Protecting Freedom of Testation: A Proposal for Law Reform in the United States

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Introduction

Heredis fletus sub persona risus est. According to a Latin aphorism, the weeping of an heir is nothing more than laughter under a mask.[1] One explanation for this cynical view of survivors' grief is that the acquisition of property through inheritance was an important source of individual wealth in ancient Rome[2]—just as it is today in the United States.[3]

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1 *See* Publilii Syri Sententiae H 18 (R. A. H. Bickford-Smith ed., G. J. Clay and Sons 1895). In academic writings today, the term "laughing heir" is used specifically to designate heirs that are so loosely linked to the testator to suffer no sense of bereavement. *Cf.* David F. Cavers, *Change in the American Family and the "Laughing Heir"*, 20 Iowa L. Rev. 203, 208 (1935) (introducing the term by reference to the German phrase "*der lachende Erbe*"); David V. DeRosa, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 Quinnipiac Prob. L.J. 153, 157 (1997) (stating that it was Cavers who brought the term into popular use in the US).

2 Even absent concrete socio-economic data, it seems that one can infer the importance of inherited wealth in ancient Rome from the fact that Roman elites were obsessed with the making of wills. *Cf.* Thomas Rüfner, *Testamentary Formalities in Roman Law*, *in* 1 Comparative Succession Law – Testamentary Formalities 1, 2 (Kenneth G.C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., 2011).

3 *See* Michael Doran, *Intergenerational Equity in Fiscal Policy Reform*, 61 Tax L. Rev. 241, 261 (2007) (reporting that, according to some estimates, inherited wealth represents as much as 80 percent of total private assets in the United States). *See also* Jens Beckert, Inherited Wealth, 2008, 14-16 (presenting different figures concerning the total amount of wealth passed on each year and concerning the question what share of private wealth is based on inheritance).

There, like in many other jurisdictions,[4] freedom of testation underlies the allocation of a person's property upon death, giving the owner the right to designate beneficiaries.[5] The less restricted this right is, the more potential there is for disappointment. Relatives and friends hoping to receive a share of the deceased's estate might suddenly find themselves empty-handed because the testator[6] revised his plans or because he never intended to leave them anything in the first place. It is this uncomfortable situation—facing the chance of an increase in personal wealth, yet being at the whim of the testator—that sometimes leads to drastic action. Some people forge, destroy, or suppress wills, or deceive, unduly influence, or threaten the testator into making a will in their favor.

It is evident that such behavior—herein called "interference with freedom of testation" and described in more detail later[7]—is wrong, irrespective of whether one adopts a welfarist or rights-based point of view.[8] Moreover, there is reason to assume that, in a wealthy and aging society such as the United States, interferences with freedom of testation will become more frequent in the future. First, because the next years will witness a giant intergenerational transfer of wealth,[9] and thus large sums could be gained

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4 *See, e.g.*, Marius J. de Waal, *Comparative Succession Law*, *in* The Oxford Handbook of Comparative Law 1071, 1084 (Mathias Reiman & Reinhard Zimmermann eds., 2006) (stating that "there can be no doubt that all developed systems of testate succession are based on the premise of freedom of testation").

5 *See, e.g.*, Tanya K. Hernandez, *The Property of Death*, 60 U. Pitt. L. Rev. 971, 976 n. 24 (1999). *See also* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 Ind.L.J. 1, 6, Fn. 16 (1992) (pointing out that freedom of testation must be distinguished from freedom of inheritance, i.e. the right of an owner at death to not have his property confiscated by the state).

6 The term "testator" is often understood to refer exclusively to a (male) person who has executed a will. Throughout this article, however, the term is used generically to reference a male or female decedent whose estate is at issue, irrespective of whether he or she dies testate or intestate.

7 *See infra* Part I.

8 From a rights-based perspective, the undesirability of this behavior follows simply from the fact that it violates the legal right of the testator to freely choose the beneficiaries of his property. From a welfarist perspective, the undesirability of interference with freedom of testation can be explained by reference to the costs of rent-seeking and rent-avoidance that are typically associated with it. Think, for example, of the resources that an interferor has to spend if he wants to find the testator's will in order to secretly destroy it. These resources are wasted from society's perspective: They do not create welfare for anyone. A similar waste of resources occurs if the testator, knowing of the possibility that his will might be destroyed by a disappointed descendant, takes special precautionary measures against such an act of interference, for example by buying a safe in which he places his will. These precautionary costs would be unnecessary in a perfect world (where wills are not suppressed), and thus they also waste resources. For a similar welfarist explanation of the undesirability of theft, see Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 Int'l Rev. L. & Econ. 367 (1997).

9 *See, e.g.*, The MetLife Study of Inheritance and Wealth Transfer to Baby Boomers (2010),

from this kind of undesirable behavior. Second, because the elderly tend to be particularly vulnerable to behavior like undue influence.[10]

Against this background, the question of how interference with freedom of testation can be effectively remedied is a pressing one. Recently, it has received increased academic attention because of the rise of the tort for wrongful interference with inheritance.[11] Under this remedy, "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance. . .that he would otherwise have received is subject to liability to the other for loss of the inheritance."[12] Hardly recognized three decades ago, this remedy against interference with freedom of testation is now available in almost two dozen states[13] and also the subject of academic

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available at https://www.metlife.com/assets/cao/mmi/publications/studies/2010/mmi-inheritance-wealth-transfer-baby-boomers.pdf (estimating that the baby-boom generation will receive inheritances of $ 6 trillion in the future).

10 *See, e.g.*, Kenneth I. Shulman et al., *Assessment of Testamentary Capacity and Vulnerability to Undue Influence*, 164 Am J Psychiatry 722, 723-24 (2007) (stating that older adults are particularly likely to suffer from cognitive impairment and dementia and that these factors cause particular vulnerability to undue influence).

11 For a detailed historic account of the rise of the wrongful interference with inheritance tort, see John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance* 65 Stan. L. Rev. 335, 355-365 (2013).

12 Restatement (Second) of Torts § 774B (1979). Classifying the tort as a remedy against interference with freedom of testation might be considered controversial, given that the focus of the tort seems to be not on the wrong committed against the testator, but rather on the wrong committed against the would-be beneficiary. Of course, both issues are inextricably linked. Hence, some conceptualize the tort as a claim derivative of the decedent's rights, others as a primary claim of the disappointed beneficiary. *See* Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance – A survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 Baylor L. Rev. 79, 88-89 n. 12 (2003) [hereinafter, Klein, *Fifth and Eleventh Circuits*]. For a criticism of both conceptualizations of the tort, see Goldberg & Sitkoff, *supra* note 11, at 379-388.

13 *See* Goldberg & Sitkoff, *supra* note 11, at 361-62 (reporting that the tort has now been accepted in twenty-one states). An extensive state-by-state analysis of the recognition of the interference tort has previously been undertaken by Diane Klein. *See* Diane J. Klein, *Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Fourth Circuit*, 104 W. Va. L. Rev. 259 (2002) [hereinafter, Klein, *Fourth Circuit*]; Klein, *Fifth and Eleventh Circuits*, *supra* note 12; Diane J. Klein, *Disappointed Yankee in Connecticut (or nearby) Probate Court: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the First, Second, and Third circuits*, 66 U. Pitt. L. Rev. 235 (2004) [hereinafter, Klein, *First, Second, and Third Circuits*]; Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Mountain States*, 45 Idaho L. Rev. 1 (2008) [hereinafter, Klein, *Mountain States*]; Diane J. Klein, "*Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—A Survey with*

controversy.[14] One reason for recognizing this tort is that antisocial conduct, like undue influence, should be deterred more effectively.[15] Some argue that the traditional remedies against interference with freedom of testation—the probate will contest and the equitable action for restitution by way of a constructive trust—do not deter this kind of undesirable behavior sufficiently. Critics of the tort, however, hold the view that, rather than recognizing a conceptually flawed new tort, the under-deterrence problem should be tackled by reforming the existing remedies against interference with freedom of testation.[16]

This Article argues that both supporters and critics of the "new" tort for wrongful interference with inheritance are slightly mistaken when it comes to the question of how antisocial conduct directed at the decedent's freedom of disposition should be deterred. Although traditional remedies against interference with freedom of testation—will contests and constructive trusts—are unsatisfactory from the point of view of deterrence,[17] neither a legislative reform of the "old" remedies nor the "new" tort remedy will solve the problem of under-deterrence of interference with freedom of testation.[18] This Article thus presents a novel solution to the under-deterrence problem: the adoption of a statutory bar from inheritance modeled after the existing "slayer statutes" addressing the problem of the "murdering heir."[19] Such a remedy would not only alleviate the

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Analysis of State Approaches in the Pacific States, 13 Lewis & Clark L. Rev. 209 (2009) [hereinafter, Klein, *Pacific States*].

14 For a powerful doctrinal attack on the tort both from the perspective of tort law and inheritance law, see Goldberg & Sitkoff, *supra* note 11. *See also* Klein, *Mountain States*, *supra* note 13, at 2-3 ("To some . . .commentators, the need for such a cause of action is obvious and acute. . .To others, the tort is an improper, unnecessary incursion on the probate court's special procedures and evidentiary requirements. . .").

15 *Cf., e.g.*, Marianna R. Chaffin, *Stealing the Family Farm: Tortious Interference with Inheritance,* 14 San Joaquin Agric. L. Rev. 73, 95 (2004); Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift—Suggestions for Resort to the Tort*, 39 U. Tol. L. Rev. 769, 774 (2008) (stating that the possibility of attorneys' fees being assessed as damages in tort and the availability of punitive damages might deter potential interferors); Klein, *Fourth Circuit*, *supra* note 13, at 267-68 (stating that a tort approach may seem clearly preferable to a probate system in terms of deterrence); Klein, *First, Second, and Third Circuits, supra* note 13, at 239 (arguing that traditional remedies against interference with freedom of testation are deficient because they do not "deter certain tort defendants"); Rachel A. Orr, *Intentional Interference with an Expected Inheritance: The only valid Expectancy for Arkansas Heirs is to expect Nothing*, 64 Ark. L. Rev. 747 (2011) (arguing for a recognition of this tort in Arkansas because "equity requires a system of deterrence for those who might wrongfully interfere with [the testator's] wishes").

16 *See* Goldberg & Sitkoff, *supra* note 11, at 391 (arguing that courts should consider reforming probate practice and restitution actions).

17 *See infra* Part II.

18 *See infra* Part II.

19 *See infra* Part III.

problem of under-deterrence of interference with freedom of testation, it would also conform with basic notions of justice underlying U.S. succession law.[20]

The remainder of this Article is organized as follows. Part I provides a definition of interference with freedom of testation and presents an effect-based taxonomy of this kind of wrongful behavior. Part II examines the existing remedies against this behavior from the point of view of deterrence. Part III explains how a statutory bar from inheritance would alleviate the current problem of under-deterrence, presents additional arguments in favor of such a legislative reform, anticipates possible criticism and defends the proposed solution against it.

I. The Wrong: Interference with Freedom of Testation Defined

This Part focusses on the wrong to which this Article will eventually propose a novel remedy: interference with freedom of testation. It begins with offering a definition of the wrongful behavior. Afterwards it will look more closely to the effects of this behavior and, on that basis, distinguish between six standard cases of interference with freedom of testation. This effect-based taxonomy shall later serve as a basis for the analysis of the existing remedies against interference with freedom of testation.

A. The Wrongful Behavior

Freedom of testation has been described as the "first principle" of U.S. succession law.[21] It reflects the commitment of American law to a conception of rights as instruments for promoting individual autonomy.[22] Even though its precise definition is subject to debate,

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20 *See infra* Part III.

21 *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 491 (1975). *Cf. also* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 10.1 cmt. a. (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition"); Goldberg & Sitkoff, *supra* note 11, at 341 (citing the restatement).

22 *See, e.g.*, Mary Louise Fellows, *In Search of Donative Intent*, 73 Iowa L. Rev. 611, 611 (1988) (stating that the American property law system "reinforces the classical liberal conception of rights as instruments for promoting individual autonomy"); Hernandez, *supra* note 5, at 976 ("The law of wills focuses upon the individual to provide a decedent with autonomy in keeping with the individualism of the Western concept of property"); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 Vill. L. Rev. 1705, 1754 (1992) ("[t]he laws of property and of trusts and estates are also based on individual autonomy"). For an essay that puts the "Classical Legal Thought" conception of rights as instruments for defining "spheres of autonomy" into a broad historical perspective, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* The New Law and Economic Development – A Critical

there is little doubt on what autonomy is essentially about. Originally referring to the self-rule of Greek city-states, the term autonomy, if applied to individuals, is nowadays understood as the ability of a person to act freely in accordance with a self-chosen plan.[23] By allowing testators to decide how their property will be distributed upon death, the law of wills provides an important opportunity to exercise self-determination in that sense.[24]

Not every decision of an individual, however, can be called autonomous. For this to be the case, two conditions are commonly considered essential. First, the individual must be mentally competent to make an autonomous choice (one can speak of "agency").[25] Second, he or she must be free from controlling influences of others (one can speak of "liberty").[26] When it comes to the writing of wills, several legal concepts have been developed that reflect the prerequisites of agency and liberty. The requirement that the testator be of "sound mind" in order to execute a valid will[27] reflects the requirement of agency. The requirement that the will not be subject to undue influence, duress, or fraud[28] reflects the requirement of liberty.

Interference with freedom of testation occurs whenever, from a legal point of view, a third party infringes upon the testator's autonomy. Consequently, it comprises the just-mentioned group of cases where, as a result of duress, fraud, or undue influence, the

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Appraisal 19 (David M. Trubek & Alvaro Santos eds., 2006). For an account of a justification of freedom of testation on different grounds, see Edward C. Halbach, Jr., *Introduction to Chapters 1-4, in* Death Taxes and Family Property 3, 6 (Edward C. Halbach, Jr. ed., 1977) (presenting a justification of freedom of testation with a view to the incentives it sets for the testator).

23 *See, e.g.,* Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 99 (6th ed. 2009). *Cf. also* Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care,* 3 NYU J.L. & Liberty 548, 555-71 (2008) (giving a detailed account of the concept of autonomy as developed in Western liberal thought on basis of Kant's philosophy).

24 *See, e.g.,* Gerry W. Beyer, *Statutory Fill-In Will Forms – The First Decade: Theoretical Constructs and Empirical Findings,* 72 Or. L. Rev. 769, 779 (stating that "[e]state planning. . . permits persons to exercise increased self-determination"); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning,* 35 Seattle U. L. Rev. 427, 444 (stating that the doctrine of freedom of testation "fosters the testator's autonomy by allowing him to make significant decisions concerning the distribution of his estate")*;* Winick, *supra* note 22, at 1759 ("The laws of property and of trusts and estates are also based on individual autonomy. These areas of law are premised on the notion that individuals may exercise substantial control over the use and enjoyment of their property and may determine what shall be done with it during their lives and upon their deaths.").

25 *See, e.g.,* Beauchamp & Childress, *supra* note 23, at 100

26 *See id.*. *Cf. also* Restatement (Third) of Restitution & Unjust Enrichment, Introductory Note II, 2, 2 (". . .transactional autonomy requires that a transferor's consent to a transfer be both competent and legitimately obtained.").

