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TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE

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Abstract

This paper examines the nature, origin, and policy soundness of the tort of interference with inheritance. We conclude that the tort should be repudiated because it is conceptually and practically unsound. Endorsed by the Restatement (Second) of Torts and recognized by the U.S. Supreme Court in a recent decision, the tort has been adopted by the courts of nearly half the states. But the tort is deeply problematic from the perspectives of both inheritance law and tort law. It undermines the core principle of freedom of disposition that undergirds all of American inheritance law. It invites circumvention of principled policies encoded in the specialized rules of procedure applicable in inheritance disputes. In many cases, it has displaced venerable and better fitting causes of action for equitable relief. It has a derivative structure that violates the settled principle that torts identify and vindicate rights personal to the plaintiff. We conclude that the emergence of the interference-with-inheritance tort is symptomatic of two related and unhealthy tendencies in modern legal thought: the forgetting of restitution and equitable remedies, and the treatment of tort as a shapeless perversion of equity to provide compensation for, or deterrence of, harmful antisocial conduct.

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INTRODUCTION

Spurred by an innovative Restatement provision,[1] and given salience by two U.S. Supreme Court decisions in a case involving former "Playmate" Anna Nicole Smith,[2] courts, lawyers, and legal scholars are today increasingly inclined to recognize a tort cause of action for wrongful interference with an expected inheritance. An extension of actions for interference with contract and commercial expectancies, the interference-with-inheritance tort subjects to liability one who, by tortious means, intentionally prevents another from receiving an inheritance.[3]

For example, suppose that Goneril fraudulently induces Lear to execute a new will in Goneril's favor and to revoke Lear's prior will in favor of Cordelia.[4] Under Section 774B of the Restatement (Second) of Torts and case law in about twenty states,[5] Cordelia can sue Goneril for tortious interference with Cordelia's expected inheritance, have the claim tried before a jury, and recover compensatory damages (including pain and suffering damages) and possibly punitive damages.

Bucking the current trend, we argue that the interference-with-inheritance tort should be repudiated. Because the courts are increasingly being asked to recognize the tort,[6] because the American Law Institute (ALI) will revisit the instigating Restatement provision in the next few years,[7] and because we are in the midst of a massive intergenerational transfer of wealth,[8] the soundness of the tort is a pressing policy issue in need of close scrutiny.

The tort is problematic because it is both redundant and in conflict with the law of inheritance.[9] The organizing principle of American inheritance law is the donor's

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[1] *See* Restatement (Second) of Torts § 774B (1979); *infra* Part II.B.

[2] *See* Stern v. Marshall, 131 S.Ct. 2594 (2011); Marshall v. Marshall, 547 U.S. 293 (2006); *infra* Part II.C.

[3] *See* Restatement (Second) of Torts § 774B (1979). Part III canvasses representative cases. Although we focus on interference with inheritance, our analysis extends to interference with an inter vivos gift, which is likewise recognized by the Restatement. *See id.*, cmt. b.

[4] *See* William Shakespeare, King Lear.

[5] *See infra* Part II.B-C.

[6] *See infra* Part II.C.

[7] The ALI will reexamine Restatement (Second) of Torts § 774B (1979) in connection with the Restatement (Third) of Torts: Liability for Economic Harm, now in preparation. See http://ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=15.

[8] *See, e.g.,* John J. Havens & Paul G. Schevrish, *Why the $41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Comments*, 7 J. GIFT PLAN. 11 (Jan. 2003) (estimating that between 1998 and 2052, $41 trillion will be transferred).

[9] *See infra* Part III.

right to freedom of disposition.[10] A prospective beneficiary's expectancy of a future inheritance is entirely dependent on the donor's exercise of his freedom of disposition in favor of the beneficiary. As such, inheritance law does not afford a prospective beneficiary direct recourse for harm suffered in consequence of a third party's interference with the beneficiary's expected inheritance. Instead, the disappointed expectant beneficiary may bring actions in probate or for restitution by way of constructive trust to vindicate the donor's right to freedom of disposition.

Accordingly, in almost any circumstance in which a prospective beneficiary could make out a tort claim to remedy wrongful interference with an expected inheritance, those same interests could be vindicated through the traditional inheritance law procedures of a probate will contest or an action for restitution. The remaining common circumstances in which the tort has been invoked, typically involving fraud in a probate proceeding or wrongful procurement of an inter vivos transfer that depletes the decedent's estate, are likewise covered by well-established non-tort procedures.

Unlike tort law, however, inheritance law has developed specialized doctrines and procedures to compensate for the inability of the decedent to give testimony to authenticate or clarify his intentions.[11] The absence of such testimony complicates the determination of whether the decedent's purported estate plan reflects a volitional decision or rather was procured by undue influence, fraud, or duress. This difficulty is acute when the decedant's last will was made late in life and departs significantly from the decedent's previously expressed intent. The specialized doctrines and procedures of inheritance law have thus developed out of long experience with the difficulties in distinguishing a bona fide claim of wrongful interference with the donor's freedom of disposition from a strike suit by a disappointed expectant beneficiary.

Because the interference-with-inheritance tort changes the rules under which such claims are litigated and offers different remedies, recognition of the tort is in truth recognition of a rival legal regime for addressing these same problems. The real-world effect of recognizing the tort is to allow disappointed expectant beneficiaries to choose their preferred rules of procedure and potential remedies—those of inheritance law, or those of tort law. This development is troubling because it has arisen without consideration of whether the alternative tort regime is preferable to the traditional regime of inheritance law. The justification for the alternative regime is not in policy but rather resides in empty formalism. The rules for an interference-with-inheritance claim are different when brought in tort for no other reason than the plaintiff chose to plead a tort rather than bring a will contest or an action for restitution.

This pattern of unreflective law reform might be understandable (or at least unobjectionable) if interference with inheritance presented a clean example of tortious conduct. But interference with inheritance makes for an awkward tort.[12] On one rendering,

[10] *See infra* Part I.A.

[11] *See infra* Part I.B.

[12] *See infra* Part IV.

it allows a disappointed expectant beneficiary to obtain redress for the defendant's violation of the donor's right to freedom of disposition. So understood, the tort runs afoul of a well-established common law rule against derivative tort claims. In Justice Cardozo's canonical formulation, a tort plaintiff must "sue[] in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[13]

Alternatively, an interference-with-inheritance tort claim could be understood as alleging that the defendant's mistreatment of the donor was simultaneously a violation of an independent right of the beneficiary. However, treating the beneficiary as having a right to an expected inheritance brings tort law into direct conflict with the principle of freedom of disposition that undergirds inheritance law. The fundamental conflict between protecting an expected inheritance under the rubric of tort law while denying protection to the same interest under the rubric of inheritance law distinguishes the expectation of an inheritance from those "prospective advantages" that courts, working at the edges of tort doctrine, have sometimes protected from wrongful interference.[14]

That modern courts and commentators have failed to confront the conceptual and practical problems of the interference-with-inheritance tort is symptomatic of a larger wrong turn in modern thinking about tort law. The last seventy years have witnessed the rise to dominance of a "Realist" conception of tort law. On this view, tort law is a general grant of power to courts to shift losses from victims to antisocial actors when doing so might achieve a policy goal such as deterrence or compensation. The Realist conception strips away the structure and substance of tort law, including the core tenet that the plaintiff must allege that the defendant's conduct infringed a right personal to the plaintiff. Reduced to an open-ended invitation to courts to shift losses in the name of policy, Realist tort necessarily threatens to swallow more structured bodies of law, in this instance probate and restitution.

The remainder of this paper is organized as follows. Part I provides a brief overview of inheritance law, including the traditional mechanisms by which it remedies wrongful interference with a donor's freedom of disposition. Part II recounts the emergence of the interference–with-inheritance tort. Part III examines the tort's redundancy and conflicts with inheritance law. Part IV examines the conceptual flaws of the interference-with-inheritance tort and relates them to the tort's grounding in the Realist conception of tort law.

When legal academics today hail the virtues of interdisciplinary study, they have in mind the use of analytical methods developed in other disciplines such as economics, psychology, and the other social sciences. An implicit claim of this Article is that interdisciplinary study across fields of law is no less important. That the ALI endorsed and then the courts recognized a new tort that so profoundly conflicts with fundamental inheritance law rules and policies is a clear example of the downside to the trend among professors and practitioners toward increasing specialization. The ill-considered dis-

[13] Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).

[14] *See infra* Parts II.B, IV.B.1.

placement of specialized inheritance law rules by the tort is also a cautionary tale about the need for modesty in top-down law reform of the common law through innovative Restatement and Uniform Act provisions that have not be tested in practice or vetted in the literature.[15]

I. FREEDOM OF DISPOSITION AND THE LAW OF INHERITANCE

A. Freedom of Disposition

The "organizing principle" of the American law of inheritance is "freedom of disposition."[16] Prevailing doctrine regards the right to dispose of one's property at death as a discrete, identifiable stick in the bundle of rights called property.[17] The Restatement (Third) of Property puts the point thus: "Property owners have the nearly unrestricted right to dispose of their property as they please. … American law does not grant courts … authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[18] The primary function of the law of inheritance is to facilitate rather than to regulate the implementation of the donor's wishes.[19] The underlying policy value is that, although an "inheritance may grant wealth to *donees* without regard to their competence and performance, … the economic reasons for allowing inheritance are … the proper rewards and socially valuable incentives to the *donor*."[20]

The donor's freedom of disposition is, of course, subject to wealth transfer taxation and a handful of policy limitations.[21] But those policy limits tend to reflect venerable anti-dead-hand social values, such as the rule against perpetuities and the rule against trusts for capricious purposes,[22] or to be triggered by the decedent's own lifetime conduct, such as the mandatory spousal share and rules protecting creditor rights.[23] No

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[15] *See* Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314, 314-315 (2010); *see also* Alan Schwartz & Robert Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

[16] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1, cmt. a (2003) .

[17] *See* Hodel v. Irving, 481 U.S. 704, 716-17 (1987); JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 8 (8th ed. 2009).

[18] RESTATEMENT (THIRD) OF PROPERTY § 10.1, cmts. a, c (2003).

[19] *See id.*, cmt. c.

[20] Edward C. Halbach, Jr., *An Introduction to Death, Taxes and Family Property*, *in* DEATH TAXES AND FAMILY PROPERTY 3 (1977).

[21] *See* Restatement (Third) of Property §10.1, cmt. c (2003); *see also* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011). The Supreme Court upheld estate and gift taxation in New York Trust v. Eisner, 256 U.S. 345 (1921), and Bromley v. McCaughn, 280 U.S. 124 (1929).

[22] *See, e.g.*, Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 365 (2005); John H. Langbein, *Burn the Rembrant? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 376-79 (2010).

[23] For example, "a testator cannot lawfully direct the executor of his or her estate not to pay lawfully enforceable debts based upon the testator's sole and personal obligation." Dolby v. Dolby, 694 S.E.2d 635 (Va. 2010). On the spousal share, see, e.g., Dukeminier, Sitkoff & Lindgren, *supra* note 17, at 476-80.

limit on freedom of disposition is rooted in the interest of a prospective beneficiary in receiving a future gratuitous transfer. American inheritance law denies the existence of any such right.

The breadth of freedom of disposition under American law, in particular the absence of a right in the decedent's children or other blood relatives to inherit, is unique among modern legal systems.[24] A classic teaching example is *Shapira v. Union National Bank*.[25] In that case, the court upheld a father's bequest to his son that was conditioned on the son marrying within seven years "a Jewish girl whose both parents were Jewish."[26] The court emphasized the father's right to "restrict a child's inheritance," even "entirely [to] disinherit his children."[27] The court regarded the son's "right to receive property," by contrast, as "a creature of the law" subordinate to the father's freedom of disposition.[28]

An important corollary to the principle of freedom of disposition is that the donor remains free to revise his plan for the deathtime disposition of his property until the moment of death. Wills and other instruments of deathtime donative transfer, the latter called "will substitutes,"[29] are "ambulatory," that is, subject always to amendment or revocation by the donor.[30] The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable legal right until the donor's death. Until then, a prospective beneficiary has a mere "expectancy" that is subject to defeasance at the donor's whim.[31]

A similar analysis applies to the interest of a prospective intestate heir, called an "heir apparent."[32] The interest of an heir apparent is not a right but an expectancy that is

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[24] *See* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 58 (2010); Adam J. Hirsch, *Inheritance: United States Law*, in 3 OXFORD INT. ENCYC. LEG. HIST. 235, 239-240 (Stanley N. Katz ed., 2009). Another prominent example is the American recognition of the spendthrift trust, which is created by the donor's imposition of a disabling restraint on the beneficiary's interest. *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 614-16.

[25] 315 N.E.2d 825 (Ohio Ct. Comm. Pleas 1974); *see also* In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009) (similar). One or the other of these cases is excerpted STEWART E. STERK, MELANIE LESLIE & JOEL C. DOBRIS, ESTATES AND TRUSTS 1 (4th ed. 2011); Dukeminier, Sitkoff & Lindgren, *supra* note 17, at 28; THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 14 (5th ed. 2010); SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 15 (2011), and the basic facts are used as an example in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.7 (8th ed. 2011).

[26] 315 N.E.2d at 826.

[27] *Id.* at 828.

[28] *Id. See* Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315 (2011); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273.

[29] *See* Restatement (Third) of Property § 7.1 (2003); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

[30] *See, e.g.*, Schilling v. Schilling, 695 S.E.2d 181, 183 (Va. 2010); Blackmon v. Estate of Battcock, 587 N.E.2d 280, 282 (N.Y. 1991).

[31] *See* In re Estate of Henry, 919 N.E.2d 33, 40 (Ill. App. 2009) (collecting authority).

[32] *See* RESTATEMENT (THIRD) OF PROPERTY § 2.1, cmt. d (1999).

contingent on the heir apparent surviving the donor and the donor not otherwise disposing of his property.[33] Like a prospective beneficiary, an heir apparent has no legally cognizable interest, not even a reliance interest, in an expected inheritance prior to the donor's death.[34]

To be sure, a donor can obligate himself by contract to make a particular disposition of certain property at death—for example, as part of a premarital agreement or a divorce settlement.[35] If the requirements of contract law for an enforceable promise are met, then the expectant beneficiary has a legally cognizable right to enforce the donor's promise.[36] However, in such circumstances the expectant beneficiary's right to enforcement arises in contract law and is rooted in the volitional lifetime act of the donor, much like a completed inter vivos gift.

An arresting illustration of the foregoing rights structure is found in the modern law governing revocable trusts. Unlike an irrevocable trust, in which the donor (called the "settlor" in trust parlance) makes a completed gift for the benefit of the beneficiaries, in a revocable trust the settlor retains the power to revoke the trust and take back the trust property. A revocable trust is therefore a will substitute.[37] And just as the beneficiary under a will has no rights until the testator's death, under modern law the beneficiary of a revocable trust has no right to enforce the trust while the trust remains revocable.[38] Instead, so long as the settlor retains the power of revocation, the trustee is subject to the control of the settlor and only the settlor may enforce the trustee's fiduciary duties.[39]

B. Safeguarding Freedom of Disposition Through Will Contests and Restitution Actions

It follows from the principle of freedom of disposition is that "[a] donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud."[40] This rule, which pertains to both inter vivos and testamentary transfers,[41] safeguards the

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[33] *See id.*; Dukeminier, Sitkoff & Lindgren, *supra* note 17, at 74-75.

[34] Equity will enforce an agreement by an heir apparent to transfer his expectancy for adequate consideration. However, the transferee takes the expectancy subject to defeasance by the heir apparent predeceasing the donor or by the donor otherwise disposing of his property during life or by will or will substitute. "The heir's promise is usually put in terms of 'conveying when and if' the expectancy comes into fruition." WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS, § 16.17 (3d ed. 1960).

[35] *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY § 10.1, cmt. e (2003). Another common pattern is a promise by an ancestor to make a bequest to a descendant in return for caregiving services. *See, e.g.*, Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129 (2008).

[36] *See id.*, § 6.1, cmt. p; *see also* Uniform Probate Code § 2-514 (1990).

[37] Langbein, *supra* note 29, at 1113.

[38] *See, e.g.*, Ex parte Synovus Trust Co., 41 So.3d 70 (Ala. 2009).

[39] *See* Uniform Trust Code § 603(a) (2000); Restatement (Third) of Trusts § 74(1) (2007).

[40] Restatement (Third) of Property § 8.3(a) (2003); *see also* Restatement (Third) of Restitution and Unjust Enrichment §§ 13 (fraud), 14 (duress), and 15 (undue influence) (2011) (hereafter "Restatement (Third) of Restitution").

[41] Restatement (Third) of Property § 8.3, cmt. a (2003).

donor's right to freedom of disposition by ensuring that only a volitional exercise of that right is enforced. Accordingly, inheritance law offers procedures for challenging a posthumous disposition on the grounds that it was wrongfully procured.

At the same time, however, courts have long recognized that posthumous litigation over wrongful interference with a donor's freedom of disposition poses an obvious and serious difficulty given the inability of the donor "to authenticate or clarify his declarations, which may have been made years, even decades past."[42] This "worst evidence" problem is inherent to the derivative structure of such litigation.[43] Although the competing claimants advance their own interests in the sense that each asserts a right to certain of the donor's property, those claims are derivative of the donor's right to freedom of disposition.

Below we canvas the structure of posthumous litigation over wrongful interference with a donor's freedom of disposition. The traditional mechanisms for resolving such claims are (1) a will contest or (2) an action for restitution by way of constructive trust. Our aim is to demonstrate both the capaciousness of these procedures and the extent to which they have been designed specifically to cope with the worst evidence problem. To be clear, we do not contend that these procedures are optimal. It may well be that other procedures would be more apt. Rather, our point is that the specialized procedures and remedies in inheritance law for posthumous litigation over the true intent of a decedent are rooted in principled policy decisions, self-consciously made, about how to best to resolve such matters given the derivative nature of the litigation and the worst evidence problem that is its hallmark characteristic.

1. Will Contests.

A will contest is normally brought after the donor's death by a person who would take more from the decedent's estate if the contested will, amendment to the will, or revocation of a prior will were deemed invalid.[44] Standing to bring the contest is based on the contestant's position in the decedent's earlier-in-time, unaffected estate plan.[45] The purpose of a will contest is to vindicate the decedent's right to freedom of disposition. If the contestant prevails, the court will deny probate to the wrongfully procured will or amendment, or will probate the will that the decedent did not volitionally revoke.

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

[43] John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (2994) (book review).

[44] *See, e.g.*, Uniform Probate Code §§ 1-201(23), 3-402(a) (1990); *see also* Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357, 362 (2004).

[45] *See, e.g.*, Ames v. Reeves, 553 So. 2d 570 (Ala. 1989); Wimberly v. Jones, 526 N.E.2d 1070 (Mass. App. 1988).

