, citing to American cases such as *Eyerman v. Mercantile Trust Co.*, *In re Pace*, and *In re Scott*.[203] Relying on the rules and reasoning of those cases and the importance of the horse in society, the court held that the order was contrary to public policy and invalidated it.[204] To destroy the horses, the court stated, would be a "waste of resources and estate assets even if carried out humanely."[205] The court did not say, however, what relevance the humane nature of the destruction of the horses had to the purely economic injury of waste that the estate would suffer.

The Canadian court determined, in a manner similar to that used in the American cases, that the horses belonged to the residual beneficiaries of the estate living in the United States.[206] As those beneficiaries had no interest in the horses, they asked the Canadian court to determine what to do with the animals.[207] The court, however, declined to render a decision and delegated the task to a referee.[208] The cost of that committee and the executors through the

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201. *Id.*

202. *In re* Wishart, 1992 ACWSJ LEXIS 10351, at *1 (New Brunswick Ct. of Queen's Bench (Trial Div.) Sept. 28, 1992). Canadian law recognizes that each citizen has the "right and privilege to make a will to bequeath and dispose of his property;" *id.* at *8, and that the "expressed intentions of a testator should be followed." *Id.*

203. *Id.* at *4 (*Eyerman*), **11-12 (*Pace*), *20 (*Scott*).

204. *Id.* at *27. The court stated that public policy is a very difficult term to define, and that the destruction of four healthy horses for "no useful purpose" should not be approved. *Id.* at *26.

205. *Id.* at **26-27.

206. *Id.* at *27.

207. *Id.* at **27-28.

208. *Id.* at **28-29. The pertinent conditions of ownership set out by the court are as follows:

> (1) Prior inspection and approval by the New Brunswick S.P.C.A. [Society for Prevention of Cruelty to Animals];
>
> (2) A written agreement between the Estate and the New Brunswick S.P.C.A. and the new owner or owners that he, she or it will co-operate with the New Brunswick S.P.C.A. after acquiring ownership, which agreement will include:
>
> (a) Permission for regular inspection of the horses. . . ;
>
> (b) An undertaking to provide and pay for veterinary services. . . ;
>
> (c) An undertaking to properly feed and care for the horse or horses in accord with accepted practices and not to abuse the horse or horses;
>
> (d) Such other reasonable conditions as the parties may agree upon and the

process were to be borne by the estate, perhaps resulting in greater economic loss than that suffered if the horses had been put down.[209]

One of the most recent cases of a testator ordering the destruction of animals in his will occurred in Vermont in 1999.[210] In the third codicil to his will, Howard Brand ordered the destruction of his motor vehicle[211] and the animals he owned at his death.[212] The court acknowledged that the Humane Society is legally enabled to put down "sick, homeless, or unwanted pets and animals," and that furthermore, people may put animals to death without fear of legal reprisal.[213] However, the court refused to allow the animals to be killed, stating that the provision of the codicil was against public policy.[214] In this case, the public sentiment concerning animal rights and the unique property status of pets influenced the court's ruling.[215] The court applied the doctrine of *cy pres*[216] to give effect to the testator's intent that the horses be treated humanely,[217] by ordering a hearing to acquire more information to enable the court to decide the appropriate disposition of the horses.

In nearly all the cases dealing with the destruction of inanimate and animate property, the courts have used public policy as the primary rationale supporting their decision. Public policy, however, is not a clearly defined concept. It is too amorphous to serve as a solid basis for overriding a testator's right to dispose of his property as he wishes. In ancient times, clearly there was as much emphasis on the importance of property as in the present day, and yet it was still commonly destroyed at death. The concept of public policy is the backbone of nearly all the courts' opinions in this area of law, and merits further exploration. Because the law considers animals mere property, there is no legal reason to distinguish between animate and inanimate property, except for public policy.

Court approve to ensure that the horses are not abused . . . .
Id. at **29-20.

209. *Id.* at **32-33.

210. *In re* Brand's Estate, No. 28473 (Vt. Chit. Prob. Ct. Mar. 17, 1999).

211. Howard Brand's Cadillac was crushed per his testamentary order. *See* Interview with Alan A. Bjerke, Attorney for the Coalition to Save Brand's Horses, in Burlington, Vt. (Sept. 22, 1999). The Coalition intervened in the hearing on Brand's last will and testament. *In re Brand*, No. 28473, slip op. at 1.