27 *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.1 cmt. c. (2003).

28 *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.3 (a) (2003).

testator is under the controlling influence of another person (this may be called "heteronomy").[29] In addition to these types of behavior, two other kinds of wrongs also have to be included in the definition of interference with freedom of testation: the forgery of wills and their suppression. In contrast to the aforementioned behaviors, the forgery of wills and their suppression are not directed at the testator himself. Rather, they can take place without any contact between the wrongdoer and the decedent. Their effect, however, if successfully undertaken, is not in any respect different from the first type of attack on the testator's autonomy. If a forged will is executed, or if intestacy rules apply as a result of the suppression of the proper will of the testator, the property distribution upon the decedent's death does not reflect his actual intent. In the following sections, wrongful interference with freedom of testation will include will forgery, will suppression, fraud, undue influence, and duress (if directed at a testator).

Applying these doctrines may of course prove tremendously difficult in practice. In particular, the concept of "undue influence" has proven notoriously problematic in litigation and is therefore subject to sharp academic criticism.[30] Although these practical difficulties in drawing the line between autonomy and heteronomy will be of some relevance later,[31] they do not matter for the definition of interference with freedom of testation in the abstract. Not unlike the prerequisite that the testator be mentally competent, the requirement that the testator be not subjected to undue influence, duress, or fraud in order for a will to be valid is indispensable for a will to be the product of the testator's autonomy.

B. The Effects of the Wrongful Behavior

In the definition of interference with freedom of testation just-offered, the outcome of such misconduct has only been described in the most general terms: the replacement of the testator's autonomy by heteronomy. This description does not fully account for important differences in the possible effects of wrongful interference. These differences

29 It seems that the term "heteronomy" has so far not been used to define interference with freedom of testation. For this purpose, I suggest using it in the broad sense of being under the controlling influence by another party and not in the specific sense given to it by Kant (referring to a condition of acting on desires that are not legislated by reason). C*f.* Simon Blackbourn, *autonomy/heteronomy*, *in* The Oxford Dictionary of Philosophy 31 (1994).

30 *See, e.g.*, Jesse Dukeminier, Robert H. Sitkoff & James Lindgren, Wills, Trusts, and Estates 180 (8th ed. 2009) ("one of the most bothersome concepts in all the law"); Ronald J. Scalise, Jr., *Undue influence and the law of wills: a comparative analysis*, 19 Duke J. Comp. & Int'l L. 41, 54 (2008) ("elusive"); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. Kan. L. Rev. 245, 245 (2010) ("fails to meet any standard of clarity, fairness, or predictability").

31 *See infra* text accompanying note 193.

result from the fact that anyone considering interfering with another's freedom of testation will adapt his behavior with reference to three important factors: (i) whether the testator has already executed a valid will; (ii) whether, if already in existence, the executed will is in the potential wrongdoer's favor; (iii) whether the testator is satisfied with the current status of his dispositions or plans to change it. These factors not only determine whether or not it makes sense for the potential wrongdoer to interfere with the testator's freedom, but also have an influence on what he will aim to do. Whether, for example, he will try to cause the testator to execute a new will or keep the existing will. Building on these insights, six standard cases of interference with freedom of testation can be identified.[32]

In the first case, the wrongdoer (hereinafter "interferor"), by means of fraud, duress, or undue influence, induces the execution of a new will in his favor (or in favor of a third person[33] whom the interferor wants to benefit).[34] Any will that the testator executed before forming the new will is likely treated as revoked, insofar as it is inconsistent with the new will.[35] The second case is in effect quite similar. Here, the interferor, instead of wrongfully inducing the testator to execute a will in his favor, decides to forge a will that designates the interferor as an heir.[36] The result, if the interferor's plan is successful,[37] is

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32 For a similar taxonomy, see Restatement (First) of Restitution § 184 cmt. a. (1937) (distinguishing between seven cases); Reinhard Zimmermann, "*Nemo ex suo delicto meliorem suam condicionem facere potest" Kränkungen der Testierfreiheit des Erblassers – englisches im Vergleich zum kontinentaleuropäischen Recht*, *in* Unternehmen – Markt – Verantwortung, Festschrift für Klaus J. Hopt zum 70. Geburtstag 269–304 (Stefan Grundmann et al. eds., 2010) [in German] (distinguishing between five cases).

33 For the sake of simplicity, it will be assumed in the following that the interferor acts for his own benefit. Where interference for the benefit of a third party requires a different legal analysis, this will be pointed out explicitly. *See infra* note 98.

34 See, e.g., *In re* Nutt's Estate, 185 P. 393 (Cal. 1919) (testatrix's physician withheld from her the information that she would die soon and thus brought her to execute a will in favor of the physician's husband in return for a promise to provide care of her during her remaining lifetime); *Nutt's Estate* is cited in the reporter's notes as the basis for Restatement (Third) of Prop.: Wills & Other Donative Transfers, § 8.3. illus. 6.

35 *Cf., e.g.,* Uniform Probate Code (1990) § 2-507 (a) (1). On the problem of revocation of wills by inconsistency, see also Dukeminier, Sitkoff & Lindgren, *supra* note 30, at 286-87.

36 See, e.g., King v. Acker, 725 S.W.2d 750 (Tex. App. 1987) (awarding damages for tortious interference with inheritance on basis that decedent's widow had forged will).

37 Whether will forgery is an option for the interferor will particularly depend on the testamentary formalities in the respective jurisdiction. Where private wills have to be attested by witnesses, forgery seems much harder than in jurisdictions that allow for holographic (i.e. handwritten) wills. For more on testamentary formalities in the US, see Ronald J. Scalise, Jr., *Testamentary Formalities in the United States of America*, *in* 1 Comparative Succession Law – Testamentary Formalities 357 (Kenneth G.C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., 2011).

not unlike that of the first case. There is a written document appearing as if it represented the testator's free volition when in fact it expresses the interferor's wishes.

In the third set of circumstances, the interferor's behavior is not directed at the production of a new document purporting to represent the testator's free volition. Rather, it is directed at a document that already exists. Here, the interferor uses fraud, duress, or undue influence to induce the testator to revoke his will. Of course, such behavior makes sense only in cases where the mere revocation of the existing will is going to benefit the interferor. This requires that he would either receive a share of the testator's estate under the respective jurisdiction's intestacy laws,[38] or that there exists still another will that is beneficial to the interferor and that will now be treated as if it were the final will of the testator.[39] In the fourth case, the departure point is usually the same as in the previous case. The interferor realizes that the testator has already executed an unfavorable will, but instead of wrongfully inducing the testator to revoke it, the interferor destroys or hides the will.[40] Again, such a plan will only be attractive if there is anything to be gained from the application of the respective jurisdiction's intestacy laws or the probation of a previous will.

In the fifth situation, the circumstances are quite different. The interferor is satisfied with the status quo, but realizes that the executor intends to execute a will that would be disadvantageous to him. Thus he uses wrongful means, i.e. fraud, duress, or undue influence, in order to prevent the testator from executing the will as intended.[41] The sixth case is only a slight variation in which the interferor wrongfully prevents the decedent not from executing a new will, but from revoking an existing one.[42] The goal of the interferor

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38 In this case, the interferor would be an "heir apparent". *Cf.* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 2.1 cmt. d. (1999).

39 See, e.g., Griffin v. Baucom, 328 S.E.2d 38 (N.C. App. 1985) (concerning evidence that decedent's wife, dissatisfied with her husband's will, unduly induced him to destroy it so that his estate passed entirely to her).

40 See, e.g., *In re* Robinson's Estate 270 P. 1020 (Wash. 1928) (holding that the previous court had not erred in refusing to confirm appointment of the decedent's son as an executor, the son having been found by the court to be responsible for the suppression of his mother's will).

41 See, e.g., Pope v. Garrett, 211 S.W.2d 559 (Tex. 1948) (Decedent, when planning to sign a will shortly before her death, was prevented from doing so by two relatives using "physical force. . .or creating a disturbance"). *Pope v. Garrett* is cited in the reporter's notes as the basis for Restatement (Third) of Prop.: Wills & Other Donative Transfers, § 8.3. illus. 11. *See also* Goldberg & Sitkoff, *supra* note 11, at 352 (using *Pope v. Garrett* as example for the functioning of constructive trusts as remedies in interference cases).

42 See, e.g., Brazil v. Silva, 185 P. 174 (Cal. 1919) (testator was deceived by beneficiary into believing that the will that he intended to revoke had been destroyed by beneficiary). *Brazil v. Silva* is cited in the reporter's notes as the basis for Restatement (Third) of Prop.: Wills & Other Donative Transfers, § 8.3. illus. 10. *See also* Goldberg & Sitkoff, *supra* note 11, at 352-51 (using

is the same as in the previous case, preserving the existing estate plan of the decedent against the latter's will.

It is these six cases of interference with freedom of testation that shall now serve as the basis for an analysis of the existing remedies against interference with freedom of testation. As shall be demonstrated, some of them cause greater difficulties for courts and legislators than others. One evident difficulty, however, is common to most cases of interference with freedom of testation. As a result of the wrongdoing, it is often almost impossible to establish with certainty the testator's true intent. Only the testator himself could authoritatively answer the question how he would have exercised his freedom of testation if he had not been threatened, deceived, or unduly influenced.[43] Given that litigation over interference with freedom of testation takes place posthumously,[44] this testimony is obviously not available. Of course, courts might instead rely on evidence only in regards to past conduct of the testator and operate with inferences, presumptions, and burden shifting. Although such mechanisms might help when it comes to verifying the wrongful interference as such,[45] they are inevitably less reliable when it comes to establishing the testator's true intent, given that the latter is entirely part of the testator's

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Brazil v. Silva as an example for the functioning of constructive trusts as remedies in interference cases).

43 This problem does not arise in the cases of will forgery and will suppression. Because the testator is not under the influence of the interferor in these cases, there is no reason to speculate what the testator's mental state would have been if there had been no interference. This is not to say, however, that these cases may not cause evidentiary problems. In case of a will forgery, it might not be possible to establish the authenticity of the purported will with certainty. Similarly, in case of will suppression, it might be impossible to establish the content of the suppressed document. In the latter cases, the severity of the evidentiary difficulties depends of course on how the testator executed the will: In case of an attested will, the content of the suppressed will might also be established by the attesting witnesses. In case of holographic wills, by contrast, where attesting witnesses are not required, this might often not be possible. Holographic wills are nowadays permitted in more than half of the states. For an account of the different testamentary formalities in the United States, see Dukeminier, Sitkoff & Lindgren, *supra* note 30, at 228-285.

44 For a critique of the American model of post-mortem probate and an account of rare legislative experiments with ante-mortem probate, see Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 Ark. L. Rev. 131 (1990).

45 For an account of how inferences, presumptions, and burden shifting are used to establish undue influence, see Goldberg & Sitkoff, *supra* note 11, at 346-348. Nevertheless, establishing undue influence is by no means easy, given that it must often take place against the background of complicated interpersonal relations that are difficult to grasp from the outside. *See id.* at 62. Other forms of interference with freedom of testation will also be very difficult to prove given that they will hardly ever be conducted openly.

inner world. This "worst evidence problem"[46] explains why remedying interference with freedom of testation is a serious challenge for any court or law reformer.

II. The Existing Remedies—Why They are not Satisfactory with Regard to Deterrence

American law knows several remedies that promise relief for interference with freedom of testation, some of them well established (i.e. will contest and constructive trusts), one of them fairly recent (i.e. the tort action for interference with an inheritance). The purpose of this section will be to demonstrate that neither the "old" remedies nor the "new" remedy are satisfactory when it comes to deterrence of interference with freedom of testation. Contrary to what some commentators suggest, even a legislative reform of these remedies would not solve the problem of under-deterrence of interference with freedom of testation.

A. Will Contests and their Deficiencies in Terms of Deterrence

The classic remedy against interference with freedom of testation is the will contest, a proceeding that is brought in order to have a will either declared invalid or denied admission to probate.[47] Typically it can only be brought after the testator's death, and only by persons with a financial interest in the contest.[48] The grounds of contest are not limited to, but include most acts of interference with freedom of testation. The Restatement (Third) of Property explicitly states that a will procured by undue influence, duress, or fraud is invalid.[49] In the comments, it is made clear that forgery is also a ground for contest.[50] Despite its seemingly broad area of application, will contests are often criticized as providing an insufficient remedy against interference with freedom of

46 This term goes back to John Langbein, who condemned the requirement that the testator be dead before investigations regarding his capacity can take place as a "worst evidence rule". *See* John H. Langbein, *Will Contests*, 103 Yale L.J. 2039, 2044 (1994). *Cf. also* Goldberg & Sitkoff, *supra* note 11, at 365, 376 (using the term "worst evidence problem" more generally for the problem of establishing the true intent of a deceased person).

47 *See, e.g.*, William J. Bowe & Douglas H. Parker, Page on the Law of Wills, § 26.50 (3d ed. 1960); William M. McGovern, Sheldon F. Kurz & David M. English, Wills, Trusts and Estates 27 (4th ed. 2010).

48 *See, e.g.* McGovern, Kurz & English, *supra* note 47, at 638-40.

49 Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3 (2003).

50 *id.*, cmt. o (2003).

testation.[51] As shall be demonstrated, this criticism holds true, particularly if one analyzes will contests with regard to their suitability for deterring potential interferors.

The first reason why will contests are sometimes alleged to be an insufficient remedy are the special procedural difficulties that will contestants face.[52] Depending on the jurisdiction, there are, for example, strict limits on standing and time limitations for bringing a contest.[53] Moreover, some probate courts require a higher standard of proof (i.e. clear and convincing evidence) for certain allegations of interference with freedom of testation than is normally required in civil actions.[54] These procedural hurdles are substantial and might, at least to some extent, explain why will contests only rarely occur.[55] Of course, one could justify these hurdles by reference to the fact that there seems to be a substantial risk of "strike suits," which are spurious claims brought mainly in order to exact large settlement payments, in the area of will contests because of both the elusiveness of the concept of undue influence and the peculiarities of American civil procedure.[56] This does not alter the fact that, from an interferor's perspective, the

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51 *See, e.g.*, Johnson, *supra* note 15, at 773-4; Klein, *Fourth Circuit*, *supra* note 13, at 260; Klein, First, Second, and Third Circuits, *supra* note 13, at 238-9; Steven K. Mignogna, *On The Brink of Tortious Interference with Inheritance*, 16 Prob. & Prop. 45, 47-8 (2002); Orr, *supra* note 15, at 764-775.

52 *See, e.g.*, Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 Real Prop. Prob. & Tr. J. 357, 361-366 (2004); Klein, *Fourth Circuit*, *supra* note 13, at 260-261; Jared S. Renfroe, *Does Tennessee Need Another Tort? The Disappointed Heir in Tennessee and Tortious Interference with Expectancy of Inheritance or Gift*, 77 Tenn. L. Rev. 385, 397-98 (2010).

