

## THE DEBATE OVER NONLAWYER PROBATE JUDGES: A HISTORICAL PERSPECTIVE

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### I. INTRODUCTION

Gentlemen, you have heard what has been said in this case by the lawyers, the rascals! . . . They talk of law. Why gentlemen, it is not the law we want, but justice. They would govern us by the common law of England. Common sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers.<sup>1</sup>

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1. DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* 11–12 (1986) (quoting ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 42–43 (1965)). See also *A New Hampshire Judge of Olden Time*, 1 ALB. L.J. 283, 283 (1870) [hereinafter *New Hampshire Judge*]; *King v. Hopkins*, 57 N.H. 334, 1876 WL

These instructions were given to an early-American jury by the strong-minded Judge John Dudley, who served the state of New Hampshire from 1785 to 1806.<sup>2</sup> Dudley had no legal training. In fact, he had very little education at all. Still, Dudley had a reputation of possessing “a discriminating mind, a retentive memory, a patience which no labor could tire, and integrity proof alike against threats and flattery.”<sup>3</sup> By fervently pursuing justice in each particular case, probably the judge’s most lasting legacy was his common “indifferen[ce] to the forms and requirements of law.”<sup>4</sup> Such was the case with most lay judges of the day.

Today, lay judges are a dying breed, often relegated to serving only in courts of probate; only four states allow nonlawyers to become probate judges.<sup>5</sup> In their adjudication of testamentary instruments, these nonlawyer judges oversee a diverse docket often containing sensitive family disputes.<sup>6</sup> However, other than some practical instruction usually administered by the local bar, no formal legal education is required. Consequently, this arrangement is continually under attack.<sup>7</sup>

Despite what the controversy of today might suggest, laymen chosen from the general community have presided over the administration of wills and estates for thousands of years. Proponents of judicial legal education requirements usually stress various benefits of completely wiping out the old system. However, if the remaining lay judge systems are counterintuitive, one wonders why they exist at all. From where did the system of lay judges come, and why has it been partly preserved? This Note will not advocate the abolition of nonlawyer probate judges but rather investigate why this system exists. Those individuals in the unique position of handling testamentary dispositions will be traced throughout history—from antiquity to modern America. The Note will attempt to extract the momen-

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5320, at \*2 (N.H. June, 1876).

2. *New Hampshire Judge*, *supra* note 1 at 283.

3. *Id.*

4. *Id.*

5. Brief of the American Judicature Society as Amicus Curiae Supporting Appellant, North v. Russell, 427 U.S. 328 (1976) (No. 74-1409), 1975 WL 173574. The states are Alabama, Connecticut, Maryland, and New Jersey. *Id.* See also Richard J. Lussier, *Integration of Family Matters into the Jurisdiction of the Connecticut Probate Courts: Feasible or Fantasy?*, 8 CONN. PROB. L. J. 305, 319 (1994) (concerning Connecticut). Of course, nonlawyers are allowed to serve as judges outside the probate context. Most states permit “some form of nonlawyer judge” to serve in limited jurisdiction courts that typically “deal with misdemeanors, traffic offenses, or minor civil cases; more rarely they specialize in . . . juvenile[] or domestic matters.” Julia Lamber & Mary Lee Luskin, *City and Town Courts: Mapping Their Dimensions*, 67 IND. L.J. 59, 59 (1991).

6. 20 AM. JUR. 2D *Courts* § 70 (2008).

7. See, e.g., *The Scandal of Connecticut’s Probate Courts*, Statement of Prof. John H. Langbein to Conn. Legislature Committee on Program Review and Investigations, in Hartford, Conn. (Oct. 7, 2005), available at <http://www.law.yale.edu/faculty/1766.htm> [hereinafter *Scandal*]; Verner F. Chaffin, *Suggestions For Improving Probate Court Organization and Procedure in Alabama*, 10 ALA. L. REV. 18 (1957); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 446–47 (1906).

tum, what has changed, and what has worked.<sup>8</sup> The Note will then consider the applicability of this momentum to the modern-day argument for the abolition of nonlawyer probate judges.

## II. PROBATE JUDGES IN ANTIQUITY

### A. Ancient Greece

The Athenians trusted the judgment of property-holding males in directing public affairs great and small.<sup>9</sup> Specialist-experts were distrusted, and there was no permanent judicial class.<sup>10</sup> Instead, the judicial system consisted of “popular courts” staffed by citizens chosen by lot.<sup>11</sup> These popular courts were made of panels called *dikasteria* usually consisting of about 500 citizens, although at times the panels were much larger.<sup>12</sup> The *dikasteria* acted as trial courts (of first instance) and dealt with a huge volume of judicial business.<sup>13</sup> Each day there could have been “several hundred to more than a thousand citizens engaged in judicial duties.”<sup>14</sup> To be clear, these courts were not the equivalent of modern-day juries “giving verdicts on disputed issues of fact. They rendered judgment on the whole case presented, including both facts and law.”<sup>15</sup> Notably, there was no equivalent of the modern lawyer in the fourth and fifth century Athens.<sup>16</sup>

By the fifth century B.C., these panels were well established,<sup>17</sup> and their lay nature had a significant impact on the struggle between the classes. The purpose of the popular courts, after all, was to “promote direct participation by all Athenian citizens in the judicial function . . . .”<sup>18</sup> The popular courts effectually transferred power from the Athenian middle class to the proletariat.<sup>19</sup> Once citizens in judicial duties got regular pay, the power shift was complete, and once the demos controlled the courts, their predominance over the state was secure.<sup>20</sup>

The popular courts did not, however, preside over matters of testamentary disposition of assets; such mechanisms did not exist. Although

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8. Since modern probate judges handle such diverse matters, in the interest of continuity, this paper will focus on those individuals responsible for handling testamentary disputes.