The most common basis for a will contest involving wrongful interference is undue influence.[46] The Restatement (Third) of Property summarizes the concept thus: "The doctrine of undue influence protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor's age, inexperience, dependence, physical or mental weakness, or other factor. A donative transfer is procured by undue influence if the influence exerted over the donor overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[47]

Two problems recur in undue influence litigation. First, shorthand formulations of undue influence, such as in the Restatement provision just quoted, do not answer the critical question of what influence is "undue."[48] In deciding this issue, the trier-of-fact inevitably will be affected by social context and the perceived fairness of the donor's dispositions.[49] Second, because direct evidence of undue influence is rare, in most cases the contestant must rely on circumstantial evidence.[50]

The combination of these two problems pose a systemic risk to the wealth transfer system. Safeguarding freedom of disposition requires the court to invalidate a disposition that was procured by undue influence.[51] But openness to circumstantial evidence encourages meritless strike suits by disgruntled family members.[52] Moreover, the plasticity and vagueness of the undue influence concept allows judges and juries leeway to rewrite the decedent's estate plan in accordance with their own views of fairness and morality.[53]

a. Inferences, Presumptions, and Burden Shifting. To impose structure on the unruly undue influence concept, courts have developed an elaborate scheme of inferences, presumptions, and burden shifting. For example, although the contestant normally has the

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[46] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 203; Jeffrey A. Schoenblum, *Will Contests – An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 648-49 (1987).

[47] RESTATEMENT (THIRD) OF PROPERTY § 8.3, cmt. e (2003); *see also* RESTATEMENT (THIRD) OF RESTITUTION § 15 (2011).

[48] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 182.

[49] Cardozo put the point thus: "The great tides and current which engulf the rest of men, do not turn aside their course, and pass the judges by." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

[50] *See* RESTATEMENT (THIRD) OF PROPERTY § 8.3, cmt. e (2003).

[51] There is a consensus … that enfeebled testators should not be allowed to be victimized by domineering nurses, counselors, or whomever." John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978).

[52] *Id.*, at 66 (suggesting that "the odor of the strike suit hangs heavily over this field"); *see also* Langbein, *supra* note 43, at 2045; Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685-86 (2011).

[53] *See, e.g.*, Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. KAN. L. REV. 245 (2010); *see also* E. Gary Spitko, *Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE WEST. RES. L. REV. 275 (1999).

burden of proving that a will was procured by undue influence,[54] the prevailing rule is that the trier-of-fact can infer undue influence from circumstantial evidence showing that "(1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence."[55] This rule of inference brings order to the question of what circumstantial evidence is relevant and therefore admissible.

Moreover, in most jurisdictions the contestant is entitled to a presumption of undue influence if the contestant shows the existence of a confidential relationship between the alleged influencer and the testator plus at least one other suspicious circumstance.[56] The term "confidential relationship" encompasses traditional fiduciary relationships, such as a lawyer and client, as well as other relationships that are "based on special trust and confidence" justifying the donor in "placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor."[57] For example, a confidential relationship may be found between a caregiver and an enfeebled patient or an adult child and an enfeebled parent.[58]

Suspicious circumstances include a will executed while the donor was in a weakened physical or mental state; the absence of an independent lawyer representing the donor's interests; the making of the will "in secrecy or in haste"; and the making of a will that is a substantial departure from the donor's prior, longstanding estate plan.[59] An especially powerful suspicious circumstance, which may give rise to an enhanced presumption of undue influence, is if "the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member."[60]

When a presumption of undue influence is triggered, the burden shifts to the proponent to come forward with rebuttal evidence—for example, by showing that the presumed influencer "acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily."[61] In the absence of such rebuttal evidence, the contestant is entitled to judgment as a matter of law.[62] The theory is that a person who benefits from a confidential relationship "can take precautions to ensure that proof

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[54] *See* Uniform Probate Code § 3-407 (1990); RESTATEMENT (THIRD) OF PROPERTY § 8.3, cmt. b (2003).

[55] RESTATEMENT (THIRD) OF PROPERTY § 8.3, cmt. e (2003).

[56] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 184.

[57] RESTATEMENT (THIRD) OF PROPERTY § 8.3, cmt. g.

[58] *See id*..

[59] *Id.*, at cmt. h.

[60] *Id.*, at cmts. f, h.

[61] Jackson v. Schrader, 676 N.W.2d 599, 605 (Iowa 2003); *see also* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 185.

[62] *See* Restatement (Third) of Property § 8.3, cmt. f (2003).

exists that the transaction was fair and that his principal was fully informed, and he is in the best position after the transaction to explain and justify it."[63]

The often-cited case of *Estate of Lakatosh* is illustrative.[64] In that case, Rose, an older woman in poor health, came to depend on a man named Roger.[65] In November 1988, Rose executed a power of attorney designating Roger as her agent and a will leaving all but $1,000 of her $268,000 estate to him. The will was drafted by Roger's second cousin, to whom Roger had referred Rose on an unrelated legal matter. An audio recording of the execution ceremony showed that Rose was "easily distracted and clearly had difficulty remaining focused on the issue of the will."[66]

At the ceremony, "Rose referred to Roger as 'an angel of mercy' who 'saved her life.'"[67] In fact, Roger had stolen more than $128,000 of Rose's assets, leaving her delinquent on her household bills and property taxes and "living in squalor and filth."[68] Rose died in 1993 without having revoked the will benefiting Roger. The court denied probate to the will on the grounds of undue influence. The circumstances gave rise to a presumption of undue influence that Roger could not rebut.[69]

b. Other specialized procedural rules. Inheritance law's preoccupation with the worst evidence problem is reflected in other specialized procedural rules. For example, because experience has shown that juries may be more sympathetic to the disinherited than to the intentions of "an eccentric decedent who is in any event beyond suffering,"[70] the trend is toward bench trial of will contests.[71] As such, will contests are moving into procedural alignment with contests over a revocable trust, the primary will substitute, which is commonly recommended when a contest is anticipated as the trust exists in "the jury-free realm of equity law."[72]

Another specialized rule is the relatively short limitations period for bringing a will contest.[73] This rule balances the need to allow challenges to vindicate the donor's

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[63] Cleary v. Cleary, 692 N.E.2d 955, 960 (Mass. 1998); *see also* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 185.

[64] 656 A.2d 1378 (Pa. Super. 1994). The case is featured, for example, in DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 182, and it is a motivating example in Spivack, *supra* note 17, at 246-48, 307.

[65] *See* 656 A.2d at 1381.

[66] *Id.*, at 1384.

[67] *Id.*, at 1385.

[68] *Id.*, at 1382.

[69] *Id.*, at 1384-85.

[70] Langbein, *supra* note 51, at 65; *see also* Langbein, *supra* note 43, at 2043; Josef Athanas, *Comment, The Pros and Cons of Jury Trials in Will Contests*, 1998 U. CHI. LEGAL F. 529 (1990); Leon Jaworski, *The Will Contest,* 10 BAYLOR L. REV. 87, 88 (1958).

[71] *See* EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 14:5 (2d ed. 1999 & Supp. 2011); *but see* UPC § 1-306 (1990).

[72] Langbein, *supra* note 51, at 67; *see also* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 206.

[73] *See, e.g.*, Fla. Stat. Ann. § 733.212 (three months); Ohio Rev. Code Ann. § 2107.76 (same); Ala. Code § 43-8-199 (six months); 755 ILCS 5/8-1 (same); Md. Code Ann., Est. & Trusts § 5- 207 (same). The effective

freedom of disposition against the need for expeditious settlement of ownership rights in the decedent's property. The Uniform Trust Code, adopted in about half the states, likewise provides for a short limitations period to bring a posthumous challenge to a revocable trust that became irrevocable at the death of the donor (i.e., a trust that is a will substitute).[74]

The adherence of inheritance law to the American rule on attorneys' fees also bears mention. Regardless of the outcome, by default a person who contests a will pays his own fees,[75] and a person who acts as a fiduciary in propounding a will in good faith is entitled to have his attorneys' fees and other costs paid out of the estate.[76] There is no fee shifting from the losing party to the prevailing party. Although the absence of an English-style loser-pays rule in will contests has been criticized by scholars,[77] the American rule remains the norm.[78]

2. Restitution By Way of Constructive Trust.

A will contest is the traditional mode of remedying the wrongful procurement of a will, amendment to a will, or revocation of a will. But what if a person has wrongfully *prevented* the decedent from making or amending or revoking a will? Or what if a person has wrongfully interfered with a *nonprobate* transfer of the decedent such as an inter vivos trust or pay-on-death bank or brokerage account? In such cases, a will contest in probate offers no relief. A will or an amendment to a will that was not in fact executed in accordance with the procedures prescribed by the Wills Act for the making of a valid will cannot be probated.[79] A will that was not in fact revoked in accordance with the procedures prescribed by the Wills Act for the revocation of a will must be probated.[80] And a nonprobate transfers operates independently of the decedent's will, outside of the reach of probate.[81]

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limitations period under the Uniform Probate Code is twelve months. *See* Uniform Probate Code §§ 3-108(a)(3), 3-412(3)(C) (1990).

[74] *See* Uniform Trust Code § 604(a) (2000).

[75] Subject to the common fund doctrine if the contestant thereby confers a benefit on others. *See* Restatement (Third) of Restitution § 29 (2011).

[76] *See, e.g.*, N.Y. Surr. Ct. Proc. Act § 2302(3)(a); Uniform Probate Code § 3-720 (1990). A person who offers for probate a will that he is found to have procured by undue influence may be required to reimburse the estate for any fees paid by the estate. *See, e.g.*, Matter of Winckler, 651 N.Y.S.2d 69, 71 (App. Div. 1996).

[77] *See, e.g.*, Langbein, *supra* note 51, at 65; 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, 265-67 (2002).

[78] Two further examples of specialized procedures are the "probable cause" rule for no-contest clauses, see Uniform Probate Code §§ 2-517, 3-905; Restatement (Third) of Property § 8.5 (2003), and the occasional experimentation with antemortem probate, see Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

[79] *See* RESTATEMENT (THIRD) OF PROPERTY § 3.1 (2003).

[80] *See id.* § 4.1.

[81] *See id.* § 7.1.

If a will contest cannot offer adequate relief for wrongful interference with the donor's freedom of disposition, the traditional fallback has been to award the equitable remedy of constructive trust in an action for restitution to prevent unjust enrichment.[82] The Restatement (First) of Restitution, published in 1937, states the principle thus: "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."[83]

A constructive trust is a plastic remedy that courts of equity have long used to make restitution and prevent unjust enrichment. In Justice Cardozo's often-quoted formulation: "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."[84] The sole duty of the constructive trustee is to convey the property to the person who has the rightful claim to it.[85]

The Restatement (Third) of Restitution and Unjust Enrichment, published in 2011, updates the principle as regards wrongful interference with a donor's freedom of disposition as follows: "If assets that would otherwise have passed by donative transfer to the claimant are diverted to another recipient as a result of fraud, duress, undue influence, or other wrongful interference, the recipient is liable to the claimant for unjust enrichment."[86] The reference to "donative transfer" instead of "by will or an intestacy," as in the First Restatement, acknowledges the applicability of the principle to nonprobate modes of transfer.[87] The Restatement continues:

> A claim in restitution with a remedy via constructive trust is the traditional response to wrongful interference that prevents a donative transfer, given the inability of probate to enforce an intended disposition that was never carried out. Wrongful interference may prevent either the making or the revocation of a will, codicil, or bequest; the alteration of prior dispositions, such as a substitution of insurance or trust beneficiaries; or the making of an intended inter vivos gift.[88]

Crucially, restitution by way of a constructive trust is a gap-filling complement, rather than a rival, to the will contest in probate. A disappointed beneficiary who can obtain relief in probate must do so, a limiting principle that is explicit in the 1937 Restatement provision quoted above and is carried forward in the commentary in the 2011

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[82] *See, e.g.*, GEORGE PALMER, THE LAW OF RESTITUTION §§ 20.2-20.5 (1995); PAGE ON WILLS, *supra* note 34, at §§ 13.8, 14.8, 24.4-24.5, 26.20.

[83] RESTATEMENT (FIRST) OF RESTITUTION § 184 (1937).

[84] Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 386 (N.Y. 1919); *see also* RESTATEMENT (THIRD) OF RESTITUTION § 55, cmt. a (2011).

[85] *See* Restatement (Third) of Restitution § 55 (2011).

[86] *Id*. § 46(1) (2011).

[87] *See id.* § 46(2) (2011).

[88] *Id*. § 46, cmt. e (2011) (emphasis removed).

Restatement.[89] Moreover, in an action for restitution by way of constructive trust the court follows "the rules of procedure, standards of proof, and limitations periods applicable in probate cases" so that the restitution action cannot be used "to circumvent" probate's specialized procedures.[90]

a. Remedying Wrongful Interference with Will Formation or Revocation. The leading cases of *Brazil v. Silva*,[91] *Pope v. Garrett*,[92] and *Latham v. Father Divine*[93] illustrate the role of restitution actions in safeguarding freedom of disposition against wrongful interference with the making or the revoking of a will.

In *Brazil*, a wife (*W*) tricked her husband (*H*) into thinking that she had complied with his request to destroy his will.[94] She did so because she stood to take more under his will than if he died intestate. After *H*'s death, *W* offered the will for probate. *H*'s other heirs, who would take more in intestacy, contested the will on the grounds of *W*'s fraud. The California Supreme Court held that the probate court was required by the Wills Act to probate the will, which had not been revoked.[95] "If relief can be given at all for such a wrong," the court suggested, "it must be sought by suit in equity to declare the wrongdoer a trustee for the heirs with respect to the property received by such wrongdoer in virtue of the will."[96]

The heirs then brought an action against *W* alleging the same facts, but asking for restitution by way of a constructive trust over so much of her inheritance as would have passed to them but for her fraud.[97] On appeal, the state Supreme Court held that the heirs had stated a valid cause of action, turning its dicta from four years earlier into a holding.[98] However, recognizing the potential for "false testimony … since the evidence … must be largely parol," the court held that on remand the heirs would have to prove their case "clearly and satisfactorily,"[99] that is, by clear and convincing evidence. The court thus harmonized the standard of proof for this kind of restitution action with that

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[89] *See, e.g., id.* § 46, cmts. c, i (2011).

[90] *Id.* § 46, cmt. c (2011).

[91] 185 P. 174 (Cal. 1919); *see also* Estate of Silva, 145 P. 1015 (Cal. 1915) (prior probate proceeding). *Brazil* is cited in the reporter's notes as the basis for RESTATEMENT (THIRD) OF RESTITUTION § 46, illus. 8 (2011).

[92] 211 S.W.2d 559 (Tex. 1948). *Pope* is cited in the reporter's notes as the basis for RESTATEMENT (THIRD) OF RESTITUTION § 46, illus. 18 (2011).

[93] 85 N.E.2d 168 (N.Y. 1949). *Latham* is cited in the reporter's notes as additional support for RESTATEMENT (THIRD) OF RESTITUTION § 46, illus. 8 (2011).

[94] *See, e.g.*, Uniform Probate Code § 2-507(a)(2) (1990); RESTATEMENT (THIRD) OF PROPERTY § 4.1, cmt. e (1999).

[95] Estate of Silva, 145 P. at 1016-17.

[96] *Id.*, at 1017.

[97] Brazil v. Silva, 185 P. at 175.

[98] *Id.*, at 176-77.

[99] *Id.*, at 177.

required by inheritance law for other kinds of claims based on parol evidence that contradict the plain language of a duly executed will.[100]

In *Pope*, some but not all of the decedent's heirs wrongfully prevented the decedent from executing a will in favor of her friend.[101] Shortly after this incident, the decedent died. The Supreme Court of Texas imposed a constructive trust in favor of the friend on all the heirs, not just those who had wrongfully prevented the new will's execution. The court reasoned that the innocent heirs, too, would be unjustly enriched if they were permitted to keep property acquired by reason of the wrongful acts of the other heirs.[102]

In *Latham*, the decedent had previously executed a will leaving the bulk of her estate to one of the defendants, Father Divine.[103] The plaintiffs alleged that the decedent had then attempted to execute a new will that would leave the plaintiffs $350,000, but that "by reason of ... false representations [fraud], ... undue influence and ... physical force [duress]," the defendants prevented its execution, whereupon the defendants arranged for the decedent's murder.[104] The plaintiffs sought an order awarding them the $350,000 that they would have inherited but for the defendants' wrongdoing.

On appeal, the New York Court of Appeals upheld the complaint. The court held that if "by fraud, duress or undue influence" a beneficiary prevents the testator from making a new will, the wrongdoer should be compelled to hold the property he receives under the testator's prior will upon a constructive trust for the testator's intended legatee.[105] Although there was then a paucity of New York case law on the question, the court concluded that the principle was established by "reliable texts" such as the Restatement (First) of Restitution and "cases elsewhere."[106]

b. Remedying "Extrinsic Fraud". Restitution by way of a constructive trust is also available when probate is fraudulently obtained, for example by failing to serve notice

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[100] *See, e.g.,* Uniform Probate Code §§ 2-503, 2-805 (1990, rev. 2008); Uniform Trust Code §§ 407, 415 (2000); RESTATEMENT (THIRD) OF PROPERTY §§ 3.3, 10.2, cmt. i, 12.1 (1999, 2003); *see also* Fredrick Vars, *Toward a General Theory of Standards of Proof*, 60 CATHOLIC L. REV. 1 (2010).

[101] 211 S.W.2d at 560.

[102] 211 S.W.2d at 561-62; *see also* RESTATEMENT (THIRD) OF RESTITUTION § 46(1) (2011); RESTATEMENT (FIRST) OF RESTITUTION § 184, cmt. j (1937).

[103] 85 N.E.2d at 169. Father Divine was either an inspirational religious leader or the head of cult, depending on whom you ask. *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 210 n.16.

[104] 85 N.E.2d at 168-69.

[105] 85 N.E.2d at 169.

[106] 85 N.E.2d at 169, quoting RESTATEMENT (FIRST) OF RESTITUTION § 184, cmt. i (1937).

on an interested party[107] or by wrongfully destroying or suppressing a will,[108] circumstances that are sometimes called "extrinsic fraud."[109]

The often-cited case of *Caldwell v. Taylor* is instructive.[110] In that case, a son petitioned for a constructive trust to be imposed upon property that his father bequeathed to the father's purported wife.[111] The son alleged that she procured the will in her favor by deceiving the father into believing that "she was a woman of fine character and good reputation and prior to her marriage to him was a single woman."[112] The son further alleged that, during the six month limitations period for contesting the will,[113] the purported wife likewise deceived the son "with the intent and purpose" of inducing him not to bring a contest.[114] After the contest limitations period expired, the son discovered that the purported wife, a "grossly immoral woman of the streets," was in fact married to someone else at the time she purported to marry the father.[115]

The California Supreme Court held that the son had stated a valid claim, though it also expressed skepticism that he could prove the allegations in the complaint.[116] The court emphasized that the son had sufficiently pleaded an "extrinsic" or "collateral" fraud in the form of the purported wife's use of misrepresentations to induce the son not to contest the will.[117] Such fraud was distinct from the fraud that the son alleged had been worked upon the father, which would have been the basis for a will contest but for the purported wife's subsequent fraud upon the son.[118] The basis for equitable relief in *Caldwell* was that the purported wife's subsequent misrepresentations to the son "prevented [the son] from setting up a real defense to the probate of his father's will."[119]

The principle of restitution to prevent unjust enrichment that underpins cases such as *Caldwell* has since been codified in the Uniform Probate Code:

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[107] *See, e.g.,* PAGE ON WILLS, *supra* note 34, at § 26.20; *Concealment of or Failure to Disclose Existence of Person Interested in Estate as Extrinsic Fraud Which will Support Attack on Judgment in Probate Proceedings*, 113 A.L.R. 1235 (1938).

