TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE

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This Article examines the nature, origin, and policy soundness of the tort of interference with inheritance. We argue that the tort should be repudiated because it is conceptually and practically unsound. Endorsed by the Second Restatement of Torts and recognized by the U.S. Supreme Court in a recent decision, the tort has been adopted by courts in nearly half the states. But it is deeply problematic from the perspectives of both inheritance law and tort law. It undermines the core principle of freedom of disposition that undergirds 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.

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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 an unstructured delegation of power to courts to impose liability whenever doing so promises to deter antisocial conduct or compensate victims of such conduct.

INTRODUCTION

Spurred by an innovative Restatement provision[1] and two U.S. Supreme Court decisions in a case involving former Playboy Playmate Anna Nicole Smith,[2] courts, lawyers, and legal scholars are 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 Second Restatement 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 damages for pain and suffering) and possibly punitive damages. In some states, Cordelia can commence her tort suit prior to Lear's death even though Lear could thereafter change his will yet again.[6]

Bucking the current trend, we argue that the interference-with-inheritance tort should be repudiated. Because courts are increasingly being asked to recognize the tort,[7] because the American Law Institute (ALI) will revisit the instigating Restatement provision in the next few years,[8] and because we are in the midst of a massive intergenerational transfer of wealth,[9] the soundness of the tort is a pressing policy issue in need of close scrutiny.

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1. *See* RESTATEMENT (SECOND) OF TORTS § 774B (1979); *see also infra* Part II.B.

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

3. *See* RESTATEMENT (SECOND) OF TORTS § 774B. 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* RESTATEMENT (SECOND) OF TORTS § 774B cmt. b.

4. *See* WILLIAM SHAKESPEARE, KING LEAR.

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

6. *See infra* text accompanying notes 333-345.

7. *See infra* Part II.C.

8. The ALI will reexamine section 774B in connection with the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM, now in preparation. *See Current Projects: Restatement Third, Torts: Liability for Economic Harm*, A.L.I., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=15 (last visited Jan. 26, 2013).

9. *See, e.g.*, John J. Havens & Paul G. Schervish, *Why the $41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11 (Jan. 2003) (discussing estimate that between 1998 and 2052, $41 trillion or more will be transferred), *available at* http://www.bc.edu/dam/files/research_sites/cwp/pdf/41trillionreview.pdf.

The tort is problematic because it is both redundant and in conflict with the law of inheritance.[10] The organizing principle of American inheritance law is the donor's right to freedom of disposition.[11] A prospective beneficiary's expectancy of a future inheritance is entirely dependent on the donor's exercise of this right in favor of the beneficiary. Inheritance law thus does not afford a prospective beneficiary direct recourse for harm suffered as a consequence of a third party's interference with the beneficiary's expected inheritance. Instead, the disappointed expectant beneficiary may bring actions in probate or in 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 in restitution. The remaining 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.

What makes the redundancy between tort law and inheritance law pernicious is that tort, as a general law of wrongful injury, is ill-suited to posthumous reconstruction of the true intent of a decedent. Such an undertaking, which is hampered by the inability of the decedent to give testimony to authenticate or clarify his intentions, requires the court to distinguish between legitimate persuasion and "undue influence" or "duress," and to do so in the context of nuanced family dynamics and customs that are often inaccessible to outsiders. In contrast to tort law, inheritance law has developed a host of specialized doctrines and procedures to deal with these difficulties.[12] There is thus little reason to suppose that tort concepts and procedures, which have developed primarily to deal with less subtle forms of injurious misconduct, will help courts better distinguish a bona fide claim of wrongful interference from a strike suit by a disappointed expectant beneficiary.

Because the interference-with-inheritance tort changes the rules under which inheritance disputes are litigated and offers different remedies than inheritance law, recognition of the tort is in truth recognition of a rival legal regime for addressing these same problems. The tort allows a disappointed expectant beneficiary to choose his preferred rules of procedure and potential remedies—the specialized rules of inheritance law, or the general civil litigation rules of tort law. This development is troubling because it has arisen without consideration of the reasons for the specialized rules of inheritance law. Courts have offered little justification for the creation of this alternative regime.

10. *See infra* Part III.
11. *See infra* Part I.A.
12. *See infra* Part I.B.

Some have reasoned, incoherently, that the tort is redundant with inheritance law yet necessary to fill gaps in that law. Other courts have allowed interference claims to proceed under different rules and to obtain different remedies for no other reason than the plaintiff chose to sue in tort rather than to bring a will contest or an action in restitution.

This pattern of unreflective law reform might be understandable if interference with inheritance presented a clean example of tortious conduct. But in fact it makes for an awkward tort.[13] As stated authoritatively in section 774B of the Second Restatement of Torts, an interference-with-inheritance claim must be premised on conduct that is "independently tortious" in character—that is, the sort of wrongful conduct that would in other contexts support tort liability.[14] Yet neither undue influence nor duress, both typical allegations in these kinds of cases, is independently tortious in this sense.[15]

More fundamentally, the interference-with-inheritance tort runs afoul of the basic principle that a tort claim vindicates the plaintiff's own right not to be mistreated rather than the rights of others. 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."[16] Yet in the teeth of this principle, some courts have characterized the tort as a means by which an expectant beneficiary can vindicate the donor's right to freedom of disposition.[17]

Other courts have characterized the interference-with-inheritance claim as alleging that the defendant's interference with the donor's intended disposition is also a violation of a freestanding right of the beneficiary.[18] But recognizing in the beneficiary 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.[19]

The failure of courts and commentators 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 vic-

13. *See infra* Part IV.
14. *See* RESTATEMENT (SECOND) OF TORTS § 774B cmt. c (1979).
15. *See infra* notes 382-387 and accompanying text.
16. Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).
17. *See infra* Part IV.A.
18. *See infra* Part IV.B.
19. *See infra* Parts II.B, IV.B.1.

tims to antisocial actors when doing so might serve the goals of deterrence or compensation. The Realist conception strips away the structure and substance of tort law, including the core tenet that the plaintiff must establish 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, tort threatens to swallow more structured bodies of law—in this instance, probate and restitution.