53 *See, e.g.*, Unif. Probate Code § 3-108(3), 3-412(3)(A) (amended 2010) (12-month limitation period). *See also* McGovern, Kurz & English, *supra* note 47, at 636-38, 640-42.

54 *See, e.g.*, Fried, *supra* note 52, at 366.

55 *Cf., e.g.*, Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22 Real Prop., Prob. & Tr. J. 607, 614 (1987) (presenting an empirical study according to which less than one per cent of wills offered for probate in Davidson County within a period of nine years were contested). *But see* Langbein, *supra* note 46, at 2042 (1994) (noting that the amount of capacity litigation in the United States is still "very serious").

56 *Cf., e.g.*, Goldberg & Sitkoff, *supra* note 11, at 346 (stating that the openness of undue influence suits to circumstantial evidence creates incentives for strike suits); Daniel B. Kelly, *Strategic Spillovers*, 111 Colum. L. Rev. 1641, 1685 (2011) (stating that negative expected value suits are common in probate courts and noting that will contests may be initiated only to extract a settlement); Langbein, *supra* note 45, at 2042-45 (arguing that, inter alia, the availability of jury trial in probate matters, and the American rule of costs invite meritless will contests); Leopold & Beyer, *supra* note 44, at 134-36 (arguing that the post-mortem probate system encourages spurious will contests); Scalise, *supra* note 30, at 100 (arguing that undue influence suits are so common in the United States because American law creates incentives for suing outside of the merits of the litigation); Spivack, *supra* note 30, at 286-290 (arguing that the continuing existence of the undue influence doctrine means that heirs dissatisfied with a will can use the threat of a

"roadblocks"[57] for will contestants are most welcome. They decrease the probability of a successful will contest being brought, and thus increase the chance that an interference with freedom of testation will yield profit.

The second reason why will contests are often considered an insufficient remedy does not merely relate to modifiable details of their procedural design. Because will contests are merely a means for invalidating a wrongfully procured will, they obviously cannot offer relief in two of the typical cases of interference with freedom of testation that have been identified above:[58] the prevention of the execution of a will (case five) and the prevention of the revocation of a will (case six).[59] In case five, as a result of the interference, there is no will that could be invalidated.[60] In case six, the will must be admitted to probate because the necessary revocatory act on the will has not been performed on the will.[61] In both cases, even a legislative reform of the will contest cannot alleviate the under-deterrence problem.

Finally, from a deterrence perspective, there is a third reason why will contests are not a satisfactory remedy, even in cases where they are clearly applicable.[62] If faced only with the possibility of a will contest, a potential interferor has, simply put, almost nothing to lose from his misbehavior. For even if the wrongfully procured will is determined to be invalid as a result of a will contest, the interferor will end in a financial position that is not substantially worse than the one he would have been in absent the wrongful

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will contest to gain a settlement).

57 Fried, *supra* note 52, at 361.

58 *See supra* Part I.B.

59 It should be noted, that a will contest is also not the right remedy for cases three (wrongful procurement of a revocation of will) and four (suppression of a will). However, in these cases, it is, at least in principle, possible to offer the original will for probate. Of course, the revoked or suppressed will can only be admitted to probate if its due execution and content can be proven, for example on the basis of existing copies, drafts, or recollection. This will be very difficult in most cases, not least because there is a presumption that a lost will has been destroyed by the testator with the intention to destroy it. *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 4.1. cmts. a., j, k (2003). *Cf. also* Fried, *supra* note 54, at 364-66 (describing the difficulties faced by proponents of a destroyed will); Goldberg & Sitkoff, *supra* note 11, at 377-78 (discussing the question whether probate offers adequate relief in case of will suppression by reference to *In re Estate of Hatten* 880 So.2d 1271 (Fla. Dist. Ct. App. 2004)).

60 *See, e.g.*, Nita Ledford, *Note – Intentional Interference with Inheritance*, 30 Real Prop. Prob. & Tr. J. 325, 342 (1995); Mignogna, *supra* note 51, at 48; Linda S. Stinehart, *Tortious Interference with Inheritance in Illinois*, 16 Loy. U. Chi. L.J. 181, 203-4 (1984).

61 *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.3. illustr. 10, § 4.1. cmt. g (2003). In some cases, however, the harmless error rule might apply to render the revocation effective. *See id.* § 8.3. illustr. 10, § 4.1. cmt. g , § 3.3. cmt. c.

62 On the basis of what has been said in the previous paragraph, it is clear that will contests can offer relief only in cases one (wrongful procurement of a will) and five (forgery of a will).

interference.[63] This is so because the interferor's financial[64] losses from a frustrated attempt of interference will usually only comprise two elements. First, if the interferor (unsuccessfully) tries to defend the wrongfully purported will against contest, he will incur attorney's fees and other related costs. Given that, at least in most cases, he will act in bad faith when defending the wrongfully procured will, the interferor will most likely not be able to recover his costs from the estate, irrespective of whether he acts as executor or as a mere beneficiary.[65] In addition, there is a second type of cost associated with an (unsuccessful) interference with freedom of testation: the opportunity costs of the behavior that constitutes the interference.[66] In the case of a year-long campaign of undue influence, for example, these costs might be significant. In most cases, however, they will probably be negligible.[67]

From the perspective of a potential wrongdoer who weighs the probable gains from an interference with freedom of testation against the probable costs,[68] the previously

63 James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, Ariz. Att'y, Jan. 2000, at 26; Klein, *Fifth and Eleventh Circuits*, *supra* note 12, at 90.

64 In addition to financial losses, there might of course also be reputational losses associated with a probate court's finding that the will is invalid as a result of a wrongful act by the interferor. However, these costs will in most cases not be significant enough to exert substantial deterrence.

65 *Cf., e.g., In re* Faust's Estate, 96 P.2d 680 (Kan. 1939) (holding that court may refuse to allow costs and attorney fees to be paid out of an estate when a will is denied probate and the executor acted in bad faith); *In re* Winckler, 651 N.Y.S.2d 69 (App. Div. 1996) (holding that allowing the proponent of a will who has procured the execution of the will by undue influence to recover his attorney's fees from the assets of the estate would be a "perversion of justice" because it would allow the proponent of the will to profit from his own wrong); Mitchell v. Smith, 779 S.W.2d 384 (Tenn. Ct. App. 1989) (holding that proponents who undertake to probate a will in good faith are entitled to have their costs paid from the assets of the estate, but not proponents of a will procured through undue influence). *Cf. also* Unif. Probate Code §§ 3-720 (amended 2010) ("If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."); 96 C.J.S. Wills § 843 (2012) (noting that a denial of probate on the ground that it was procured by fraud or undue influence of the executor would indicate bad faith on side of the executor and would prevent him from recovering his expenses from the estate).

66 These costs arise of course independently of whether a will contest is successfully brought.

67 In particular the opportunity costs of fraud, threat, duress, will forgery, and will suppression will hardly be substantial. In addition, it should be noted that with regard to these opportunity costs, the interferor has full discretion as to how much he wants to spend.

68 The idea that wrongdoers engage in a cost/benefits analysis before deciding to act is one of the premises of the economic analysis of deterrence. Of course, "real wrongdoers" do not always behave in way that is consistent with the notion of *homo oeconomicus*, as behavioral economics have shown. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* Behavioral Law and Economics 13, 45-46 (Cass R. Sunstein ed., 2000). Within the scope of the present Article, it is not possible to address the abundant

mentioned costs will probably not be substantial enough to exert a large deterrent effect. This is so because the probability of a successful contest of a wrongfully purported will is significantly less than 100 percent, given the fact that interference with freedom of testation is not easily discovered and the existence of the "roadblocks" for will contestants. For a rational actor, the expected costs of an interference will correspondingly be smaller, and interference with freedom of testation will thus almost always produce an expected gain.[69] To illustrate, think of a hypothetical legal system where a thief only risks having to compensate the owner for the value of the stolen property if his wrongful act is discovered and the owner successfully brings a claim in court. Such a legal system would be unsatisfactory when it comes to deterring potential thieves.[70] Similarly, the threat of a will contest alone will not deter a potential interferor.

B. Constructive Trusts and their Deficiencies in Terms of Deterrence

The previous section demonstrated that will contests cannot serve as a remedy in some cases of interference with freedom of testation.[71] To close this remedial gap, courts have,

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literature on how the insights from social sciences about people's actual behavior require a modification of standard deterrence theory. As regards interference with freedom of testation, it does not seem untenable, however, to take the idea of the rationally calculating wrongdoer as a starting point. After all, as opposed to other wrongs committed within the context of close personal relationships, interference with freedom of testation will in most cases clearly be motivated by the concrete prospect of economic gain and not by other motivations that are a priori incompatible with the idea of the calculating wrongdoer.

69 The significance of the probability of law enforcement for the issue of deterrence is also one of the central ideas of the economic analysis of deterrence. According to orthodox deterrence theory, a sanction that would deter optimally at an enforcement rate of 100 percent should be multiplied by the inverse probability of its imposition to account for the fact that enforcement is in reality not 100 percent. *See, e.g.*, Richard A. Posner, Economic Analysis of Law 262 (8th ed. 2011); Steven Shavell, Foundations of Economic Analysis of Law 244 (2004); Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 Mich. L. Rev. 2185, 2186 (1999); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties***,** 87 Geo. L.J. 421, 422 (1998); Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874 (1998). Within the context of the present Article, it is not possible to address the controversial question whether the so-called "multiplier principle" is a sound basis for legislative decisions regarding the sanctioning of wrongdoing. In any case it does not seem unreasonable, however, to continue the argument on the premise that law's deterrent effect is in fact diminished (albeit to an unknown extent) when the probability of enforcement is less than one.

70 For an authoritative treatment of this problem from the perspective of law and economics, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1124-27 (1972).

71 *See supra* text accompanying note 59.

for a considerable time, made use of constructive trusts.[72] A constructive trust is an equitable remedy aimed at preventing unjust enrichment of one person at the expense of another.[73] As such, it is part of the law of restitution,[74] i.e. the academically neglected[75] part of American law that, according to common orthodoxy, deals with liability based on unjust enrichment.[76] In an action for restitution, the remedy of the constructive trust allows a court to direct that a specific piece property to which the defendant holds title be transferred to the claimant in order to rectify unjustified enrichment.[77] Because property

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72 *See* George Palmer, The Law of Restitution §§ 20.2, 20.3, 20.4, 20.5 (1978); Goldberg & Sitkoff, *supra* note 11, at 349-351.

73 *See* Restatement (Third) of Restitution & Unjust Enrichment § 55 cmt. b (2011) (". . .the term 'constructive trust,' used correctly to designate a remedy for unjust enrichment,. . ."); Dan B. Dobbs, Law of Remedies 398-99 (2d ed. 1993); Palmer, *supra* note 72, at § 1.3; Mark R. Siegel, *Unduly Influenced Trust Revocations*, 40 Duq. L. Rev. 241, 248-50 (2002).

74 *See* Lionel Smith, *Legal Epistemology in the Restatement (Third) of Restitution and Unjust Enrichment*, 92 B.U. L. Rev. 899, 910-11 (2012) (simultaneously pointing out and criticizing the fact that the Restatement of Restitution and Unjust Enrichment is the only restatement in which constructive trusts are treated). In the 1920s, the American Law Institute originally planned to deal with the topic of constructive trusts within the Restatement of Trusts before later deciding that it would better be treated together with the topic of quasi-restatements as part of the Restatement of Restitution. *See* Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 Oxford J. Legal Stud. 297, 299–302 (2005).

75 *Cf.* Restatement (Third) of Restitution & Unjust Enrichment § 1 cmt. a. (2011) ("An incomparably more extensive literature on the theory of restitution and unjust enrichment has been produced in recent decades by scholars outside the United States."); Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 Wash. & Lee L. Rev. 993, 994 (2008) ("Whereas in American legal discourse restitution sits at the backwaters of the academic and judicial consciousness, in recent years, English and Commonwealth courts have expended considerable energy to articulate and develop this substantive area of law"); Chaim Saman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party* 28 Oxford J. Legal Stud 99, 100 (2008) ("The past twenty-five years have witnessed a global renaissance of restitution reflected in hundreds, perhaps thousands, of books and articles. . .The United States remains a notable holdout to this global movement.").

76 *See* Restatement (Third) of Restitution & Unjust Enrichment § 1 (2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution"); Restatement (First) of Restitution § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other"); Palmer, *supra* note 72, at § 1.1. *But see* Hanoch Dagan, The Law and Ethics of Restitution 11-36 (2004) (criticizing the unjust enrichment reasoning).

77 *See* Restatement (Third) of Restitution & Unjust Enrichment § 55 cmt. b (2011). For a famous articulation of the principle behind the constructive trust by Justice Cardozo, see Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919) ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.").

acquired through interference with an intended donative transfer is considered an unjust enrichment of the recipient at the expense of the intended beneficiary,[78] constructive trust can offer relief in cases of interference with freedom of testation.[79] For several reasons, however, it would be wrong to assume that the constructive trust solves the problem of under-deterrence resulting from the deficiencies of the will contest as a remedy.

To begin with, constructive trusts do not constitute a generally available alternative to the will contest. Most jurisdictions ensure that an action in restitution is not used to circumvent the rules of procedure and limitation periods that apply in probate proceedings.[80] Consequently, a constructive trust may only be imposed where relief cannot be obtained in the probate court, i.e. in those cases where the execution or revocation of a will is prevented.[81] In all other cases, the probate proceeding, with its previously described problems in terms of deterrence, remains the only remedy against interference with freedom of testation (apart from the controversial interference with inheritance tort). Moreover, even in cases where constructive trusts may be imposed, they do not provide sufficient deterrence against interference with freedom of testation, insofar as they suffer from the same two deficiencies as the will contest: problems regarding the burden of proof and the level of sanctioning.

The burden of proving a constructive trust lies on the party seeking to establish it.[82] If the consequence of establishing a constructive trust would be to overturn a formal testamentary disposition, courts may impose a higher standard of proof than in ordinary actions for restitution and require the standard applicable in comparable probate

78 *See* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. a (2011).

79 In addition, constructive trusts can also serve as a remedy in case of wrongful interferences with inter vivos gifts. *See id.* § 46 (2). For the purpose of this article, however, this is irrelevant.

80 *See id.* § 46 cmt. c. *Cf. also* Goldberg & Sitkoff, *supra* note 11, at 351 (". . .restitution by way of constructive trust is a gap-filling complement. . .").

81 *See* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmts. c, e, i. (2011). *See also* Restatement (First) of Restitution § 184 (1937) ("Where a disposition of property by will or an intestacy is procured by fraud, duress or undue influence, the person acquiring the property holds it upon a constructive trust, *unless adequate relief can otherwise be given in a probate court*") (emphasis added). In addition to cases of wrongful prevention of the execution or revocation of a will where probate can never offer relief, constructive trusts are sometimes also imposed in other cases of interference with freedom of testation where relief in probate is simply very difficult to attain, namely the cases of wrongful procurement of revocation of a will and will suppression. *See* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. d. (2011); Palmer, *supra* note 72, at § 20.5. For an explanation why in the latter cases relief in probate is not a priori impossible, see *supra* note 59.