[108] *See, e.g.,* Palmer, *supra* note 82, at § 20.5.

[109] *See, e.g.,* Minter v. Minter, 62 P.2d 233, 235-36 (Mt. 1936); PAGE ON WILLS, *supra* note 34, at § 26.20.

[110] 23 P.2d 758 (Cal. 1933). *Caldwell* is cited in the reporter's notes as the basis for RESTATEMENT (THIRD) OF RESTITUTION § 46, illus. 1 (2011); *see also* Page on Wills § 26.20 (describing *Caldwell*).

[111] 23 P.2d at 759.

[112] *Id.*, at 759.

[113] Short limitations periods on bring a will contest are common. *See supra* notes 73-74 and text accompanying.

[114] 23 P.2d at 759.

[115] *Id.*

[116] *Id.* at 761-62. The same court in *Brazil* had emphasized the need for clear and convincing evidence in such cases. *See supra* note 99 and text accompanying.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 761.

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not.[120]

c. The Capaciousness of Restitution. The interference-with-inheritance tort is sometimes defended as a necessary supplement to the limited ability of probate courts to provide relief for wrongful interferences with a deathtime donative transfer.[121] But the law of restitution already plays this role, and it has done so since long before the tort emerged. "Legal rules that give the property to the wrongdoer cannot simply be ignored, but they can be accommodated to the doctrine prohibiting unjust enrichment by a simple equitable device: a decree that the wrongdoing holds the property as constructive trustee for someone else."[122]

In keeping with the function of restitution in this context as a supplement to probate, whether enrichment via an inheritance is unjust is measured in relation to the donor's right to freedom of disposition. The question is whether the transfer must be undone because it was induced by wrongful means. In the words of the Restatement (Third) of Restitution: "Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights."[123] In *Brazil*, *Pope*, *Latham*, and *Caldwell*, what made the enrichment unjust was not an abridgement of a right to inherit in the disappointed beneficiary, but rather the violation of the donor's freedom of disposition.

II. THE EMERGENCE OF THE INTERFERENCE WITH INHERITANCE TORT

A. Nineteenth- and Early-Twentieth-Century Doctrine

As late as 1979, there was little recognition in American law of wrongful interference with inheritance as a tort. Conceptually, interference with an expected inheritance was understood to be a violation of donor's right to freedom of disposition, not a violation of any independent right of the beneficiary. A disappointed expectant beneficiary's recourse was in a will contest or in an action for restitution by way of constructive trust, not in tort.

Amidst the sparse pre-1979 case law, the leading early authority is *Hutchins v. Hutchins*,[124] an 1845 decision of the New York Supreme Court, then the court of last

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[120] Uniform Probate Code § 1-106 (1969, 1990).

[121] *See infra* Part III.B.

[122] RESTATEMENT (THIRD) OF RESTITUTION, Chapter 5, Introductory Note to Topic 2 (2011).

[123] *Id.*, § 1, cmt. b.

[124] 7 Hill. 104 (N.Y. Sup. Ct. 1845).

resort in New York.[125] The plaintiff brought a tort action for deceit, alleging that the defendants had fraudulently induced the testator to revoke a will under which the plaintiff had been devised a farm. The court dismissed the complaint, reasoning that the defendants had interfered with a "naked possibility" rather than a "right" of the plaintiff.[126]

The reasoning in *Hutchins*, which exemplifies nineteenth- and early twentieth century orthodoxy,[127] might seem viciously circular. But there is a logic to it. The premise is the donor's unqualified right to set the terms on which his property will be disposed of at death. If the donor has a right to unfettered freedom of disposition up until the moment of death,[128] a potential donee cannot have a right to receive, for such a right would be subject to complete defeasance by the donor's change of mind.[129]

On this view, the plaintiff's claim in *Hutchins* was comparable to that of a plaintiff who sues to recover economic losses for a trespass upon land in which the plaintiff has no possessory interest. Even if such a plaintiff could prove that she suffered a loss because of the trespass, she would have no claim, because no property right of hers had been invaded by the defendant. Likewise in *Hutchins*, the defendants may have violated the decedent's right to freedom of disposition, but the defendants did not thereby violate any legal right of the plaintiff.

Perhaps the first decision clearly breaking from the nineteenth- and early twentieth century orthodoxy, albeit in dictum, is *Lewis v. Corbin*, decided in 1907 by the Supreme Judicial Court of Massachusetts.[130] Anticipating the view that would later be written into the Restatement (Second) of Torts by William Prosser,[131] *Lewis* sidestepped the question of whether the plaintiff could claim to have suffered the violation of a right, and instead focused on the question of whether the plaintiff could adduce adequate proof of a wrongful act by the defendant, causation, and harm. The court dismissed the

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[125] The high court in New York has since been recast as the New York Court of Appeals, with the Supreme Court now denominating the state's trial courts. The opinion was by Chief Justice Samuel Nelson, who would later be appointed to the United States Supreme Court.

[126] 7 Hill., at 109-10.

[127] *See, e.g.,* Hall v. Hall, 100 A. 441, 442 (Conn. 1917) (explaining that "the alleged fraud in procuring these transfers was a fraud practiced upon the father, and not upon the plaintiff, and so the personal representatives of the deceased grantor are the only persons who can maintain an action to set these transfers aside"); Cunningham v. Edward, 3 N.E.2d 58, 65 (Oh. App. 1936) ("While a child desires and is usually expected to be permitted to share in its parents' estates, the law does not insure this as a right. If its parents see fit to disinherit it, it has no redress by an action in tort, even against one who wrongfully induces such disinheritance, because no legal right of the child has been invaded.").

[128] *See supra* Part I.A.

[129] 7 Hill. at 109 (action for interfernce with inheritance would be "next to saying that every voluntary courtesy was a matter of legal obligation").

[130] 81 N.E. 248 (Mass. 1907). There is an early hint of approval for a tort action in dicta in *Kelly v. Kelly*, 10 La. Ann. 622 (1855). Affirming judgment for the defendant on other grounds, the court noted that Roman law had regarded wrongful interference with inheritances as unlawful, albeit as a crime and not as a tort. *Id.* at *1. On this basis, the *Kelly* court indicated that it might be willing to recognize an interference-with-inheritance tort in a future case. *Id*.

[131] *See infra* notes 148 - 159 and text accompanying.

plaintiff's tort claim for want of sufficient evidence.[132] However, the court also allowed that other claimants could recover in tort with more compelling evidence.[133]

In 1936, the North Carolina Supreme Court recognized the interference-with-inheritance tort action in *Bohannon v. Wachovia Bank & Trust*.[134] In that case, the plaintiff alleged that the defendants had wrongfully interfered with the decedent's plan to make a provision for the plaintiff, who was the decedent's grandson, in the decedent's will.[135] The court upheld the complaint against what was effectively a motion to dismiss, reasoning that a tort cause of action for interference with inheritance followed inexorably from the recognition in prior decisions of a tort cause of action for "malicious and wrongful" interference with a contractual expectancy.[136] The court's opinion, which did not address the prior case law that had rejected the tort, relied instead on precedent involving equitable relief by way of constructive trust, a point to which we return below.[137]

B. The First and Second Torts Restatements

Three years after *Bohannon*, the interference-with-inheritance tort received an obscure form of recognition in two illustrations to provisions tucked away at the back of the ALI's new Restatement of Torts. The first provision, Section 870, provides that "A person who does any tortious act for the purpose of causing harm to another … is liable to the other for such harm if it results."[138] To illustrate this principle, the Restatement describes a suit by a disappointed beneficiary against a defendant who murders the decedent for the purpose of preventing the decedent from making a new will in favor of the beneficiary.[139] Later, in commentary to Section 912 (on proof of damages), there is an illustration involving a suit against a defendant who purposefully interferes with the plaintiff's expected inheritance by defrauding the decedent.[140] There is no mention that

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[132] 81 N.E., at 249-50.

[133] 81 N.E., at 250.

[134] 188 S.E. 390 (N.C. 1936).

[135] *Id.*, at 393-94.

[136] *Id.*

[137] See *infra* Part III.A..

[138] RESTATEMENT (FIRST) OF TORTS § 870 (1939).

[139] *Id.*, illus. 3 ("A is desirous of making a will in favor of B and has already prepared but has not signed such a will. Learning of this, C, who is the husband of A's heir, kills A to prevent the execution of the will, thereby depriving B of a legacy which otherwise he would have received. B is entitled to maintain an action against C."). The commentary emphasizes that liability would attach only if the defendant acted with the specific purpose of harming the victim. *See infra* notes 353 - 356 and text accompanying.

[140] RESTATEMENT (FIRST) OF TORTS § 912, cmt. f ("Where a person can prove that but for the tortious interference of another, he would have received a gift or a specific profit from a transaction, he is entitled to full damages for the loss."); *id*. at illus. 13 ("A is a favorite nephew of B in whose favor B tells C, an attorney, to draw a will, devising one-half of B's property to A. C, who is B's son and heir, pretending compliance with his mother's wishes, intentionally draws an ineffective will. B dies believe that one-half of her property will go to A. A is entitled to damages from C to the extent of the net value to A of one-half of the property of which B died possessed.").

these illustrations, which resemble *Latham v. Father Divine* and *Brazil v. Silva* respectively,[141] would give rise to an action for restitution by way of constructive trust. Nor is there acknowledgment that the case law stood against recovery in tort for interference with an expected inheritance.

Section 870, the substantive basis for liability in these illustrations, is an awkward provision. It seems to offer a generic principle that, if taken at face value, could supplant much of the black-letter doctrine that is recognized in earlier provisions of the Restatement. Victims of established torts such as assault, battery, and false imprisonment could make out claims under Section 870, rendering those traditional torts mere specifications of the general principle. So read, the section would carry forward a version of Oliver Wendell Holmes's controversial contention that the various nominate torts could be reduced to a single liability formula, which he sometimes referred to as the "general theory" of tort liability.[142]

But Section 870 does not appear to have been intended to function as a general principle of liability. Each of the nominate torts that Holmes's general theory would have subsumed are elaborately specified in earlier and more prominent portions of the Restatement. By contrast, Section 870 is found in "Division 11" of the Restatement, entitled "Miscellaneous Rules," hardly the august framing befitting an organizing principle of tort liability. The structure and organization of the Restatement suggest that Section 870 was meant to fill gaps among the more specific tort rules.

Section 870's uncertain scope and awkward placement probably trace to its late insertion into the Restatement. In 1937, fourteen years into the project, the Reporter, Professor Francis Bohlen, became incapacitated. The ALI then tapped Professor Warren Seavey, among others, to finish the project.[143] Seavey took the occasion of "mopping up" after Bohlen to insert Sections 870 and 912.[144] So far as we are aware, there is no record explaining Seavey's inclusion of these illustrations in the absence of supporting case law,[145] nor of the ALI's decision to approve these sections and their accompanying illustrations.[146]

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[141] *See supra* Part I.B.2.a.

[142] Oliver W. Holmes, *The Path of the Law*, 1 BOSTON L. S. MAG. 1, 12 (1897); *see also* Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894).

[143] *See* William Draper Lewis, Annual Report of the Director, The American Law Institute, 16th Annual Meeting 44, 46-47 (May 12, 1938 Proceedings); Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. Ill. U. L.J. 93, 120 (2007). The ALI chose Seavey even though as one of the Advisors Seavey had so irritated Bohlen that two years earlier Bohlen arranged to oust Seavey from the project. Kelly, *supra*, at 119-20.

[144] *See* RESTATEMENT (SECOND) OF TORTS § 744A, Note to Advisers, at 73 (P.D. No. 15, 1961) (explaining that Sections 870 and 912 were inserted at the last minute by Professor Seavey "when he was mopping up").

[145] Kelley, *supra* note 143, at 120 (noting the absence of "state-court decisions specifically adopting th[e] generalized cause of action" identified in Section 870).

[146] One participant at the 1938 annual meeting criticized the interference-with-inheritance illustration accompanying Section 912 for relieving the plaintiff of the ordinary burden of proving that the defendant's tortious conduct probably caused the plaintiff's harm. The American Law Institute, 17th Annual Meeting 290, 296 (May 13, 1939) (statement of Mr. Snow).

The First Restatement's two interference-with-inheritance illustrations had little immediate impact on case law.[147] Given their obscure placement and the failure to engage the reasoning of the *Hutchins* line of decisions, the lack of impact is unsurprising. Indeed, the absence of decisional support for an interference-with-inheritance tort was contemporaneously recognized by Professor William Prosser. Ironically, it would be Prosser who would later write an interference-with-inheritance tort into the black-letter of the Second Restatement.

In the 1941 first edition of his classic torts treatise, Prosser placed interference-with-inheritance claims into the category of "tortious interference with prospective advantage," which he regarded as an offshoot of the category of claims for tortious interference with contract.[148] According to Prosser, since the 1893 English decision of *Temperton v. Russell*,[149] courts regularly had deemed actionable wrongful interferences with a person's efforts to obtain employment, hire employees, secure customers, and purchase property.[150] Yet he also acknowledged that, outside the realm of "commercial dealings," courts had "usually refused to allow" interference-with-expectancy claims such as for "interference with an expected gift or legacy under a will."[151] Nevertheless, embracing the dicta of the Massachusetts Supreme Judicial Court in *Lewis v. Corbin*,[152] Prosser insisted that this hesitancy was not based on any principled ground, but rather was based on practical worries over proof of causation and loss.[153]

Prosser seems to have supposed that the grounds for compensation in an interference-with-inheritance case were obvious. In the standard case, the plaintiff claimed to be the innocent victim of wrongful conduct by the defendant. As between a person who suffers a loss and a wrongdoer who causes it, the wrongdoer ought to bear the loss. To Prosser's way of thinking, in such circumstances the only sound consideration against allowing recovery in tort was a concern over the competence of the courts to sort valid from invalid claims. But Prosser thought that such concerns could be addressed by means less drastic than refusing to recognize the tort altogether. As the court in *Lewis* had suggested, the courts could require the plaintiff to offer ample evidence of a concrete and well-defined expectancy.[154] Prosser found support for the justiciability of interference-with-inheritance tort claims in the restitution case law described above.[155] But he

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[147] Only a handful of decisions, mostly by intermediate appellate courts, approvingly invoked Section 870. *See* Lowe Found. v. Northern Trust Co., 96 N.E.2d 831, 835 (Ill. App. 1951); Lovelady v. Rheinlander, 34 N.E.2d 788 (Ohio Ct. App. 1940); Moore v. Travelers Ins. Co, 59 N.E.2d 225, 229 (Ohio Ct. App. 1940); Mangold v. Neuman, 91 A.2d 904, 907 (Pa. 1952).

[148] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §105, at 1015-16 (1941).

[149] [1893] 1 QB 715.

[150] PROSSER, *supra* note 148, at 1015.

[151] *Id*. at 1015-16.

[152] *See supra* notes 130-133 and text accompanying.

[153] Prosser, *supra* note 148, at 1015-16.

[154] *Id*. at 1016; *see supra* text accompanying notes 130-133.

[155] PROSSER, *supra* note 148, at 1017.

neglected to attend to the distinct procedural and remedial rules that had evolved to address the problems of judicial administration that he was considering anew.[156]

In the 1955 Second Edition of his treatise, Prosser again acknowledged that the case law stood against recognizing an interference-with-inheritance tort cause of action.[157] But he also identified a modest doctrinal countertrend.[158] This revision to the treatise portended Prosser's plan for the Second Restatement, for which he had been selected as Reporter. Six years later, he drafted a provision for the new Restatement expressly recognizing the tort.[159]

Like Section 870 of the First Restatement, Prosser's interference-with-inheritance provision was slated for the back end of the Second Restatement. As such, the provision was not published until 1979, when it was promulgated as Section 774B. In its final form, Section 774B reads as follows:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.[160]

Between Prosser's first draft in 1961 and the publication of the final version in 1979, Section 774B underwent little discussion and few changes.[161] The most significant discussion occurred at the 1969 Annual Meeting.[162] Prosser acknowledged that "the older cases denied liability outright," but he misdescribed them as resting on evidentiary rather than principled grounds.[163] Prosser also pointed to "cases of a remedy in equity," which he regard as de facto tort decisions, rather than a standard application of restitution by way of constructive trust to prevent unjust enrichment.[164] At a subsequent Annual Meeting, John Wade, who succeeded Prosser as Reporter, likewise asserted that

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[156] *See supra* Part I.B.

[157] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §107, at 747 (2d ed. 1955)

[158] *See id*. at 747 & n. 68 (citing, in addition to *Bohannon*, Hegarty v. Hegarty, 52 F. Supp. 296, 298 (D. Mass. 1943); Moore v. Travelers Ins. Co, 59 N.E.2d 225, 229 (Ohio Ct. App. 1940); Axe v. Wilson, 96 P.2d 880 (Kan. 1939); and Kelly v. Kelly, 10 La. Ann. 622 (1855)).

[159] RESTATEMENT (SECOND) OF TORTS §774A (P.D. No. 15) (1961).

[160] RESTATEMENT (SECOND) OF TORTS § 774B (1979).

[161] As initially presented for internal ALI review, the Section did not specify a particular mental state. The word "purposely" was first inserted, then it was changed to "intentionally." Restatement (Second) of Torts § 744B, at 91 (C.D. No. 23, 1967); Restatement (Second) of Torts § 744B, at 52 (C.D. No. 40, 1976).

[162] *See* The American Law Institute, 46th Annual Meeting, Wednesday Afternoon Session, May 21, 192, 238-47 (1969 Proceedings).

[163] *Id*., at 238-39.

[164] *Id*. at 239.

"clear authority" supported Section 774B, though he admitted that most of the cases were "brought in restitution for constructive trust or something of that sort."[165]

C. Recognition in Contemporary Law

Once published, Section 774B did not set off a doctrinal revolution like the one that followed, say, Section 402A's endorsement of strict products liability.[166] Still, Section 774B has had much more influence than Section 870 of the First Restatement.[167] In twelve states, the court of last resort has recognized the tort.[168] In eight, an intermediate appellate court has recognized it.[169] So the tort has been accepted by appellate courts in twenty states—twenty-one, if we add an additional state on the basis of a projection by a federal court sitting in diversity.[170]

But these counts understate the receptiveness of the courts to the tort and the influence of the Restatement. Since the promulgation of Section 774B, only two state courts of last resort have rejected the tort (a third had rejected it prior to Section 774B).[171] In the remaining twenty-seven states, the viability of the tort is an open question. In ten of these states, a court has declined to recognize the tort on the facts presented rather than

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[165] The American Law Institute, 54th Annual Meeting, Thursday Afternoon Session, May 19, 378, 431-32 (1977 Proceedings). Comment e to the final version of Section 774B acknowledges the overlapping cause of action for restitution by way of constructive trust. *See* RESTATEMENT (SECOND) OF TORTS § 774B, cmt. e (1979).