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 the courts then recognized a new tort that so profoundly conflicts with fundamental inheritance law rules and policies is a clear example of the need for coordination among experts in different fields of law, particularly in law reform projects. The tort's ill-considered displacement of specialized inheritance law rules also provides a cautionary tale about the need for modesty in top-down reform of the common law through innovative Restatement and Uniform Act provisions that have not been tested in practice or vetted in the literature.[20]

The remainder of this Article is organized as follows. Part I provides a brief overview of inheritance law, focusing on the traditional mechanisms by which it deals with wrongful interference with a donor's freedom of disposition. Part II recounts the emergence of the interference-with-inheritance tort. Part III examines courts' confused and contradictory assertions that the tort is both redundant with inheritance law and yet necessary to fill gaps in that law. Part IV examines the conceptual flaws of the interference-with-inheritance tort and relates them to the tort's grounding in the problematic Realist conception of tort law.

I. FREEDOM OF DISPOSITION AND THE LAW OF INHERITANCE

We begin with an overview of freedom of disposition and the traditional procedures by which the law of inheritance protects that right against wrongful interference. Our aim is to demonstrate the grounding of inheritance law in the rights of the donor; the existence of ample procedures within inheritance law to protect those rights; and the extent to which those procedures have been designed to cope with the difficulties of posthumous reconstruction of the subtle

20. *See* Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 AM. C. TR. & EST. COUNS. J. 314, 314-15 (2010); *see also* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (discussing pros and cons of Restatements and Uniform Laws).

dynamics of a decedent's familial and other close relationships as they pertain to the decedent's wealth.

A. *Freedom of Disposition*

The "organizing principle" of the American law of inheritance is "freedom of disposition."[21] Prevailing doctrine regards the right to dispose of one's property at death as a "separate, identifiable stick in the bundle of rights called property."[22] The Third Restatement 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 any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[23] The primary function of the law of inheritance is "to facilitate rather than regulate" the implementation of the donor's wishes.[24] 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 viewed in terms of proper rewards and socially valuable incentives to the *donor*."[25]

The donor's freedom of disposition is, of course, subject to wealth transfer taxation and a handful of policy limitations.[26] 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,[27] or to be triggered by the donor's lifetime conduct, such as the mandatory spousal share and rules protecting creditors.[28] No limitation on the donor's freedom of disposition is rooted in the interest of a prospective beneficiary in receiving a future gratui-

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21. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

22. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 8 (8th ed. 2009) (discussing *Hodel v. Irving*, 481 U.S. 704 (1987)).

23. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c.

24. *See id.* § 10.1 cmt. c.

25. Edward C. Halbach, Jr., *Introduction to Chapters 1-4*, *in* DEATH, TAXES AND FAMILY PROPERTY 3, 6 (Edward C. Halbach, Jr. ed., 1977).

26. *See* N.Y. Trust Co. v. Eisner, 256 U.S. 345 (1921) (upholding the estate tax); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (noting policy limits).

27. *See, e.g.*, John H. Langbein, *Burn the Rembrandt?: Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 376-79 (2010); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 364-65 (2005).

28. 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, 637-38 (Va. 2010). On the spousal share, see, for example, DUKEMINIER ET AL., *supra* note 22, at 476-80.

tous transfer. To the contrary, American law denies the existence of any such interest.

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.[29] A classic teaching example is *Shapira v. Union National Bank*.[30] 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."[31] The court emphasized the father's right to "restrict a child's inheritance," even "entirely [to] disinherit his children."[32] The court regarded the son's "right to receive property by will" as "a creature of the law" subordinate to the father's freedom of disposition.[33]

An important corollary to the principle of freedom of disposition is that the donor remains free to revise her estate plan until the moment of death. Wills and other instruments of deathtime donative transfer, the latter called "will substitutes,"[34] are "ambulatory," that is, subject always to amendment or revocation by the donor.[35] 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.[36]

A similar analysis applies to the interest of a prospective intestate heir, called an "heir apparent."[37] The interest of an heir apparent is not a right but an expectancy that is contingent on the heir apparent surviving the donor and the

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29. *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 INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 239-40 (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 ET AL., *supra* note 22, at 614-16.

30. 315 N.E.2d 825 (Ohio Ct. Com. Pl. 1974); *see also* DUKEMINIER ET AL., *supra* note 22, at 215 (excerpting *Shapira*).

31. *Shapira*, 315 N.E.2d at 826.

32. *Id.* at 828.

33. *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.

34. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); *see also, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 (2003).

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

36. *See In re* Estate of Henry, 919 N.E.2d 33, 40 (Ill. App. Ct. 2009) (collecting authorities).

37. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. d (1999).

donor not otherwise disposing of his property.[38] 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.[39]

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.[40] If the requirements of contract law for an enforceable promise are met, then the expectant beneficiary has a legally cognizable right and may enforce the donor's promise.[41] However, in such circumstances the expectant beneficiary's right 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 (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.[42] 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.[43] 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.[44]

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

It follows from the principle of freedom of disposition that "[a] donative transfer is invalid to the extent that it was procured by undue influence, duress,

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38. *See id.* To use the Latin phrase, *nemo est haeres viventis*. DUKEMINIER ET AL., *supra* note 22, at 74-75.