9. JOHN P. DAWSON, A HISTORY OF LAY JUDGES 13 (1960).

10. *See id.*

11. *See id.* at 10–11. Regarding the filling of these positions by lot, see Kevin O’Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1531–32 (2007).

12. *See* DAWSON, *supra* note 9, at 11.

13. *See id.*

14. *Id.* at 11–12.

15. *Id.* at 12.

16. *See id.* at 13.

17. *See id.* at 11.

18. *Id.*

19. *See id.*

20. *See id.* at 12.

persons could alienate individual items of personal property in their possession, “most wealth—especially ancestral property (*patrôia*)—belonged to the various *oikoi*,” or households, through which property was exclusively transferred.<sup>21</sup> The heads of households only served as stewards of the family property and could not themselves “make testamentary disposition of assets by will.”<sup>22</sup> Although successor arrangements existed, they only dealt with securing new heads of household for the *oikoi*.<sup>23</sup> Indeed, “[t]here is no Athenian example of a testamentary disposition of *oikos* assets permanently outside the household.”<sup>24</sup>

## B. Rome

### 1. The Republican Period

Like the Athenians, the Romans believed that a citizen’s duties included the responsibility to take “his share of the burdens of the law.”<sup>25</sup> Citizens would act as judges, arbitrators, or jurors, and would “com[e] forward as witness, surety and so on” for their friends.<sup>26</sup> During the first 500 years of recorded Roman law, there were no professional judges—only part-time amateurs.<sup>27</sup> Civil matters, including testamentary dispositions, were handled by a *praetor*,<sup>28</sup> an “elected judicial magistrate who seldom had any special competence in law.”<sup>29</sup> The *praetor* would hold a preliminary hearing with the parties (and possibly their counsel)<sup>30</sup> and then appoint one Roman citizen as *iudex* to serve, with the parties’ consent, as a judge-arbitrator for the case.<sup>31</sup> The *praetor* would define for the *iudex* the legal issues to be considered and “authorize[] him to render judgment

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21. Edward E. Cohen, *An Unprofitable Masculinity*, in MONEY, LABOUR AND LAND: APPROACHES TO THE ECONOMIES OF ANCIENT GREECE 100, 104 (Paul Cartledge, Edward E. Cohen, & Lin Foxhall eds., 2001).

22. *Id.*

23. *See id.*

24. *Id.*

25. Michael Frost, *Ethos, Pathos and Legal Audience*, 99 DICK. L. REV. 85, 88 (1994) (citing JOHN ANTHONY CROOK, LAW AND LIFE OF ROME 33 (1967)).

26. *Id.*

27. DAWSON, *supra* note 9, at 14. Unspecialized laymen performed “all decision-making in every form of state-sponsored court . . . [d]own to the end of the Republic. . . . [T]he last known evidence of private citizens chosen as *iudices* from lists of eligibles comes from the early third century A.D.” *Id.* at 29–30.

28. George M. Bush, *The Primitive Character and Origin of the Bonorum Possessio*, 25 MICH. L. REV. 508, *passim* (1927). Four categories of people could inherit under Roman law: “[t]hose persons who had been specially designated in a will” (or *testamentum*), the *heredes legitimi* (either the *heredes sui* and the *agnati*), and the *gentiles*. *Id.* at 508.

29. Bruce W. Frier, *Why Law Changes*, 86 COLUM. L. REV. 888, 895 (1986) (reviewing ALAN WATSON, THE EVOLUTION OF LAW (1985)).

30. *See* DAWSON, *supra* note 9, at 22.

31. *Id.*

according to his findings.”<sup>32</sup> Eventually, the procedure concluded with a *litis contestatio*, which was in essence a contract between the parties.<sup>33</sup> The *iudex*’s judgment was, in effect, a final and unappealable arbitration award backed by the state.<sup>34</sup>

Unlike the influence of class on Athens’s court system, the use of private Roman citizens as judges was not a democratic reform.<sup>35</sup> First, both substantive and procedural law was rigid and formal.<sup>36</sup> Consequently, the judge had little room to influence the trial. Second, the use of only one judge (rather than the large assemblies used in criminal trials)<sup>37</sup> suggests no effort to obtain a “cross section of opinion.”<sup>38</sup> The citizen-judge “deriv[ed] his powers both from litigants’ consent and praetor’s appointment.”<sup>39</sup> There was no Athenian style of “direct democracy.”<sup>40</sup> Third, “the public office of judge was clearly reserved for lay persons of rank and high social standing.”<sup>41</sup> Judges were “members of the Roman upper class” and acted “out of a sense of noblesse oblige . . . .”<sup>42</sup>

## 2. The Empire

The administrative officers of the early principate quickly established a system of administrative courts that oversaw “hearings, findings, and adjudication.”<sup>43</sup> The courts were described as *extra ordinem*, operating outside the praetorian system.<sup>44</sup> The system grew until the entire judicial system became “a hierarchy of public officials, surmounted by the emperor himself as highest appellate judge and deriving its powers by delegation

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32. *Id.* The *praetor* appointed the *iudex* and defined the issues by preparing what was called a formula. *See id.* This “two-stage court of praetor and *iudex* . . . provided great freedom for invention and flexibility in detail.” *Id.* at 21–22. *Praetors* could create new doctrines by varying the issues to be considered, and useful experiments “could be incorporated as standard provisions” in the future. *Id.* at 22.

33. *See id.*

34. *See id.* (quoting LEOPOLD WENGER, *PRAETOR UND FORMEL* 30 (1926)).