212. *See id.*

213. *Id.* at 3.

214. *Id.* at 7.

215. *Id.* at 5-6.

216. The doctrine of *cy pres* is an "equitable doctrine under which a court reforms a written instrument . . . as closely to the donor's intentions as possible, so that the gift does not fail" when it would be impossible or illegal to give it literal effect. BLACK'S LAW DICTIONARY 392 (7th ed. 1999).

217. *In re Brand*, No. 28473, slip op. at 7. The court acknowledged the fact that Mr. Brand was attempting to thwart any possibility that the animals would be mistreated after his death. *See id.*

III. PUBLIC POLICY

When a court faces a decision about a will ordering the destruction of any kind of property, the court generally finds issues of public policy to be compelling.[218] But the notion of public policy is elusive. Cases cite to "statute[s], the Constitution, and judicial decisions"[219] as sources of public policy, but then proceed to render their own interpretation.[220] Furthermore, the courts have made no effort to balance the status of property in society within the public policy construct.

The very notion of private property gives important clues as to the motivation behind destructive will provisions. Examining common conceptions of property explains the motivation behind those will provisions and provides a link between ancient and present day practice. In order to understand why testators wish to destroy their property or pets, we must first understand the almost magical power that property has over the minds and souls of people.

Secondly, to assess carefully the equity and logic of the unbalanced mode of analysis used by the courts, it is imperative to distinguish, as the courts seem to, between animate and inanimate property. The legal status of animals as mere property in our society is changing, and subsequently, they cannot be treated in the same way as inanimate property. When one court allows the destruction of a testator's home as long as the reasons for destroying it are clearly set out,[221] and other courts do not allow the destruction of animals even when the testator's intent is clearly reasoned,[222] inconsistent precedents develop which necessitate different strands of analysis. Therefore, public policy should serve only as a rationale for preventing the destruction of animals when there is no anticruelty law to prevent the killing, and should never be used as rationale in cases of inanimate property.

A. Property

One of the most fundamental yet commonly ignored concepts intertwined with the idea of most private property is personhood.[223] In order to define the self, people form attachments to items of property, thus coming to posses

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218. *See supra* Part II.

219. *In re Brand*, No. 28473, slip op. at 3-4.

220. *See id.* at 4.

221. *See* Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 815 (Ohio 1976).

222. *See supra* Part II.B.

223. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (describing the relationship between property and an individual conception of "personhood").

objects "they feel are almost part of themselves."[224] Examples of property generally subject to this sort of intimate association with an owner are houses, wedding rings, and heirlooms.[225] Strong attachment to property, and the concurrent importance of property to an individual, are illustrated when the property is taken away from its owner.[226] Powerful reactions, feelings of sadness, stress, and loss indicate that the person identified with the property to an extent that renders it a part of that person's self.[227] The idea of property being intertwined with personhood stems from the Lockean concept that every person has property in his own body, and, therefore, anything that follows from his labor and work is rightfully his.[228]

People express their characters through the property they own; often the clothes or vehicle a person owns just fit his personality.[229] It is this association which leads us to link property with people, as well as the reason that people tie property to their future plans, giving themselves continuity of self.[230] People form stronger attachments to some items of their personal property than to others. This is evident because one's expectations solidify around specific items, rather than general wealth.[231] Wills are uniquely suited to working within this concept. People write wills to dispose of their personal property in ways that are pleasing to them, resisting unavoidable or distasteful appropriation of property they consider uniquely theirs.[232]

Clearly, the association of property with personhood is not a new combination. The ancient Egyptians buried highly personal property with the deceased so that the person could continue to use the items in the afterlife.[233] Other cultures burned items of personal property with the deceased or destroyed it in other ways upon the death of its owner, specifically because the

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224. *Id.* at 959.

225. *Id.*

226. *Id. See also* Hirsch, *supra* note 3, at 77.

227. *See* Hirsch, *supra* note 3, at 77. *See also* Radin, *supra* note 223, at 959. Radin refers to property that people take as part of their "self" as personal property, and other property, owned by an individual but not part of the "self," as fungible property. *See id.* at 960.