39. 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." 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 16.17, at 795 (3d ed., rev. 1960).

40. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 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).

41. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. p.

42. Langbein, *supra* note 34, at 1113.

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

44. *See* UNIF. TRUST CODE § 603(a) (2000); *accord* RESTATEMENT (THIRD) OF TRUSTS § 74(1) (2007).

or fraud."[45] This rule, which pertains to both inter vivos and testamentary transfers,[46] safeguards the donor's right to freedom of disposition by ensuring that only a volitional exercise of that right is enforced. Inheritance law offers procedures for challenging a posthumous disposition on the grounds that it was wrongfully procured.

At the same time, 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."[47] This "worst evidence" problem is inherent to the derivative structure of such litigation.[48] Although the competing claimants advance their own interests in the sense that each asserts a right to the donor's property, those claims are derivative of the donor's right to freedom of disposition. The worst evidence problem is aggravated by the fuzzy definition of undue influence, which is the most common basis for a will contest, and by the profound difficulty of reconstructing the subtle dynamics of familial and other close personal relationships.

Below we canvass 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 in restitution by way of constructive trust. Our aim is to demonstrate the capaciousness of these procedures and the extent to which they have been designed specifically to cope with the worst evidence problem, to give organizing structure to the nebulous concept of undue influence, and to deal with the difficulty of reconstructing the dynamics of familial relationships.

To be clear, we do not contend that procedures for inheritance disputes are now optimal, though they have come a long way from old English Chancery practice famously lampooned by Charles Dickens.[49] It may well be that other procedures would be more apt. Rather, our point is that the procedures and remedies in inheritance law for posthumous litigation over the intent of a decedent are rooted in principled policy decisions, ongoing and self-consciously made, about how best to resolve such matters given the derivative nature of the litigation and the worst evidence problem.

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45. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(a); *accord* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 13-15 (2011).

46. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. a.

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

48. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)).

49. *See* CHARLES DICKENS, BLEAK HOUSE (Random House 2002) (1853).

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.[50] Standing to bring the contest is based on the contestant's position in the decedent's earlier, unaffected estate plan.[51] 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 probate the will that the decedent did not volitionally revoke.

The most common basis for a will contest involving wrongful interference is undue influence.[52] The Third Restatement 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.[53]

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."[54] In deciding this issue, the trier of fact inevitably will be affected by social context and the perceived fairness of the donor's dispositions.[55] Second, because direct evidence of undue influence is rare, in most cases the contestant must rely on circumstantial evidence.[56]

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50. *See, e.g.*, UNIF. PROBATE CODE §§ 1-201(23), 3-402(a) (amended 2010); 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).

51. *See, e.g.*, Ames v. Reeves, 553 So. 2d 570, 573 (Ala. 1989); Wimberly v. Jones, 526 N.E.2d 1070, 1071 (Mass. App. Ct. 1988).

52. *See* DUKEMINIER ET AL., *supra* note 22, at 203; Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 648-49 (1987). We do not discuss capacity claims, which are also common grounds for a contest, because they do not involve an allegation of wrongful interference by a third party.

53. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. e (2003); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 15 (2011) (similar).

54. *See* DUKEMINIER ET AL., *supra* note 22, at 182.

55. *See, e.g.*, *In re* Will of Moses, 227 So. 2d 829, 836-37 (Miss. 1969) (invalidating the bequest of an older woman to her younger male lover, explaining that "[t]he sexual morality of the personal relationship is not an issue," but the fact of the "intimate relationship" gave rise to "an inference of undue influence").

56. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. e.

The combination of these two problems poses a systemic risk to the system of transferring wealth at death. Safeguarding freedom of disposition requires the court to invalidate a disposition that was not volitional because it was procured by undue influence.[57] But openness to circumstantial evidence facilitates the bringing of strike suits by disgruntled family members whom the decedent truly meant to exclude.[58] Moreover, the plasticity and vagueness of the undue influence concept allow judges and juries leeway to rewrite the decedent's estate plan in accordance with their own views of fairness and morality.[59]

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. The contestant normally has the burden of proving that a will was procured by undue influence.[60] But the trier of fact can infer undue influence from circumstantial evidence which shows 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."[61] This rule of inference brings order to the question of what circumstantial evidence is admissible.

In most jurisdictions, moreover, the contestant is entitled to a presumption of undue influence if she shows (1) the existence of a "confidential relationship" between the alleged influencer and the testator and (2) other "suspicious circumstances."[62] The rules for triggering this presumption—in particular, the meanings given to the terms confidential relationship and suspicious circum-

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

58. *See id.* at 65-66 (suggesting that "the odor of the strike suit hangs heavily over this field"); *see also* Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685-86 (2011) ("[B]y increasing costs through delays, negative publicity, and litigation expenses, [contestants] may be able to extract a settlement from the estate.").

59. *See, e.g.*, Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243-58 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 611 (1997); E. Gary Spitko, *Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 283 (1999); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 276-77 (2010).

60. *See* UNIF. PROBATE CODE § 3-407 (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. b.

61. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. e.

62. DUKEMINIER ET AL., *supra* note 22, at 184.

stances—help structure the difficult task of reconstructing the nature of the decedent's relationship with the alleged wrongdoer.