[166] *See, e.g.,* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744 (1996) (observing that Section 402A had been embraced "[w]ith a gusto unmatched in the annals of the Restatements of Law").

[167] Within the ALI, recognition of the interference-with-inheritance tort is now treated as a settled issue. *See* RESTATEMENT (THIRD) OF RESTITUTION § 46, cmt. a (2011); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONTATIVE TRANSFERS § 8.3, cmt. m (2003).

[168] Florida: DeWitt v. Duce, 408 So. 2d 216, 219 (Fla. 1981). Georgia: Mitchell v. Langley, 85 S.E. 1050, 1053 (Ga. 1915); *see also* Morrison v. Morrison, 663 S.E.2d 714 (Ga. 2008). Idaho: Carter v. Carter, 146 P.3d 639, 647-48 (Idaho 2006) (discussing tort as if valid cause of action but dismissing claim for lack of wrongful act); *see also* Losser v. Bradstreet, 183 P.3d 758, 764 (Idaho 2008) (assuming would recognize the tort). Illinois: Estate of Ellis, 923 N.E.2d 237, 240-41 (Ill. 2009). Iowa: Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978). Kentucky: Allen v. Lovell's Adm'x, 197 S.W.2d 424, 426 (Ky. 1946). Maine: Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979). Massachusetts: Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997). North Carolina: Bohannon v. Wachovia Bank & Trust Co., 188 S.E. 390, 394 (N.C. 1936); *see also* Griffin v. Baucom, 328 S.E.2d 38, 41 (N.C. Ct. App. 1985) (following *Bohannon*). Ohio: Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993). Oregon: Allen v. Hall, 974 P.2d 199, 202 (Or. 1999) (extending tort of interference with economic relations to expectation of inheritance). West Virginia: Barone v. Barone, 294 S.E.2d 260, 264 (W. Va. 1982).

[169] California: Beckwith v. Dahl, 205 Cal.App.4th 1039 (Cal. App. Ct. 2012). Indiana: Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996). Michigan: Estate of Doyle v. Doyle, 442 N.W.2d 642, 643 (Mich. Ct. App. 1989). Missouri: Hammons v. Eisert, 745 S.W.2d 253, 256-58 (Mo. Ct. App. 1988). New Mexico: Doughty v. Morris, 871 P.2d 380, 383 (N.M. Ct. App. 1994). Pennsylvania: Cardenas v. Schober, 783 A.2d 317, 325-26 (Pa. Super. Ct. 2001). Texas: King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987). Wisconsin: Harris v. Kritzik, 480 N.W.2d 514, 517 (Wis. Ct. App. 1992).

[170] Colorado: Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975).

[171] Since 1979, Tennessee and Virginia: Stewart v. Sewell, 215 S.W.3d 815, 827 (Tenn. 2007); Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000). Before 1979, New York: Hutchins v. Hutchins, 7 Hill 104, 109 (N.Y. 1845); *see also* Vogt v. Witmeyer, 622 N.Y.S.2d 393, 394 (N.Y. App. Div. 1995) (following *Hutchins*).

categorically rejecting it (six courts of last resort,[172] three appellate courts,[173] and one projection by a federal court sitting in diversity[174]). In seventeen states and the District of Columbia, the law is unclear owing to a lack of precedent (twelve[175]) or to precedent that is contradictory or not authoritative (five plus D.C.[176]).

In just two decades, therefore, lawyerly sensibilities have shifted much closer to Prosser's views. This shift is evident in the growing number of reported appellate decisions accepting the tort and in the proliferation of practitioner-oriented writings about it.[177] The tort has also penetrated the teaching and scholarly discourse in trusts and estates. Recent editions of the leading casebooks offer much-expanded coverage of the tort

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[172] Alabama: Holt v. First Nat'l Bank of Mobile, 418 So. 2d 77, 79-80 (Ala. 1982); *see also* Ex parte Batchelor, 803 So. 2d 515, 515 (Ala. 2001) (quashing, without explanation, prior opinion recognizing the tort). Arkansas: Jackson v. Kelly, 44 S.W.3d 328, 331-34 (Ark. 2001). Delaware: Chambers v. Kane, 424 A.2d 311, 314-16 (Del. Ch. 1980), *aff'd in relevant part*, 437 A.2d 163 (Del. 1981); *see also* Moore v. Graybeal, 843 F.2d 706, 710-11 (3d Cir. 1988) (applying Delaware law, declining to recognize the tort because probate remedies were available). Kansas: Axe v. Wilson, 96 P.2d 880, 885-88 (1939). Maryland: Anderson v. Meadowcroft, 661 A.2d 726, 728-31 (Md. 1995); *see also* Geduldig v. Posner, 743 A.2d 247, 257 (Md. Ct. Spec. App. 1999) (assuming state high court "would recognize the tort if it were necessary to afford complete, but traditional, relief"). Montana: Hauck v. Seright, 964 P.2d 749, 753 (Mont. 1998).

[173] Minnesota: Botcher v. Botcher, 2001 WL 96147, at *2 (Minn. Ct. App. Feb. 6, 2001). New Jersey: Garruto v. Cannici, 936 A.2d 1015, 1021 (N.J. Super. Ct. App. Div. 2007). Washington: Hadley v. Cowan, 804 P.2d 1271, 1275 (Wash. Ct. App. 1991).

[174] Rhode Island: Umsted v. Umsted, 446 F.3d 17, 21 (1st Cir. 2006).

[175] Alaska, Arizona, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, South Dakota, Utah, Vermont, and Wyoming.

[176] Connecticut: *Compare* Moore v. Brower, 41 Conn. L. Rptr. 681 (Super. Ct. 2006) (unpublished opinion refusing to recognize the tort), *with* Debus v. Comp., 2011 WL 1288602, *5 (Conn. Super.) (declining to rule on "whether Connecticut has recognized the existence of the cause of action"), *and* Bocian v. Bank of Am., N.A., 42 Conn. L. Rptr. 483 (Super. Ct. 2006) (unpublished opinion recognizing the tort). In an earlier decision, the Second Circuit assumed that Connecticut recognized the tort. *See* Devlin v. United States, 352 F.3d 525, 542-43 (2d Cir. 2003) (citing Benedict v. Smith, 376 A.2d 774 (Conn. Super. Ct. 1977)). District of Columbia: In re Ingersoll Trust, 950 A.2d 672, 699-700 (D.C. 2008) (claim dismissed after assuming without deciding that D.C. recognized the tort); *but cf.* In re Estate of Reilly, 933 A.2d 830, 834 (D.C. 2007) (noting a D.C. trial court's holding that D.C. does not recognize the tort). Hawaii: Foo v. Foo, 65 P.3d 182 (Haw. Ct. App. 2003) (unpublished opinion declining to recognize the tort because probate remedies were available). Louisiana: Kelly v. Kelly, 10 La. Ann. 622, 622 (1855) (allowing an action "in damages"); *see also* McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951) (unclear if applying Colorado or Louisiana law, but finding that courts generally approve of the tort), *aff'd*, 201 F.2d 528 (10th Cir. 1953). South Carolina: Douglass *ex rel.* Louthian v. Boyce, 542 S.E.2d 715 (S.C. 2001) (dismissing claim without deciding issue of whether tort is available).

[177] *See, e.g.*, W. Fletcher Belcher, *Tortious Interference in Estate Planning*, LPC Florida Bar Continuiing Legal Education Materials 13-1 (2009); Dominic Campisi, *Marshall v. Marshall -- Rashomon Revisited*, 21 PROB. & PROP. 8 (2007); Angela G. Carlin, *International Interference with an Expectancy of Inheritance – Revisited*, 14 OHIO PROB. L.J. 152 (2004); James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, ARIZ. ATT'Y, Jan. 2000, at 26; Steven K. Mignogna, *On The Brink of Tortious Interference with Inheritance*, 16 Prob. & Prop. 45 (2002); M. Read Moore, *At the Frontier of Probate Litigation: Intentional Interference with the Right to Inherit*, 7 PROB. & PROP. 6 (1993).

relative to prior editions, typically taking the Second Restatement as their starting point.[178] A small but growing corpus of scholarly-oriented writing has examined the tort,[179] a significant uptick from the previously limited scholarly attention.[180]

The tort's growing salience derives in part from the publicity surrounding a suit involving former "Playboy Playmate" Anna Nicole Smith, which reached the U.S. Supreme Court twice.[181] Smith alleged that her step-son tortiously interfered with her expected gift from her deceased husband, the Texas oil magnate J. Howard Marshall. Although the Texas probate court with jurisdiction over Marshall's estate rejected Smith's inheritance law claims against the estate, her tort claim against her step-son was litigated in federal court incident to her bankruptcy proceeding.[182] Smith's litigation is featured in the leading trusts and estates casebooks and is routinely cited by commentators.[183]

The Court's first opinion, a unanimous decision that addressed the substantive nature of Smith's tortious interference allegations, changed the litigation landscape in

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[178] Dukeminier text: *Compare* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 221-22 (6th ed. 1999) (one-page note on the tort), *with* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 215-21, (expanded section on tortious interference with principal case and discussion of Anna Nicole Smith case with photo). Dobris text: *Compare* JOEL C. DOBRIS, STEWART E. STERK, & MELANIE B. LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS (2d ed. 2003) (no coverage), *with* STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, ESTATES AND TRUSTS: CASES AND MATERIALS 473-82 (separate section with principal case and discussion of Anna Nicole Smith case with photo).

[179] *See, e.g.*, Fried, *supra* note 44, at 366-71; Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift – Suggestions for Resort to the Tort*, 39 U. TOL. L. REV. 769 (2008); Mark R. Siegel, *Unduly Influenced Trust Revocations*, 40 DUQ. L. REV. 241 (2002); and the series by Diane J. Klein. *See* Klein, *Revenge*, *supra* note 77; *see also* Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectationof Inheritance – A survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003); Diane J. Klein, *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*]; 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); Diane J. Klein, *"Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209 (2009) [hereinafter, Klein, *Go West*].

[180] *See Torts-Recovery in Tort for False Representation Preventing an Expected Inheritance*, 23 VA. L. REV. 614 (1936); *Torts-Wills-Interference with Testamentary Disposition*, 5 Fordham L. Rev. 514 (1936); *Intentional Interference with the Expectation of a Gift*, 48 HARV. L. REV. 984 (1935); *Torts-Interference with a Gift as a Cause of Action*, 14 B. U. L. REV. 860 (1934); *Comment, Tort Liability for Depriving the Plaintiff, Through False Representations, of an Expected Inheritance*, 27 YALE L. J. 263 (1917); Leo H. Whinery, *Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates*, 19 U. KAN. CITY L. REV. 78 (1950); Alvin E. Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 187 (1944).

[181] *See* Stern v. Marshall, 131 S.Ct. 2594 (2011) (addressing scope of Article III limits on bankruptcy court jurisdiction; Marshall v. Marshall, 547 U.S. 293 (2006) (addressing scope of probate exception to federal jurisdiction.

[182] *See* Marshall v. Marshall, 275 B.R. 5 (C.D. Cal. 2002); DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 220.

[183] *See supra* note 178; *see also* Gallanis, *supra* note 25, at 179-181; Campisi, *supra* note 177; Johnson, *supra* note 179, at 769-70.

two ways. First, the Court gave its imprimatur to the tort by erroneously (but understandably) characterizing it as "widely recognized" on the basis of Section 774B.[184] Second, the Court confirmed the availability of federal jurisdiction for litigation involving the tort, holding that it falls outside of the probate exception to federal jurisdiction.[185] As practitioners and academic commentators have noted, the availability of a federal forum offers a potentially significant tactical advantage.[186]

Underpinning the Court's reasoning was the dubious but increasingly prevalent assumption that the tort is substantively well-founded and detachable from specialized inheritance policy concerns. Writing for the Court, Justice Ginsburg explained: "State probate courts possess no 'special proficiency' in handling such issues."[187] This sentiment is a realization of Prosser's aspiration for claims of wrongful interference with inheritance to migrate out of probate and restitution and into tort.

III. REDUNDANCY AND CONFLICT WITH INHERITANCE LAW

The interference-with-inheritance tort is at best a redundancy. A person whose expectancy of an inheritance is frustrated by a third party's wrongful interference with the decedent's right to freedom of disposition may bring a will contest in probate or, if the probate court cannot offer adequate relief, may bring an action for restitution seeking the equitable remedy of constructive trust.

Often, however, the tort operates not merely as a redundancy, but as a rival legal regime. When a claim for wrongful interference with the donor's freedom of disposition is pursued in a will contest or an action for restitution, it is governed by specialized rules and procedures that reflect principled (if contestable) policy judgments about how best to address the "worst evidence" problem inherent in finding the true intent of a deceased person.[188] By resolving inheritance disputes on different and often more plaintiff-friendly procedural and remedial terms, the tort allows a disappointed beneficiary to circumvent those rules and procedures. Consequently, recognition of the tort has invited disappointed expectant beneficiaries to pick their preferred procedures and remedies—those of tort, or those of inheritance law.[189]

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[184] Marshall, 547 U.S. at 312, citing RESTATEMENT (SECOND) OF TORTS § 774B (1979), and King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987).

[185] The theory was that the tort is an action for damages that does not interfere with probate court proceedings or the probate court's control of the decedent's estate *See* Marshall, 547 U.S. at 1748-49.

[186] *See, e.g.,* Campisi, *supra* note 177 at 11-15; Thomas Featherstone, Jr., Sharon Brand Gardner & Sara Patel Pacheco, 2 TEX. PRAC. GUIDE PROB. § 14:16 (Supp. 2011); James A. Herb & Jay L. Kauffman, *The Supreme Court Takes Exception to the "Probate Exception,"* 80 Fla. Bar J. 49 (Nov. 2006); *see also* Klein, *supra* note 77, at 265-66 (noting the potential availability of a federal forum to tortious interference claimants).

[187] Marshall, 547 U.S. at 312 (internal quotes and cites removed, brackets by the Court).

[188] *See supra* Part I.B.

[189] A point observed by the tort's leading chronicler. *See* Klein, *First, Second and Third*, *supra* note 179, at 250-52.

The emergence of a rival tort regime for resolving inheritance disputes is troubling because it has not been accompanied by any serious consideration of whether adjudication in tort is preferable on grounds of policy. In some cases, having overlooked the availability of relief in restitution, courts have recognized the tort to fill a mistakenly perceived remedial gap. In other cases, courts have substituted tort rules for inheritance law for no other reason than the plaintiff chose to plead a tort rather than bring a will contest or an action for restitution. In neither circumstance can one be optimistic that tort law will improve the adjudication of claims of wrongful interference with the donor's freedom of disposition.

A. *Bohannon* and the Confused Origins of the Tort

Confusion about the need for the interference-with-inheritance tort and its overlap with established inheritance law procedures traces all the way back to *Bohannon v. Wachovia Bank & Trust*,[190] perhaps the first case formally to recognize the interference-with-inheritance tort.[191] In that case, the court simultaneously suggested that (1) the tort was necessary to fill a gap so as not to leave disappointed expectant beneficiaries without a remedy for wrongful interference with that expectancy, and (2) the tort was justified by precedents allowing such beneficiaries to recover in an action for restitution by way of constructive trust. These arguments are contradictory. If precedent established that a restitution action would lie on the facts alleged, there was no gap for the tort to fill.

The plaintiff in *Bohannan* alleged that the decedent "had formed the fixed intention and settled purpose of providing for the plaintiff … in the distribution of his estate, and would have carried out this intention and purpose but for [the defendants'] false and fraudulent representations" to the decedent.[192] Reasoning by analogy to actions for wrongful interference with a contractual expectancy, the court deemed the plaintiff to have stated a valid cause of action.[193] Toward the end of the opinion, the court summed up the rationale as follows: "There is an old maxim of the law, 'No wrong without a remedy.'"[194]

This rationale supposes that the plaintiff would have lacked a remedy unless the court recognized the tort. But the availability of restitution by way of constructive trust to prevent unjust enrichment from the wrongful prevention of the making of a will (as in *Latham v. Father Divine*) or the revoking of a will (as in *Brazil v. Silva*) was by this time already well-established.[195] Indeed, just a few months after the decision in *Bohannon*, the

[190] 188 S.E. 390 (N.C. 1936).

[191] *See supra* Part II.A.

[192] Bohannon, 188 S.E., at 393.

[193] *See id.*, at 393-94.

[194] *Id.*, at 394.

[195] *See supra* Part I.B.2.

ALI published the First Restatement of Restitution, which, as we have seen, included this settled principle.[196]

In stretching to recognize the tort, the court garbled the "old maxim" about wrongs and remedies. A more accurate translation of the original Latin—*ubi jus, ibi remedium*—is "where there is a right, there is a remedy."[197] The court's legerdemain, changing "right" to "wrong," is revealing. The basis of the decision was not the defendants' abridgement of a right of the plaintiff, but rather the court's felt need to permit a response to the defendants' wrongful acts upon the decedent and the ensuing economic loss suffered by the plaintiff.

Foreshadowing Prosser's move in the Second Restatement of Torts,[198] the court suggested that one of the old writs under which tort actions once were brought—the "special action on the case"—allowed recovery "whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce such an injury."[199] In truth, the common law of torts had never recognized a cause of action derivative on the violation of a right of a third party, a point on which we elaborate below.[200] Instead, this conception of tort is an early manifestation of the Realist conception of tort advanced by Prosser and his sympathizers. [201]

In support of its treatment of the "action on the case" as an all-purpose remedy for wrongfully caused losses, *Bohannon* relied heavily on *Mitchell v. Langley*, decided in 1915 by the Georgia Supreme Court.[202] But *Mitchell* is a poor precedent for *Bohannon*. In *Mitchell*, the plaintiff had "made some allegations … looking in the direction of equitable relief," but framed "the action … as one for damages."[203] In other words, the court in *Mitchell* was faced with a claim for restitution by way of constructive trust that had been mispleaded as a tort suit for damages.

To get around this pleading problem—that is, to allow the plaintiff to bring in a law court what was in truth a petition for equitable relief—the court in *Mitchell* glommed onto the special action on the case.[204] The giveaway is that, in support of this maneuver, the court invoked the principle that "the original beneficiary" could have

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[196] *See* RESTATEMENT (FIRST) OF RESTITUTION § 184 (1937); *supra* text accompanying note 83; *see also* RESTATEMENT (THIRD) OF RESTITUTION § 46, illus. 10 & reporter's note to cmt. e (2011) (example based on *Bohannon*).