228. Radin, *supra* note 223, at 965.

229. *See id.* at 968.

230. *Id.*

231. *See id.* at 1004.

> For example, if someone returns home to find her sofa has disappeared, that is more disorienting than to discover that her house has decreased in market value by 5%. If, by magic, her white sofa were instantly replaced by a blue one of equal market value, it would cause no loss in net worth but would still cause some disruption in her life. . . . If the white sofa were totally fungible, then magically replacing it with a blue one would cause no disruption. In fact, neither would replacing it with money.

Id.

232. *See* Hirsch, *supra* note 3, at 76-77.

233. *See supra* Part I, notes 56-57, and accompanying text.

items were intimately linked with the soul or being of the deceased.[234] Testators in the present also associate their personhood with items of property they owned, preferring to destroy the property at their death rather than have that part of their personality transferred to another individual.[235]

For example, in *National City Bank v. Case Western Reserve University,* the court held that the testator's order to destroy the house she made her home for a large part of her life was not forbidden by public policy.[236] Motivated by the testator's intent and careful explanation of her desire, the court recognized the personhood the testator associated with her home and distinguished this case from *Eyerman v. Mercantile Trust Co.*[237] The court described public policy in the *National City Bank* case as not properly defined by the courts, but that it "may be said to be the community common sense . . . having due regard to all the circumstances of each particular relation and situation."[238] Clearly recognizing the strength of the testator's personal attachment to her home, the court's ruling upheld the testator's stated wishes. The court found no other issues or concerns more important than the testator's obvious wishes as to the disposal of her personal property.

In a more recent case, the Surrogate's Court in New York permitted directions in a testator's will to be carried out, allowing her family home to be torn down.[239] The court followed and strengthened the distinction between *Eyerman* and *National City Bank.*[240] The court's reasoning was again based on the fact that Ms. Beck "personally treasured" the house, and that "[a]t her death, it was hers to dispose of as she intended."[241] The court recognized that there "is some recognized merit in applying a public policy rationale to barring destruction of property by testamentary direction where the testator's wishes are capricious and demonstrably harmful."[242] Nonetheless, the court went on to say: "The clearly expressed provisions of a duly executed Will cannot be abrogated based on anemic assertions of vacillating public interest. This court

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234. *See supra* Part I.

235. *See supra* Part II and Part III.B.

236. Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 818 (Ohio 1976). *See also supra* notes 161-65 and accompanying text.

237. *Nat'l City Bank*, 369 N.E.2d at 818. *See also supra* notes 161-65 and accompanying text.

238. *Id.* at 817 (citations omitted).

239. *In re* Beck, 676 N.Y.S.2d 838, 841 (1998). *See also supra* notes 210-17 and accompanying text.

240. *Id.* at 840-41. The court also relied in part on the fact that the Buffalo Urban Renewal Agency (BURA) entered an agreement with Ms. Beck in an earlier dispute over the house. *Id.* In the agreement, BURA resolved to allow Ms. Beck to destroy the house upon her death, in addition to giving the city a purchase option on the lot. *Id.* at 840.

241. *Id.* at 841.

242. *Id.* (citing Estate of Pace, 93 Misc. 2d 969 (N.Y. 1977)). *See also supra* notes 175-76 and accompanying text.

refuses to substitute quasi-public interest for the enforcement of a properly executed and valid Will."[243]

This combination of the recognition of personhood and public policy also seemed to motivate the decisions of the courts in *In re Meksras,* where the testator wished to be buried with her jewelry, and the case of Ms. Sandra West, who wished to be buried in her car.[244] Although the testator's desire to be buried with her jewelry was not permitted by the court in *Meksras,* the court refused to do so to avoid incitement to grave robbery.[245] This fear was valid, as can be seen by the plunder, violation, and destruction that plagued the ancient Egyptian graves previously containing untold riches. Concerns about grave robbery and vandalism are substantial enough for the court to override the testator's wishes about her property. Conversely, Ms. West's desires were properly upheld because the courts recognized that the car and mode of dress were part of Ms. West's character, and that no one would be harmed by the bequest. Clearly the elements of personhood embodied in a car and personal attire are substantial enough to justify whatever waste is involved.