Confidential relationships encompass traditional fiduciary relationships, such as between a lawyer and client, as well as other relationships "based on special trust and confidence" that justify the donor in "placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor."[63] For example, a confidential relationship may be found between a caregiver and an enfeebled patient or an adult child and an enfeebled parent.[64]

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 estate plan.[65] 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."[66]

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."[67] In the absence of such evidence, the contestant is entitled to judgment as a matter of law.[68] The theory is that a person who benefits from a confidential relationship "can take precautions to ensure that proof 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."[69]

Estate of Lakatosh, decided by a Pennsylvania intermediate appellate court in 1994,[70] is typical in its underlying facts and in its resolution on the basis of a presumption of undue influence. Rose, an older woman in poor health, came to depend on a younger man named Roger.[71] In November 1988, Rose executed a power of attorney designating Roger as her agent and a will leaving him all but $1000 of her $268,000 estate. An audio recording of the execution ceremony showed that Rose was "easily distracted and clearly had difficulty remaining

63. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g.

64. *See id.*

65. *Id.* § 8.3 cmt. h.

66. *Id.* § 8.3 cmts. f, h.

67. Jackson v. Schrader, 676 N.W.2d 599, 605 (Iowa 2003).

68. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f.

69. Cleary v. Cleary, 692 N.E.2d 955, 960 (Mass. 1998).

70. 656 A.2d 1378 (Pa. Super. Ct. 1994).

71. *See id.* at 1381.

focused on the issue of the will."[72] She was also "somewhat out of touch with reality," having "referred to Roger as 'an angel of mercy' who 'saved her life.'"[73] In fact, Roger had stolen more than $128,000 from her, leaving her delinquent on her household bills and property taxes and "living in squalor and filth."[74] Rose died in 1993 without having revoked the will benefiting Roger.[75] 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.[76]

b. *Other specialized procedural rules*

Inheritance law's preoccupation with the worst evidence problem and sensitivity to the difficulty of policing familial relationships for undue influence 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,"[77] the "direction of the law is away from the trial of will contests before a jury."[78] 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 because it exists in "the jury-free realm of equity law."[79]

Another specialized rule is the relatively short limitations period for bringing a will contest.[80] This rule balances the need to allow challenges to vindicate the donor's 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

72. *Id.* at 1384.

73. *Id.*

74. *Id.* at 1382.

75. *See id.*

76. *See id.* at 1385.

77. Langbein, *supra* note 57, at 65; *see also* Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (describing inclination of juries toward "what is fair and right"); Langbein, *supra* note 48, at 2043 (noting "jurors' sympathy for disinherited offspring").

78. EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 14:5 (2d ed. 1999 & Supp. 2011). *But see* UNIF. PROBATE CODE § 1-306 (amended 2010) (providing for jury trial in formal testacy proceedings).

79. Langbein, *supra* note 57, at 67; *see also* DUKEMINIER ET AL., *supra* note 22, at 206 (noting use of bench trials for trust litigation in nearly all states).

80. *See, e.g.*, FLA. STAT. § 733.212(2)(c) (2012) (three months); OHIO REV. CODE ANN. § 2107.76 (LexisNexis 2012) (same); ALA. CODE § 43-8-199 (2012) (six months); 755 ILL. COMP. STAT. 5/8-1 (2012) (same); MD. CODE ANN., EST. & TRUSTS § 5-207(a) (LexisNexis 2012) (same). The outer limitations period under the Uniform Probate Code is three years. *See* UNIF. PROBATE CODE § 3-108(a)(3) (amended 2010).

to bring a posthumous challenge to a revocable trust that became irrevocable at the death of the donor (that is, a trust that is a will substitute).[81]

The adherence of inheritance law to the American rule on attorneys' fees, although not a specialized rule, also bears mention as an example of a considered judgment not to adjust the ordinary rules of civil litigation. Scholars have criticized the absence of an English-style loser-pays rule in will contests,[82] but the American rule nonetheless remains the norm.[83] Regardless of outcome, the default rule is that a person who contests a will pays his own fees,[84] 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.[85]

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, 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 will cannot be

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81. *See* UNIF. TRUST CODE § 604(a) & cmt. (2000) (applying a limitations period of the earlier of 120 days after notice is sent or three years after donor's death, the latter derived from section 3-108 of the Uniform Probate Code).

82. *See, e.g.*, 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, 266-67 (2002); Langbein, *supra* note 57, at 65.

83. An interesting exception is California, which subjects certain categories of transferees, such as care custodians (typically professional caregivers) or persons who draft an instrument of transfer, to special rules of evidence in proving that a transfer was voluntary. *See* CAL. PROB. CODE §§ 21350-21351 (West 2012). Such transferees must prove the absence of fraud, duress, or undue influence by clear and convincing evidence, on pain of being liable for costs, including reasonable attorneys' fees. *Id.* § 21351(d).

84. *See* Langbein, *supra* note 57, at 65. This rule is subject to the common fund doctrine if the contestant thereby confers a benefit on others. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 (2011).

85. *See, e.g.*, N.Y. SURR. CT. PROC. ACT § 2302(3)(a) (McKinney 2012); UNIF. PROBATE CODE § 3-720. 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.*, *In re* Winckler, 651 N.Y.S.2d 69, 71 (App. Div. 1996).

Two further examples of specialized procedures are the "probable cause" rule for no-contest clauses, *see* UNIF. PROBATE CODE §§ 2-517, 3-905; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 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).

probated.[86] 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.[87] And a nonprobate transfer operates outside of the reach of probate.[88]

In such cases, the traditional fallback has been to award the equitable remedy of constructive trust in an action for restitution to prevent unjust enrichment.[89] The First Restatement of Restitution, published in 1937, states the underlying 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."[90]

A constructive trust is a flexible remedy that courts of equity have long used to 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."[91] A more direct expression of the concept is this:

> If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights, the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product.[92]

The sole duty of the constructive trustee is to convey the property to its rightful claimant.[93]

The recently published Third Restatement of Restitution and Unjust Enrichment explains liability in restitution owing to 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 by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment."[94] The reference to "donative transfer" instead of "by will or an intestacy," as in the First Restatement,

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86. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 (1999) (describing the rules for executing a will).