35. Still, the role of judge was honored and represented civic duty. DAWSON, *supra* note 9, at 28.

36. *See id.* at 25–26.

37. By contrast, *criminal* trials used law assembly courts. A Roman citizen accused of a criminal act was first tried before a single magistrate. If the citizen was found guilty of a major crime, and if prosecution had commenced within the city, the citizen could “appeal to the whole Roman people, meeting in a general assembly” through a process called *provocatio*. *See id.* at 15.

38. *Id.* at 27.

39. *Id.*

40. *Id.* at 28.

41. *Id.* at 28–29.

42. Frost, *supra* note 25, at 88. Indeed, political judgeships were “only incidents in lives of leisure, and it was therefore an amateur activity just as much as being a historian or an agricultural expert.” *Id.* (quoting JOHN ANTHONY CROOK, *LAW AND LIFE OF ROME* 89 (1967)).

43. DAWSON, *supra* note 9, at 31.

44. *See id.*

from him.”<sup>45</sup> By A.D. 342 the system of *praetor* and *iudex* was expressly forbidden.<sup>46</sup>

So came the end of lay judges in Rome. The judicial function had been transferred to permanent officials, and the role’s power and influence greatly increased.<sup>47</sup> Judging became a steady job, “captured and administered by the state as one of the essential functions of autocratic government.”<sup>48</sup>

### III. ENGLAND AND AMERICA

#### A. England

Roman law was passed on to medieval Europe through Justinian’s *Corpus Juris*.<sup>49</sup> Canon lawyers—or church lawyers—accepted the late empire’s version because they sought a “system of courts and procedure that would promote the organization of a universal church under strong papal control,”<sup>50</sup> and secular jurists readily followed their lead.<sup>51</sup>

#### 1. Early Testamentary Dispositions

As early as the eighth century, the dying man would hand over a portion of his chattels to another who was “to distribute them for the good of his soul,”<sup>52</sup> and his “last words . . . [were] to be respected.”<sup>53</sup> Combined with his last confession, this oral act was called his *verba novissima*, or deathbed confession.<sup>54</sup> In the ninth through eleventh centuries, the Anglo-Saxon will appeared in the form of the *cwīðe*, a written memorial of the dying man’s oral instructions.<sup>55</sup> This instrument could be used to give land, provide for kinsfolk, free slaves, bestow assets upon a church, or make gifts of chattel.<sup>56</sup> Though the *cwīðe* was “not the Roman testa-

45. *Id.* at 32.

46. *See id.*

47. *See id.* Indeed, party consent was no longer required. *See id.* at 31.

48. *Id.* at 33. Because the administrative judges were not highly trained lawyers and persons trained in the law were in short supply, the state employed lawyers to act as legal advisers. *Id.*

49. *Id.*

50. *Id.* at 34.

51. *Id.*

52. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW 319 (Cambridge Univ. Press 1968 (1898)). This process marked the birth of executorships. *Id.*

53. *Id.* at 318.

54. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 868 (2007); see C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 189 (1991).

55. Breyer & Hargrove, *supra* note 54, at 868; see POLLOCK & MAITLAND, *supra* note 52, at 319.

56. *See* POLLOCK & MAITLAND, *supra* note 52, at 320.

ment,”<sup>57</sup> there were some similarities. The *cwiðe* employed both a writing and the “vague idea that in some way or another a man can by written or spoken words determine what shall be done after his death with the goods that he leaves behind.”<sup>58</sup>

The term “testament” was used loosely at the time, meaning anything that “witnessed a conveyance by one living man to another.”<sup>59</sup> Truly testamentary instruments had not yet been firmly established in Anglo-Saxon folk-law; such wills were only used by the most distinguished individuals.<sup>60</sup> In fact, the king’s consent was required for a will to be valid, for the *cwiðe* to stand.<sup>61</sup> A testator appealed “to ecclesiastical sanctions,” and “a bishop set[] his cross to the will.”<sup>62</sup>

## 2. The Rise of the Land/Chattel Dichotomy

Gradually, a definite testamentary law was established by a “complicated set of interdependent changes” during the twelfth and thirteenth centuries.<sup>63</sup> First, the king’s court denounced all testamentary transfers of land. Such transfers were criticized as “deathbed gifts” wrung from men in their agony and subject to duress and coercion by “ecclesiastical greed.”<sup>64</sup> Instead, the primogeniture system was firmly established, which gave “all the land to the eldest son” as heir.<sup>65</sup>

Chattels, by contrast, did not pass through primogeniture to the heir, who had “nothing to do with the chattels of the dead man.”<sup>66</sup> Consequently, chattels became “prey for the ecclesiastical tribunals,” or Courts Christian, and the church asserted a right to administer last wills.<sup>67</sup> The move was not unnatural; for centuries the church had overseen legacies given

57. *Id.* at 316. The Roman *heres* was the person who possessed “the right of heredity” from a will, see Bush, *supra* note 28, at 511–12, and he bore the dead man’s whole persona, POLLOCK & MAITLAND, *supra* note 52, at 317. The English did not institute the Roman *heres*, *id.* at 316, even though English clerks used the term for (what are today known as) devisees, *id.* at 316–17. English “heirs” were those who succeeded to land *ab intestato*. *Id.* at 316. By the end of the middle ages, “the *heres* of Roman law” had been termed “in England the executor.” POLLOCK & MAITLAND, *supra* note 52, at 337.

58. POLLOCK & MAITLAND, *supra* note 52, at 316.

59. *Id.* at 317 (explaining that “almost any instrument might be called a testament”); see Miller, *supra* note 54, at 190–93.