[197] *See* Douglas Laycock, *How Remedies Became A Field: A History*, 27 REV. LITIG. 161, 168 (2008). The maxim, moreover, "is not true." *Id.*, at 169.

[198] *See supra* text accompanying notes148 - 165.

[199] Bohannon, 188 S.E., at 393, quoting Lewis v. Bloede, 202 F. 7, 16 (4th Cir. 1912).

[200] *See infra* Part IV.A.

[201] *See infra* Part IV.C.

[202] 85 S.E. 1050 (Ga. 1915). This passage has influenced many subsequent cases. *See* RESTATEMENT (THIRD) OF RESTITUTION § 46, reporter's note to cmt. e (2011).

[203] Mitchell, 85 S.E., at 1052.

[204] *Id*, at 1051-1053.

brought an "equitable petition to have a trust declared in his favor, if the benefit which would have accrued to him was divested from him and the fund went into the possession of another by means of fraud."[205]

Accordingly, in asserting the need for a novel tort cause of action to fill a remedial gap, *Bohannon* relied principally on a precedent that had explicitly recognized that an action for restitution by way of constructive trust already filled that gap. Tort came into the picture in *Mitchell* only because of the mispleading in that case. Years later, the same contradiction would surface in the efforts of Prosser and John Wade, who succeeded Prosser as Reporter for the Second Restatement of Torts, to justify the adoption of Section 774B. They argued that case law support for the interference-with-inheritance tort could be found in cases of restitution.[206] Neither *Bohannon* nor Prosser and Wade acknowledged the contradiction in urging the necessity of a gap-filling tort by pointing to existing causes of action that covered the same ground but on different procedural terms.[207]

B. An Unnecessary Tort: The Forgetting of Restitution

Following the promulgation of Section 774B, a host of modern courts have picked up on the first strand of *Bohannon*. These courts have recognized the tort on the grounds that it is necessary to fill a remedial gap. Without the tort, these courts reason, the disappointed expectant beneficiary would have no recourse, leaving the decedent's right to freedom of disposition unprotected. But this reasoning is based on a false premise. In virtually every case in which the tort has been recognized in the absence of relief in probate, the plaintiff could have brought an action for restitution by way of constructive trust. Here we consider three common types of cases: (1) interference with a nonprobate transfer, (2) fraud in connection with a probate proceeding, and (3) an inter vivos transfer that depletes the decedent's estate.

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[205] *Id.* at 1051.

[206] *See supra* notes 164-165 and text accompanying. Some contemporary cases do likewise. *See, e.g.*, In re Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2010); Morrison v. Morrison, 663 S.E.2d 714, 717 (Ga. 2008); *see also* Holt v. First Nat'l Bank of Mobile, 418 So.2d 77, 79-80 (Ala. 1982) (citing *Pope*); Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979) (citing *Latham*).

[207] In one important respect the interference-with-inheritance tort covers less ground than an action for restitution. Unlike tort, which focuses on the wrongful conduct of the defendant, restitution focuses on the unjust enrichment that would arise if a person acquires property to which she has no right. In such circumstances, liability in restitution arises irrespective of whether the holder acquired the property through his own wrongdoing. *See* Restatement (Third) of Restitution § 1, cmt. b (2011) (defining unjust enrichment). The practical effect of the distinction is illustrated by *Pope v. Garrett*, discussed above, which involved wrongful interference that benefited innocent takers. *See supra* notes 101-102 and text accompanying. In such a case, a tort action does nothing to prevent the innocent takers' unjust enrichment at the expense of the rightful claimant. As even Prosser acknowledged, albeit without tracing the implications for the lack of need for the interference-with-inheritance tort, in such circumstances only restitution can provide a remedy. *See* 1969 Proceedings, *supra* note 162, at 192, 246-47. Diane Klein, who has suggested without citation that "[m]any courts will not impose a constructive trust on an 'innocent' party," Klein, *supra* note 77, at 290-91 & n.169, is mistaken. Cases such as *Pope* and the black-letter law of restitution, as expressed in Restatement (Third) of Restitution § 46(1), in Palmer, *supra* note 82, § 20.16, and in UPC §1-106, quoted in the text accompanying *supra* note 120, are contrary to her claim.

1. Interference with a Nonprobate Transfer.

As we have seen, the recipient of a donative transfer—regardless of the form of the transfer—is liable in restitution if the transfer was obtained by fraud, duress, or undue influence and if adequate relief is not available in probate.[208] Thus, wrongful interference with a will substitute such as an inter vivos trust or pay-on-death contract is remediable through the equitable device of constructive trust. In some states, however, a disappointed beneficiary may as an alternative bring suit in tort.[209] Commentators, too, have urged recognition of the tort in such circumstances.[210]

Davison v. Feurherd,[211] decided just after the promulgation of Section 774B, is representative. In that case, the stepdaughter of the decedent sued certain of the decedent's caretakers for tortious interference with the stepdaughter's expectation of taking under the decedent's inter vivos trust. The stepdaughter sought not just compensatory damages, but also litigation costs and punitive damages.[212]

The stepdaughter's allegations of fraud and undue influence are typical. The decedent, an octogenarian, had intended to give the stepdaughter "the major portion" of her estate by way of an amendment to her revocable trust.[213] The decedent had even instructed an attorney to draft the necessary documents.[214] The decedent never finished the amendment process, however, because the caretakers falsely persuaded her that the stepdaughter did not love her and was not worthy of receiving her estate, and that they should be rewarded for caring for her. The caretakers also threatened to cease providing the care on which the decedent had come to depend.[215]

Invoking Prosser's treatise, Section 774B of the Second Restatement, and *Bohannon* and *Mitchell*, the court upheld the complaint as stating a valid cause of action. The court reasoned that even though "the donor has the privilege of changing his mind," the interference-with-inheritance tort protects "the expectancy status" of the plaintiff.[216]

As in *Bohannon*, the opinion in *Davison* reads as if the plaintiff would not have had recourse unless the court recognized the tort. (Notice the role of Prosser's treatise and Section 774B in carrying forward the no-wrong-without-a-remedy Realist reasoning

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[208] *See supra* Part I.B.2.

[209] *See* Siegel, *supra* note 179, at 250-55 (surveying wrongful intererence with trust cases).

[210] *See, e.g.* Klein, *supra* note 77, at 268.

[211] 391 So.2d 799 (Fla. App. 1980).

[212] *Id.*, at 800.

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

of *Bohannon* and *Mitchell*.[217]) But the plaintiff could have brought an action for restitution by way of constructive trust.[218] And in such an action, the court would have followed the procedural norms of inheritance law.[219] Instead, because the plaintiff styled her claim as sounding in tort, she was entitled to demand punitive damages and to a trial by jury under a preponderance of the evidence standard.[220] In this application, therefore, the tort is a rival cause of action that is in conflict with the "policy of unifying the law of wills and will substitutes,"[221] here by unifying will contest procedures with those for post-humous trust contests.[222]

2. Fraud in Connection with a Probate Proceeding.

A recurring application of the interference-with-inheritance tort involves an allegation that the defendant committed fraud in connection with a probate proceeding—for example, by concealing the fact of the proceeding from an interested party or by wrongfully suppressing or destroying a will. Although relief has long been available in restitution for such "extrinsic fraud,"[223] in some states the interference-with-inheritance tort has emerged as a rival cause of action.[224] A prominent example is *Schilling v. Herrera*,[225] decided by a Florida appellate court in 2007.

In *Schilling*, the testator had executed a will in 1996 in which she left her entire estate to the plaintiff, her brother. Subsequently, as the testator's health deteriorated, she hired the defendant, a nurse, to assist her.[226] By 2003, the testator could no longer live alone, so she moved in with the defendant, who had "converted her garage into a bedroom."[227] Later that year, while "completely dependent on" the defendant, the testator purportedly executed a new will that revoked her 1996 will and left her entire estate to the defendant.[228]

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[217] We take up the relationship of the Realist conception of tort to the evolution of the interference-with-inheritance action in Part IV.C.

[218] A point observed in Siegel, *supra* note 179, at 255-63 (arguing in favor of equity and against tort for addressing wrongful interfernce with a gift by trust).

[219] *See supra* note 90 and text accompanying.

[220] *See* Klein, *supra* note 77, at 265.

[221] RESTATEMENT (THIRD) OF PROPERTY § 7.2, cmt. a (2003).

[222] *See, e.g.,* Uniform Trust Code § 604 (2000); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP., TR. & EST. J. 523, 531-34 (2008).

[223] *See supra* Part I.B.2.b.

[224] *See, e.g.,* Ebeling v. Voltz, 454 So.2d 783 (Fla. App. 1984); Wilburn v. Meyer, 329 S.W.2d 228 (Mo. App. 1959); In re Hatten, 880 S.2d 1271 (Fla. App. 2004) (suppression).

[225] 952 So.2d 1231 (Fla. App. 2007). *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 215 (excerpting *Schilling* as a principal case).

[226] 952 So.2d, at 1233.

[227] *Id*.

[228] *Id*.

When the testator died in 2004, the defendant offered the testator's 2003 will for probate. The defendant did not, however, tell the plaintiff that his sister had died.[229] Instead, while waiting for Florida's three-month period for claims by creditors to expire, the defendant ducked the plaintiff's calls, leading him to believe that his sister was still alive.[230] After the three-month period, on petition of the defendant the probate court entered a final order closing the probate proceeding.[231] Nominally foreclosed from bringing a will contest by the order closing probate, the plaintiff sued the defendant for tortious interference with his expected inheritance.

The defendant moved to dismiss the suit on the audacious grounds that the plaintiff had failed to bring a timely will contest.[232] In Florida, as in most (but not all[233]) states that have recognized the tort, "if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued."[234] The court denied the defendant's motion, holding that the adequacy-of-probate rule contemplates not just "an adequate remedy in probate," but also "a fair opportunity to pursue it."[235] In this case, in addition to the undue influence worked upon the testator (the underlying wrong), the plaintiff had also alleged that the defendant prevented him from bringing a timely contest by concealing the fact of the probate proceedings (i.e., extrinsic fraud).[236]

We are less sanguine than the court that the plaintiff satisfactorily pleaded a lack of fair opportunity to pursue a will contest in probate. Most American codes of civil procedure, including Florida's, provide for relief from a final judgment on the grounds of "fraud," including specifically "extrinsic fraud."[237] So the plaintiff could have petitioned to reopen the probate proceedings. The opinion in *Schilling* does not even hint at this possibility, but rather reads as if the tort were the plaintiff's only means for relief.

An alternative and perhaps clearer basis for relief would have been for the plaintiff to bring an action for restitution by way of constructive trust. A comparison of *Schilling* with *Caldwell v. Caldwell*, discussed earlier,[238] is instructive. In *Caldwell*, the testator's

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[229] Curiously, Florida law does not require notice of a petition for probate to be served on the decedent's heirs. *Compare* Fla. Stat. § 733.212(1), *with* Uniform Probate Code § 3-705 (1990) (requiring such notice). Foreclosing a claim by an heir without notice to the heir is probably unconstitutional under Tulsa Prof. Collection Servs. v. Pope, 485 U.S. 478 (1988).

[230] *See* 952 So.2d, at 1233.

[231] *See id*.

[232] *See id*., at 1235-36.

[233] *See, e.g.,* Plimpton 668 A.2d, at 886-87; Butcher v. McClain, 260 P.3d 611, 616 (Or. App. 2011).

[234] *Id.*, at 1235-36, quoting DeWitt v. Duce, 408 So.2d 216, 218 (Fla. 1981); *see also* Wilson v. Fritschy, 55 P.3d 997, 1001–02 (N.M. App. 2002) (collecting authority).

[235] 952 So.2d, at 1236, quoting Dewitt, 408 So.2d, at 221 (emphasis removed).

[236] *See id*., at 1236. On "extrinsic fraud," see Part I.B.2.b.

[237] *See* Fla. R. Civ. Pro. 1.540(b) (providing for relief from a final judgment for "excusable neglect" and "fraud," the latter regardless of whether "intrinsic or extrinsic"). The parallel provision in the federal rules, Fed. R. Civ. Pro. 60(b), likewise includes "extrinsic fraud" as a basis for relief from a final judgment.

[238] *See supra* notes 110-119 and text accompanying.

wife induced the testator's son not to contest the testator's purported will by making a series of misrepresentations to the son. After the probate limitations period had expired, the son discovered the wife's fraud. Without recourse in probate, the son brought an action for restitution seeking the imposition of a constructive trust on the property that the wife took under the will. The California Supreme Court upheld the son's complaint, because he had pleaded that the wife's fraud "prevented [him] from setting up a real defense to the probate of his father's will."[239] Section 1-106 of the Uniform Probate Code, promulgated in 1969, provides likewise.[240]

In *Schilling* the extrinsic fraud took the form of concealment rather than affirmative misrepresentation, as in *Caldwell*, but this distinction is immaterial. *Schilling* relied on an earlier case, *Ebeling v. Voltz*,[241] in which the fraud took the form of misrepresentations that induced a party to forebear from bringing a will contest. In *Ebeling*, a rerun of *Caldwell*, the court held that this allegation was enough to overcome the requirement that, before the tort action could be maintained, the plaintiff must first exhaust his remedies in probate. "Extrinsic fraud, or in other words, fraud alleged in the prevention of the will contest, as opposed to in the making of the will, would appear to be the type of circumstance that would preclude relief in the probate court."[242]

The transformation of restitution into tort in *Schilling* allowed the plaintiff to try a simple will contest[243] before a jury, with access to punitive damages, and in circumvention of the proponent's presumptive right to pay costs out of the estate.[244] If the plaintiff had been required instead to bring an action for restitution by way of constructive trust, the court would have followed inheritance law procedural norms,[245] which in Florida do not provide for a jury trial,[246] and almost nowhere allows for punitive damages. In *Schilling* we therefore find another application in which the tort works a reform of the otherwise applicable specialized procedures of inheritance law, giving the disappointed expectant beneficiary the choice of his preferred procedures and remedies.

3. Inter Vivos Transfer that Depletes the Estate.

In some cases the interference-with-inheritance tort has been applied to a wrongfully procured inter vivos transfer. The theory is that, but for the inter vivos transfer, the

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[239] 23 P.2d at 761.

[240] *See supra* note 120 and text accompanying.

[241] 454 So.2d 783 (Fla. App. 1984).

[242] 952 So.2d, at 1236-37, quoting *id.*, at 785.

[243] The plaintiff would have had a strong case for undue influence in the probate court. Because the defendant was in a confidential relationship with the decedent, and because there are multiple suspicious circumstances, in Florida (as in many states) the plaintiff would be entitled to a presumption of undue influence. *See* Fla. Stat. § 733.107(2); *see also supra* Part I.B.1.a.

[244] *See* Klein, *supra* note 77, at 265 (arguing for recognition of the tort in part on the ground that the expenses of pursuing a claim in probate are borne by the estate).

[245] *See* Restatement (Third) of Restitution § 46, cmt. c (2011).

[246] *See* Estate of Howard, 542 So.2d 395 (Fla. App. 1989); Estate of Fanelli, 336 So.2d 631 (Fla. App. 1976).

property would have been in the donor's estate and then would have passed to the plaintiff. Commentators who favor the tort have also endorsed this theory.[247]

Peralta v. Peralta,[248] decided in 2005 by an appellate court in New Mexico, is illustrative. In that case, after the decedent executed a will leaving her estate in equal shares to each of her three children, two of the children wrongfully induced the decedent to transfer to them certain real property and to name them as the pay-on-death beneficiaries of her bank accounts.[249] The two children also convinced the decedent to execute a codicil to her will removing the third child, but as a consequence of the inter vivos transfer of the real estate and the pay-on-death designations on the bank accounts, the decedent died with no probate assets.[250]

The excluded child sued her siblings for tortious interference with her expected inheritance. The siblings moved to dismiss on the grounds that relief was available in probate. In New Mexico, as in Florida,[251] an interference-with-inheritance tort claim "will not lie when probate proceedings … can otherwise provide adequate relief."[252] The court explained that this rule reflects a policy preference for resolution "in probate because the legislature had enacted the Probate Code to deal with such matters."[253]

The court held that relief in probate was inadequate, however, because the "estate has been depleted so that there could be no remedy in probate."[254] Even if the plaintiff had "filed a probate proceeding as a means to attack the codicil" that disinherited her, "she would have achieved nothing because there was nothing in the estate for her to recover."[255] In the court's view, this was precisely the kind of "injustice that the tort of intentional interference with inheritance was meant to remedy."[256]

The court was wrong. As we have seen, the recipient of a nonprobate transfer procured by wrongful conduct is liable to the rightful claimant in restitution.[257] Likewise, an inter vivos transfer procured by wrongful conduct is voidable by the transferor, and the property is recoverable in restitution by way of constructive trust, a claim that passes to the fiduciary of the transferor's estate upon the transferor's death.[258] Although it was once true that certain of the decedent's legal claims perished on his death, today a

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[247] *See, e.g.,* Klein, *supra* note 77, at 269.

[248] 131 P.3d 81 (N.M. App. 2005).

[249] *Id.*, at 82.

[250] *Id.*

[251] *See supra* notes 232-235 and text accompanying.

[252] 131 P.3d, at 83.

[253] *Id.*

[254] *Id.*

[255] *Id.*, at 84.

[256] *Id.*, at 83.

[257] *See supra* Part I.B.2.

[258] *See, e.g.,* Monroe v. Marsden, 207 P.3d 320, 325-26 (Mont. 2009).

"survival action … continues in existence the injured person's claim after death as an asset of his estate."[259] Thus, the fiduciary of a decedent's estate "has the same standing to sue … as his decedent had immediately prior to death."[260] The court in *Peralta* overlooked the plaintiff's potential claim in restitution to recover her share of the bank assets and the power of the fiduciary of the decedent's estate to bring an action to recover into the estate the real estate.[261]

Peralta may be usefully compared with *Plimpton v. Gerrard*,[262] a 1995 decision of the Supreme Judicial Court of Maine involving roughly similar facts and a similar outcome, but quite different reasoning. In *Plimpton*, the plaintiff alleged that the defendant wrongfully induced the decedent, during life, to transfer to the defendant certain real estate that the plaintiff expected to receive under the decedent's will.[263] The court upheld the complaint against the defendant's motion to dismiss. Even though the plaintiff had "an adequate remedy in the Probate Court for his challenge to the inter vivos transfer," the court held that the "theoretical possibility of adequate relief in the Probate Court does not" foreclose a suit in tort.[264] In Maine, the probate court and the courts of general jurisdiction have "concurrent jurisdiction" over such matters, reflecting a policy judgment to reject the adequacy-of-probate rule; there is "no preference for one forum over another."[265] As such, the plaintiff was allowed to demand a jury trial and to seek punitive damages, neither of which would have been available if the plaintiff had litigated in probate rather than in tort.[266]

C. Reform without Reason and"Adequacy of Probate"

Thus far we have focused on cases that illustrate how the forgetting of restitution has led courts to recognize a redundant tort on the mistaken premise that doing so is necessary to fill remedial gaps. In each of *Davison*, *Schilling*, and *Peralta*, the court expressed a preference for resolution of inheritance disputes within inheritance law, but then the court overlooked the venerable role of restitution in such matters. As a consequence, those cases effected a kind of accidental law reform in which tort procedural norms displaced those of inheritance law. In *Plimpton*, by contrast, the court recognized

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[259] 1 STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH §§ 1:2, at 1-6 – 1-10; 1:13, at 1-46. (4th ed. 2005).