87. *Cf. id.* § 4.1 cmt. a (describing the rules for revoking a will).

88. *See id.* § 7.1 (2003).

89. *See, e.g.*, 1 BOWE & PARKER, *supra* note 39, §§ 13.8, 14.8; 2 *id.* §§ 24.4-24.5; 3 *id.* § 26.20; 4 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 20.2-20.5 (1978).

90. RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 184 (1937).

91. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919).

92. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(1) (2011).

93. *See id.* § 55(2).

94. *Id.* § 46(1).

acknowledges the applicability of the principle to nonprobate modes of transfer and inter vivos gifts.[95] The Third 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.[96]

Crucially, restitution by way of 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. This limiting principle is explicit in the 1937 Restatement provision quoted above and is carried forward in the commentary in the 2011 Restatement.[97] Moreover, the law of restitution is sensitive to "the rules of procedure, standards of proof, and limitations periods applicable in probate cases," so that restitution cannot be used "to circumvent" probate's specialized procedures.[98] For example, if an action in restitution is brought "to overturn a formal testamentary disposition, the court may impose the same heightened standard of proof (such as 'clear and convincing evidence') applicable" in comparable probate litigation.[99]

a. *Remedying wrongful interference with will formation or revocation*

The leading cases of *Latham v. Father Divine*,[100] *Pope v. Garrett*,[101] and *Brazil v. Silva*[102] illustrate the role of restitution actions in safeguarding freedom of disposition against wrongful interference and the coordination of such actions with the specialized procedures of probate.

95. *See id.* § 46(2) & cmt. a.

96. *Id.* § 46 cmt. e (emphasis omitted).

97. *See, e.g.*, *id.* § 46 cmts. c, i.

98. *Id.* § 46 cmt. c.

99. *Id.*; *see also infra* note 108 and accompanying text.

100. 85 N.E.2d 168 (N.Y. 1949); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 reporter's note e (citing *Latham* as authority for illustration 8 to section 46).

101. 211 S.W.2d 559 (Tex. 1948); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 reporter's note h (citing *Pope* as authority for illustration 18 to section 46).

102. 185 P. 174 (Cal. 1919); *see also In re* Silva's Estate, 145 P. 1015 (Cal. 1915) (prior probate proceeding); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 reporter's note e (citing *Brazil* as authority for illustration 8 to section 46).

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 later attempted to execute a new will that would have given the plaintiffs $350,000, but that "by reason of . . . false representations [fraud], . . . undue influence and . . . physical force [duress]," the defendants prevented its execution and then arranged for the decedent's murder.[104] The New York Court of Appeals held that if "by fraud, duress or undue influence" a beneficiary prevents the testator from making a new will, the beneficiary holds the property he receives under the prior will upon a constructive trust for the intended beneficiary under the unexecuted new will.[105]

In *Pope*, some but not all of the decedent's heirs wrongfully prevented the decedent from executing a will in favor of her friend.[106] 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 wrongful acts by the other heirs.[107]

In *Brazil*, a wife tricked her husband, who wanted to revoke his will, into thinking that she had destroyed it for him.[108] After the husband's death, the wife offered the will for probate, as she would take more under the will than in intestacy. The husband's other heirs, who would take more in intestacy, contested the will on the grounds of the wife's fraud.[109] The California Supreme Court held that the probate court was required by the Wills Act to probate the will, which had not in fact been revoked.[110] "If relief can be given at all for such a wrong," said the court, "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."[111] So the heirs brought such an action against

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103. 85 N.E.2d at 169. Father Divine was either an inspirational religious leader or the head of a cult, depending on whom you ask. *See* DUKEMINIER ET AL., *supra* note 22, at 210 n.16.

104. *Latham*, 85 N.E.2d at 169 (quoting the amended complaint) (internal quotation marks omitted).

105. *Id.* (quoting RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 184 cmt. i (1937)). 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 First Restatement of Restitution and by "cases elsewhere." *Id.*

106. Pope v. Garrett, 211 S.W.2d 559, 559-60 (Tex. 1948).

107. *Id.* at 561-62. The liability in restitution of an innocent third party is codified in RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46(1) (2011), and RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 184 cmt. j.

108. *In re* Silva's Estate, 145 P. 1015, 1016-17 (Cal. 1915).

109. Brazil v. Silva, 185 P. 174, 175 (Cal. 1919).

110. *In re* Silva's Estate, 145 P. at 1016-17.

111. *Id.* at 1017.

the wife, and on appeal the same court held that the heirs had stated a valid cause of action.[112] However, recognizing the potential for "false testimony . . . since the evidence in most cases must be largely parol," the court held that on remand the heirs would have to prove their case "clearly and satisfactorily,"[113] that is, by clear and convincing evidence. The court thus harmonized the standard of proof for this kind of restitution action with that required in probate for other kinds of claims based on parol evidence that contradicts the plain language of a duly executed will.[114]

b. *Remedying "extrinsic fraud"*

Relief in restitution is also available to rectify wrongdoing in connection with probate administration. Thus, a constructive trust may be imposed to prevent unjust enrichment if probate is fraudulently obtained, such as by failing to serve notice on an interested party[115] or by wrongfully destroying or suppressing a will,[116] circumstances that are sometimes called "extrinsic fraud."[117]

Caldwell v. Taylor is instructive.[118] 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.[119] The son alleged that she procured the will 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."[120] The son further alleged that, during the six month limitations period for contesting the will,[121] the purported wife deceived the son "with the intent and purpose" of inducing him not to bring a contest.[122] After the contest limitations period expired, the son discovered that the purported wife, a "grossly immoral woman

112. Brazil v. Silva, 185 P. at 177-78.

113. *Id.* at 178.