Similarly, if other cases are actually litigated, the courts should uphold the testator's desire to destroy other items of personal property. For example, in cases concerning items of highly personal property such as diaries,[246] personal writings,[247] notes,[248] and other items, destruction ought to be permitted. Those items are inseparably linked with their owner/creator's personhood, and as such have no recognizable value to another person. Items of a highly personal nature like diaries are clearly intertwined with an individual's personhood, perhaps even in ways that animals or pets are not.

Testamentary dispositions fulfill unique personal objectives, and arguments that the public good is served by the preservation of most items against the wishes of its owner are strictly utilitarian, failing to acknowledge any sense of personhood or a personal role in the ownership of the item.[249] All bequests, whether to a charitable organization helping many people, or to one's own child, promote the testator's personal goals. For instance, some people donate to charity because it makes them feel good, supporting a cause they feel is worthy.[250] Similarly, testators may provide for their families because it satisfies their own emotional needs. Therefore, setting aside a testator's desire

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243. *In re Beck*, 676 N.Y.S.2d at 841.

244. DUKEMINIER & JOHANSON, *supra* note 10, at 410. *See also supra* notes 133-40 and accompanying text.

245. *Id. See also* Hirsch, *supra* note 3, at 77 n.163.

246. Hirsch, *supra* note 3, at 76 n.157 (quoting *Tax Report*, WALL ST. J., Aug. 29, 1979, at A1).

247. DUKEMINER & JOHANSON, *supra* note 10, at 36.

248. *Id.*

249. Hirsch, *supra* note 3, at 68-69.

250. *Id.*

to destroy his property on the grounds that it may remove some benefit from a beneficiary is an act not supported by logic, because testamentary actions most often actually benefit the testator. In actuality, no beneficiary is entitled to a benefit.

Although this reasoning obviously supports the desires of the testators who wish to destroy inanimate property, there is no indication that testators who wish to destroy their pets are influenced by the same motivations. Not only do these testators indicate different considerations for attempting to destroy animals by testamentary order,[251] but also, in most states, destroying animals without reason is illegal.[252]

B. Animals

Despite advances by the animal rights movement, animals do not have a legal status that is different from any other type of property.[253] Our society has a sentimental place for animals, as evidenced by the social outcry surrounding cases where a testator attempts to destroy animals in a will.[254] Although animals are still legally accorded the status of mere property, it is both morally and legally wrong to consider killing a living creature because of the sheer desire to do so. Therefore, courts have correctly refused to allow the destruction of animals by will provision, despite the fact that without exception, testators' reasons for doing so are carefully thought out.[255] While people tend to link their personhood with objects of inanimate property, such as houses, there is no indication that humans develop their sense of self through pet animals. Rather, people love their animals and tend to come to think of them as members of the family.[256] This distinction appears to provide motivation for testators to attempt destruction of their animals in will provisions.

Testators explain more or less universally that their rationale justifying the execution of their pets or other animals by testamentary order is to prevent their mistreatment or abuse.[257] People are afraid that their pets will not be

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251. *See supra* Part II.B.

252. *See supra* Part III.B. *See also* Frances Carlisle, *Destruction of Pets by Will Provision*, REAL PROP. PROB. & TR. J. 894, 898-99 & nn.32-35 (citing to each state's anticruelty statute and describing those that prohibit needless killing).

253. *See generally* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995) (describing the legal status of animals and analyzing ways to improve it).

254. *See supra* Part II.B.

255. Clarity of thought and explanation of desire seem to be some of the main decision criteria when allowing the destruction of other property. *See supra* Part II.A and III.A.

256. *See supra* Part II.B. *See, e.g.*, *In re* Caper's Estate, 34 Pa. D. & C.2d 121 (1964).