60. See POLLOCK & MAITLAND, *supra* note 52 at 320.

61. *Id.* at 320; see Miller, *supra* note 54, at 195.

62. POLLOCK & MAITLAND, *supra* note 52, at 321; see Miller, *supra* note 54, at 189.

63. POLLOCK & MAITLAND, *supra* note 52, at 325.

64. See *id.* at 325, 328.

65. See *id.* at 331–32; see also Barbara R. Hauser, *Born a Eunuch? Harmful Inheritance Practices and Human Rights*, 21 LAW & INEQ. 1, 13 (2003). “Glanville, writing in about 1188, state[d] that ‘only God, not man, can make an heir.’” Miller, *supra* note 54, at 196 (quoting THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 71 (G. Hall ed., 1965)).

66. POLLOCK & MAITLAND, *supra* note 54, at 325, 331.

67. *Id.* “Court Christian” is another name for ecclesiastical court. See *id.* at 343.

over for pious uses, and in their last hour testators wished “to do some good and to save [their] soul[s].”<sup>68</sup> Somewhat more alarmingly to the people, the church preached that intestacy was a sin, “tantamount to dying unconfessed.”<sup>69</sup> Accordingly, the church asserted a right to oversee the goods of men who died without wills “for the repose of [their] soul[s].”<sup>70</sup>

### 3. *The Introduction of Ecclesiastical Probate*

Last wills, then, gradually assumed “a truly testamentary character.”<sup>71</sup> The instruments appointed executors as personal representatives of the decedent.<sup>72</sup> A will was “a religious instrument made in the name of the Father, Son and Holy Ghost”<sup>73</sup> and “was sanctioned only by spiritual censures.”<sup>74</sup> Most commonly a will was written and was sealed “in the presence of several witnesses.”<sup>75</sup> If in Latin, the will called itself a testament; in French or English, a testament, devise, or last will.<sup>76</sup> Once the will was established, bishops would swear “that they would duly administer the estate of the dead man[,] and they became bound to exhibit an inventory of his goods and to account for their dealings.”<sup>77</sup>

Probate—the procedure of proving a will—probably did not appear in England until the church courts obtained this exclusive jurisdiction over testamentary instruments.<sup>78</sup> By the thirteenth century, it was settled that executors should probate wills in the proper ecclesiastical court, which was normally the court of the bishop of the diocese where “the goods of the dead man [lay].”<sup>79</sup> Legatees wanting their legacies filed action there; indeed, “it was for the spiritual judge to pronounce for or against a will . . . .”<sup>80</sup>

The ecclesiastical courts were difficult to classify, having “an ancient history, a moral authority which they believed to transcend the state, and a

68. *Id.* at 332.

69. Miller, *supra* note 54, at 198.

70. POLLOCK & MAITLAND, *supra* note 52, at 326.

71. *Id.*

72. Miller, *supra* note 54, at 199; POLLOCK & MAITLAND, *supra* note 52, at 326.

73. POLLOCK & MAITLAND, *supra* note 52, at 338.

74. *Id.* at 334. Though there was, of course, “imprisonment in the background.” *Id.*

75. *Id.* at 337; see Miller, *supra* note 54, at 189.

76. POLLOCK & MAITLAND, *supra* note 52, at 338.

77. *Id.* at 343.

78. See *id.* at 341. “The early history of probate lies outside England, and . . . [it is unknown] whether some slender thread of texts traversing the dark ages connects it directly with the Roman process of insinuation, aperture and publication.” *Id.* However, one scholar has asserted that “[t]he concept of the testament of personal property may have been an innovation derived from Roman law introduced in Britain through the medium of the Roman Catholic Church, although the form which these dispositions assumed were clearly not imported from Rome.” Miller, *supra* note 54, at 188.

79. POLLOCK & MAITLAND, *supra* note 52, at 342–43; Miller, *supra* note 54, at 197.

80. POLLOCK & MAITLAND, *supra* note 52, at 348.

large jurisdiction long before acquired.”<sup>81</sup> They were “not ‘private’ and not quite ‘public.’”<sup>82</sup> The courts were “probably staffed with civilian-trained persons,”<sup>83</sup> though from their beginning judges were required “to be at least somewhat trained for [their] task[s], to devote substantial time to [them], and to retain full command and responsibility so long as the case [was] before [them].”<sup>84</sup> By the fifteenth century the courts had “trained personnel, working within a quite well organized career service and using for contested cases a written procedure with court-directed examination of witnesses.”<sup>85</sup>

#### 4. Statutory Changes

After the devising of real property had been suspended, landowners greatly exploited a “device known as the ‘use,’” an equitable device that allowed them to circumvent the primogeniture scheme.<sup>86</sup> Eventually, the use became “the most common form of ownership.”<sup>87</sup> But, because the king lost revenue with every use employed, Parliament abolished them by enacting the Statute of Uses of 1535.<sup>88</sup> As “a direct result of the resentment of land owners at the loss of the power to determine succession to their land,” the Statute of Wills of 1540 was enacted, at last allowing landholders to devise real estate.<sup>89</sup> The law did not yet require that such wills be signed or witnessed, only that they be in writing.<sup>90</sup> However, the Statute of Frauds of 1677 enacted signature, attestation, and subscription requirements for such wills.<sup>91</sup> The same statute also required wills conveying chattels to be in writing, but they did not have to be signed or attested.<sup>92</sup>

Even after such extensive reforms, another change lay ahead. In the years following the Statute of Frauds of 1677, judges—especially in the

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81. DAWSON, *supra* note 9, at 175.

82. *Id.* at 175. For a description of “[t]he ecclesiastical courts and the scope of their jurisdiction in general,” see WILLIAM SEARLE HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 598–632. DAWSON, *supra* note 9, at 175 n.144.