114. *See, e.g.*, UNIF. PROBATE CODE §§ 2-503, 2-805 (amended 2010); UNIF. TRUST CODE §§ 407, 415 (2000); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999); *id.* §§ 10.2 cmt. i, 12.1 (2003); *see also* Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1 (2010) (analyzing standards of proof in will contests).

115. *See, e.g.*, 3 BOWE & PARKER, *supra* note 39, § 26.20.

116. *See, e.g.*, PALMER, *supra* note 89, § 20.5.

117. *See, e.g.*, Minter v. Minter, 62 P.2d 233, 235 (Mont. 1936); 3 BOWE & PARKER, *supra* note 39, § 26.20.

118. 23 P.2d 758 (Cal. 1933); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 reporter's note d (2010) (citing *Caldwell* as authority for illustration 1 to section 46); BOWE & PARKER, *supra* note 39, § 26.20 (discussing *Caldwell*).

119. *Caldwell*, 23 P.2d at 759.

120. *Id.*

121. Short limitations periods for will contests are common. *See supra* notes 80-81 and accompanying text.

122. *Caldwell*, 23 P.2d at 759 (quoting the complaint) (internal quotation marks omitted).

of the streets," was in fact married to someone else at the time she purported to marry the father.[123]

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.[124] The court emphasized that the son had sufficiently pleaded an "extrinsic" or "collateral" fraud, separate from the fraud upon the father, in the misrepresentations that induced the son not to contest the will.[125] The basis for equitable relief in *Caldwell* was that the purported wife's misrepresentations to the son "prevented [the son] from setting up a real defense to the probate of his father's will."[126]

The availability of restitution to prevent unjust enrichment arising from manipulation of the probate process, as in *Caldwell*, was codified in the Uniform Probate Code in 1969:

> 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.[127]

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 certain wrongful interferences with a testamentary transfer.[128] 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 wrongdoer holds the property as constructive trustee for someone else."[129]

In keeping with the role of restitution in inheritance matters as a supplement to probate, the test for whether an inheritance causes unjust enrichment is measured in relation to the donor's right to freedom of disposition. The ques-

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123. *Id.*

124. *Id.* at 761-62 (noting that it "may be extremely difficult" for the plaintiff to prove his case). The same court in *Brazil* had emphasized the need for clear and convincing evidence in such cases. *See supra* note 113 and accompanying text.

125. *Caldwell*, 23 P.2d at 760-61.

126. *Id.* at 761.

127. UNIF. PROBATE CODE § 1-106 (amended 2010). This provision is unchanged since its original promulgation in 1969.

128. *See infra* Part III.B.

129. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT ch. 5, topic 2, intro. note (2011).

tion is whether the transfer must be undone because it was induced by wrongful means. In the words of the Third Restatement 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."[130] In *Latham*, *Pope*, *Brazil*, and *Caldwell*, what made the defendants' inheritance an unjust enrichment was not an abridgement of a right to inherit enjoyed by the plaintiff, but rather the violation of the donor's freedom of disposition. As in a will contest, the underlying question was to whom the donor would have given the property but for the wrongful conduct of the defendant.

II. THE EMERGENCE OF THE INTERFERENCE-WITH-INHERITANCE TORT

As late as 1979, there was little recognition in American law of wrongful interference with inheritance as a tort. In the years since, however, the tort has been recognized by the courts in nearly half the states. The swift emergence of this tort traces to the work of William Prosser, who endorsed it in his scholarship and then wrote it into the Second Restatement of Torts. Since the publication of that Restatement in 1979, litigators have seized upon the tort to take advantage of its different rules, including most prominently the availability of jury trials and pain-and-suffering and punitive damages.

A. *Nineteenth and Early Twentieth Century Doctrine*

Amidst the sparse pre-1979 case law on interference with inheritance as a tort, the leading early authority is *Hutchins v. Hutchins*, a New York case decided in 1845.[131] 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.[132]

The reasoning in *Hutchins*, which exemplifies nineteenth and early twentieth century orthodoxy,[133] might seem to beg the critical question of why the

130. *Id.* § 1 cmt. b.

131. 7 Hill 104 (N.Y. Sup. Ct. 1845).

132. *Id.* at 109-10.

133. *See, e.g.*, Hall v. Hall, 100 A. 441, 442 (Conn. 1917) ("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 (Ohio Ct. 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.").

disappointed beneficiary should be understood not to have a right. But there is 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,[134] 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.[135]

On this view, the plaintiff's claim in *Hutchins* was comparable to that of a plaintiff who sues to recover economic losses resulting from 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 trespass claim, because no property right of hers had been invaded by the defendant. In *Hutchins*, the defendants may have violated the decedent's right to freedom of disposition, but the defendants did not violate any legal right of the plaintiff.

Perhaps the first decision clearly breaking from the nineteenth and early twentieth century orthodoxy, albeit in dicta, was *Lewis v. Corbin*, decided in 1907 by the Supreme Judicial Court of Massachusetts.[136] Anticipating the view that Prosser would later write into the Second Restatement of Torts,[137] *Lewis* sidestepped the question of whether the plaintiff could claim to have suffered the violation of a right. Instead the court focused on whether the plaintiff could adduce adequate proof of the defendant's wrongful act, causation, and harm. The court dismissed the plaintiff's tort claim for want of sufficient evidence.[138] However, the court left open the possibility that other claimants could recover in tort with more compelling evidence.[139]

In 1936, the North Carolina Supreme Court recognized the interference-with-inheritance tort in *Bohannon v. Wachovia Bank & Trust Co.*[140] 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.[141] The court upheld the complaint against

134. *See supra* Part I.A.