[260] Uniform Probate Code § 3-703(c) (1990); *see also* Siegel, *supra* note 179, at 259.

[261] Several commentators have likewise overlooked these potential claims and more generally the capacious scope of restitution by way of contstructive trust to prevent unjust enrichment. *See, e.g.*, Siegel, *supra* note 179, at 266 (arguing that "to the extent the trust property were consumed or otherwise dissipated or wasted, a tort action would be necessary to make the trust beneficiaries whole"); Johnson, *supra* note 179, at 784-85 (arguing that "an action in equity seeking a constructive trust would also be a possibility, but it would not provide A with relief if, for example, B spent the estate assets during the pendency of the litigation").

[262] 668 A.2d 882 (Me. 1995).

[263] *Id*. at 886.

[264] *Id*. at 887.

[265] *Id*.

[266] *Id*.

that the tort was redundant, but it nonetheless expressly invited disappointed expectant beneficiaries to circumvent the specialized procedural and remedial norms of inheritance law by recasting their claims as sounding in tort. *Plimpton* is thus an example a different and more troubling kind of law reform in which the court sanctions the creation of a rival legal regime, but leaves the choice of which regime will apply in a given case to the complaining party.

1. Rivaling the Will Contest.

Perhaps the best examples of this more overt and worrisome kind of law reform are interference-with-inheritance cases in which the plaintiff alleges that the defendant wrongfully induced the decedent to make, amend, or revoke a will. In spite of the obvious overlap with a will contest in probate,[267] in some states a disappointed beneficiary may instead bring suit in tort.[268] *Theriault v. Burnham*,[269] a 2010 decision of Maine's Supreme Judicial Court, is illustrative.

In *Theriault*, the testator had executed a will in 2001 in which she left real property known as Kent's Landing to the plaintiff, whose friendship with the testator had spanned three decades. Around the same time, the testator was befriended by the defendant.[270] In 2006, the testator, by then a nonagenarian, purportedly executed a new will that revoked her 2001 will and gave Kent's Landing to the defendant. Upon the testator's death the following year, her 2006 will was admitted to probate without objection by the plaintiff. Instead, the plaintiff sued the defendant in tort, alleging that the defendant procured the 2006 will through undue influence.[271]

The evidence at trial showed that the defendant had taken advantage of the testator, who was dependant on the defendant for transportation, cooking, and other basic needs. The defendant pressured the testator, threatened her, and isolated her from others. The defendant also took the testator to the defendant's lawyer, who drafted and supervised the execution of the 2006 will, and thereafter the defendant refused to allow the testator to see the will.[272] On these facts, which are typical in undue influence cases and resemble those of the *Lakotosh* case discussed earlier,[273] the jury found for the plaintiff and awarded damages in the amount of the value of Kent's Landing. On appeal, the court upheld the jury verdict as supported by sufficient evidence.[274]

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[267] *See supra* Part I.B.1.

[268] *See, e.g.,* Howard v. Nasser, 613 S.E.2d 64 (S.C. App. 2005); Wickert v. Burggraf, 570 N.W.2d 889 (Wis. App. 1997); Harkins v. Crews, 907 S.W.2d 51, 54 (Tex. App. 1995).

[269] 2 A.3d 324 (Me. 2010).

[270] *Id.*, at 325.

[271] *Id.*

[272] *Id.*, at 326.

[273] *See supra* notes 64-69 and text accompanying.

[274] 2 A.3d, at 325-26.

The second issue on appeal was whether the trial court had properly instructed the jury on the burden of proof in establishing the fact of a confidential relationship, and whether such a relationship, if proved, would trigger a presumption or merely allow an inference of undue influence.[275] The Supreme Judicial Court upheld the trial court's instruction that if the plaintiff proved the fact of a confidential relationship by a preponderance of the evidence, the normal standard of proof in tort and other civil litigation, then the plaintiff would be entitled to a presumption of undue influence.[276] If the case had been litigated as a will contest, however, the plaintiff would have been required to prove the fact of a confidential relationship by clear and convincing evidence, and would have been entitled to only an inference rather than a presumption of undue influence.[277]

What is striking about *Theriault*, therefore, is the court's explicit sanctioning of the redundant interference-with-inheritance tort in spite of the different evidentiary rules that would have applied to the same claim had it been brought as a will contest in probate. Indeed, the court acknowledged that its decision would allow a disappointed expectant beneficiary "to choose between two causes of action with differing standards of proof."[278] In *Plimpton*, the same court had acknowledged that under its decisions a disappointed expectant beneficiary could circumvent the rule requiring a bench trial in probate by suing in tort instead.[279]

The court explained that the "more demanding approach toward proof" in a will contest was justified because in a contest the disappointed expectant beneficiary "seeks to set aside a testator's entire will."[280] In the tort action, by contrast, the disappointed expectant beneficiary "seeks only monetary damages."[281] This is a rather facile distinction. Because wealth is today held predominantly in fungible financial assets,[282] in many cases there will be no difference between an award of damages and an order denying probate to the purported will.

More important, the formal difference in remedial structure in a will contest versus a tort action does not touch the underlying "worst evidence" problem that pertains equally to both.[283] The controlling consideration is the intent of a decedent who neces-

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[275] *Id.*, at 326-28.

[276] *Id.*

[277] *Id.*, at 327.

[278] *Id.*, at 327, n.4.

[279] *See supra* notes 262-266 and text accompanying

[280] 2 A.3d, at 327-28.

[281] *Id.*

[282] *See, e.g.,* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

[283] *See supra* Part I.B. One of the comments to Section 774B hints at the need for the plaintiff to establish his claim "by proof of a high degree of probability." But the rest of the comment is fuzzier, nowhere stating clearly the applicable standard of proof. RESTATEMENT (SECOND) OF TORTS § 774B, cmt. d (1979). Moreover, Section 912 states as a general rule that a tort plaintiff need only prove his claim "with as much certainty as

sarily cannot give live testimony to authenticate or clarify his intentions. Unlike tort law, which has no special competence or experience with this problem, the law of inheritance has evolved specialized procedures to address it. In *Theriault* we thus find an example of the tort operating not merely as a redundancy to the will contest, but as a rival cause of action that as a practical matter overrides the different procedural rules of inheritance law without consideration of the principled policy bases for those differences.

2. Unprincipled Application of the "Adequacy of Probate" Rule.

An even more blatant kind of reform by pleading technicalities arises through unprincipled application of the inadequacy-of-probate rule.[284] In applying this rule, some courts have held that relief in probate was inadequate precisely because the plaintiff's claim was barred by the application of a specialized rule of inheritance law. In such a case, the court's finding of inadequacy is in truth a displacement of the contrary rule in the law of inheritance. Three decisions exemplify this overt form of law reform, expanding the reach of tort law into inheritance disputes: *Estate of Hatten*,[285] *Estate of Ellis*,[286] and *Huffey v. Lea*.[287]

In *Hatten*, decided in 2004 by a Florida appellate court, the plaintiffs alleged that immediately after the testator's death, the defendant located and then destroyed the testator's will. The defendant had a strong motive to do so. Under the will, the decedent was to inherit just one dollar, whereas if the decedent had died intestate, the defendant would receive $100,000.[288]

In most states, a lost will that was not properly revoked by the testator is entitled to probate if its contents can be proved—for example, by a copy retained in the drafting lawyer's files.[289] In Florida, however, a statutory rule requires proof "by the testimony of two disinterested witnesses, or, if a correct copy is provided, … by one disinterested witness."[290] The plaintiffs in *Hatten* did not have such evidence. They had only their own testimony about what the testator had told them and what one of them recalled from reading the will.[291] Because "the only available testimony would come from the three plaintiffs, all of whom are 'interested' under the terms of the Probate Code," the court held that the statute foreclosed relief in probate.[292]

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the nature of the tort and the circumstances permit." *Id*., at § 912. In all events, as evidenced by *Theriault* and the other cases discussed in this Part, in litigation involving the interference-with-inheritance tort, the courts have applied the ordinary civil preponderance-of-the-evidence standard.

[284] *See supra* notes 232-235, 251-254.

[285] 880 So.2d 1271 (Fla. App. 2004).

[286] 923 N.E.2d 237 (Ill. 2009).

[287] 491 N.W.2d 518 (Iowa 1992).

[288] 880 So.2d, at 1273-74.

[289] *See* RESTATEMENT (THIRD) OF PROPERTY § 4.1, cmt. k (1999).

[290] 880 So.2d, at 1275 (quoting Fla. Stat. 733.207).

[291] *Id*. at 1273-75.

[292] *Id*. at 1275.

Plainly this statute reflects a legislative policy judgment, not unique to Florida,[293] that interested testimony should be excluded categorically rather than left to the trier-of-fact for a case-by-case determination of credibility. Although the trend in the modern law of inheritance is to the contrary, the Florida statute is consistent with an older tradition of barring interested testimony in inheritance matters.[294] To get around the statute, the plaintiffs sued in tort, and the court allowed the claim. The court reasoned that "relief is unavailable to [the plaintiffs] under the Probate Code."[295] But the court did not consider *why* relief was unavailable—namely, a specialized rule of evidence for inheritance disputes that rests on a principled (if contestable) policy choice to bar the plaintiff's evidence. Commentators who have argued for the tort likewise praise its utility in circumventing inheritance law rules that limit interested testimony.[296]

A similar pattern is evident in *Ellis*. In that case, decided in 2009, the Supreme Court of Illinois held that relief in probate was inadequate because the state's six-month limitations period for a will contest had run.[297] The court reasoned that, because the plaintiff was unaware of its claim during that period, the plaintiff did not have a fair opportunity to bring a timely contest in probate.[298] But the purpose of a short limitations rule—which as we have seen is common in probate codes across the country[299]—is to bring expeditious closure to probate, ensuring certainty of title in the decedent's successors. To hold that relief in probate is inadequate because the limitations period has run is to override the specialized limitations period of inheritance law for such disputes.[300]

Perhaps the most egregious of our three examples is *Huffey*, decided by the Iowa Supreme Court in 1992.[301] In *Huffey*, the plaintiff had first brought and won a will contest on the grounds of undue influence and lack of capacity. The plaintiff's expectancy of an inheritance was thus satisfied completely. In the words of the dissenting Justice, the plaintiff "received everything to which he was entitled under the [testator's prior] will."[302]

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[293] *See* PAGE ON WILLS, *supra* note 34, at § 29.157.

[294] *See, e.g.,* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1, cmt. o (1999).

[295] 880 So.2d, at 1275.

[296] *See* Klein, *supra* note 77, at 266-67.

[297] 923 N.E.2d 237, at 241-43; *see also* Frohwein v. Haesemeyer, 264 N.W.2d 792, 793-95 (Iowa 1978).

[298] 923 N.E.2d, at 241-43.

[299] *See supra* notes 73-74 and text accompanying.

[300] If, as in *Schilling*, the defendant concealed the fact of the plaintiff's claim or otherwise committed fraud in connection with the probate proceeding, the plaintiff would have a claim for restitution by way of constructive trust, as in *Caldwell*. *See supra* Part III.B.2.b. There was a hint of such a fraud in *Ellis*, but the court followed *Schilling* without regard to the possibility of relief in restitution. *See* 923 N.E.2d, at 242-43 (discussing *Schilling*).

[301] 491 N.W.2d 518 (Iowa 1992); *see also* Glickstein v. Sun Bank/Miami, 922 F.2d 666, 674 (11th Cir. 1991).

[302] *Id.*, at 524 (McGivern, C.J., dissenting).

Nonetheless, after the successful contest in probate, the plaintiff brought a second suit against the undue influencer in tort. The plaintiff sought not his lost expectancy, which had been recovered in probate, but rather his attorneys fees and costs in the earlier will contest, the value of his "time lost in his farm operation," for his mental anguish emotional distress, and punitive damages.[303] Precisely because none of these damages was available in the will contest, the court allowed the tort claim to proceed. "Obviously, the setting aside of the will did not provide [the plaintiff] with recovery of his consequential damages. [The plaintiff] also requested an award of punitive damages based on intentional and malicious conduct of the defendants. An adequate remedy has not been provided by the mere setting aside of the will."[304] In *Huffey*, therefore, we find a judgment that the remedial structure of probate itself is inadequate, justifying a supplemental action in tort. A clearer example of the tort effecting reform of inheritance law could scarcely be imagined.[305]

To be clear, we do not contend that the law of inheritance has evolved optimal rules and procedures. Rather, our point is that the law of inheritance includes specialized rules and procedures that are rooted in principled policy decisions, self-consciously made, about how best to implement the principle of freedom of disposition. To override those decisions on an ad hoc basis by allowing a rival tort action, without consideration of the structural "worst evidence" problem and related policies that underpin the specialized rules of inheritance law, is to reform the law of inheritance in an unprincipled, unreflective, and unpromising manner.

IV. THE INCONGRUITY OF INTERFERENCE WITH INHERITANCE AS A TORT

Inheritance law deals with the problem of wrongful interference by vindicating directly the donor's right to freedom of disposition. The interference-with-inheritance tort, by contrast, starts with a claim of collateral damage to the expectant beneficiary owing to the wrongdoer's violation of the donor's right to freedom of disposition. The awkwardness of the tort's basis in collateral harm manifests itself in a deep tension with which the courts have yet come to grips.

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[303] *Id.*, at 520-522.

[304] *Id.*, at 521.

[305] Some commentators have argued in favor of the tort on the grounds that it provides these additional remedies. *See, e.g.,* Klein, *supra* note 77, at 265; Stewart Sterk, *For Love or Money? Legal Treatment of Golddiggers*, JOTWELL (available online at http://trustest.jotwell.com/for-love-or-money-legal-treatment-of-golddiggers/). Such arguments treat tort law as a grant to judges of power to impose liability to achieve certain policy goals rather than a mechanism to vindicate rights personal to the plaintiff. For example, Klein supports recognition of the tort because it might allow a disappointed beneficiary to recovery attorneys fees that are not recoverable in a will contest or in a restitution action. *See* Klein, *supra*, at 265 But a successful tort plaintiff is not normally entitled to attorneys fees incurred in prosecuting the tort, making the use of tort to shift fees incurred in a separate action rather peculiar. Likewise, she argues that the imposition of tort damages allows for "punishing" wrongdoers. *See id.*, at 267; *see also* Sterk, *supra* (lamenting that (the deterrence potential" of restitution "is limited"). But tort is not a law of punishment. In truth, the notion of "tort" being invoked is not tort law as it has been traditionally understood, but rather is a general and unstructured power of the courts to impose damages as might serve one or another policy goal. We take up this point in *infra* Part IV.C.

On the one hand, interference-with-inheritance claims are sometimes cast as *derivative* claims. For example, in *Schilling v. Herrera*, discussed above, the court reasoned that even though the action is brought by the disappointed beneficiary, the beneficiary's claim is not personal but rather is meant to vindicate the donor's right to freedom of disposition.[306] On the other hand, interference-with-inheritance claims are sometimes characterized as *primary* claims – that is, as alleging a violation of a cognizable primary right in the beneficiary to the expected inheritance. The court in *Davison v. Feuerherd*, also discussed above, adopted this characterization, emphasizing that "[i]t is the expectancy status to which this theory of liability applies."[307]

With these alternate characterizations untangled, the interference-with-inheritance tort's conceptual difficulties come into sharp relief. The tort fails as a derivative claim because the common law of torts has a bright-line rule against such claims. And the tort fails as a primary claim because, except in one limited circumstance, the expectancy of an inheritance is too evanescent to warrant recognition as a primary right that could support a tort claim.

The willingness of the ALI and then the courts to embrace such a problematic tort is a testament to the pervasive influence of the Realist conception of tort law. On this view, tort law is an uncanalized delegation of authority to courts to shift losses from victims to antisocial actors when doing so promises to achieve deterrence or compensation. This impoverished, functionalist account strips away the structure and substance of tort law, in particular the core tenet that the plaintiff must allege that the defendant's conduct infringed on a right personal to the plaintiff. Reduced to nothing more than an invitation to courts to shift losses in the name of policy, Realist tort has the potential to swallow all of private law, including in this instance probate and restitution.

A. Interference with Inheritance as a Derivative Claim

To prevail on a tort claim, the plaintiff must establish that the defendant violated a right of the plaintiff not to be injured in the manner enjoined by the tort. As Cardozo explained in the canonical *Palsgraf* case, a tort plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[308] Benjamin Zipursky describes this rule as a "substantive standing" requirement.[309] We shall refer to it as "the *Palsgraf* principle."

Each tort defines a legal right not to be mistreated in certain ways. For example, the tort of negligence recognizes a person's right not to be injured physically by another person's acting carelessly toward her. Even if one suffers physical injury because of the careless actions of another, if those actions were not careless as to the injured person, she

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[306] *See infra* notes 315-316 and text accompanying.

[307] Davison, 391 So.2d, at 802.

[308] Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).

[309] Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 10 (1998).

has no claim for negligence, as she has not been mistreated in the manner enjoined by the tort. This is why Mrs. Palsgraf's claim failed. The defendant's employees did not act carelessly toward her. Instead, her injuries resulted from conduct that was careless only as to others.[310] Her claim was derivative, not primary. She was attempting to recover "as the vicarious beneficiary of a breach of duty to another."[311]

The other common law torts likewise deny derivative claims.[312] A plaintiff whose property declines in value because of the physical invasion of a neighbor's land has no claim for the tort of trespass. Because no possessory right of the plaintiff's was invaded, the plaintiff has not been mistreated in the manner enjoined by the tort.[313] A plaintiff who is not himself defamed, but who suffers economic loss owing to the defamation of a relative or friend, has no claim for defamation.[314]

Courts that conceptualize the interference-with-inheritance tort as a derivative cause of action have recognized, if only dimly, that they are departing from basic principles of tort law. The *Schilling* court, for example, acknowledged that on its rendering "[i]nterference with an expectancy is an *unusual* tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's interest rather than the disappointed beneficiary's expectations."[315] The court continued: "*In a sense,* the beneficiary's action is *derivative* of the testator's rights."[316] The court's concession that it is "unusual" for tort law to recognize a claim that is "in a sense … derivative" was its way of acknowledging, without coming to grips with, the deep conflict between the tort and core tenets of American tort law. In the law of torts, derivative claims are not "unusual," they are not recognized. A tort claim is an assertion that one's own rights have been violated by the defendant.