83. *Id.* at 175.

84. *Id.* at 175–76.

85. *Id.* at 176 n.145.

86. See Miller, *supra* note 54, at 197. The “use” allowed a property owner to convey his property to the eldest son for the use of a younger son, “whom the property owner wished to benefit. The equity courts would enforce such a conveyance against all but a bona fide purchaser on the theory that [the eldest son] had a moral and enforceable obligation to [the younger son] in accordance with the provisions of the gift.” *Id.*

87. *Id.*

88. See *id.*

89. See *id.* at 197, 199; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547 (1990).

90. Lindgren, *supra* note 89, at 547.

91. See *id.* at 547–48; see also Miller, *supra* note 54, at 200.

92. See Lindgren, *supra* note 89, at 547.

ecclesiastical courts—created a confusing and distorted body of decisions by manipulating formalities so as to overcome noncompliant yet well-intentioned decedents.<sup>93</sup> In response, the Statute of Wills of 1837 “merged the formal requirements for devising real and personal property,” mandating that all wills be signed, subscribed, and attested.<sup>94</sup> Even though the act was enacted well past the American Revolution, it had an enormous influence on American law.<sup>95</sup>

## B. *The United States*

### 1. *Seventeenth Century New England*

The American Seventeenth Century has been called “the miraculous era of law without lawyers.”<sup>96</sup> Juries were powerful, deciding matters of both law and fact, in both trials and appeals.<sup>97</sup> Judicial offices were made up of secular and religious lay leadership who formulated laws and adjudicated cases as necessary.<sup>98</sup> In fact, legislatures often took up private bills for petitioners who had been unsuccessful in the courts.<sup>99</sup> Although the judges had no technical training, they recognized the superiority of civil legislation and precedent, and they incorporated many of the English procedures used to achieve fair adjudication.<sup>100</sup> Testamentary jurisdiction was scattered and held by a various array of colonial bodies: the General Courts, county courts, orphans’ courts, superior courts, inferior courts, and even governors (who usually commissioned surrogates to handle such matters).<sup>101</sup>

Early American lay judges were much more knowledgeable of law than modern American laypersons.<sup>102</sup> Still, judges had no problem deviat-

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93. See Miller, *supra* note 54, at 201–02.

94. Lindgren, *supra* note 89, at 548. Later, the Probate Act of 1857 removed jurisdiction of all probate matters from the ecclesiastical courts to the Court of Probate; the Act also established identical procedures for land and personal property. In re Estate of Bleeker, 168 P.3d 774, 781 n.22 (Okla. 2007).

95. Lindgren, *supra* note 89, at *id.* “Until promulgation of the 1969 UPC, the formalities required in all United States jurisdictions for a formal will were those derived from an English model, either the Statute of Frauds of 1677 or the 1837 amendment of the Statute of Wills.” Miller, *supra* note 54, at 204.

96. PROVINE, *supra* note 1, at 2 (quoting Everett C. Hughes, *Professions, in THE PROFESSIONS IN AMERICA* 1, 1–14 (Kenneth Lynn ed., Houghton Mifflin 1965)).

97. See *id.* at 3.

98. See *id.*

99. See *id.*

100. See *id.* To be clear, a distinction should be recognized between the borrowing of English court procedures and the incorporation of English law in the American British colonies. The English common law was incorporated through a process of selective reception. See BH MCPHERSON CBE, *THE RECEPTION OF ENGLISH LAW ABROAD* (2007).

101. See Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 977–78 (1944).

102. See PROVINE, *supra* note 1, at 3.

ing from English court procedures if necessary to prevent technicalities from leading to improper outcomes.<sup>103</sup> Lay judges would “become quite impatient with any attempts on the part of counsel to use such procedural methods as a means to an end.”<sup>104</sup>

As the American economy gradually expanded, a true lawyer class formed.<sup>105</sup> With their new economic power and social and political influence, lawyers began to argue for the requirement that judges be lawyers.<sup>106</sup> These efforts largely failed, and judicial appointments remained influenced most heavily by political concerns.<sup>107</sup> The American back country looked down on professionals intensely.<sup>108</sup> The following description by Hector St. John de Crevecoeur is typical of the villainization of lawyers:

They are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root they will extinguish every other vegetable that grows around them . . . . The most ignorant, the most bungling member of that profession, will if placed in the most obscure part of the country, promote its litigiousness and amass more wealth without labour, than the most opulent farmer. . . .<sup>109</sup>

## 2. *Post-Revolution America*

After the American Revolution, lawyers grew more powerful and gained in their efforts to professionalize the bench.<sup>110</sup> Massachusetts and Virginia enacted legal “education requirements” for judges.<sup>111</sup> However, the bar in other states was not yet politically prominent enough to accomplish the same.<sup>112</sup> Most judgeships continued to be staffed by laymen, such as Chief Justice John Dudley of New Hampshire, who embodied the continued tradition of common-sense adjudication. Judge Dudley once instructed his jury that their pious duty was to follow common sense instead of legal technicalities:

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103. *See id.* at 3–4.

104. *Id.* at 4 (quoting FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 36 (1940)).

105. *Id.* at 5–6.

106. *See id.* at 6–7.

107. *Id.* at 7.

108. *See id.* at 8–9.

109. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 112–13 (1971).

110. *See* PROVINE, *supra* note 1, at 9.

111. *See id.* at 10–11. Virginia created district courts and staffed them with lawyer judges. The district courts heard appeals from county courts, which were still open to nonlawyers. *Id.*

112. *See id.* at 11.