257. *In re Capers' Estate*, 34 Pa. D. & C.2d at 128 (forbidding destruction of dogs; testator ordered to prevent abuse of dogs after her death); *In re* Wishart, 1992 ACWSJ LEXIS 10351, at *1 (New

cared for, and often go to great lengths to protect the pet, such as creating trusts for the animal.[258] When testators have no family or friends to take care of the animal, rather than condemn their pet to the uncertainty of life in an animal shelter,[259] many feel more comfortable knowing and having control over what will happen to their pet. Also, even if the testator was not able to find someone to take care of their pet while alive, there are members of society willing to bear that burden once attention is brought to the animal's plight.[260]

In Vermont, it is not necessary to void a testamentary clause ordering the destruction of an animal through reliance on the doctrine of public policy, because Vermont has created statutes in order to prevent cruelty to animals.[261] "A person commits the crime of cruelty to animals if [the person] . . . overworks, overloads, tortures, torments, abandons, administers poison to, cruelly beats or mutilates an animal, exposes a poison with intent that it be taken by an animal. . . ."[262] "Torture" or "torment" is defined as: "omission, neglect, or an act by an animal owner or other person, whereby physical pain, suffering or death is caused or permitted to be caused to an animal."[263] "Animals" are defined as: "all living sentient creatures, not human beings."[264]

When read together, these provisions indicate that any person who kills an animal commits cruelty to animals.[265] Specific exceptions are created for

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Brunswick Ct. of Queen's Bench (Trial Div.) Sept. 28, 1992) (forbidding destruction of horses; testator ordered to prevent harm coming to them after his death).

258. *See* generally Bette Heller, *Trusts for Pets*, 26 COLO. LAW. 71 (1997) (explaining how to draft a pet trust and describing their problematic administration). One of the major stumbling blocks is that animals have no standing in the American judicial system. FRANCIONE, *supra* note 253, at 66-67. Therefore, they cannot serve as the sole beneficiaries of a trust, for the reason that they cannot enforce the fiduciary duties of the trustee. DUKEMINIER & JOHANSON, *supra* note 10, at 599.

259. "Registered animal shelters may purchase, possess and administer approved euthanasia solution to euthanize injured, sick, homeless or *unwanted* pets and animals in accordance with the rules established by the commissioner of agriculture, food and markets under section 3913 of Title 20." VT. STAT. ANN. tit. 13, § 371(a) (1998) (emphasis added).

260. *See. e.g., In re Wishart*, 1992 ACWSJ LEXIS 10351, at *28 (explaining the procedure of finding new owners for the animals and approving those owners, in light of the fact that the residuary beneficiaries do not want the animals).

261. *See* VT. STAT. ANN. tit. 13, § 351a. The statutes criminalize cruelty to animals, imposing punishments of any combination of imprisonment for not more than a year, and/or a fine of not more than $2,000. *Id.* § 353(a)(1).

262. *Id.* § 352.

263. *Id.* § 351.

264. *Id.*

265. If a person has intentionally killed an animal in a way causing "undue pain or suffering," he has committed the crime of aggravated cruelty to animals. *Id.* § 352a. The court in *In re Brand* states that "those who own animals may put them to death personally without fear of legal reprisal." *In re* Brand, No. 28473, slip op. at 3 (Vt. Chit. Prob. Ct. Mar. 17, 1999). *See also supra* notes 211-13 and accompanying text. However, the court does not offer a citation to support this assertion, and no support is to be found within the statutes.

the disposal of abandoned animals,[266] the killing of domestic pets or wolf-hybrids that attack people, pets, or fowl,[267] or are suspected of being rabid and having infected another animal or person.[268] Furthermore, trained individuals and Vermont licensed veterinarians may perform euthanasia under strict guidelines.[269] The statutes are written so that they may be read literally, forbidding even poisoning rats in one's home, and subsequently, also prohibiting the killing of an animal by a testamentary order. However, it appears that no court ever cited the anticruelty statutes in a judicial decision. Punishments imposed by these statutes, if any, must not have caused enough contention to result in an appeal.

The Vermont court in *In re Brand* hung its ruling on theories of public policy.[270] The public policy doctrine is not the strongest foundation upon which to base a ruling prohibiting the destruction of property.[271] Arguably, the destruction of animals is more clearly against public policy than the destruction of inanimate property because it "may be said to be [against] the community common sense."[272] However, the courts employ a legal fiction, rather than the law, as the foundation for their decisions when using public policy as a rationale. When statutes exist which would permit rulings on the law, not on a concept based only in theory, law ought to serve as the primary justification for a judge's decision.