82 *See, e.g.*, Lucas v. Grant, 962 S.W.2d 388, 390 (Ark. App. 1988); U.S. v. Currency $11,331, 482 F.Supp.2d 873, 882 (E.D.Mich. 2007); 90 C.J.S. Trusts § 200 (2012).

litigation, such as "clear and convincing evidence".[83] This in itself can cause substantial difficulties for potential plaintiffs.[84] What is more problematic than the standard of proof, however, is the scope of issues that have to be established. For a constructive trust to be imposed it has to be established that "the defendant (i) has been unjustly enriched (ii) by acquiring legal title to a specifically identifiable property (iii) at the expense of the claimant or in violation of the claimant's rights."[85] When it comes to interference with freedom of testation, this means that, for relief by way of constructive trust, unlike the case of will contests, it is insufficient to establish that the testator's freedom of testation was interfered with. It also must be established that, but for the wrongful interference, the claimant would have been the recipient of specific assets of the decedent.[86] Obviously the latter issue can cause even more difficulties than the first. After all, in cases where the decedent is under the controlling influence of another party, one must consequently establish how the decedent would have exercised his freedom of testation if there had been no interference. Because of the "worst evidence problem" that has been described above,[87] this will often prove impossible. The only fact that can be proven is that the testator was prevented from freely exercising his autonomy—but not *how* he intended to exercise it. This problem is inherent in the concept of constructive trust, and it is the first of two reasons why constructive trusts are insufficient as a means of deterring interference with freedom of testation.

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83 *See* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. b (2011).

84 This is not to say that applying the same standard of proof in restitution actions as in probate litigation does not make sense when their effects would be virtually the same. Nor does it imply that the requirement of clear and convincing evidence in inheritance cases is an inadequate response to the "worst evidence" problem. However, irrespective of whether this particular standard of choice reflects a good policy judgment, one cannot escape the fact that, as a result of a stricter standard of proof, not only bogus claims but also well-founded actions are less likely to succeed. From the perspective of the interferor, this makes an action in restitution much less worrisome.

85 *See* Restatement (Third) of Restitution & Unjust Enrichment § 55 cmt. a (2011).

86 *Cf., e.g.*, Ransdel v. Moore 53 N.E. 767, 771 (Ind. 1899) ("The rule established by the authorities is that when an heir or devisee in a will prevents the testator from providing for one for whom he would have provided *but for the interference* of the heir or devisee, such heir or devisee will be deemed a trustee, by operation of law, of the property, real or personal, received by him from the testator's estate, to the amount or extent that the defrauded party would have received had not the intention of the deceased been interfered with") (emphasis added); Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. e illustr. 10 (2011) (presenting an example of a wrongful interference with an intended donative transfer and stating that a constructive trust can be imposed if the intended beneficiary can prove that, ". . .*but for* the wrongful interference. . ." (emphasis added), he would have been designated as beneficiary).

87 *See supra* text accompanying note 43.

The second problem of constructive trusts stems from a lack of deterrence because of the degree of sanctioning. As indicated, constructive trusts form part of the law of restitution and, as such, are directed at preventing unjust enrichment, not at imposing penalties.[88] Punitive damages are consequently not available by way of constructive trusts.[89] This in itself would not lead to an under-deterrence problem if the unjust enrichment of the interferor would be rectified in most cases.[90] After all, if an interferor were almost always barred from the profits of his wrongdoing, there would be virtually no incentive for him to act, given that he would also have to bear the opportunity costs of his interference[91] and the litigation costs associated with being defendant in an action for restitution. However, not unlike the case of the will contest, the likelihood of a constructive trust being imposed to rectify an interference with freedom of testation is much less than 100 percent, even in cases where this remedy would in principle be available. The previously described issues of burden of proof and the general difficulties of detecting interference with freedom of testation make a successful action in restitution unlikely. Thus, from the perspective of a rational wrongdoer,[92] the financial risks associated with a constructive trust—the chance of losing one's profits and incurring litigation costs—are correspondingly smaller.[93] Hence, an interference with freedom of testation will in most cases produce an expected gain, even where constructive trusts are theoretically available as a remedy.

In conclusion, the preceding analysis of the "traditional" remedies against interference with freedom of testation suggests that will contest and constructive trust, even together, do not sufficiently deter potential interferors. In addition, a legislative reform of these

88 *See, e.g.*, U.S. v. Snepp 595 F.2d 926, 937 (1979) (". . .a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment."); In re Estate of Corriea 719 A.2d 1234, 1240 (D.C., 1998) ("The remedy of disgorgement, much like that of a constructive trust, is meant 'to provide just compensation for the wrong, not to impose a penalty.'" (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940))); Restatement (Third) of Restitution & Unjust Enrichment § 51 cmt. k (2011) ("The rationale of punitive or exemplary damages is independent of the law of unjust enrichment. The rules that govern such damages are part of the tort law of a given jurisdiction, often fixed by statute, outside the scope of this Restatement.").

89 *See, e.g.*, Goldberg & Sitkoff, *supra* note 11, at 372; Klein, *First, Second, and Third Circuits*, *supra* note 13, at 239-40.

90 In this respect it seems noteworthy that disgorgement of profits is explicitly advocated by some scholars of deterrence theory as the preferable sanctioning measure for activities that are always socially undesirable *See, e.g.*, Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law* 1 Review of Law and Economics 175, 182-83 (2005); Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 Sw. U. L. Rev. 575,581-82 (2008).

91 *See supra* text accompanying 66.

92 For a brief discussion of the notion of the rational wrongdoer, *see supra* note 68.

93 For a discussion of the importance of enforcement probability for deterrence, *see supra* note 69.

remedies, as recommended by some commentators, would help only minimally to alleviate this situation. The problem that will contests are simply unsuitable for many cases of interference with freedom of testation is not simply a matter of procedural design that could be changed. The same holds true for the problem that constructive trusts require the establishment of certain facts that might often not be accessible, irrespective of the standard of proof that is applied.

C. Tort Actions and their Deficiencies in Terms of Deterrence

The tort cause of action for wrongful interference with expectancy of inheritance is still a comparatively recent phenomenon and is not yet recognized in all jurisdictions,[94] even though it has found recognition in the Restatement (Second) of Torts.[95] It gives a disappointed heir the opportunity to recover damages if, as a result of another person's interference with the decedent's freedom of testation, the disappointed heir was prevented from receiving an inheritance.[96] Thus, from a conceptual point of view, the marked difference between this tort action and the previously described action in restitution is as follows: whereas a constructive trust seeks to rectify an unjust enrichment of the defendant, this action in tort aims to compensate the plaintiff's loss.[97] Within the context of interference with freedom of testation, however, this conceptual difference hardly gives rise to practical consequences.[98] In most cases of interference with freedom of

94 *See* sources cited *supra* note 13.

95 *See* Restatement (Second) of Torts § 774B (1979). For an overview of the developments that have led to a recognition in the restatement and a critique of this process, see Goldberg & Sitkoff, *supra* note 11, at 357-361.

96 *See* Restatement (Second) of Torts § 774B (1979).

97 *See,e.g.,* Restatement (Third) of Restitution & Unjust Enrichment § 3 cmt. b (explaining the difference between restitution and an action for damages); Dobbs, *supra* note 73, at 369 (explaining the remedial differences between restitution and damages).

98 This is not to say that the conceptual difference between, on the one hand, a focus on the defendant's unjust enrichment and, on the other hand, a focus on the plaintiff's loss never yields practical consequences. As a result of this conceptual difference, for example, a tort action is only available against the wrongdoer himself whereas constructive trusts can also be imposed on otherwise innocent third parties as long as they are unjustly enriched. *See* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. a. (2011). This is of great relevance in cases where the interferor does not act for his own benefit, but for the benefit of a third party. *See supra* note 33. Another consequence that might sometimes be practically relevant is that a constructive trust cannot be imposed where the asset originally acquired, or any traceable product of that asset, can no longer be identified in the defendant's hands. *See id.* § 55 cmt. a; Paul F. Driscoll, *Tortious Interference with the Expectancy of a Legacy: Harmon v. Harmon*, 32 Me. L. Rev. 529, 536-37 n.38 (1980); Klein, *First, Second, and Third Circuits, supra* note 13, at 239. Within the present context, however, both consequences are only of limited significance.

testation, the disappointed heir's loss will match the interferor's gain.[99] Nevertheless, there are (in many jurisdictions) differences between an action in tort and an action for constructive trust that are sometimes supposed to be of great relevance to disappointed heirs, most notably the availability of jury trial,[100] the chance of being awarded punitive damages,[101] and the application of the ordinary civil preponderance-of-the-evidence standard[102] as opposed to the clear-and-convincing-evidence standard in probate. It is mainly for these reasons that the new tort action for wrongful interference with expectancy of inheritance is considered an attractive option by legal practitioners[103]—and why, as indicated above, some authors argue that recognizing this tort would help to close the deterrence gap left by the traditional remedies.[104] It is doubtful, however, that the new tort action has substantial advantages over the traditional remedies against interference with freedom of testation when it comes to deterring this wrongful behavior.

The primary reason that will contests and constructive trusts have turned out to be dissatisfactory from a deterrence perspective concerns the hurdles faced by disappointed heirs with regard to issues of proof.[105] In this respect, the new tort action fails to bring about significant improvement. This might sound counterintuitive given the fact that, at least in some jurisdictions, courts apply a lower standard of proof in tort actions for

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99 *See, e.g.*, Fried, *supra* note 52, at 372 (pointing out that the ultimate goal of an equitable action in restitution and an action for damages is the same and that they hardly ever diverge). A disparity between the interferor's gain and the disappointed heir's loss exists, however, in case of consequential losses and non-pecuniary losses in the form of emotional distress. In many jurisdictions, such damages are available in a tort action for interference with inheritance. *See, e.g.*, York Ins. Group of Maine v. Lambert 740 A.2d 984, 986 (Me.,1999) (holding that, even though the claim did not include allegations of emotional distress, ". . .the general allegations of the interference with an expectancy of inheritance claim carry the possibility of an award for emotional distress."); Restatement (Second) of Torts §§ 774B cmt. e, 774A(1)(c) (1979); Ledford, *supra* note 60, at 339-40. Given the limited number of cases in which such damages are awarded, this disparity does not seem to be of substantial importance in the present context.

100 *See* Goldberg & Sitkoff, *supra* note 11, at 337; Klein, *Fourth Circuit*, *supra* note 13, at 265.

101 *See* Restatement (Second) of Torts §§ 774B cmt.e, 774 cmt.a. (1979); Fassold, *supra* note 63, at 28; Klein, *Fifth and Eleventh Circuits*, *supra* note 12, at 89.

102 *See* Goldberg & Sitkoff, *supra* note 11, at 376 n. 290; Klein, *Pacific States*, *supra* note 13, at 230-31.

103 *Cf., e.g.*, Dennis D. Reaves, *Tortious Interference with an Expected Gift or Inheritance,* 47 J. Mo. B. 563, 567 (1991) (". . .a tort action for interference with an expected gift, with its more lucrative damage options, could be an appropriate and attractive remedy."); Curtis E. Shirley, *Tortious Interference with an Expectancy,* 41-Oct Res Gestae 16, 20-21 (1997) ("The tort of intentional interference with an expectancy. . .is a powerful weapon in comparison to the usual alternatives available to the probate practitioner. Plaintiff attorneys should become familiar with the tort in the circumstances where the normal probate alternatives may not provide adequate relief.").

104 *See* sources cited *supra* note 15.

105 *See supra* text accompanying notes 54, 82.

interference with inheritance than in will contests or actions in restitution.[106] As the above analysis of constructive trust demonstrates, however, sometimes it is not so much the applicable standard of proof that creates problems for disappointed heirs, but rather the scope of issues that have to be proven for the remedy to apply.[107] This also holds true with regard to the tort action for interference with an expectancy of inheritance.

The elements of the interference tort that the plaintiff must establish are commonly held to be:[108] (1) the existence of an expectancy,[109] (2) intentional interference with that expectancy, (3) independently tortious conduct (such as undue influence, fraud, or duress);[110] (4) reasonable certainty that, but for the tortious interference, the plaintiff would have received the expectancy; and (5) damages. Thus, not unlike the case of the constructive trust, it does not suffice to prove that there has been a wrongful interference with freedom of testation. From the first and fourth element of the tort, it follows that the plaintiff must also prove that, had there been no such interference, he would have received a larger inheritance. Hence, the plaintiff must establish that the decedent would have left something to the plaintiff absent the interference.[111] The difficulties associated

106 *See* sources cited *supra* note 102.

107 *See supra* text accompanying note 84.

108 *See, e.g.*, Beckwith v. Dahl, 141 Cal. Rptr. 3d 142, 151 (App. Dep't Super. Ct. 2012); In re Estate of Ellis, 236 Ill.2d 45, 52 (Ill., 2009); Morrill v. Morrill 712 A.2d 1039, 1041-42 (Me.,1998); Firestone v. Galbreath, 67 Ohio St.3d 87, 89 (Ohio, 1993); Fell v. Rambo 36 S.W.3d 837, 849 (Tenn.Ct.App., 2000); Johnson, *Pacific States*, *supra* note 13, at 214. *See also* Sonja A. Soehnel, Annotation, *Liability in Damages For Interference With Expected Inheritance or Gift*, 22 A.L.R. 4th 1229 (1983).

109 The question how the existence of an expectancy of inheritance can be established has often occupied the courts, and yet there seems to be no clear consensus on what is necessary. Some courts and commentators have suggested that the mere existence of a parent-child relationship is sufficient to establish an expectancy. *See, e.g.*, Morrill v. Morrill, 679 A.2d 519, 521 (Me.,1996); Fassold, *supra* note 63, at 27. Others have rejected the idea that an expectancy can be established merely by status. *See, e.g.*, Morrill v. Morrill, 712 A.2d 1039, 1041-42 (Me., 1998); Holt v. Holt 61 S.E.2d 448, 452 (N.C. 1950). *See also* Klein, *First, Second, and Third Circuits*, *supra* note 13, at 258-260. Where an expectancy cannot be established by reference to status, courts have differed as to what kind of evidence the plaintiff must put forward, in particular whether written evidence of the decedent's intent is necessary. *See* Fassold, *supra* note 60, at 27; Ledford, *supra* note 60, at 327-34.

110 *See also* Restatement (Second) of Torts § 774B cmt. c (1979). As Professors Goldberg and Sitkoff point out, the characterization of undue influence and duress as "independently tortious" by courts and the restatement is actually inconsistent with tort doctrine. *See* Goldberg & Siktoff, *supra* note 11, at 393.