It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books that I have never read, and never will; but by common sense and common honesty, as between man and man. That is our business, and the curse of God is upon us if we neglect or evade, or turn aside from it.<sup>113</sup>

As the country grew, so did its court system. The first United States probate court was established in Massachusetts in 1784.<sup>114</sup> There being no ecclesiastical tribunals in America, probate courts were thought to adjudicate using the unwritten law of equity.<sup>115</sup> At first, the powers of the probate courts mimicked those of the ecclesiastical courts, consisting merely of probating wills and granting letters, but gradually expanded to include supervising “executors and administrators in their administration of estates.”<sup>116</sup> In some states, guardianship and conservatorship of minors were added to the scope of probate courts, but in others, however, the evolution was the reverse. Orphans’ courts had been created very early in five colonies and then evolved to include the administration of decedents’ estates.<sup>117</sup> A Pennsylvania judge described how the orphans’ courts grew to include testamentary responsibility:

The idea was taken from the Court of Orphans of the city of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates. . . . The Court of Orphans was one of the privileges of that free city; and that the people of Pennsylvania might enjoy the same protection, it was transplanted into our law . . . . The begin-

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113. *New Hampshire Judge*, *supra* note 1, at 283; *see also* PROVINE, *supra* note 1, at 11–12 (quoting ANTON-HERMANN CHROUST, 2 *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 42–43 (1965)).

114. Richard W. Pingel, *Should Social Security Retire? A Study of Personal Retirement Accounts in the American Probate System*, 20 *QUINNIPIAC PROB. L.J.* 99, 117 (2006) (citing Summit County Court of Common Pleas - Probate Division, History of the Probate Court, *available at* <http://summitohio-probate.com/CaseTypes.htm>).

115. *In re Estate of Bleeker*, 168 P.3d 774, 780 n. 22 (Okla. 2007). Integrating probate into equity jurisdiction was not seen as a constitutional problem because there was no right of trial by jury in the ecclesiastical courts. *Id.* “[T]hat right governs solely those common-law actions to which it stood attached in England.” *Id.* For criticism denouncing the validity of this so-called “probate exception,” *see Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).

116. Simes, *supra* note 101, at 978–79. Despite the continued evolution of the probate system, courts continued to advocate the use of ecclesiastical law well into the future:

If, as between the rule of the old common-law courts and the rule of the English ecclesiastical courts, we are not required by statute to follow the former, we think the latter, on principle, greatly to be preferred; and it has the support of the weight of recent authority in America. . . . But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts . . . .

*Williams v. Miles*, 94 N.W. 705, 708 (Neb. 1903).

117. *See* Simes, *supra* note 101, at 979.

nings of this court were feeble. But it grew in importance with the increase of wealth and population, was recognised in our Constitution of 1776, and in each of our subsequent constitutions, and has been the subject of innumerable Acts of Assembly.<sup>118</sup>

### 3. *The Jacksonian Era (c. 1828 to 1850)*

With the Jacksonian Era came reformers advocating Egalitarianism and attacking the rise of the lawyers' prominence.<sup>119</sup> The reformers campaigned for the removal of the bar associations' strict requirements and to "open up the legal profession," and their efforts were in part a success.<sup>120</sup> By 1840, every New England state except Connecticut had stripped away control of professional law examinations from the bar.<sup>121</sup>

Surprisingly, practicing lawyers offered little resistance.<sup>122</sup> Increased numbers "made the bar more competitive, flamboyant, and resourceful: 'It pruned away deadwood; it rewarded the adaptive and the cunning. Jacksonian democracy did not make everyman a lawyer. It did encourage a scrambling bar of shrewd entrepreneurs.'"<sup>123</sup> In the end, the reformers' efforts had done little to discourage the use of lawyers on the bench. President Jackson—and accordingly the states—continued to fill important judicial posts with lawyers.<sup>124</sup>

And so, the convergence of lawyers and judgeships had begun, which can be attributed to two interdependent forces. The bar itself promoted the use of lawyers as judges, and lawyers seeking judicial posts had "certain advantages over other would-be politicians."<sup>125</sup> Once lawyers were in politics and the judiciary was restricted to lawyers, the relationship was "mutually reinforcing."<sup>126</sup> Moreover, the law was becoming more complicated, and the American people began to believe that a lawyer's expertise was necessary for adjudication.<sup>127</sup>

By 1820 the legal landscape in America bears only the faintest resemblance to what existed forty years earlier. While the words are often the same, the structure of thought has dramatically changed and with it the theory of law. Law is no longer conceived of as an

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118. *Id.* at 979–80 (quoting *Horner v. Hasbrouck*, 41 Pa. 169, 178 (1861)).

119. *See* PROVINE, *supra* note 1, at 15–16.

120. *Id.* at 16.

121. *Id.*

122. *Id.*

123. *Id.* at 16–17 (quoting LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 278 (1973)).

124. *Id.* at 17.

125. *Id.* at 18.