The Vermont court did not find a reference to public policy from a Vermont source and cited instead to a case from Missouri: "Acts are said to be against public policy 'when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.'"[273] The language of that precedent instructs the court to look to the laws of the state to see whether the act is one not "enforce[d] or recognize[d]."[274] Clearly, Vermont's anticruelty statutes do not recognize the killing of animals as legal behavior. Thus, because the legislature has enacted statutes that prohibit the killing of

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266. VT. STAT. ANN. tit. 20, § 3513 (2000). For the purposes of title 20, "animal" is defined as: "any dog or cat, rabbit, rodent, nonhuman primate, bird or other warm-blooded vertebrate but shall not include horses, cattle, sheep, goats, swine and domestic fowl." *Id.* § 3901.

267. *Id.* §§ 3545(a)-(b), 3809.

268. *Id.* § 3807(a)-(c).

269. VT. STAT. ANN. tit. 13, § 371. "'Euthanize' means to humanely destroy an animal by a method producing instantaneous unconsciousness and immediate death, or by anesthesia produced by an agent which causes painless loss of consciousness and death during the loss of consciousness." VT. STAT. ANN. tit. 20, § 3901(8).

270. *In re Brand*, No. 28473, slip op. at 7.

271. *See supra* Part III.A.

272. Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 817 (Ohio 1976).

273. *In re Brand*, No. 28473, slip op. at 3 (quoting Dille v. St. Like's Hospital, 196 S.W.2d 615, 620 (Mo. 1946)).

274. *Id.*

animals,[275] the killing of Mr. Brand's horses would be illegal and therefore against "public policy" within Vermont. The precedent cited states that illegality is a consideration apart from public policy,[276] but the court did not recognize the illegality of the action, choosing instead to rest its ruling on the less assertive public policy doctrine.[277]

The difference between present day and ancient treatment of animals is clearly linked to their different status within each society, and indicates why humans feel free to attempt to control the destiny of their pets. Ancient Egyptians revered animals and wildlife.[278] Despite this, they still permitted the killing of animals for religious purposes or so that they could be buried with the deceased.[279] The ancient Greeks, however, treated animals like objects, even holding murder trials with killer animals as defendants.[280] Roman culture and life was intertwined with both Egyptian and Greek societies.[281] The Romans also used animals for sport, killing vast numbers of them in cruel ways solely for amusement.[282] The American system of wills and will writing is based on the Roman tradition, which was the first to define legal doctrines concerning the ownership of wild animals. This link suggests that our attitude toward animals and their status in society is directly rooted in the Roman tradition of cruelty.

The will-writing tradition and system of Egyptian, Greek, and Roman societies is most like that used in modern America.[283] Undoubtedly it is a

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275. *See supra* notes 260-68 and accompanying text.

276. *In re Brand*, No. 28473, slip op. at 3 (citing *St. Like's Hospital*, 196 S.W.2d at 620).

277. *Id.* at 7.

278. D'Arcy Kemintz, *Hunting Moves to Suburbia's Backyard: The Animals, the Agencies, and the Passionate Conflict Over Backyard Kills*, 6 U. BALT. J. ENVTL. L. 219, 223 (1998).

279. Snow, *supra* note 1, at 25 (quoting GRAFTON ELLIOT SMITH & WARREN R. DAWSON, EGYPTIAN MUMMIES 52 (1924)). *See also supra* notes 54-56 and accompanying text. *Cf.* Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 482 (1996) (stating that ancient Egyptians punished the death of sacred animals, whether it was willfully caused or not). The conflict between authorities suggests that perhaps there was a ceremonially proper reason for killing sacred animals for burial with a decedent, but that normally killing sacred animals was not tolerated.

280. Wise, *supra* note 279, at 489-90.

281. Greek culture influenced Egyptian society through assimilation between the years of 663 and 525 B.C. AN ENCYCLOPEDIA OF WORLD HISTORY, *supra* note 4, at 40. Subsequently, Egypt was almost completely Hellenized after Alexander the Great conquered Egypt in 332 B.C. *Id.* at 79. Rome absorbed Greek culture and society in the third century B.C. as a result of the decline in Greek power, and a rise in the Roman's. *Id.* at 81-82. The Romans were so enamored of Greek culture that they adopted it as their own, and consequently Hellenized the Roman Empire, spreading Greek culture with their conquests. *Id.* Rome conquered Egypt in 30 B.C., ending the Helenistic monarchies installed by the Greeks, imposing a Romanized interpretation of Greek culture on Egypt. *Id.* at 97.