The *Palsgraf* principle is no mere formalism. It is crucial to holding tort law together as a distinct department of the law. Understanding what unifies the various tort causes of action helps to explain what otherwise might seem to be ad hoc or unprincipled impositions of liability or refusals to impose such liability. Recognition of the *Palsgraf* principle also helps lawyers and lawmakers better appreciate what is at stake in addressing behavior through tort versus criminal or regulatory law. Torts stand apart from other kinds of legal wrongs in that tort law empowers a private plaintiff to harness

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[310] *See id*., at 9.

[311] *See supra* note 308 and text accompanying.

[312] Certain claims for loss of consortium and negligent infliction of emotional distress might seem to contradict the rule against derivative claims, but as explained elsewhere, the contradiction is more apparent than real. *See* Zipursky, *supra* note 309, at 30, 35-6; *see also* John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1685-88 (2002).

[313] Zipursky, *supra* note 309, at 17-18.

[314] *Id*. at 25-26.

[315] Schilling, 952 So.2d at 1234 (emphasis added), quoting Whalen v. Prosser, 719 So.2d 2, 5 (Fla. App. 1998).

[316] *Id*. (emphasis added).

the power of the state to obtain private redress from a wrongdoer.[317] In contrast to a criminal prosecution or a regulatory proceeding, which is brought by the state to vindicate the interests of the state (i.e., a collective social interest), a tort action is brought by the victim of mistreatment to vindicate her personal interest in not being mistreated in the proscribed manner.

The *Palsgraf* principle also serves the important prudential function of limiting the scope of tort liability. Almost every wrongful injuring of a person has negative effects on persons other than the immediately injured victim—the victim's family, his neighbors, emergency responders, taxpayers, and so on. As one moves further away from the wronged victim, the plausibility of the law conferring a power to extract a private remedy from the wrongdoer wanes. The interests of remote victims become difficult to distinguish from the interest of all members of the community, undermining the case for allowing a lawsuit for private redress of a personal mistreatment. By categorically rejecting second-, third- and fourth-order claims, the *Palsgraf* principle sets a principled and clear boundary on tort liability.[318]

The *Palsgraf* principle is so fundamental to tort law that it admits of only one clearly established exception, which itself is a creation of statute rather than judicial decision. Wrongful death acts authorize claims by surviving family members to recover certain losses that they suffer as a result of the defendant's tortious killing of their decedent.[319] The family members' claim is usually derivative, because the defendant's conduct is usually tortious as to the decedent but not as to the decedent's family. The necessity of statutory authorization for such claims is a reaffirmation of the ubiquity of the *Palsgraf* principle across the common law of torts. But for the principle, there would have been no need for the statutes.[320]

B. Interference with Inheritance as a Primary Claim

1. Multiple Primary Claims Versus Derivative Claims.

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[317] *Palsgraf*, 162 N.E., at 101 (explaining that to ignore the principle that the tort plaintiff sues in her own right is "to ignore the fundamental difference between tort and crime").

[318] The death of the donor does not change the analysis. Claims to vindicate the right of the donor not to have been tortiously injured during life may be brought as survival actions by the fiduciary of the donor's estate. *See supra* notes 259-260 and text accompanying.

[319] SPEISER & ROOKS, *supra* note 259, at 1-46 – 1-47. Neither at the time of their enactment (in the late nineteenth and early twentieth century) nor since has anyone understood the statutes themselves to authorize interference-with-inheritance actions. They allow suits in which the plaintiff complains about the wrongful killing of the decedent, not the wrongful deprivation of assets that the plaintiff expected to receive upon the decedent's death.

[320] *See* John C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 382-87 (3d ed. 2012) (discussing English common law's rejection of wrongful death claims). Some early American common law decisions had allowed claims by a husband (or father) for the wrongful killing of his wife (or child). However, these were understood at the time as "property" torts – i.e., as claims by the patriarch for the violation of his right to the decedent's services. *See* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statues, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 732 (2006).

The *Palsgraf* principle does not deny that a single act might infringe upon the rights of more than one victim, giving rise to multiple *primary* claims. If a driver carelessly loses control of his car, striking a pedestrian and then a cyclist, each can pursue a separate negligence claim against the driver. A single wrongful act might also generate distinct tort claims for different victims. Suppose an assailant shoots at an intended victim, missing him, but the bullet hits a bystander. The intended victim may have a claim for assault, while the bystander will probably have a claim for negligence.[321] The assailant's assault of the intended victim was at the same time a violation of the bystander's right not to be injured by conduct that was careless as to his physical well-being.

With one exception discussed below,[322] interference with a donor's freedom of disposition does not involve conduct that is multiply tortious. For the expectant beneficiary to have his own claim, separate from any claim of the donor, the defendant's mistreatment of the donor must also infringe on a right personal to the expectant beneficiary. Yet an expectant beneficiary cannot plausibly be said to have a legal right to his or her expected inheritance. To begin to see why, compare an interference-with-inheritance claim with the claims that could be brought by the above-imagined cyclist and bystander.

If the cyclist were to sue the driver, the cyclist would seek redress for the violation of his right not be injured by the driver's carelessness toward him, distinct from any carelessness by the driver toward the pedestrian. The actions of the pedestrian, whether before or after the accident (in the form, say, of comparative fault or a waiver by the pedestrian of her claim) would play no role in determining the validity of the cyclist's claim. The same is true of the bystander with respect to the assailant and the intended victim.

In an interference-with-inheritance case, by contrast, the beneficiary's expectation of an inheritance is entirely dependent on the donor's will. Suppose a third party fraudulently induces a donor to revoke his will favoring his friend and to execute a new will in favor of the third party. Even if the donor were later to make a third will that restored the gift to the donor's friend, the donor would still retain the right to make yet another will that excluded the friend.[323] The utter dependence of the expectant beneficiary's interest on the donor's exercise of his right of freedom of disposition suggests that the beneficiary's claim is derivative, not primary.

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[321] Courts today might describe the bystander's allegation as a battery claim, reasoning that the defendant's intent to shoot the intended victim "transfers" to the bystander. *See* Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 914-15 (2004). The gist of the wrong, however, is carelessness or recklessness as to bystanders. *Id*.

[322] *See infra* Part IV.B.3.

[323] *See supra* Part I.A.

And yet, as in *Davison*, some courts have insisted that "[i]t is the expectancy status to which this theory of liability applies."[324] If that were true, giving the expectant beneficiary a cognizable right in his expectancy, then he should be able to bring suit to protect that expectancy even while the donor is still alive. But such a suit would be in deep tension with the right of the donor, while alive, lawfully to defeat the beneficiary's expectancy by changing her estate plan. Courts that characterize the interference-with-inheritance action as a primary claim have yet to find a satisfactory way of resolving this tension. A comparison of two such decisions, *Harmon v. Harmon*[325] and *Butcher v. McClain*,[326] is instructive.

In *Harmon*, the plaintiff sued his brother for interference with the plaintiff's expectation of an inheritance from their mother while their mother was still alive.[327] The plaintiff alleged that his brother had wrongfully convinced their mother to transfer certain property to the brother that the plaintiff had expected to inherit under the mother's will.[328] The Court deemed the complaint to state a valid claim on the theory that the brother's interference with the plaintiff's expectation was "complete" at the moment the brother took ownership of the property in question.[329]

The court's reasoning creates a conundrum. If the brother had in fact procured the transfer of the property by fraud and undue influence, then the mother would have her own claims against the brother for fraud and restitution.[330] If the mother became incompetent, the mother's fiduciary (such as a guardian or conservator) would have the power (and likely a fiduciary duty) to pursue such claims.[331] After the mother's death, those claims would pass as survival actions to the fiduciary of the mother's estate.[332] Now suppose that, during life and while competent, the mother knowingly and voluntarily waived her claims against the brother. Just as such a waiver would bind the fiduciary of her estate, would not the waiver scotch the plaintiff's interference-with-inheritance claim by lawfully defeating his expectancy?

To get around this problem, the court posited that the mother's lifetime transfer of the property to the brother injured the plaintiff during the mother's life by reducing the plaintiff's chances of inheriting the property.[333] But this conceptualization of the

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[324] Davison, 391 So.2d, at 802.

[325] 404 A.2d 1020 (Me. 1979).

[326] 260 P.3d 611 (Or. App. 2011).

[327] *Harmon*, 404 A.2d, at 1021.

[328] 404 A.2d, at 1021.

[329] *Id*. at 1022-23.

[330] *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION §§ 13, 15 (2011).

[331] *See* Siegel, *supra* note 179, at 259; Paul F. Driscoll, *Note, Tortious Interference with the Expectancy of a Legacy:* Harmon v. Harmon, 32 Me. L. Rev. 529, 533-44 (1980).

[332] *See supra* notes 259-260 and text accompanying.

[333] 404 A.2d, at 1023. A further peculiarity of this reasoning is that loss of chance is rarely cognizable as an injury in tort. *See* DAN B. DOBBS, THE LAW OF TORTS § 178 (2000). The one well-established exception is medical malpractice claims for loss of a chance of improved health. Unlike interference-with-inheritance

brother's injury is in truth a backhanded acknowledgment that his claim was derivative. What made the plaintiff's expectancy chancy was his mother's unfettered right to change her mind about the deathtime disposition of her property. Rather than confront this problem, and the obvious tension with inheritance law it generates, the court punted: "We do not here have occasion to address the rule that an expectant heir may not maintain an action to set aside a transfer during the life of the ancestor or impose a constructive trust over it, unless the incompetency of the ancestor is shown and the expectant heir acts as guardian in litem."[334]

The alternative manner of dealing with the donor's lawful right to destroy the expectant beneficiary's interest is illustrated by *Butcher*.[335] In that case, an Oregon appellate court held that the tort is not complete until the donor's death.[336] The court reasoned that, "although the alleged interference occurred when the defendants caused [the testator] to execute a will disinheriting" the plaintiffs, they "were not damaged by that interference until [the testator's] death, when they lost their expected inheritance."[337] In other words, because actions by the testator subsequent to the defendants' wrongful acts could lawfully defeat the plaintiffs' claim, the plaintiff could not have been injured during the donor's lifetime. But this is just another way of asserting that the plaintiffs' interest was derivative of the donor's freedom of disposition.

2. Conflict Between Inheritance and Tort Law.

The utter dependency of the plaintiff's expectancy on the donor's freedom of disposition counts overwhelmingly against recognizing within tort law a right to an expectant inheritance giving the expectant beneficiary a primary rather than a derivative tort claim. In this respect, we share the general outlook of older cases, such as *Hutchins v. Hutchins*, that declined to recognize the interference-with-inheritance tort.[338] There is, however, an important difference between our analysis and the reasoning of those cases. The older cases treated inheritance law's refusal to recognize a right to an expected inheritance as settling the question of whether such a right could be recognized within tort law. In so doing, they assumed that the primary rights recognized by tort law are dependent on, or limited to, the rights conferred by other bodies of law.

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claims, the malpractice claim rests on a primary right rooted in the breach of an affirmative undertaking by the defendant to provide a benefit to the plaintiff. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1657-59 (2002).

[334] 404 A.2d, at 1022, n. 1. In allowing the plaintiff's claim to go forward, the court made another revealing observation. It said that the availability of the mother to testify was a consideration in favor of allowing the suit to proceed "notwithstanding the ambulatory nature of the mother's will." 404 A.2d, at 1025. Here again we see an acknowledgment that the plaintiff's claim was derivative of his mother's right to freedom of disposition. The mother's testimony would be all but dispositive precisely because the plaintiff's expectancy was entirely dependent on her whim.

[335] 260 P.3d, at 615.

[336] *Id*.

[337] *Id*.

[338] *See supra* Part II.A.

The domain of tort law is not so limited. The recognition of a tort is a recognition *within tort law* of a right in the plaintiff not to be mistreated in the manner proscribed by the tort. No legal rule or policy requires tort law to recognize only those rights that are first recognized by another body of law. To the contrary, numerous rights have been recognized within tort law without predicate recognition elsewhere in law.[339] For example, a person does not have a property right in her reputation. Except in a metaphorical sense, no one owns the esteem in which he is held by others. Nonetheless, every person has a right recognized within tort law not to have her reputation damaged by defamation.[340]

As Prosser recognized, a more pertinent example is in the recognition of claims for tortious interference with commercial advantage.[341] Suppose *P* has leased commercial space to *L* through a series of mutual renewals of an annual lease. Then, by fraudulent misrepresentations, *D* induces *L* not to renew for the coming year. Although neither property nor contract law recognize a right in *P* to *L*'s renewal, in some jurisdictions *P* can sue *D* for tortiously interfering with his commercial expectancy.[342] A similar pattern of tort protection for "prospective advantage" is found in certain corners of negligence law.[343] A favorite teaching example is that of decisions allowing commercial fishermen to recover from a defendant who carelessly destroys fishing stocks, even though the fishermen cannot claim the as-yet-uncaught fish as their property.[344]

So *Hutchins* and like cases were wrong, or at least would be wrong today, in assuming that the absence in the expectant beneficiary of a right recognized by inheritance law precludes the recognition within tort law of a right against interference with the beneficiary's expected inheritance. But our argument does not rely on this syllogism. Rather, we argue that the fragility of an expected inheritance militates strongly against against recognizing within tort law a legally cognizable right in such an expectancy.[345]

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[339] *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 945-46 (1981) (arguing that the emergence of modern negligence law was largely a process of tort law developing its independence from property and contract law).

[340] *See* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 309-29 (2010).

[341] *See supra* notes 148-153 and text accompanying; *see also* Klein, *Go West*, *supra* note 179, at 226 (analogizing interference-with-inheritance claims to claims for interference with prospective advantage).

[342] DOBBS, *supra* note 333, § 450, at 1276

[343] We take up another possible analogue for the interference tort, liability for attorney malpractice in estate planning, below. *See infra* Part IV.2.2

[344] *Id.*, § 452, at 1284 (citing Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)).

[345] *Cf.* Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1564 (1982) (discussing the distinctive nature of wholly defeasible expectancies).

As we have seen, an expectant beneficiary's interest in a future inheritance is always subject to lawful defeasance at the donor's whim.[346] American inheritance law affirmatively denies that an expectant beneficiary or an heir apparent has any sort of legally cognizable interest, even a reliance interest, in an expected inheritance prior to the donor's death. The law of inheritance even tolerates forms of discrimination, such as the conditioning of a gift on the religious ancestry of the donee's spouse,[347] that are forbidden in other legal contexts.

The weakness of a prospective beneficiary's interest in an expected inheritance is further evidenced by comparing it to the prospective advantages described above that support tort claims. In the example of the landlord whose tenant declines to renew a lease because of the misrepresentations of a third party, the third party intentionally interfered with the landlord's interest in putting his property to commercial use.[348] In the example of the commercial fishermen who are denied their catch by a third party's carelessness, the third party wrongfully interfered with the fishermen's justifiable interest in pursuing unowned resources.[349] True, in market competition the landlord might lose out on the renewal or the fishermen might lose out on catching fish. In Judge Posner's pithy formulation: "Competition is not a tort."[350] However, recourse in tort is available if "the defendant [has] employed unlawful means to stiff a competitor."[351]

At stake for both the landlord and the fisherman are what might be described as a liberty interest – an interest in pursuing productive activity free from wrongful interference. An expectant beneficiary, as compared to the donor, has no comparable liberty interest. Until the donor's death, a prospective beneficiary merely awaits a transfer that might—but might not—occur. The policy interest that undergirds the law's facilitation of deathtime donative transfer is the right of donor to dominion over his property, not any interest of a donee in the receipt of an expected gratuitous transfer.[352]

3. The Special Case of Malicious Interference.

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[346] *See supra* Part I.A.

[347] *See supra* notes 25-28 and text accompanying.

[348] *See supra* note 342 and text accompanying.

[349] *See supra* note 344 and text accompanying.

[350] Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 865 (7th Cir. 1999) (Posner, C.J.).

[351] *Id.*, at 867 (citing Harvey S. Perlman, *Inteference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982)).

[352] *See supra* Part I.A. It could be argued that the typical expectant beneficiary has an interest in her reputation or in maintaining harmonious family relations that supports treating her tort claim as primary rather than derivative. But this is an argument against treating interference with inheritance as a freestanding tort, for it suggests that recovery must be predicated on interference with an interest apart from the plaintiff's expectancy. True, a person who loses an expected inheritance because an intermeddler defames her might be entitled to damages corresponding to the lost inheritance. But such damages would be parasitic on the violation of her right not to be defamed. An effort to ground the interference-with-inheritance tort in the plaintiff's interest in maintaining harmonious family relations runs into the additional problem that interference with familial relationships is not a tort.

In a typical interference-with-inheritance case, the wrongdoer mistreats the donor for the purpose of enriching himself. The expectant beneficiary's loss is a known or foreseeable side effect of the mistreatment of the donor. However, in a small subset of interference-with-inheritance cases, the wrongdoer acts out of *malice* toward the beneficiary. The wrongdoer's primary purpose is not to interfere with the donor's freedom of disposition, but rather to inflict harm on the expectant beneficiary. To the extent the wrongdoer acts out malice in this sense, arguably tort law should protect the beneficiary, for in such a case the beneficiary has been targeted for a deliberate mistreatment.

The supposition that an expectant beneficiary enjoys a right against malicious interference finds support in the scholarly writings of Holmes and Seavey, the intellectual grandfathers of the interference-with-inheritance tort. Both took the view that malicious injurings are a special case warranting protection in tort. In *Privilege, Malice and Intent*, a classic in the field, Holmes identified several instances in which an injurer's malice toward the victim converted non-tortious into tortious conduct.[353] Holmes emphasized in particular the role of malice in establishing liability for interference with contract and interference with prospective advantage, the doctrinal antecedents of the interference-with-inheritance tort.[354] Seavey later published an article amplifying Holmes's thesis.[355]

Given Seavey's and Holmes's views, as expressed in their scholarship, it seems likely that, in fashioning interference-with-inheritance illustrations for the First Restatement of Torts, Seavey had foremost in mind malicious interference. The Restatement emphasizes that liability would arise only if the defendant acted for the "purpose" of depriving the beneficiary of his expected inheritance.[356]

In contrast to Prosser's extension of interference-with-inheritance to cases in which the beneficiary's loss is a predictable side effect of the wrongdoer's mistreatment of the donor, the substantially narrower malice-based cause of action has a firmer conceptual basis. The insight that undergirds the *Palsgraf* principle is that torts are fundamentally mistreatments. The defendant who acts out of malice has, in his own mind, rendered the beneficiary a direct object of mistreatment. When, as in the case of malicious conduct, an actor conceptualizes his own conduct as wrongfully injuring another, there is good reason to treat the conduct as tortious even if the interest underlying the victim's injury is weak.[357] On this view, every person has a right, cognizable in tort,

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[353] Holmes, *supra* note 142, at 2 (describing liability for "malevolent motive for action, without reference to any hope of a remoter benefit").