126. *Id.*

127. *Id.* at 17.

external set of principles expressed in custom and derived from natural law. Nor is it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges have come to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct.<sup>128</sup>

#### IV. THE LAWYER/LAYMAN DEBATE

##### A. *Nonlawyer Probate Judges Today*

Today, only Alabama, Connecticut, Maryland, and New Jersey allow nonlawyers to become judges handling matters of probate, and in some states, existing nonlawyer probate judges continue to serve under grandfather clauses.<sup>129</sup> In Alabama, probate judges are chosen by the public through partisan elections.<sup>130</sup> Maryland handles probate through its Orphans' Court and fills those judicial posts by public election as well.<sup>131</sup> Likewise, Connecticut's probate judges are elected, despite all other judicial offices being filled by appointment.<sup>132</sup> Judicial officials handling probate matters in New Jersey, however, are appointed.<sup>133</sup>

##### B. *Merits of Nonlawyer Judges*

As has been shown, nonlawyer judges have adjudicated testamentary dispositions throughout history. Such a long-established tradition over different cultures did not happen without good reasons. Proponents, especially the ancient Greeks, often point to the importance of having democratic influences on the judiciary. Regarding the people's role in judging private suits, the philosopher Plato once said, "[A]ll citizens should take their part . . . , since a man who has no share in the right to sit in judg-

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128. *Id.* at 20 (quoting Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in PERSPECTIVES IN AMERICAN HISTORY 287, 326 (Donald Fleming & Bernard Bailyn eds., 1971)).

129. Brief of the American Judicature Society as Amicus Curiae Supporting Appellant at 19, *North v. Russell*, 427 U.S. 328 (1976) (No. 74-1409), 1975 WL 173574. In Alabama, Mobile and Jefferson Counties require that "the Judge of Probate be licensed to practice law." History of the Court, Mobile County Probate Court, <http://probate.mobilecountyal.gov/> (follow "General Info" hyperlink) (last visited Apr. 2, 2009).

130. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1085 (2007); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 167 (1999).

131. See Schotland, *supra* note 130; see also Cecil County Orphans' Court, <http://cecilcounty.us/orphanscourt/> (last visited Mar. 23, 2009).

132. Schotland, *supra* note 130, at n.29.

133. *Id.* at 1085.

ment on others feels himself to be no real part of the community.”<sup>134</sup> In fact, Aristotle defined the term *citizen* as a man who “shares in the administration of justice, and in [holding] offices,”<sup>135</sup> and he included the following “[a]mong the essential elements of a constitution[:]. . . ‘the system of popular courts, composed of all citizens or of persons selected from all, and competent to decide all cases—or, at any rate, most of them, and those the greatest and most important.’”<sup>136</sup>

Proponents of lay judges also point to the merits of having decision-makers rely on common sense and life experience. Although critics describe this side effect as creating unreasonable uncertainty in the courts, one proponent who conceded this point went as far as suggesting that such unpredictability is healthy for the family unit, encouraging families to settle disputes among themselves instead of pursuing the often-estranging process of public litigation.<sup>137</sup> That is to say, this supposed slant of non-lawyer judges toward common sense rather than the exact letter of the law is quite arguably a positive consequence. Pre-trial settlement is encouraged, possibly even strengthening the autonomy and vigor of the family unit by preventing permanent post-litigation familial fallout.

### C. Criticisms of Nonlawyer Judges

Modern studies have been unanimous in their call for the requirement that judges be lawyers,<sup>138</sup> and these critics of nonlawyer probate judges have formulated many arguments. Before the common criticisms are explored, however, it is important to note that the argument is for professionalizing judges as lawyers rather than creating a self-standing profession of the judiciary. “America never made the judiciary into a true specialist’s domain, requiring technical training geared to the responsibilities of office. Practitioners whose education is for law practice, not adjudication, are our ‘professional’ judges.”<sup>139</sup> So when scholars criticize nonlawyer judges as being “nonprofessional,” they are really criticizing them for not being lawyers.

Most commonly, critics stress the complicated and critical nature of probate adjudication, concluding that professional legal training is essential. For example, Roscoe Pound strongly felt that the administration of justice was a difficult task, and that not just “anyone is competent to adju-

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134. THE LAWS OF PLATO 150 (A.E. Taylor trans., J. M. Dent & Sons Ltd. 1934).

135. ARISTOTLE, THE POLITICS 52 (III, 1275a, 21–22) (Stephen Everson ed., Cambridge Univ. Press 1988).

136. Dawson, *supra* note 9, at 10 (quoting ARISTOTLE, THE POLITICS, 1317b (Barker ed. & trans., New York, Oxford Univ. Press 1899)).

137. See Robert Foster, *An Era Ends*, 76 MICH. B.J. 964, 965 (1997).

138. North v. Russell, 427 U.S. 328, 340 n.2 (1976) (Stewart, J., dissenting).

139. PROVINE, *supra* note 1, at 22–23.

dicating the intricate controversies of a modern community . . . .”<sup>140</sup> Mr. Pound sensed that the public held that misconception stating that the notion

contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in . . . lay judges of probate . . . in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class-feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the everyday purity and efficiency of courts of justice.<sup>141</sup>

These academics usually emphasize that a system of lay judges allows people not thoroughly trained in the law to make decisions with enormous impact on families. Professor Langbein has argued that probate judges “should have a strong command of the complex substantive and procedural rules that are meant to govern” decisions regarding property ownership, liberty, and incompetency, and that such persons should possess legal training.<sup>142</sup> Interestingly, Langbein called into question the constitutionality of such a system:

Indeed, it is far from clear that Connecticut probate could withstand constitutional scrutiny on this ground under the Due Process clause of the U.S. Constitution. When liberty and property are at stake, the state has an obligation to operate under procedures commensurate with the seriousness of the affected interests.<sup>143</sup>

Another common argument is that, although they are said to have been needed at one time in rural areas with almost no trained lawyers, modern America is dramatically more equipped in this regard, so lay judges are no longer necessary. However, one study of Indiana judges found “only a mild correlation between the size of the place and whether the judge [was] trained as a lawyer . . . , and no relationship between a court’s being located in the county seat and having a lawyer judge.”<sup>144</sup>

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140. Pound, *supra* note 7, at 446.

141. *Id.* at 446–47.

142. *Scandal*, *supra* note 7.

143. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

144. Lamber, *supra* note 5, at 67.

Others propose that having a lay system fosters an unhealthy simplicity in the law. John Langbein has suggested that the inferiority of the probate courts in some states has resulted in continued adherence to “the rule of literal compliance with the Wills Act[,]” saying that “[s]uch courts cannot be trusted with anything more complicated than a wholly mechanical rule.”<sup>145</sup>

Still other critics have even suggested that nonlawyer judges are “especially susceptible to local economic, social, and political pressure and to personal prejudice, resulting in questionable decisions.”<sup>146</sup> The underlying implication is that legal training would allow judges to more ably resist improper pressure. However, at least one academian has credibly painted this theory as myth.<sup>147</sup>

Finally, one may also point to the advantages arising from judges possessing a working knowledge of the vast body of legal principles *outside* the probate world. A legally-trained mind that knows areas of the law outside testamentary matters might lead to increased consistency and predictability. In the same way a student of American literature must know British literature to put forth informed critiques, probate judges with general legal educations likely benefit by having a working knowledge of general law peripheral to probate.

## V. CONCLUSION

The debate between lawyer and nonlawyer judges of probate has burned for centuries. The arguments have often been passionate, and positions obstinate, as shown by Justice Stewart’s dissenting language in *North v. Russell*: “At Runnymede in 1215 King John pledged to his barons that he would ‘not make any Justiciaries, Constables, Sheriffs, or Bailiffs, excepting of such as knows the laws of land . . . .’ Today, more than 750 years later, the Court leaves that promise unkept.”<sup>148</sup>

As history progressed, cultures placed decreasing emphasis on the importance of the common sense and tailored justice administered by lay judges. Even though the Ancient Greeks did not use wills, they did employ laymen from the general citizenry in judicial offices as a democratic device. Greeks, as well as Romans, distrusted professionals and felt that the citizenry had a *duty* to participate in government. Unlike Greece, Rome did have a system of adjudicating wills in which they applied these virtues by employing the system of *praetor/iudex*. England continued this

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145. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 503 (1975). Langbein then went on to criticize this theory.

146. Lamber, *supra* note 5, at 60.

147. *See id.* (referring to Doris Marie Provine’s study of New York municipal judges).

148. *North v. Russell*, 427 U.S. 328, 346 (1976) (Stewart, J., dissenting) (quoting MAGNA CARTA 45).

trend of lay judges, although the reasons shifted from lay insight to canonical control. Training increased as well in the ecclesiastical court system; judges were both civilian-trained and focused on their profession. In America, judges overseeing wills and estates began as laymen because of a common distaste for professionals. Even the early layman American judges, however, adjudicated in a professional manner, recognizing precedent and fair procedures. As America matured, the bar influenced many of the states to restrict judgeships to lawyers only. American law grew more complicated, both in actuality and in public perception.

This trend is usually attributed to an increase in the complexity of the law. For example, the Statute of Wills of 1837 was enacted when the English ecclesiastical judges of the late Seventeenth Century created a convoluted scheme of law. The lay judges had fashioned many exceptions seeking ways of honoring the intents of decedents who had not complied with will formalities. Parliament was apparently displeased with the resulting complexity and felt a need for unification and rigidity rather than “tailored justice” for the people. A second example is the increasing complexity of American law throughout its history. Public sentiment for lawyer judges grew during the Nineteenth Century only because people came to believe they were necessary.

Today, the overwhelming common sentiment is that lawyer judges are necessary, and any shortcomings of rigidly following the law may be remedied by altering the law, further increasing its complexity. The process is mutually-reinforcing.

However, neither the Greeks, Romans, English, nor early Americans required probate judges to be formally trained as legal advocates. Though the English ecclesiastical judges were civilian trained, and the Roman Empire administrative judges were professionalized, the lawyer-judge is a relatively modern concept. Is this because the modern law is more complex? According to this Note’s foregoing analysis, the answer is no. Rather, the American people gradually accepted the lawyer requirement because they *perceived* the law to be growing in complexity. Though nuanced, whether the belief *accurately reflected* the status of the law is a separate matter. The dynamic at issue is one of perception.

The impetus for the lawyer requirement has always come from the lawyer class, which has historically preached the law’s complexity as a threshold barrier to entrance. However, as this Note has shown, there is much merit in maintaining amateur minds in at least some strategic judicial posts, and those offices overseeing matters of testamentary dispositions are among the most appropriate. The law governing this discipline need not remain simplistic and enforcement rigid. With proper training, persons of intelligence from the community may nobly serve the people. Such training might need to be intensive and substantial, perhaps on the level of an actual post-secondary degree in probate adjudication. Requiring three

years of lawyer training, however, is probably heavy-handed on the part of today's lawyer class and further segregates the American proletariat from a perceived judicial aristocracy.

Indeed, a legal profession colluding for mutual gain is a real concern of the public. Perhaps Charles Dickens represented that criticism best in *Bleak House*:

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.<sup>149</sup>

This “egalitarian rhetoric” was rampant during the time of the American Revolution as well, when most citizens openly believed that “in the United States faith should be placed in the ordinary citizen’s ability to recognize and administer justice. ‘Any person of common abilities can easily distinguish between right and wrong.’”<sup>150</sup>

American lawyers today would do well to heed history and be reminded that its citizens often pride themselves on their heritage of independence and the pursuit of freedom from controlling classes. Despite the increased complexity of the law, the debate over lawyer requirements for probate judges is not such a clearly-sided issue.

*James Findley\**

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149. CHARLES DICKENS, *BLEAK HOUSE* 467 (Wordsworth Editions Ltd. 1993) (1853).

150. ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY* 140–41 (2004).

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