135. *See Hutchins*, 7 Hill at 109 (asserting that an action for interference with inheritance would be "next to saying that every voluntary courtesy was a matter of legal obligation").

136. 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. *See id.* at 622. On this basis, the court indicated that it might be willing to recognize an interference-with-inheritance tort in a future case. *See id.* In *Creek v. Laski*, 227 N.W. 817, 818 (Mich. 1929), the court permitted an action on the case for malicious destruction of a will.

137. *See infra* notes 154-166 and accompanying text.

138. *Lewis*, 81 N.E. at 249-50.

139. *Id.*

140. 188 S.E. 390 (N.C. 1936).

141. *Id.* at 393.

what was effectively a motion to dismiss, reasoning that a tort cause of action for interference with inheritance followed from the recognition in prior decisions of a tort cause of action for "malicious and wrongful" interference with a contractual expectancy.[142] 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.[143]

B. *The First and Second Restatements of Torts*

Three years after *Bohannon*, the interference-with-inheritance tort received an obscure form of recognition in two illustrations to provisions toward the end of the ALI's First Restatement of Torts. One of these provisions, 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."[144] 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.[145] 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.[146] There is no mention that these illustrations, which resemble *Latham v. Father Divine* and *Brazil v. Silva* respectively,[147] would give rise to an action in 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 recognized in earlier

142. *Id.* at 393-94.

143. *See infra* Part III.A.

144. RESTATEMENT (FIRST) OF TORTS § 870 (1939).

145. *Id.* § 870, 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 362-365 and accompanying text.

146. *See* 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.* § 970, 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 believing 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.").

147. *See supra* Part I.B.2.a.

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 this 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.[148]

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 therefore 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 First Restatement. In 1937, fourteen years into the project, the reporter, Francis Bohlen, became incapacitated, so the ALI tapped Warren Seavey, among others, to finish the project.[149] Seavey took the occasion of "mopping up" after Bohlen to insert sections 870 and 912.[150] So far as we are aware, there is no record explaining Seavey's inclusion of these illustrations in the absence of supporting case law,[151] nor of the ALI's decision to approve these sections and their accompanying illustrations.[152]

The First Restatement's two interference-with-inheritance illustrations had little immediate impact on case law.[153] Indeed, the absence of decisional sup-

148. Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894) [hereinafter Holmes, *Privilege, Malice, and Intent*]; Oliver W. Holmes, *The Path of the Law*, BOS. L. SCH. MAG., Feb. 1897, at 1, 12.

149. *See* William Draper Lewis, *Annual Report of the Director*, 16 A.L.I. PROC. 44, 46-47 (1939); 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 an advisor to the reporter, Seavey had so irritated Bohlen that two years earlier Bohlen had arranged to oust Seavey from the project. Kelley, *supra*, at 119-20.

150. *See* RESTATEMENT (SECOND) OF TORTS § 774A Note to Advisers (Preliminary Draft No. 15, 1961) (explaining that the references to interference with inheritance in sections 870 and 912 of the First Restatement were inserted at the last minute by Seavey "when he was mopping up").

151. Kelley, *supra* note 149, at 121 (noting the absence of "state-court cases specifically adopting th[e] generalized cause of action" identified in section 870).

152. One participant at the 1938 annual meeting criticized section 912 because it might relieve the plaintiff of the ordinary burden of proving that the defendant's tortious conduct probably caused the plaintiff's harm. *See Discussion of Torts Proposed, Final Draft No. 8*, 17 A.L.I. PROC. 290, 296 (1940) (statement of Mr. Snow).

153. Only a handful of decisions, mostly by intermediate appellate courts, invoked section 870. *See* Lowe Found. v. N. Trust Co., 96 N.E.2d 831, 835 (Ill. App. Ct. 1951); Moore

port for an interference-with-inheritance tort was contemporaneously recognized by Prosser. Ironically, he 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.[154] According to Prosser, since the 1893 English decision of *Temperton v. Russell*,[155] courts regularly had deemed actionable wrongful interferences with a person's efforts to obtain employment, hire employees, secure customers, and purchase property.[156] 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 a legacy under a will."[157] Nevertheless, embracing the dicta of the Massachusetts Supreme Judicial Court in *Lewis v. Corbin*,[158] Prosser insisted that this hesitancy was not based on any principled grounds, but rather on practical worries over proof of causation and loss.[159]

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. To Prosser's way of thinking, in such circumstances the only compelling reason not to allow the victim to bring a tort claim would be a concern about the competence of the courts to sort valid from invalid claims. But Prosser thought that this concern could be addressed by means less drastic than refusing to recognize the tort. In *Lewis v. Corbin*, for example, the court had addressed the problem by requiring the plaintiff to offer ample evidence of a concrete and well-defined expectancy.[160] Prosser also found support for the justiciability of interference-with-inheritance tort claims in the restitution case law described above.[161] But he neglected to attend to the distinct procedural and remedial rules that had evolved in those cases to address the problems of judicial administration that he was considering anew.[162]

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v. Travelers Ins. Co., 59 N.E.2d 225, 226 (Ohio Ct. App. 1944); Lovelady v. Rheinlander, 34 N.E.2d 788, 789 (Ohio Ct. App. 1940); Mangold v. Neuman, 91 A.2d 904, 907 (Pa. 1952).

154. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 1015-16 (1941).