111 *But see* Fassold, *supra* note 63, at 27 (arguing that proof of the testator's true intent is not necessary in a tort action for interference with inheritance); Shirley, *supra* note 103, at 18 (claiming that only proof of the defendant's intent is necessary in a tort action for interference with inheritance). These statements are, however, incompatible with the elements of the

with the latter issue have already been described above. Given the "worst evidence problem" and given the fact that the decedent's true intent is entirely part of his inner world, there cannot be certainty about how he would have exercised his freedom of testation absent the interference.[112]

In jurisdictions where the interference tort is recognized, courts are of course aware of the previously described difficulties. Hence, most of them require only "reasonable certainty" that, but for the interference, the disappointed heir would have realized his expectancy.[113] In many cases of interference with freedom of testation, however, this cannot solve the difficulties of proof.[114] What if, for example, the plaintiff can establish that the interferor burned the testator's will, but can only speculate about its content? What if it can be proven that the testator was prevented from executing a will, but not whom he was planning to designate as heir? In cases like these, where it is simply impossible to come to any conclusion about the testator's true intent, lowering the standard of proof does not help plaintiffs with valid causes of action. Even worse, within other contexts, such a step invites undesirable strike suits. Thus, there is no reason to consider the interference with inheritance tort as an advantageous solution to the "worst evidence problem" in comparison with will contests and constructive trusts.

The second reason that will contests and constructive trusts have proven imperfect with regard to deterrence relates to the degree of sanctioning that may result. In this respect, the tort action admittedly has advantages insofar as it allows courts to award punitive damages. Even ardent critics of the interference tort concede that, with regard to deterrence, the imposition of over-compensatory damages may make sense in cases of interference with freedom of testation.[115] The reasons for this have been outlined above. Given the difficulties of detecting interference with freedom of testation, and given the procedural problems faced by potential plaintiffs, it is quite unlikely from the point of view of an interferor that his wrongdoing will be sanctioned at all. To account for this circumstance, sanctions for the interference should correspondingly be increased in order to ensure that the wrongful deed does not yield an expected gain in the eyes of the

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interference tort as established by the courts. *See* Klein, *Fifth and Eleventh Circuits*, *supra* note 12, at 88 n. 27.

112 *See supra* text accompanying note 43.

113 *See* Restatement (Second) of Torts § 774B cmt. d (1979); Soehnel, *supra* note 108.

114 *Cf. also* Renfroe, *supra* note 52, at 398 (noting that "evidentiary difficulties of proving what the testator would have done" might cause problems for potential claimants under the interference tort).

115 *See* Goldberg & Sitkoff, *supra* note 11, at 391 ("We do not deny that deterrence and punishment objectives might point toward awarding punitive damages for wrongful interference with inheritance.")

potential interferor calculating the prospective costs and benefits of his action.[116] Nevertheless it seems that punitive damages are awarded only rarely in cases of interference with freedom of testation.[117] One reason for this is that, in most jurisdictions, the tort action for interference with inheritance may only be pursued where adequate relief in probate proceedings is not available. For determining the adequacy of relief in probate proceedings, it is irrelevant that punitive damages are available in tort.[118] As long as punitive damages are not awarded more often, potential interferors do not have reason to be significantly more concerned about the interference tort than about constructive trusts. After all, in most cases a judgment for compensatory damages will not be substantially different from a judgment for restitution of the interferor's gain by way of constructive trust. Even if court practice were to change and punitive damages were imposed more frequently—a development that might be undesirable for reasons unrelated to the deterrence issue[119]—the problem of under-deterrence of interference with freedom with testation would probably not disappear. Given the difficulties of proving the testator's true intent posthumously, it appears that the likelihood of a successful action in tort is so small in many cases of interference with freedom of testation that the legal system's imperfect enforcement could only be counterbalanced by punitive damages totally disproportionate to the individual wrongdoing—a step that courts obviously cannot take.[120]

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116 *Cf.* sources cited *supra* note 69.

117 *Cf., e.g.*, Dewitt v. Duce, 408 So.2d 216, 220 n. 11 (Fla., 1981) (". . .we can find no case authority allowing punitive damages in this type of action."); Reaves, *supra* note 103, at 565 (". . .most jurisdictions have yet to decide whether punitive damages would be allowed for tortious interference in this noncommercial area.").

118 *See, e.g.*, Jackson v. Kelly, 44 S.W.3d 328, 333 (Ark., 2001); Minton v. Sackett 671 N.E.2d 160, 162 (Ind.App., 1996); McMullin v. Borgers 761S.W.2d 718, 720 (Mo.App. E.D., 1988); Garruto v. Cannici, 936 A.2d 1015, 2022 n. 7 (N.J.Super.A.D., 2007); Wilson v. Fritschy, 55 P.3d 997, 1005 (N.M.App., 2002); Roll v. Edwards, 805 N.E.2d 162, 169 (Ohio App. 4 Dist., 2004). With regard to questions other than punitive damages, courts seem much more willing to conclude that probate offers inadequate relief and to allow for actions in tort. For a critical account of the application of the "adequacy-of-probate rule" by courts, see Goldberg & Sitkoff, *supra* note 11, at 377-79.

119 *Cf. id.*at 58 (objecting to the idea of recognizing the interference tort for the purpose of making punitive damages available on the ground that "tort law is not criminal law on par with criminal or regulatory law").

120 *Cf.* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (". . .courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.")

D. Why Criminal Law Does not Solve the Problem of Under-Deterrence

Any analysis of whether a certain type of unsocial behavior is effectively deterred would be incomplete without also devoting some attention to criminal law. In regards to interference with freedom of testation, criminal law does not close the deterrence gap left by the imperfectness of civil remedies. This is so for reasons related both to substantive criminal law and to criminal law enforcement. As regards the first aspect, deterrence deficits arise from the fact that not all forms of interference with freedom of testation can actually be prosecuted under criminal law. Interference with freedom of testation as such does not constitute a crime; and although some forms of misbehavior that amount to interference with freedom of testation do in fact constitute criminal offenses (e.g. the forgery of a will and the subsequent offering of the forged will for probate),[121] other particularly relevant forms of interference, such as undue influence or duress, do not necessarily constitute crimes. Second, even where an act of interference with freedom of testation constitutes a criminal offense, the probability of enforcement will in most cases not be high enough to exert sufficient deterrence. Not only are the resources for criminal law enforcement limited; public authorities will also often lack the information to prosecute interferences, given that acts of interference with freedom of testation typically take place within the context of private relationships.[122] Since disappointed heirs will

121 *See, e.g.*, Cal. Penal Code § 470(c) (West 2006) ("Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will. . . is guilty of forgery."); *id.* § 115(a) ("Every person who knowingly procures or offers any. . .forged instrument to be filed. . .in any public office within this state, which instrument, if genuine, might be filed. . .under any law of this state or of the United States, is guilty of a felony."); *id.* § 132 ("Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or ante-dated, is guilty of felony."); *id.*. § 134 ("Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony."). *Cf. also* People v. Horowitz, 161 P.2d 833 (Cal.App. 2 Dist., 1945) (upholding a conviction of four distinct felonies—forgery of a will, Cal. Penal Code § 470; causing a forged will to be filed, Cal. Penal Code § 115; offering a forged will in evidence, Cal. Penal Code §132; preparing a false and antedated will, Cal. Penal Code § 134—in a case where the accused had prepared the contents of a purported will on a blank piece of paper containing only the testatrix's signature, subsequently offered the purported will for probate, and presented it as evidence in defending a will contest).

122 The informational advantage of private actors over public actors is often mentioned as one of the major arguments in favor of law enforcement via private parties. For such an argument in a different context, see Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 4-5 (2002) ("No matter how talented or dedicated our public law enforcement personnel may be nor how many resources our society commits to regulatory efforts, a public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic

usually not receive a reward in return for reporting information about potential interferences to the authorities, their incentive to do so will often be imperfect. In addition, interferors will also benefit from the fact that the standard of evidence required for a criminal conviction ("beyond reasonable doubt") is even higher than the standard applied in many probate proceedings ("clear and convincing evidence"):[123] This decreases the probability of a criminal sanction for interference with freedom of testation even further. Hence, the institutions of criminal law will hardly deter potential wrongdoers from interfering with a testator's freedom of testation.

III. The New Proposal for a Solution to the Under-Deterrence Problem

The previous Part demonstrated that the existing remedies against interference with freedom of testation—will contests, constructive trusts, and tort law—are unsatisfactory when it comes to deterring potential wrongdoers. In order to diminish this problem of under-deterrence, this section proposes a statutory solution that is modeled after the so-called slayer statutes, which deal with the killing of a decedent by a prospective heir. To that end, subsection A first gives a brief overview of the historic origin and function of these slayer statutes, and demonstrates how they could serve as a blueprint for a statutory remedy against inference with freedom of testation. Subsection B then demonstrates how such a solution would help to remedy the problem of under-deterrence. Following that, subsection C presents additional arguments in favor of the proposed solution before trying to anticipate, in subsection D, the possible criticism and defending the proposed solution against it.

A. Slayer Statutes as a Model for Sanctioning Interference with Freedom of Testation

Slayer statutes are the codification of an older, but originally not universally recognized[124] common law maxim, the slayer rule, according to which a person that

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wrongdoing: inside information.")

123 See 23 C.J.S. Criminal Law § 1482 (2013).

124 *See, e.g.*, Owens v. Owens 6 S.E. 794 (N.C. 1888) (refusing to bar a wife who had been an accessory to the murder of her husband from her right of dower). For an account of the reaction of the North Carolina legislature, see Linda J. Maki & Alan M. Kaplan, *Elmer's Case Revisited: The Problem of The Murdering Heir***,** 41 Ohio St. L.J. 905, 930-31 (1980). For further references to courts unwilling to apply the slayer rule, see John W. Wade, *Acquisition of Property by Willfully Killing Another – A Statutory Solution*, 49 Harv L. Rev. 715, 717 n. 10 (1936). For a detailed account of the history of slayer rules in the common law, see Alison Reppy, *The Slayer's Bounty – History of Problem in Anglo-American Low*, 19 N.Y.U. L.Q. Rev. 229 (1942); Carla Spivack, *Killers Shouldn't Inherit From Their Victims. . .Or Should They?* 6-16 (Sep. 7, 2012)

wrongfully and intentionally kills another person shall be denied any right to benefit from the wrong.[125] The 1889 New York Court of Appeals decision, *Riggs v. Palmer*,[126] is regarded as the most famous articulation of this principle.[127] In that case, the defendant, a sixteen-year-old with the first name Elmer, poisoned his grandfather after the latter had voiced the intention of revoking some provisions in his will that were favorable to the defendant.[128] Two of the decedent's children then brought an action for the purpose of having the will provisions in the defendant's favor annulled.[129] Even the majority on the bench openly acknowledged that, if literally construed, the New York statutes regulating the making, proof, and effect of wills did not provide for such an annulment.[130] Nevertheless the court ruled that the provisions in Elmer's favor should be declared ineffective because "public policy" dictated that "no one [should] be permitted to profit from his own fraud, take advantage of his own wrong, found any claim upon his own iniquity, or acquire property by his own crime".[131]

Over course of the twentieth century, *Riggs v. Palmer* (or "Elmer's case", as it is sometimes referred to) gained some notoriety in jurisprudential debates about the legally binding character of abstract principles.[132] With regard to the "murdering heir problem", however, this debate became less practically significant over time because many state legislatures enacted slayer statutes.[133] By codifying the slayer rule, wind was taken out of

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(unpublished manuscript), *available at* http://works.bepress.com/carla_spivack/26/.

125 *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 cmt. a. and rep. note 1 (2003).

126 22 N.E. 188 (N.Y. 1889) (Gray, J. dissenting).

127 *Cf., e.g,* Robert F. Hennessy, *Property – The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute"*, 31 W. New Eng. L. Rev. 159, 166 (2009); Tara L. Pehush, *Maryland is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. Balt. L. Rev. 271, 276 (2005). *But see also* Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire* 76 UMKC L. Rev. 101, 107 (2007) (pointing out that *Riggs v. Palmer* was not the first case to articulate the slayer rule in a modern fashion).

128 22 N.E. 188, 189 (N.Y. 1889).

129 22 N.E. 188, 191 (N.Y. 1889).

130 22 N.E. 188, 189 (N.Y. 1889). *See also* dissenting opinion of Gray, J., at 191.

131 22 N.E. 188, 190 (N.Y. 1889).

132 *Cf., e.g.,* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. Rev. 14, 23-24, 29-31 (1967) (using *Riggs* as an example for the idealist thesis of the binding character of principles). For replies to Dworkin, see Frederick Schauer, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909, 1935-40 (2004) (criticizing Dworkin's use of *Riggs* from a formalist perspective because of its "potential unrepresentativeness"); Charles Silver, *Elmer's Case: A Legal Positivist Replies to Dworkin*, 6 Law and Philosophy, 381-99 (1987).

133 *Cf., e.g.,* Sneddon, supra note 127, at 109. *See also* Anne-Marie E. Rhodes, *Consequences of Heir's Misconduct: Moving From Rules to Discretion*, 33 Ohio N.U.L. Rev. 975, 979 n. 20 (2007) (reporting that as of 2007, 48 states have slayer statutes); Spivack, *supra* note 124, at 10

the sails of those complaining after *Riggs* about unwarranted judicial legislation.[134] There is considerable variation among the states concerning the language and content of these codifications, particularly in respect to the types of killings and the types of benefits covered by the bar from inheritance.[135] Concerning the latter question, there is significant consensus that a slayer should be denied both statutory benefits with regard to the decedent's estate, such as an intestacy share and, if applicable, any benefits under the decedent's donative documents, for example a will.[136]

A rule with the previously described content is also included in both the Restatements of Property and of Restitution.[137] In each codification, the slayer rule immediately follows or precedes the rules on wrongful interference with freedom of testation in the form of fraud, duress, and undue influence.[138] This close proximity is by no means coincidental. After all, homicide motivated by the prospect of inheritance can be classified as another form of interference with freedom of testation,[139] given that it deprives the killed person of the chance of changing his existing estate plan.[140] Against this background, the idea

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(reporting that, as of 2012, 44 states have slayer statutes, whereas the remaining states use common-law slayer rules).

134 Such criticism was already raised by Justice Gray in his dissenting opinion in *Riggs*. *Cf.* 22 N.E. 188, 191-93. For an overview of the debate at that time, see also Hennessy, *supra* note 127, at 169-70; Wade, *supra* note 124, at 717-18.

135 *See, e.g.*, Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 Iowa L. Rev. 489, 496-99, 507-08 (1986); *Special Project-The Collateral Consequences of a Criminal Conviction: Civil Disabilities*, 23 Vand. L. Rev. 929, 1089-1094 (1970).

136 *See, e.g.*, Uniform Probate Code § 2-803 (3) (b), (c) (1969) (amended 2010); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4, Reporter's Note 1 (2003) (listing the slayer statutes that are based on the UPC provisions); Spivack, *supra* note 124, at 10-11 (describing the typical content of a slayer statute).

137 Restatement (Third) of Restitution & Unjust Enrichment § 45 (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 (2003).

138 *See* Restatement (Third) of Restitution & Unjust Enrichment Part II ("Liability In Restitution"), Chapter 5 ("Restitution For Wrongs"), Topic 2 ("Diversion Of Property Rights At Death") (2011) (comprising only § 45 ("Homicide – The Slayer Rule") and § 46 ("Wrongful Interference With Donative Transfer")); Restatement (Third) of Prop.: Wills & Other Donative Transfers Division III ("Protective Doctrines"), Chapter 8 ("Invalidity Due To The Donor's Incapacity Or Another's Wrongdoing"), Part B ("Protection Against Wrongdoing) (2003) (comprising only § 8.3 ("Undue Influence, Duress, Or Fraud") and § 8.4 ("Homicide – The Slayer Rule")).