[354] *Id.*, at 5-6; *see also* DOBBS, *supra* note 333, § 446, at 1262-63 (discussing "bad motives" as a basis for liability for interference with contract).

[355] Warren A. Seavey, *Bad Motive Plus Harm Equals a Tort*, 26 ST. JOHN'S L. REV. 279 (1952).

[356] *See* RESTATEMENT (FIRST) OF TORTS § 870 (1939) (liability attaches only to one who does any tortious act "for the purpose of" causing harm to another); *id.* cmt. e (indicating that liability does not attach simply because the defendant knows that, by harming one person, he will deprive another of an inheritance or gift).

[357] *Cf.* Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427, 456-57 (D. Owen, ed. 1995) (a malicious interference counts as a violation of the contracting party's rights because the malicious interferer "expressly or implicitly treats the right as a valuable asset which he can use, appropriate, or injure").

against being targeted for a malicious injury. In effect, the wrongdoer's own understanding of his conduct estops him from denying that the conduct was a tort as to the victim.

Having conceded the potential cogency of treating malicious interference with an expected inheritance as actionable, we must put this concession into perspective. Judging by the cases, the literature, and common sense experiential learning, instances of genuinely malicious or spiteful interference with an expected inheritance are rare. In the prototypical case, the wrongdoer interferes with the donor's freedom of disposition in order to secure a personal benefit. The loss to the expectant beneficiary is a predictable side effect rather than the purpose of the wrongdoer's action.

Given the relative infrequency of true cases of malicious interference, prudential considerations counsel against recognizing such a cause of action. There is an obvious and profound difficulty in asking judges and juries to ascertain the subjective motivation for the defendant's actions, particularly since the decedent cannot give testimony about what transpired. To recognize a tort of malicious interference with inheritance would be to ask fact-finders first to isolate those cases in which a defendant has intentionally and by wrongful means interfered with the plaintiff's expected inheritance, and then to isolate within that set of cases the subset in which the motivation, or at least the primary motivation, was the defendant's malice or spite toward the beneficiary. The risk of error and the costs of decision in such cases seems quite likely to overwhelm any benefit from recognizing the cause of action. Indeed, in light of the existence of a well-developed alternative body of law with procedures specifically designed to determine whether a deathtime transfer was volitional or the result of wrongful interference, the case against recognizing a malicious interference-with-inheritance tort is overwhelming.

C. The Realist Conception of Tort: Law and Equity Revisted

1. The Imperialism of Realist Tort.

The interference-with-inheritance tort cannot be justified on traditional understandings of tort law. The question thus arises, what is the basis for the tort? The answer, we suggest, is the pervasive influence of the Realist conception of tort law. On the Realist view, the common law of torts is best understood as a broad delegation of power to courts to impose liability for the purpose of compensating victims, deterring antisocial conduct, or both.[358] It follows from the Realist view that, in any circumstance in which a loss is suffered by *A* as a result of undesirable conduct by *B*, tort law authorizes courts to shift the loss from *A* to *B*.

The timing of the emergence of the interference-with-inheritance tort, the identity of its early academic proponents, and the grounds on which it has been articulated and defended, all demonstrate the degree to which this tort is the child of the Realist

[358] *See* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEORGETOWN L.J. 513, 521-29 (2003); *see also id*. at 531-37; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 953-71 (2010).

conception of the domain of tort. Prosser defended his inclusion of the tort in the Second Restatement of Torts on Realist terms.[359] *Bohannon*, *Mitchell*, *Davison* and other such cases adopted the tort on the basis of Realist-type reasoning.[360] (*Bohannon*'s invocation of the *ubi jus* maxim, mistranslated as requiring a remedy for every "wrong,"[361] is an example of a Realist recharacterization of the special action on the case.) And contemporary academic proponents argue for recognition of the tort on Realist grounds.[362] Perhaps the clearest example is in the work of Diane Klein, the scholar who has most carefully charted the growth of the tort.[363] Klein argues in favor of the tort primarily on the grounds that tort liability promises greater deterrence of wrongful interference.[364]

The problem with the Realist conception of tort is that it drains tort law of its doctrinal structure and content, leaving only an open-ended license for courts to shift losses. A tort plaintiff need not allege that the defendant breached a duty owed to the plaintiff. Instead, the plaintiff need only plead a loss or a setback that traces to antisocial conduct of the defendant. Core concepts that render tortious conduct distinctive – such as duty, breach of duty, causation, proximate cause, and injury – are reduced to empty labels. More generally, tort is converted into the "chancellor's foot" caricature of old equity—an unstructured loss-shifting apparatus that, owing to its lack of structure, has the potential to swallow better-defined fields of law,[365] in this instance probate and restitution.

The imperialism of Realist tort is at the heart of the conceptual awkwardness of the interference-with-inheritance tort. This point is perhaps most evident in the rule, embraced by many courts, that a tort claim will not lie unless probate remedies are inadequate.[366] The incorporation of an exhaustion requirement into a tort cause of action is a sure sign that something has gone wrong. No other tort has such a limitation, as it is inconsistent with vindicating a right personal to the plaintiff.

Lawyers familiar with English legal history will detect an oddly refracted echo of old notions about the relationship of equity to law. As the keeper of the king's conscience, equity's role was to offer relief in the gaps created by the law's adherence to rigid procedural formalities.[367] Today, in the domain of inheritance disputes, law and equity have traded places. Courts are now invoking tort law to fill perceived gaps in inheritance law doctrines suffused with principles of equity and that trace back to chancery

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[359] *See supra* notes 153 - 154 and text accompanying.

[360] *See supra* Part III.B.

[361] *See supra* text accompanying note 197.

[362] *See e.g.*, Johnson, *supra* note , at 774; Klein, *First, Second and Third*, *supra* note 179, at 239-40.

[363] *See supra* note 179.

[364] Klein, *supra* note 77, at 207.

[365] *See* GRANT GILMORE, THE DEATH OF CONTRACT (1974) (discussing the potential of tort, on a Realist conception, to swallow contract).[366] *See supra* notes 232-235, 251-254 and text accompanying.

[366] *See supra* notes 232-235, 251-254 and text accompanying.

[367] *See* JOHN H. LANGBEIN, ET AL., HISTORY OF THE COMMON LAW 271-72 (2009); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105-06 (4th ed. 2002).

practice.[368] To require claimants who seek to invoke tort to establish the inadequacy of inheritance law is to invert the hoary maxim that equitable relief lies only when the common law is inadequate.[369] In this application, tort is playing the role of equity, offering a less-structured alternative to probate and restitution.

The perversion of tort into a kind of shapeless equity is also discernable in another peculiar feature of the interference-with-inheritance tort, namely, the imposition of liability without the commission of a tortious act. As canonically expressed in Section 774B of the Second Restatement, the tort is "limited to cases in which the actor has interfered with the inheritance or gift by means that are *independently tortious*."[370] Yet, as we have seen, the predicate wrongdoing recognized in the cases often takes the form of "undue influence" and "duress," neither of which is by itself "tortious."

Undue influence involves "excessive and unfair persuasion, sufficient to overcome the free will of the transferor, between parties who occupy either a confidential relation or a relation of dominance on one side and subservience on the other."[371] The concept is meant to capture forms of mistreatment that are less overtly coercive than fraud or force or threat of force. Rather, it refers to "overreaching" and "overpersuasion."[372] In the inheritance context, undue influence commonly takes the form of a caretaker who ingratiates himself to an elderly and infirm donor, while at the same time isolating the donor from friends, family members, and physicians, after which the donor, at the suggestion of the caretaker, arranges to transfer property to the caretaker.

However blameworthy, undue influence is not "independently tortious" as to the donor. There is no tort of undue influence. In the absence of fraud, assault, or other such tortious mistreatment, a donor who transfers property a result of undue influence has no tort claim against the influencer. Instead, the donor can recover the transferred property in an action against the recipient for restitution by way of constructive trust.[373] Likewise, if the donor changed his estate plan as a result of undue influence, at the donor's death the disappointed expectant beneficiaries can vindicate the donor's right to freedom of disposition in a probate will contest or in an action for restitution.[374]

A similar analysis pertains to duress. There is no tort of duress. Of course, certain forms of duress are tortious, such as a threat of imminent physical harm (assault) or a threat of unfounded legal action (abuse of process). But insofar as duress in the inheritance context refers to subtler forms of coercion such as berating and brow-beating an

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[368] *See* LANGBEIN ET AL., *supra* note 367, at 354-55. Recall the lauding of the tort in *Peralta v. Peralta* for its role in avoiding the "injustice" of an expectant beneficiary's (erroneously) assumed lack of remedy in inheritance law. *See supra* note 256 and text accompanying.

[369] *See, e.g.*, 1 DAN B. DOBBS, LAW OF REMEDIES § 2.5 (2d ed. 1993).

[370] RESTATEMENT (SECOND) OF TORTS § 774B, cmt. c (1979) (emphasis added).

[371] RESTATEMENT (THIRD) OF RESTITUTION § 15 (2011).

[372] *Id.* § 15, cmt. b.

[373] RESTATEMENT (THIRD) OF RESTITUTION § 15(2) (2011).

[374] *See supra* Part I.B.

elderly donor into making a transfer or a new estate plan, the donor cannot complain of a tort. Recourse lies instead in probate or in restitution.

John Wade, who succeeded Prosser as the Reporter for the Second Restatement of Torts, confronted the oddity of the non-tortiousness of the paradigmatic interference-with-inheritance cases in a revealing way. Instead of limiting the tort to cases of tortious conduct, Wade proposed making explicit in commentary to Section 774B that the interference-with-inheritance action could be predicated on the defendant's commission of an "equitable tort."[375] Although Wade's proposal was not adopted, his arresting neologism is a candid expression of the Realist conception of tort as equity unbound, and of the imperialist tendencies of Realist tort to displace other bodies of private law.

2. Law, Equity, and the Inapt Analogy to Legal Malpractice.

We do not deny that good things might come from interdepartmental competition within a legal system. For example, the ancient competition between law and equity produced such staples of modern practice as the deposition, which arose in equity and was kept when law and equity fused.[376] A more salient example is the recognition in modern law of legal malpractice liability to intended beneficiaries for negligently planning a donor's estate.[377] Such a beneficiary cannot be understood to have a property interest in the expected benefit. Yet in the overwhelming majority of states, todaythis type of claim is allowed.[378]

Under traditional rules, there was no recourse in probate or elsewhere for such a beneficiary. Recognizing malpractice liability in tort thus filled a remedial gap. Such liability also has a basis in the lawyer's affirmative undertaking to assist the donor in benefitting the intended beneficiary. For these reasons, the emergence of tort liability for legal malpractice is a poor analogy for justifying the interference-with-inheritance tort.

Unlike estate planning malpractice, wrongful interference with the donor's freedom of disposition is already covered by will contests and restitution. There is no remedial void in the absence of tort liability as there had been for an intended beneficiary who was denied his inheritance as a result of attorney error. As such, the recognition of malpractice liability to intended beneficiaries posed no risk of creating a rival legal regime.

The plaintiff in an estate planning malpractice case also has a much stronger claim to be vindicating a personal right. In such a case, the intended beneficiary seeks vindication of his right to the competent performance of the lawyer's affirmative under-

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[375] 1969 Proceedings, *supra* note 162, at 238-39 (emphasis added).

[376] *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1231 (2005).

[377] *See, e.g.*, Bradley E.S. Fogel, *Attorney v. Client: Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261 (2001).

[378] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 60.

taking to assist the donor in arranging for the transfer of property to the intended beneficiary. For this reason, some courts conceptualize these claims as sounding in contract, treating the plaintiff as the intended third-party beneficiary of the contract between the donor and the lawyer.[379] Regardless whether the claim technically sounds in tort or contract, however, the plaintiff's claim is rooted in the defendant's breach of an affirmative duty, voluntarily assumed, to exercise due care acting for the benefit the intended beneficiary.

There is, moreover, a prudential difference between estate planning malpractice and tortious interference with inheritance, which reflects the different nature of the alleged misconduct. Estate planning malpractice claims call for a self-contained inquiry into whether the lawyer misrendered the donor's instructions. Wrongful interference claims, by contrast, involve often difficult judgments about whether the donor acted volitionally, judgments that must be made against the backdrop of family dynamics and customs that are alien to outsiders. In the face of such difficulties, there is good reason to limit the inquiry into the question of rightful ownership (i.e., probate and restitution), rather than the question of wrongful injury (i.e., tort).[380]

Finally, the estate planning malpractice cases are beginning to yield to a movement within inheritance law toward permitting reformation of mistaken terms and excusing harmless errors in execution.[381] Those reforms, which are rooted in equity traditions,[382] are taking hold because they more expeditiously correct the underlying mistake within the original probate proceeding without a separate tort action.[383] Importantly, this movement has arisen in the teeth of the hoary maxim that equitable relief is available only when the common law is inadequate. Rejected is the notion that tort law, by dint of its origin in the law courts, has priority over other fields, such as restitution, that offer equitable remedies. As the ALI has put the point in the just-published Restatement (Third) of Restitution: "A claimant otherwise entitled to a remedy for unjust enrichment,

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[379] *See, e.g.,* Simpson v. Calivas, 650 A.2d 318, 322-323 (N.H. 1994); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (recognizing third-party beneficiary standing to enforce a contract).

[380] To be sure, there are cases of wrongful interference that involve obvious and egregious wrongdoing. But rather than seeing in these special cases a reason to endure the many difficulties associated with recognizing the interference-with-inheritance tort, courts should instead ask whether such cases require reforming probate practice and restitution actions by, for example, allowing punitive damages awards. *See, e.g.,* Estate of Stockdale, 953 A.2d 454 (N.J. 2008) (recognizing punitive damages in a will contest in limited circumstances).

[381] *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28 (Jan./Feb. 2004). On reformation, see Uniform Probate Code § 2-805 (2008) (reformation); Uniform Trust Code § 415 (2000) (same); RESTATEMENT (THIRD) OF PROPERTY § 12.1 (same). On harmless error, see Uniform Probate Code § 2-503 (1990, rev. 1993); RESTATEMENT (THIRD) OF PROPERTY § 3.3 (2003). Dukeminier previously predicted that malpractice liability would spur law reform. *See* Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151 (1979).

[382] *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3, cmt. b (1999); Langbein, *supra* note 381, at 31; DUKEMINIER, SITKOFF & LINDGREN, *supra* note 17, at 336.

[383] The reforms also bring to bear the specialized procedural norms of inherance law, most significantly a requirement of clear and convincing evidence. *See* Uniform Probate Code §§ 2-503, 2-805 (1990, rev. 2008); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 3.3, 12.1 (1999, 2003).

including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law."[384]

CONCLUSION

Our purpose has been to examine the nature, origin, and policy soundness of the tort of interference with inheritance. Bolstered by its recognition in the Restatement (Second) of Torts, the tort has been adopted by the courts of nearly half the states. In many cases, it has displaced more venerable causes of action in probate and restitution. Despite its growing acceptance, the tort is deeply flawed. We have argued that its recognition was a doctrinal wrong turn that should be repudiated.

From the perspective of inheritance law, the interference-with-inheritance tort runs counter to the core value of freedom of disposition. The American law of inheritance so strongly protects the donor's freedom of disposition that, prior to the donor's death, the law denies an expectant beneficiary any interest in an expected inheritance. Yet the tort purports to protect a right in the beneficiary to an expected inheritance. Moreover, recognition of the tort invites circumvention of principled policies encoded in the specialized rules of procedure and remedy applicable in inheritance disputes. Unlike tort law, which has not been fashioned to address the particular problems posed by posthumous litigation, inheritance law has evolved out of long experience with the difficulty of discerning the intent of a decedent who necessarily cannot give testimony to authenticate or clarify his intentions. Because the interference-with-inheritance tort changes the rules under which such claims are litigated, recognition of the tort has amounted to ad hoc reform of inheritance law undertaken without reflection or an experiential base.

The tort is no less problematic from the perspective of tort law. On its face, it authorizes a derivative claim in violation of the settled principle that torts identify and vindicate rights personal to the plaintiff. To avoid this problem, some courts have conceptualized the tort as recognizing in an expectant beneficiary a right against interference with the beneficiary's expectation of an inheritance. But this conceptualization puts tort law into deep conflict with the principle of freedom of disposition. The fundamental conflict between protecting an expected inheritance under the rubric of tort law while denying protection to the same interest under the rubric of inheritance law distinguishes the expectation of an inheritance from those "prospective advantages" that courts have sometimes protected from wrongful interference. Although tort law can and does recognize rights that are not based in other bodies of law, tort should not recognize a right that is in fundamental conflict with the rights structure of a field of law that has been structured to handle precisely the matter at issue.

The emergence of the interference-with-inheritance tort is symptomatic of two related and unhealthy tendencies in modern legal thought. The first is the forgetting by lawyers and academics in this country of restitution and equitable remedies. On this

[384] RESTATEMENT (THIRD) OF RESTITUTION § 4(2) (2011); *see also* Laycock, *supra* note 197, at 169.

score, the ALI is to be commended for the Restatement (Third) of Restitution and Unjust Enrichment, which collects and organizes those rules in an easily accessible form.[385] On the other hand, the interference-with-inheritance tort owes its current prominence to an ill-considered provision slipped into the Restatement (Second) of Torts by its Reporter, Professor William Prosser. The ensuing unhappy experience with the tort in the cases is a cautionary tale against immodest top-down law reform that has not been tested in practice or vetted in the literature.

The second trend is the increasing influence of what we have called the Realist conception of tort law. On this view, tort law has minimal content and maximum reach; it is a sweeping grant of jurisdiction to courts to respond to antisocial conduct that causes loss. So understood, tort is a shapeless perversion of traditional equity that is available to supplant more structured bodies of law whenever a court concludes that the remedies available through other law are "inadequate." When modern, Realist-trained lawyers see a setback connected to antisocial conduct, they instinctively reach for tort. The notion that another body of law might already address the problem on different terms does not occur to them or does not trouble them. They have forgotten the capaciousness of restitution, a subject rarely taught in the modern era. It is therefore no surprise to see the interference-with-inheritance tort threatening to usurp the more traditional modes of relief in probate and in restitution.

Today when legal academics hail the virtues of interdisciplinary study, they have in mind the use of analytical methods developed in other disciplines. From the example of interference with inheritance, we learn that interdisciplinary study across fields of law is no less important. The ALI's acceptance of Prosser's draft, which granted life to a new tort that so profoundly conflicts with fundamental inheritance law rules and policies, and that reflects a deep ignorance of basic principles of equity practice, is a clear example of the downside to the trend among professors and practitioners toward increasing specialization. Scholars and practitioners who could coordinate across the law of inheritance, the law of restitution and unjust enrichment, and the law of torts would have been more alert to the tort's deep conceptual and practical difficulties.

[385] *See* Douglas Laycock, *Restoring Restituion to the Canon*, 110 MICH. L. REV. 929 (2012). Among other things, the new Restatement confirms that restitution can be legal or equitable. *See id*., at 931.