282. FRANCIONE, *supra* note 253, at 37. "Countless thousands of animals, maddened with red-hot irons and by darts tipped with burning pitch, were baited to death in Roman arenas. At the dedication of the Colosseum by Titus, five thousand died in a day; lions, tigers, elephants and even giraffes and hippos perished miserably." *Id.* (citations omitted).

283. *See supra* Part I.

sense of domination and control, tempered by a healthy dose of paternalism, that allows testators to feel righteous when ordering the destruction of their pets. It is the philosophy of control over property, encouraged, necessitated, and perpetuated by modern testamentary doctrine, that permits and requires some provision to be made for all personal property. This will inevitably result in a testator attempting to "dispose of his property as he sees fit," leading to disparate treatment of animals and other property depending on the level of personhood or animal rights with which each testator has infused each item of his property.[284]

CONCLUSION

If the origins of the public policy doctrine stem from the court's desire to prevent injury to society, then the holdings in most of the cases concerning the destruction of inanimate property are suspect. The decisions in those cases protect the interests of the beneficiary or the value of the estate, only one segment of society, at the expense of the testator's intent. It is the testator's intent that ought to be of paramount importance for two reasons. First, wills have been important since nearly the beginning of time. Subsequently, the feature common to all wills that has remained essentially unchanged, allowing a testator to dispose of his property in a way he sees fit, emphasizes the importance of preserving the testator's control over his property. Secondly, people define themselves and their personhood through ownership of inanimate objects. Consequently, people need to control those objects in order to continue to develop themselves as people, which permits them to contribute value to society as a whole.

To a certain extent, courts have recognized the personhood aspect of property. Conversely, courts have refused to acknowledge any personhood aspect in pets, forbidding their destruction, and citing to public policy to justify their decisions.[285] There is an inherent conflict in permitting the destruction of inanimate property for "reasons of public policy,"[286] while prohibiting the destruction of animals for the same reason, especially in light of the fact that there are laws available to prohibit the killing of animals.

Thus, if in the cases dealing with animals, public policy is founded on the principle that it is cruel to kill animals, then the rulings ought not rely on theories of waste. Regardless, due to the current legal status of animals in our

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284. People invest themselves in "personal property" and to the extent that people believe in animal rights they will be less likely to attempt deadly testamentary force over the animal because the vision of animals as controllable property diminishes with an increased sense of animal rights.

285. *See supra* notes 177-217 and accompanying text.

286. Courts' acknowledgment of the importance of the testator's right to dispose of his property as he wishes and the personhood interest in property.

society, there is little reason to treat them differently from other items of personal property except out of sentimentality, a trend toward advocating animals' rights and anticruelty laws. If a state has not passed its own anticruelty statutes like Vermont's statutes, which may be read to forbid any act resulting in the death of an animal, then public policy is an acceptable backup to the unavailable legal certainty of preventing a criminal act. Common sense dictates the necessity of relying on the most concrete legal doctrine available to accomplish the intended goal.

With the precedents standing as they do, there are no clear guidelines for the courts to follow, even in hypothetical situations where there may be no beneficiaries under the will, or any heirs-at-law who are willing or able to care for an animal ordered destroyed by a will. Additionally, much strain will be put on the probate court system and other judicial resources as a result of supervising the placement of any animal saved from destruction by the court's judgement, making sure the animal is well cared for after the testator's death. However, these issues are properly dealt with in the interests of preventing cruelty to animals that results from condemning them to death.

Furthermore, since courts give effect to the doctrine of public policy only to protect the interests of beneficiaries or the state, it cannot be said to be a solid basis for prohibiting the destruction of property. It is a doctrine that is not clearly grounded in any legal principle except a general sense of equity. Moreover, there are no good public policy reasons to forbid testamentary destruction of inanimate property, outside of a generalized capitalistic instinct focusing on the monetary rather than the personal value of an item. Wills are about people. They are written by testators in order to give them a sense of order and control over some aspects of the inevitability of death. The value of a testamentary order, therefore, is so personal that no public good can outweigh the benefit of an individual plan, except as it may negatively affect another individual's ability to do the same.

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