139 This would make the killing of the decedent the seventh case in the above-outlined list of standard cases of interference with freedom of testation. *See supra* Part I.B. *Cf. also* Zimmermann, *supra* note 32, at 299 (having started with a list of five standard cases of interference with freedom of testation, Zimmermann includes the killing of the decedent as the sixth).

140 *See* Fellows, *supra* note 135, at 493 (noting that "slayers motivated by greed. . .potentially interrupt the normal disposition of property", because, inter alia, "the killings may deny the

almost suggests itself to use the forfeiture principle of the slayer statutes as a means for addressing interference with freedom of testation in general. Surprisingly, however, such a proposal has not yet been voiced in the on-going debate about how to remedy interference with freedom of testation. The following section shall sketch out what form such a disinheritance statute for interference with freedom of testation might assume.

B. Possible Content and Application of a Disinheritance Statute for Interference with Freedom of Testation

A legislator contemplating the enactment of a statutory bar from inheritance in order to counteract interference with freedom of testation would primarily have to answer the following questions: (i) What kind of wrongful behavior should lead to forfeiture?; (ii) What kind of benefits should be forfeited?; (iii) Who should take the forfeited property instead of the wrongdoer?; (iv) How and by whom should the conditions for the forfeiture be proven? Given that all of these questions may give rise to complex considerations, this Article does not put forward an elaborate legislative proposal. For the purpose of enhancing the debate on remedies against interference with freedom of testation, it seems sufficient to give a general account of the possible content and application of a disinheritance statute for interference with freedom of testation.

In regards to the first question for a legislator contemplating such a disinheritance statute—what form of behavior should lead to forfeiture?—there seems to be no reason to draw distinctions between the different types of interference with freedom of testation. Hence, fraud, duress, undue influence, will forgery, and will suppression should all trigger the bar from inheritance. For the second question—the scope of forfeiture—slayer statutes suggest that a wrongdoer should in any case be barred from both testate and intestate succession. It seems that this would also be an acceptable starting point for a rule on interference with freedom of testation. In addition, a legislator has to consider

victims the opportunity to change their existing estate plans"). *Cf. also* Restatement (Third) of Restitution & Unjust Enrichment § 46 cmt. a. ("In a few cases outside these categories, comparable misconduct produces comparable results. Interference by homicide, while literally within the terms of the present section, receives separate treatment in § 45.").

whether other statutory benefits arising at the decedent's death[141] and benefits conferred by donative instruments other than wills[142] should also be included in a forfeiture rule.

With regard to the third question—who should take the assets that would otherwise have gone to the interferor?—slayer statutes also offer a workable solution. Most of them distribute property that the wrongdoer is barred from taking as if the latter had predeceased the decedent or disclaimed his interest.[143] Enacting such a specific rule with regard to the distribution of the victim's estate seems advantageous over relying primarily on principles of equity,[144] given that only a clear-cut rule can be effectively applied within the probate proceeding. Sometimes, efficiency and legal certainty might of course come at the price of individual justice. If the estate is distributed as if the interferor predeceased the decedent, persons might benefit that the decedent did not intend to designate as beneficiaries. In such cases, however, equity could still be realized in a subsequent action for restitution.[145]

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141 Such statutory benefits can, inter alia, arise in form of an elective share, omitted spouse's or child's share, homestead allowance, exempt property, and family allowance. In the case of most slayer statutes, the wrongdoer is denied the latter benefits as well, in addition to the statutory benefits following from intestacy rules. *See, e.g.*, Uniform Probate Code § 2-803 (b) (1969) (amended 2010); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 cmt. j. (2003).

142 Such instruments include revocable trusts, retirement assets and life insurance policies. Most slayer statutes cover them as well. *See, e.g.*, Uniform Probate Code §§ 2-803 (c), 1-201 (18) (1969) (amended 2010); Restatement (Third) of Restitution & Unjust Enrichment § 45 cmts. e, f (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 cmt. k. (2003). Whether a bar from inheritance for interference with freedom of testation in general should be given an equally broad scope depends, again, on whether one should focus exclusively on deterrence or also on other aspects, such as testator's intent.

143 *See, e.g.*, Uniform Probate Code §§ 2-803 (b), (e), 2-1106 (b)(3)(B) (1969) (amended 2010); Restatement (Third) of Restitution & Unjust Enrichment § 45 reporter's note d (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 cmt. j, k. It is subject to debate, however, whether the approach that treats the wrongdoer as predeceased should also be pursued in cases where it would allow the wrongdoer's children to claim parts of the estate by means of representation. Some jurisdictions have rejected this consequence and limited the eligibility of the wrongdoer's relatives to claim interests in the estate as a result of the wrongdoing. *Cf., e.g., id.* § 45 cmt. d; 26.B. C.J.S. Descent and Distribution § 66 (2012); Sneddon, *supra* note 127, at 113-121. The latter approach might also be preferable in case of a bar from inheritance for interference with freedom of testation in general given that, otherwise, interferors would often profit indirectly from their wrongdoing.

144 The latter approach is taken by the Restatement of Restitution. *See* Restatement (Third) of Restitution & Unjust Enrichment § 45(3) (2011) ("Property the slayer is barred from taking is distributed as directed by statute or (in the absence of statutory direction) to the person with the paramount equitable claim.")

145 The need for an availability of such an equitable action can be demonstrated by the following

Finally, for the actual application of such a disinheritance rule, it follows from the foregoing that anyone who would benefit if the estate were distributed as if the interferor had disclaimed his interest should be able to invoke the interferor's bar from inheritance in a probate proceeding. Not unlike a slayer statute or other measures against interference with freedom of testation, it should be on the party invoking the remedy to prove the requirements of its application. For the bar from inheritance to apply, the party appealing to it should have to establish that the purported heir has interfered with the decedent's freedom of testation. In regards to the standard of proof, the internal coherence of succession law requires the application of the same heightened standard of proof as in the case of will contests or constructive trusts (i.e. clear and convincing evidence) where the effect of the rule would be to overturn a formal testamentary provision.[146] From a perspective of deterrence, this might be imperfect. However, as will be demonstrated in the following section, the major advantage for deterrence of a disinheritance statute of the previously described kind over existing remedies against interference with freedom of testation will in any event relate not to the applicable standard of proof, but rather to the scope of issues that have to be established.

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example: Father *A* plans to disinherit his sons *B* and *C* and intends to designate the unrelated *D* as beneficiary of his estate. If *B* wrongfully prevented *A* from doing so, *B* would be disqualified from inheritance under the proposed disinheritance statute. Under intestate law, *A*'s estate would consequently be distributed as if *B* disclaimed his interest. Thus the estate would go to *C* even though *A* was planning to disinherit him as well: In effect, *C* would thus gain a windfall profit as a result of *B's* wrongful interference. In order to allow for the realization of *A*'s true intent, *D* should consequently be able to bring an action for restitution against *C* subsequent to the distribution of the estate. Such an action would of course face the same procedural and evidentiary hurdles as an action for restitution against *B.* After all, the very idea behind the proposed disinheritance statute is that *D* will often not be able to prove that *A* was intending to designate him as beneficiary—and that thus the existence of the disinheritance statute is needed to ensure that *B (*faces a sanction for his wrongdoing. There is no reason, however, why *B*'s bar from inheritance should preclude a subsequent equitable action by *D* against *C*.

146 Applying a more plaintiff-friendly standard of proof would in certain circumstances allow disappointed heirs to circumvent the rules of the traditional remedies against interference with freedom of testation. Such possibilities of circumvention already exist in cases involving the interference tort and are heavily criticized. *See* Goldberg & Sitkoff, *supra* note 11, at 365.

C. How a Disinheritance Statute Would Help to Alleviate the Under-Deterrence Problem

1. Advantages of a Disinheritance Statute over Existing Remedies

The analysis of existing remedies against interference with freedom of testation identified two partly related reasons for the currently existing problem of under-deterrence of this kind of wrongful behavior within American law: the burden of proof for claimants in tort law and equity, and the inadequate sanctioning that the existing remedies impose.[147] Both of these problems would at least partly be alleviated by a disinheritance statute of the kind that has been outlined in the previous Part.

First, the fundamental advantage of a disinheritance statute over constructive trusts and tort actions concerns the scope of facts that have to be proven. For the disinheritance statute to apply, it only has to be established that there was an interference with the decedent's autonomy.[148] What need not be answered is the question of how the decedent was planning to exercise his autonomy, i.e. whom he would have designated as heir in absence of the wrongful act. It is easy to imagine cases in which this could make a difference. A plaintiff might, for example, be able to establish that the wrongdoer burned the decedent's holographic will (case four), but not be able to prove its content. He might be able to demonstrate that the decedent was threatened into executing a certain will (case one), but not be able to prove which provisions the testator would have made in the absence of the wrongful act. Similarly, he might be in a position to show that the testator was prevented from executing a will (case five), but not be able to prove what kind of disposition the testator intended to make. The reason for this difficulty of proof with regard to the testator's intent is straightforward and has been described above as the "worst evidence problem."[149] Whereas the act of interference is, at least to some extent, a "fact of the outer world," the testator's intention is not. The very effect of the interference is to prevent the testator's true intent from materializing in the outer world. Thus, there will often be no sources for establishing the testator's intent other than the testator himself; he, however, will no longer be present at the time of the court proceeding. Therefore, it seems almost an obvious solution that proof of the interference act be the sole requirement for a remedy to apply.

When it comes to deterrence, the second advantage of a disinheritance statute over the existing remedies against interference with freedom of testation concerns the level of sanctioning. As demonstrated, one problem of constructive trusts and tort actions with

147 *See supra* Part II.B., C.
148 *See supra* text following note 145.
149 *See supra* text accompanying note 46.

merely compensatory damages is that the wrongdoer has barely anything to lose—if he is caught and a successful action is brought, he is at most stripped of the fruits of his wrongdoing. A disinheritance statute works differently. It is not only the wrongdoer's gains that are taken away, but also any entitlements under intestate succession or other parts of the will that were (potentially) not affected by the interference. To illustrate how this can in fact make a substantial difference, let us imagine the following fact pattern: The wealthy and widowed *A* has two sons—*B* and *C*—that would each be entitled to fifty percent of her estate under the local intestacy statutes. *A* considers this a fair distribution of her property and thus decides not to execute a will. *B*, however, is unhappy with the mother's decision and considers threatening her into executing a will under which he, *B*, would be entitled to the whole of *A*'s estate.[150] Under a legal system, where only will contests, constructive trusts, and tort actions (with compensatory damages) are available to remedy interference of freedom of testation, the avaricious *B* has a strong incentive to move ahead with his plan. If his threat were discovered and a successful action brought, he would still be allowed to keep half of his mother's estate, i.e. the portion he would have received under the intestacy laws anyway. In contrast, under a legal system with a disinheritance statute, *B* would risk losing his fifty percent intestacy share with this plan. Interfering with *A*'s freedom of testation would thus entail significant expected costs that, ideally, would make the whole enterprise unprofitable.[151]

2. Remaining Problems—and Why a Bar from Inheritance is still a Good Solution

As demonstrated, the enactment of a disinheritance statute would substantially deter interference with freedom of testation. However, a statute of the described kind would by no means completely solve the problem of under-deterrence of interference with freedom of testation. In fact, for two reasons, it is likely that the under-deterrence problem would remain substantial, even after the adoption of such a solution.

First, even though a disinheritance statute causes fewer problems of proof than the traditional remedies, the conditions for its application are by no means easy to prove. Interference actions such as will suppression, forgery, undue influence, fraud, and harassment are typically not conducted openly. Therefore proving the "outer fact" of the interference action can often be almost as difficult as the "inner fact" of the true intent of

150 For similar fact patterns showing the deficiencies of will contests, see Klein, *Fourth Circuit*, *supra* note 13, at 266 (using an example with four siblings); Klein, *First, Second, and Third Circuits*, *supra* note 13, at 247.

151 It is important to note, however, that in many cases one will not know how *A* would have crafted his estate plan if *B* had not interfered with his freedom of testation. After all, it is not uncommon that testators change their estate plans at a late stage of their lives. For a discussion of this aspect, *see infra* Part III.C.2.

the testator. This is particularly true in the case of undue influence where, as two commentators put it, courts are facing the "profound difficulty of reconstructing the subtle dynamics of familial and other such relationships."[152] These difficulties will in turn decrease the likelihood of the disinheritance rule being applied and consequently also diminish the risks of an interference action.

Second, and more importantly, with regard to potential interferors who would not receive anything from the decedent's estate absent their interference action, a disinheritance statute is an empty threat. There are simply no benefits under succession law from which they could be barred. If, for example, returning to the previous example, *A* had already executed a will leaving his complete estate to *C*, *B* would again have nothing to lose from interfering with *A*'s autonomy because absent the interference he would end up empty-handed anyway. It seems worthy to point out that this deficit in the deterrence effect of a disinheritance statute would be significantly smaller if persons closely related to the descendant were generally entitled to a fixed portion of his estate even against the deceased's wish. At least for them,[153] there would always be benefits that could be forfeited—and thus "something to lose" from interfering with freedom of testation.[154] American law contains such provisions on "forced heirship" only to a comparatively[155] limited extent. With the exception of Lousiana,[156] all American states allow testators to disinherit their children;[157] protection against intentional disinheritance is only afforded to surviving spouses.[158] Ironically—and with only slight exaggeration—by restricting the

152 Goldberg & Sitkoff, *supra* note 11, at 344.

153 For interferors that are not closely related to the decedent, the existence of such provisions would of course not make any difference. Regrettably, there are no empirical studies that investigate whether interference with freedom of testation is typically committed by members of the decedent's family or by outsiders.

154 This would of course require including such "compulsory portions" in the scope of a disinheritance statute. For a brief discussion of this possibility, see *supra* note 141.

155 For an overview of the law on compulsory heirship in the different European legal systems, see, e.g., Inge Kroppenberg, *Compulsory Portion*, *in* 1 The Max Planck Encyclopedia of European Private Law 337-41 (Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann eds., 2012). *Cf. also* Goldberg & Sitkoff, *supra* note 11, at 342 (noting that the absence of compulsory rules regarding a right of the decedent's next-of-kin to inherit makes American law unique among modern legal systems); Ronald J. Scalise Jr., *Freedom of Testation in the United States*, *in* Freedom of Testation/Testierfreiheit 143, 144 (Reinhard Zimmermann ed., 2012) (contrasting the American rejection of the concept of forced heirship with the approaches in France and Germany).

156 Even in Lousiana, however, the protection of children against intentional disinheritance has been limited in recent years. See Vincent D. Rogeau, No Bonds But Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law, 1 Civ. L. Comment, no. 3, winter 2008, at 2.

157 See Dukeminier, Sitkoff & Lindgren, supra note 30, at 519.

158 See id. at 469-519.

testator's freedom less than other jurisdictions, American law makes it therefore harder to deter interference with it.[159]

It is important to note, however, that the two qualifications with respect to the effectiveness of a disinheritance statute do not, strictly speaking, constitute arguments *against* its enactment. In particular, they do not contradict the conclusion that, both with regard to issues of proof and the measure of sanctioning, a disinheritance statute has substantial advantages over the existing remedies against interference with freedom of testation. If enacted in addition to these existing remedies, and not as a substitute, a disinheritance statute will in any case decrease the problem of under-deterrence of interference with freedom of testation—even if it will most likely not fully solve it. In this context it is also noteworthy that other solutions proposed in favor of protecting freedom of testation more effectively would require much more radical and costly changes to American law than the introduction of the proposed disinheritance statute. In particular, the sometimes advocated[160] introduction of an "authenticated will," as it exists in civil-law countries,[161] where a notary determines that the testator has capacity and is free of the controlling influences of others, would constitute a significantly larger challenge in terms of institutional design.

D. Additional Arguments in Favor of a Disinheritance Statute

This section will now present three additional arguments, beyond deterrence, in favor of the suggested solution that can be found outside the instrumentalist logic applied so far.

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159 The absence of forced estate entitlements in American law is sometimes also seen as a reason for the fact that capacity litigation and allegations of undue influence are more frequent in the United States than in Europe. *See* John H. Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63, 65-66 (1978) (pointing out that the typical plaintiff in testamentary capacity litigation is the disinherited child, a figure unknown to European law).

160 *Cf., e.g.*, Leopold & Beyer, *supra* note 46, at 150-52; Nicole M. Reina, *Protecting Testamentary Freedom in the United States by Introducing the Concept of the French Notaire*, 22 N.Y.L. Sch. J. Int'l & Comp. L. 427 (2003). For an account of the differences between civil law notaries and U.S. notaries public, see also Peter L. Murray & Rolf Stürner, The Civil Law Notary – Neutral Lawyer for the Situation 114-19 (2010); Langbein, *supra* note 159, at 65-66; Scalise, *supra* note 30, at 95-97.

161 *See* Kenneth G C Reid/Marius J de Waal/Reinhard Zimmermann, *Testamentary Formalities in Historical and Comparative Perspective, in* 1 Comparative Succession Law– Testamentary Formalities 432, 448-49 (Kenneth G.C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., 2011).

1. Wrongdoer Should Not Benefit From His Wrong

The principle that was so powerfully articulated by the court in *Riggs*—a wrongdoer should not benefit from his wrong—is one of the most frequently cited justifications for slayer statutes.[162] This principle can also be used to justify a bar from inheritance in cases of interference with freedom of testation wherever it is impossible to reconstruct with reasonable certainty how the testator would have devised his estate plan absent the wrongful interference.[163] After what has been said above about the "worst evidence problem," it is clear that this is not an insignificant group of cases.

To illustrate, consider a straightforward fact pattern, similar to the one used earlier:[164] Widower *A* has two sons—*B* and *C*—that would each be entitled to fifty percent of his estate under the applicable intestacy statutes. *B* threatens *A* into executing a will under which he, *B*, would be entitled to the whole of *A*'s estate. *B's* wrongful action is discovered. In contrast to the earlier example, however, this time it cannot be reconstructed how *A* would have distributed his estate if *B* had not threatened him. He might not have executed a will at all; he might have left everything to *C*, or to *B* (even though that is unlikely), or devised a totally different plan. If a will contest were brought under such circumstances, *A*'s will would be denied probate and intestacy rules would apply. Consequently, *B* could still claim half of his father's estate. Despite the will contest, *B* would thus profit from his wrongdoing in all those cases where *A* would have left him less than his intestacy share if *B* had not threatened him.

Starting from the premise that an interferor should not profit from his wrongful interference with the testator's freedom of testation leads to the conclusion that the interferor should be barred from inheritance in cases like the one just presented where the testator's preferred estate plan is unknown. Of course, there is no way to be sure that *A* was actually planning to disinherit *B* completely. His plan might as well have been to leave *B* half of his estate, or even more. Thus, one might argue that the principle that no one should profit from his wrong cannot justify a bar from inheritance in such cases,

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162 *Cf.* Restatement (Third) of Restitution & Unjust Enrichment § 45 cmt. a (2011) ("The law of unjust enrichment forecloses the possibility that a person might benefit from committing a felonious and intentional homicide"); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.4 cmt. a. (2003) ("The principle of this section is that a person who, without legal excuse or justification, is responsible for the felonious and intentional killing of the decedent . . .is denied any right to benefit from the wrong."); Fellows, *supra* note 135, at 490.

163 To avoid confusion: this is a different question from the one discussed in the previous paragraph where it was asked how the testator would have devised his estate if he had had the chance to do so in full autonomy and with knowledge of the wrongful act of the interferor. In this paragraph, by contrast, the question is what the testator would have done if the wrongful act had never taken place.

164 *See supra* text accompanying note 150.

given that it is impossible to know that such a disinheritance would merely strip the interferor of the profits of his wrongdoing—instead of also taking something away from him that he would have received even absent his wrongdoing. Such an argument, however, would ignore the fact that, in a case like this, it was the interferor himself that has created the situation where we cannot reconstruct the testator's true intent. If the true intent of a testator cannot be established because of interference with freedom of testation, it is fair that the resulting uncertainty be resolved at expense of the wrongdoer.[165] Otherwise the wrongdoer would profit from a situation that he himself wrongfully created. Thus, it seems reasonable that the law should draw the adverse inference that the testator would not have left anything to the interferor had he been able to exercise his freedom of testation without interference.

2. The General Trend towards a Behavior-Based Inheritance Regime and the Theory of the "Expressive Function" of Law

The last few years have witnessed an increasing number of U.S. legal scholars advocating for inheritance rules that take the behavior of presumptive heirs towards the decedent into account. Thus, bars to inheritance on basis of the following types of misconduct have been proposed: domestic violence between spouses,[166] physical and sexual abuse of minor children by their parents,[167] abandonment of minor children by their parents,[168] failure to support a minor child by his father,[169] and domestic elder abuse.[170] Authors of such

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165 The principle that wrongfully created uncertainty should be at the expense of the wrongdoer seems to be well accepted in different areas of law. *Cf., e.g.,* SEC v. First City Fin. Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989) ("...the line between restitution and penalty is unfortunately blurred, and the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty…".); 31A C.J.S. Evidence § 251 (2012) (explaining under what circumstances courts draw adverse inferences from the wrongful destruction of evidence).

166 *See* Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 Law & Ineq. 401, 412 (1995); Thomas H. Shepherd, *It's the 21st Century . . . Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 St. Louis Univ. Pub. L. Rev. 449, 464-66 (2001); Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 Or. L. Rev. 247, 248-49 (2011).

167 *See* Richard Lewis Brown, *Undeserving Heirs? The Case of thëTerminated" Parent* , 40 U. Rich. L. Rev. 547, 586-88 (2006). It should be noted, however, that the primary focus of Brown's article is to argue for a move from mandatory to discretionary disinheritance for terminated parents.

168 *See* Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We are, Where We Need to Go*, 27 Ind. L. Rev. 517, 537 (1994).

169 *See* Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. Miami L. Rev. 257, 291-97 (1994).

170 *See* Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser's Right to Inherit*, 23

proposals often refer to the fact that some state jurisdictions and model codes already have certain fault-based bars to inheritance, sometimes exactly the rules that the authors suggest for their own jurisdictions. Examples of existing behavior-based inheritance bars include statutes barring adulterous spouses from inheriting,[171] statutes barring persons liable for physical abuse of an elder or dependent decedent from inheriting,[172] statutes barring parents who abandoned their child from inheriting,[173] statutes barring from inheritance on basis of spousal abandonment,[174] and bars resulting from a termination of parental rights.[175]

In support of these disinheritance statutes, three rationales are particularly often brought forward: (i) deterrence,[176] (ii) realization of the testator's intent,[177] and (iii) the importance of law expressing social values by condemning certain behavior.[178] The relevance of the first of these arguments—deterrence—with regard to the suggested solution to the interference with freedom of testation problem has already been addressed in detail.[179]

Quinnipiac Prob. L. J. 214, 234-37 (2010).

171 As of 2011, there were five states providing for an inheritance bar on the basis of adultery. *See* Spivack, *supra* note 166, at 272. For a similar overview as of 2007, see Rhodes, *supra* note 133, at 978-79.

172 *See, e.g.*, Cal. Prob. Code § 259 (West 2012). *Cf. also* Spivack, *supra* note 166, at 274 (reporting that elder abuse bars inheritance in four states).

173 *See, e.g.*, Uniform Probate Code § 2-214 (b) (1969, rev. 2008) (barring a parent from inheriting from a minor child if there is evidence that immediately before the child's death the parental rights could have been terminated on the basis of, inter alia, nonsupport, abandonment, abuse, or neglect). *See also* Rhodes, *supra* note 133, at 982-85; Spivack, *supra* note 166, at 273 n. 119.

174 For an overview of existing spousal abandonment statutes as of 2011, see Spivack, *supra* note 166, at 273 n. 118.

175 *See, e.g.*,Uniform Probate Code § 2-214 (a) (1969, rev. 2008) (barring a parent from inheriting from a child if parental rights were terminated). *But see* Brown, *supra* note 167, at 552-53 (pointing out that not all of the statutes dealing with the termination of parental rights explicitly extinguish the right of the terminated parent to inherit and some even explicitly preserve the right). For a critique of a mandatory bar on inheritance in case of a termination of parental rights, see *id.* at 569-81 and Spivack, *supra* note 166, at 270-71.

176 *See., e.g.*, Dumond, *supra* note 170, at 214; Monopoli, *supra* note 169, at 281-82; Preble, *supra* note 166, at 412. *But see* Brown, *supra* note 167, at 560 (calling the notion that the threat of losing inheritance rights will deter parents from abusing their child "fanciful"); Spivack, *supra* note 166, at 259 (stating that it is unlikely that a bar on intestate succession would deter many abusers).

177 *See, e.g.*, Shepherd, *supra* note 166; Spivack, *supra* note 166, at 270. *But see* Monopoli, *supra* note 169, at 282 (doubting, on basis of child psychology, whether minor children would want their parents to be barred from inheritance on the basis of abuse); Brown, *supra* note 167, at 561 (following Monopoli's argument with regard to presumptive child intent).

178. *See, e.g.*, Brown, *supra* note 167, at 587; Monopoli, *supra* note 169, at 282; Preble, *supra* note 166, at 412; Shepherd, *supra* note 166, at 475; Spivack, *supra* note 166, at 259-61.

179 *See supra* parts III.C.1. and D.1.

The value of the second argument—the testator's intent—will be addressed separately.[180] The third argument—that law should speak out against unacceptable behavior—also provides some support for the suggested disinheritance statute. After all, interference with freedom of testation is both disapproved of in society and harmful. Thus, it is fair to conclude that succession law should clearly condemn such behavior.

The value of the theory of law's "expressive function"[181] is disputed. With regard to inheritance rules in particular, it has been argued, that using law to make statements about the moral value of certain behavior is neither legitimate nor efficacious.[182] Against this background it might at least seem debatable whether succession law should really take all sorts of misbehavior towards the decedent into account and whether the trend towards a behavior-based inheritance regime is in fact a good development.

Irrespective, however, of what stance one should take in the debate over a behavior-based inheritance regime, there are valid arguments on either side for including a bar to inheritance on the basis of interference with freedom of testation. If, on the one hand, one believes that succession law *should* take into account misbehavior towards the decedent, then it is a natural step to include interference with the decedent's freedom in the list of unacceptable behavior that acts as a bar to inheritance. If, on the other hand, one is skeptical whether questions of domestic abuse, child neglect, adultery, etc. should be addressed via succession law, there is still reason to enact a disinheritance statute for interference with freedom of testation because, in contrast to the aforementioned behavior, interference with freedom of testation is immediately directed at the disposition of property upon death. Addressing it within the frame of succession law thus seems a conceptually[183] sound solution.

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180 *See infra* Part III.D.2.

181 This theory is sometimes mentioned in support of a more behavior-based inheritance regime. *Cf.* Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC J. 143, 177 (2010); Spivack, *supra* note 166, at 259-61.For an overview, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

182 *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 Fordham L. Rev. 1031, 1054-58 (2004).

183 For an argument in favor of more conceptualism and doctrinalism in private law scholarship, see John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 Harv. L. Rev. 1640, 1652-56 (2012).

3. Comparison to Civil Law Systems

Including a section on "comparative law"[184] in an argument for law reform may generate skepticism. Even ardent proponents of comparative legal scholarship acknowledge that, strictly speaking, the study of foreign legal systems is of little normative value. Ultimately, arguing that a certain rule should be adopted *because* other jurisdictions have enacted it would mean deducing an "ought" from an "is".[185]

When it comes to justifying behavior-based bars from inheritance, however, it has been a recurring pattern in U.S. legal discourse to refer to civil law solutions. Thus, in *Riggs v. Palmer*, for example, the court's majority mentioned provisions in the French Civil Code and Roman law in support of their decision barring Elmer from receiving his grandfather's estate.[186] Similarly, in the ongoing debate about the desirability of a behavior-based inheritance system, it is quite common for supporters of such a system to refer to the civil law doctrine of "unworthiness to inherit".[187] Hence it seems that, at least within this context, there is a particular openness in U.S. succession law discourse to comparative law observations.

Therefore, it seems noteworthy to point out that there is "precedent" in other jurisdictions for the suggested solution of a bar from inheritance on basis of interference with freedom of testation. The mentioned civil law doctrine of "unworthiness to inherit" works essentially like a bar from inheritance,[188] and thus, similar to the statutory solution proposed in this essay. In many civil law jurisdictions, interference with freedom of testation constitutes the core area of application of this concept.[189] It is all the more

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184 For the purpose of this section, the term "comparative law" is basically equivalent to "the study of foreign law", i.e. law from jurisdictions that are not part of the United States. In a different context, "comparative law" could of course also refer to the study of the different U.S. state laws.

185 *See, e.g.*, Ralf Michaels, *The Functional Method of Comparative Law*, *in* The Oxford Handbook of Comparative Law 339, 373-74 (Mathias Reiman & Reinhard Zimmermann eds., 2006); John C. Reitz, *How to Do Comparative Law*, 46 Am. J. Comp. L., 617, 624-25 (1998).

186 *See*, 22 N.E. 188, 190 ("Under the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. . .Code Nap. § 727; Mack. Rom. Law, 530, 550"). *Cf. also* Wade, *supra* note 124, at 716 n. 4 (referring also to the civil law doctrine of unworthy heirs in the context of the debate on slayer rules)

187 *Cf., e.g.*, Monopoli, *supra* note169, at 259 n. 8 (referring to a "[t]elephone conversation" with John Langbein about the concept of unworthiness of heirs in civil law); Rhodes, *supra* note 168, at 530 (referring to the Roman bars from inheritance on the basis of "dignitas"); Spivack, *supra* note 166, at 268 (referring also to Roman law).

188 For a concise historical and comparative account of this doctrine, see Reinhard Zimmermann, *The Present State of European Private Law*, 57 Am. J. Comp. L. 479, 505-8 (2009).

189 For Germany, see Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2002, Bundesgesetzblatt

surprising that U.S. authors, even though referring to this doctrine when discussing the general possibility of behavior-based bars from inheritance, have never discussed it as a potential model for dealing specifically with the interference problem.[190] That some civil law jurisdictions already deploy a bar from inheritance on the basis of interference with freedom of testation does not as such constitute an argument in favor of adopting a similar solution in the United States. It might, however, be of some value when it comes to demonstrating that the suggested solution is not a legislative experiment but rather has already been tested in practice.[191]

E. A Short Rebuttal of Possible Criticism of the Proposal

The proposal presented in this Article—sanctioning interference with freedom of testation with a bar from inheritance—would in effect mean that, from the perspective of succession law, a person who unduly influences a testator is treated like a person that murders him. Such a proposal is likely to be met with criticism. Hence, the remainder of this Article anticipates possible critiques and demonstrates how they can be rebutted.

1. Over-Deterrence?

Given that a major argument in favor of this proposal is its deterrence potential, a possible counterargument from within the instrumentalist framework might be that the enactment of a disinheritance statute for interference with freedom of testation leads to over-deterrence. However, interference with freedom of testation is undesirable per se: the preferable level for this activity is zero.[192] Consequently, when it comes to interference actions themselves, a danger of over-deterrence does not exist. Even sanctions for per se undesirable behavior can, however, create a problem of over-deterrence if there is a risk that courts might mistakenly classify socially desirable behavior as the kind of behavior that triggers the sanction. With regard to most

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[BGBl.] I 42, as amended, §§ 2339, para. 1 (Ger.) (naming as grounds for unworthiness to inherit, inter alia, the intentional, unlawful killing of the deceased, the prevention of the execution or revocation of a will, the procurement of a will by deceit or duress, and the suppression or forgery of a will). For the situation in other European jurisdictions, see Zimmermann, *supra* note 188, at 505-06.

190 *See* Monopoli, *supra* note 169, at 259; Rhodes, *supra* note 168, at 530; Spivack, *supra* note 166, at 268.

191 See Goldberg & Sitkoff, *supra* note 11, at 340, for a call for "modesty in top-down law reform of the common law through innovative. . .provisions that have not been tested in practice or vested in the literature."

192 For an explanation of the undesirability of interference with freedom of testation from a welfare-oriented perspective, see *supra* note 8.

interference acts, the risk of such false positives seems to be rather small. The chance, for example, that a court would mistakenly believe that a will forgery has occurred seems negligible.

With regard to undue influence, however, the risk of false positives cannot easily be brushed aside, given the noted difficulties of applying the doctrinal concept of undue influence in practice.[193] It seems nevertheless doubtful that this creates a strong argument *against* the suggested solution. For there to be a case against the proposed solution, it would first have to be demonstrated that there is a socially desirable activity, such as friendly interaction with the decedent, on which the existence of a disinheritance statute has a chilling effect. Second, it would also have to be demonstrated that the welfare loss caused by over-deterrence after the enactment of a disinheritance statute is in fact larger than the welfare loss caused by under-enforcement in absence of a disinheritance statute. None of these points seem likely to be the case.

2. Violation of Testator's Intent?

The central goal of the proposed disinheritance statute is the protection of the testator's autonomy. Thus the value of this proposal would be seriously undermined if the proposed protection mechanism—i.e. the bar from inheritance—were itself in conflict with the testator's intent.[194] This would be the case if one could convincingly argue that a testator whose freedom has been interfered with would not want the interferor to be disqualified from inheritance. A similar point is sometimes made with regard to slayer statutes: Even if murdered by his designated heir, so the argument goes, a testator would prefer the murderer not to end up empty-handed.[195]

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193 *See supra* the text accompanying note 30. *Cf. also* Goldberg & Sitkoff, *supra* note 11, at 391-92 (pointing out that increasing the sanctions for interference with freedom of testation would "magnify the costs of policing what is necessarily a murky line between permissible persuasion and impermissible overpersuasion").

194 It should be pointed out, however, that even if such a conflict between the testator's intent and the bar from inheritance existed, it would not be impossible to justify the suggested disinheritance statute by reference to the testator's autonomy. After all, one of the central idea behind the proposed bar from inheritance is its deterrence effect: If potential interferors are discouraged by the prospect of a bar from inheritance, the need for imposing the sanction will not arise.

195 See, e.g., Andrew S. Gold, Absurd Results, Scrivener's Errors and Statutory Interpretation, 75 U. Cin. L. Rev. 26, 72 (2006) (". . .parents might still wish their children to receive an inheritance in [case they are murdered by them].") John C. Nagle, Textualism's Exceptions, 2 Issues in Legal Scholarship 10 (2002) ("The very people whom I expect to inherit from me. . .are the very people whom I would want to forgive and let them have my stuff in the hopefully remote possibility that they were to murder me").

Absent any empirical evidence, however, such references to the hypothetical intent of the testator are drawn from mere speculation.[196] With regard to slayer statutes, the weakness of these references is illustrated by the fact that the testator's intent is invoked not only against, but also in favor of such statutes. At the moment of death, as some authors argue, the testator would have most likely revoked his dispositions in so far as they benefited the slayer.[197] In that sense, a slayer statute would merely help to realize the testator's true intent. The same point could be made with regard to the suggested disinheritance statute for cases of interference with freedom of testation. After all, it does not seem unreasonable to assume that a testator whose freedom has been interfered with would have preferred not to leave anything to the interferor if he had been able to make an autonomous disposition with knowledge of the interference attempt.[198] Given the common sentiment that interference with freedom of testation is morally wrong and demonstrates bad character, there is no reason to see why this assumption should be less likely to be true than the assumption that the testator would have left his disposition unchanged even if he had been able to exercise his autonomy with knowledge of the previous interference. In conclusion, one can thus say that the hypothetical intent of the testator can at least not be invoked *against* the suggested bar from inheritance for interference with freedom of testation.

3. Illegitimate Punishment?

In civil law jurisdictions, the doctrine of "unworthiness to inherit" is sometimes criticized as punitive and therefore misplaced in private law.[199] Such criticism might also be brought forward with regard to the disinheritance statute proposed in this Article. To assess the merits of such an objection, two questions have to be addressed: (1) Is the

196 *Cf.* Spivack, *supra* note 124, at 17 (criticizing the testamentary intent rationale for slayer statutes and noting that "speculation and imagination are all we can use").

197 See, e.g., Nili Cohen, The Slayer Rule, 92 B.U. L. Rev. 793, 799 (2012); William McGovern, Jr., Homicide and Succession to Property, 68 Mich. L. Rev. 65, 71 (1969); Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 259 (1974): John V. Orth, Second Thoughts in the Law of Property, 10 Green Bag 2d 65, 75 (2006); Jeffrey G. Sherman, Mercy Killing and the Right to Inherit, 61 U. Cin. L. Rev. 803, 861 (1992); Sneddon, supra note 127, at 103.

198 Admittedly, the justification of a bar from inheritance by reference to the testator's (hypothetical) intent would not work if, and insofar as, the forfeiture related to benefits that the testator could not deny the wrongdoer anyway. This is the case with regard to benefits, such as the elective share, that arise from mandatory family protection provisions.

199 *Cf., e.g.*, Zimmermann, *supra* note 32, at 300 (arguing that the bar from inheritance in the German Civil Code in case of certain cases of interference with freedom of testation constitutes a sanction and thus a "foreign object" within private law).

proposed disinheritance statute punitive? (2) And, if so, is it therefore misplaced in American law?

In determining if a civil sanction is punitive, courts routinely attach great weight to whether it can only be explained as serving retributive and/or deterrent purposes.[200] Applying this logic, the punitive aspect of the proposed bar from inheritance for interference with freedom of testation can hardly be denied. Deterrence, as outlined,[201] is not only an important function of the suggested statute; it is furthermore impossible to justify the proposed sanction completely independently of this goal (and the public condemnation rationale).[202] After all, the mentioned non-punitive rationale for the proposed statute—i.e. the idea that no one should profit from his wrongdoing[203]—cannot explain a bar from inheritance in all cases of interference with freedom of testation.

Acknowledging the punitive aspect of the suggested disinheritance statute does not mean, however, that it contravenes any fundamental principle of American law. Punishment is indisputably a function of important parts of American private law, with punitive damages being just one example.[204] The position that civil sanctions should never be punitive—an opinion still held by many scholars in civil law jurisdictions[205]—has therefore no basis in current American law. Criticism of the suggested disinheritance statute as an inacceptable private punishment should hence be rejected.

4. Unconstitutional Forfeiture?

A possible challenge to the suggested disinheritance statute might also be brought on the ground that many state constitutions explicitly prohibit forfeiture of a criminal's estate.[206] Such an argument, however, would most likely not be successful, as the history of the establishment of the slayer statutes demonstrates. Even though some state courts

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200 See, e.g., United States v. Halper, 490 U.S. 435, 448 (1989) ("...a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.");

201 See supra text following note 147.

202 See supra text accompanying note 176.

203 See supra text accompanying note 162.

204 See, e.g., Anthony J. Sebok, Introduction: What does it mean to say that a remedy punishes?, 78 Chi.-Kent L. Rev. 3, 14 (2003).

205 Cf., e.g., Helmut Koziol, Punitive Damages – A European Perspective, 68 LA. L. REV. 741, at 750 ("The idea of punishment is outside of the private law, as according to its purpose, the private law is not aimed at and also is not in a position to realize this idea").

206 *See, e.g.*, Colo. Const. art. II, § 17 ("no conviction can work corruption of blood or forfeiture of estate"). For an overview of similar constitutional and statutory provisions, see Fellows, *supra* note 135, at 538 n. 147.

originally refused to recognize the slayer rule on the basis of the constitutional prohibitions of forfeiture,[207] it seems undisputed today that the standard slayer statute does not violate such a constitutional prohibition.[208] The rationale for this view has already been spelled out in *Riggs v. Palmer*, where the majority pointed out that the slayer rule "takes from [the wrongdoer] no property."[209] A slightly more elaborated way of presenting this so-called "owned interest rationale"[210] would go as follows: technically speaking, one can only forfeit something in which one holds a property right; the mere expectation of an inheritance prior to the decedent's death does not constitute such a property right; thus a slayer statute that merely bars a slayer from acquiring property cannot violate the prohibition on forfeiture.[211] This rationale should also apply to the disinheritance statute that has been proposed above with regard to interference with freedom of testation.

Conclusion

The purpose of this Article is twofold: first, to analyze the existing remedies against interference with freedom of testation to determine their ability to deter this kind of undesirable behavior sufficiently; second, to demonstrate why a statutory bar from inheritance for interference with freedom of testation would enhance the deterrence of such behavior and also accord with important principles underlying the law of succession.

The analysis of the existing remedies against interference with freedom of testation in Part II leads to the conclusion that there is currently under-deterrence of interference with

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207 *See, e.g.*, McAllister v. Fair, 84 P. 112, 113 (Kan. 1906) ("[It is not] easy to attribute to the Legislature an intention to take from a criminal the right to inherit as a consequence of his crime, since the Constitution provides that no conviction shall work a corruption of blood or forfeiture of estate."). For further references to similar decisions, see, e.g., Maki & Kaplan, *supra* note 124, at 911 n. 58.

208 *Cf., e.g.*, Fellows, *supra* note 135, at 544-45; Hennessy, *supra* note 127, at 171-72. *But see, e.g.*, Bradley Myers, *The New North Dakota Slayer Statute: Does it Cause a Criminal Forfeiture?* 83 N.D. L. Rev. 997, 1025 (2007) (arguing that a slayer statute that deprives the killer of any interest in property held in joint tenancy with the victim constitutes a criminal forfeiture).

209 *Riggs*, 22. N.E. at 190. *See also* Hennessy, *supra* note 127, at 172.

210 This term seems to have been established by Fellows, *supra* note 135, at 542.

211 *Cf., e.g.*, Restatement (First) of Restitution § 187 cmt. c. (1937); Hennessy, *supra* note 127, at 172-73; Wade, *supra* note 124, at 720. *But see* Fellows, *supra* note 135, at 542-45 (holding slayer statutes constitutional, but rejecting the "owned interest rationale" and proposing a different rationale); Julie J. Olenn, '*Till Death Do Us Part: New York's Slayer Rule and In re Estates of Covert*, 49 Buff. L. Rev. 1341, 1347 n. 24 (agreeing apparently with the alternative interpretation of Fellows); Sneddon, *supra* note 127, at 106 (agreeing also with the alternative interpretation of Fellows).

freedom of testation. This problem results in particular from the following three factors: (i) the inapplicability of will contests in many cases of interference with freedom of testation, (ii) the insufficient degree of sanctioning that all three available remedies—will contests, tort actions, and constructive trusts—provide, and (iii) the difficulty of proving the conditions for the application of constructive trusts and tort actions. It has also been demonstrated that the resulting problem of under-deterrence cannot be solved merely by legislative modification of the existing remedies.

Part III, therefore, suggests adopting a new remedy against interference with freedom of testation as a supplement to the existing remedies. The suggested disinheritance statute would alleviate the described under-deterrence problem, primarily because of two advantages over the existing remedies. First, it would not be necessary to demonstrate how the testator would have exercised his freedom of testation in the absence of the interference. Second, the bar from inheritance would entail a sanction for many interferors and thus solve the problem that they currently have little to lose from an interference.

In addition to being advantageous from a deterrence perspective, a bar from inheritance helps to ensure that an interferor does not profit from his wrongdoing in cases where, as a consequence of the interference, it can no longer be established how the testator would have devised his estate plan. Other factors also support the conclusion that a bar from inheritance for interference with freedom of testation would fit well in the system of succession law: (1) the general trend towards a behavior-based inheritance regime; (2) the availability of similar solutions in jurisdictions outside the United States; (3) and the fact that, within the United States, almost all jurisdictions have already adopted bars from inheritance for the problem of the “murdering heir”—a problem that, when viewed conceptually, is essentially nothing other than a highly aggravated from of interference with freedom of testation..

Summary

This Article addresses a problem ever more pressing in wealthy and aging societies like the United States: interference with freedom of testation by the use of wrongful means such as undue influence or will forgery to acquire benefits through inheritance. A detailed analysis of the remedies against interference with freedom of testation under inheritance law, tort law, and equity reveals that there is currently a significant under-deterrence of this undesirable behaviour. Hence, this Article proposes a new remedy in order to protect freedom of testation more effectively: a disinheritance statute barring wrongdoers that have infringed upon someone’s freedom of testation from inheriting from their victims, not unlike the slayer statutes adopted by many state legislators in order to deal with

"murdering heirs." This statutory prohibition against inheritance in cases of interference with freedom of testation would do more than alleviate the identified under-deterrence problem. The proposed legislative reform would also conform with an important principle of American law: the idea that no one should profit from his wrongdoing. In addition, arguments in favour of the suggested proposal can also be made by reference to the general trend towards a behaviour-based inheritance regime and in view of the availability of similar rules in jurisdictions outside the United States.