155. [1893] 1 Q.B. 715 (Eng.).

156. *See* PROSSER, *supra* note 154, at 1014-15.

157. *Id.* at 1015-16.

158. *See supra* notes 136-139 and accompanying text.

159. *See* PROSSER, *supra* note 154, at 1016-17.

160. *See id.* at 1016; *supra* text accompanying notes 136-139.

161. *See* PROSSER, *supra* note 154, at 1017.

162. *See supra* Part I.B.

In the 1955 second edition of his treatise, Prosser again acknowledged that the case law stood against recognizing an interference-with-inheritance tort.[163] But he also identified a modest doctrinal countertrend.[164] 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.[165]

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.[166]

The phrase "fraud, duress or other tortious means" was meant to impose a limit on the tort by requiring the plaintiff to prove that the defendant's conduct was "independently tortious in character"—that is, the sort of wrongful conduct that would in other contexts support tort liability.[167]

Between Prosser's first draft in 1961 and the publication of the final version in 1979, section 774B was subject to little discussion and few changes.[168] The most significant discussion seems to have occurred at the 1969 Annual Meeting.[169] Prosser acknowledged that "[t]he older cases denied liability outright," but he misdescribed them as resting on evidentiary rather than principled grounds.[170] Prosser also pointed to "cases of a remedy in equity," which he regarded as de facto tort decisions, rather than a standard application of restitution by way of constructive trust to prevent unjust enrichment.[171] At a subsequent Annual Meeting, John Wade, who succeeded Prosser as Reporter for the Second Restatement, likewise asserted that "clear authority" supported section

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

164. *See id.* at 747 n.68 (citing, in addition to *Bohannon*, Hegarty v. Hegarty, 52 F. Supp. 296 (D. Mass. 1943); Axe v. Wilson, 96 P.2d 880 (Kan. 1939); and Kelly v. Kelly, 10 La. Ann. 622 (1855)).

165. *See* RESTATEMENT (SECOND) OF TORTS § 774A (Preliminary Draft No. 15, 1961).

166. RESTATEMENT (SECOND) OF TORTS § 774B (1979).

167. *Id.* § 774B cmt. c. The drafters were apparently unperturbed by the fact that duress is not independently tortious in this sense. Nor is undue influence. *See infra* notes 382-387 and accompanying text.

168. As initially presented for internal ALI review, the section did not specify a particular mental state. The word "purposely" was first inserted, and then was changed to "intentionally." *Compare* RESTATEMENT (SECOND) OF TORTS § 774B (Council Draft No. 23, 1967), *with* RESTATEMENT (SECOND) OF TORTS § 774B (Council Draft No. 40, 1976).

169. *See Wednesday Afternoon Session*, 46 A.L.I. PROC. 192, 238-47 (1970).

170. *Id.* at 238-39.

171. *Id.* at 239.

774B, though he admitted that most of the cases were "brought in restitution for constructive trust or something of that sort."[172]

C. *Recognition in Contemporary Law*

Section 774B did not set off a doctrinal revolution like the one that followed section 402A's endorsement of strict products liability.[173] Still, section 774B has had much more influence than section 870 of the First Restatement.[174] In eleven states, the court of last resort has recognized the tort,[175] and in one more the court assumed it was a valid cause of action.[176] In eight states, an intermediate appellate court has recognized it.[177] So the tort has been accepted by appellate courts in twenty states—twenty-one, if we add Colorado based on a projection by a federal court sitting in diversity.[178]

But these numbers understate courts' receptiveness to the tort and the influence of the Restatement. Since the promulgation of section 774B, only Ten-

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172. *Thursday Afternoon Session*, 54 A.L.I. PROC. 378, 431 (1978). Comment e to the final version of section 774B acknowledges the overlapping cause of action in restitution for constructive trust. *See* RESTATEMENT (SECOND) OF TORTS § 774B cmt. e.

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

174. Within the ALI, subsequent Restatement projects have followed the Second Restatement of Torts in recognizing the interference-with-inheritance tort. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 & cmt. a (2011); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. m (2003).

175. Florida: DeWitt v. Duce, 408 So. 2d 216, 219 (Fla. 1981). Georgia: Morrison v. Morrison, 663 S.E.2d 714 (Ga. 2008); Mitchell v. Langley, 85 S.E. 1050, 1053 (Ga. 1915). Illinois: *In re* Estate of Ellis, 923 N.E.2d 237, 240-41 (Ill. 2009). Iowa: Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992); Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978). Kentucky: Allen v. Lovell's Adm'x, 197 S.W.2d 424, 426-27 (Ky. 1946). Maine: Harmon v. Harmon, 404 A.2d 1020, 1024 (Me. 1979); 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); 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, 202-03 (Or. 1999) (en banc) (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).

176. In 2006, the court of last resort in Idaho treated the tort as if it were a valid cause of action. *See* Carter v. Carter, 146 P.3d 639, 647-48 (Idaho 2006). But in 2008, the same court implied that it had not yet ruled on the validity of the tort. *See* Losser v. Bradstreet, 183 P.3d 758, 764 (Idaho 2008).

177. California: Beckwith v. Dahl, 141 Cal. Rptr. 3d 142, 148 (Ct. App. 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).

178. *See* Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975).

nessee and Virginia have rejected the tort[179] (New York had rejected it previously[180]). 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 categorically rejecting it (six courts of last resort,[181] three appellate courts,[182] and one projection by a federal court sitting in diversity[183]). In sixteen states and the District of Columbia, the law is unclear owing to a lack of precedent (twelve)[184] or to precedent that is contradictory or not authoritative (four plus D.C.).[185]

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179. *See* Stewart v. Sewell, 215 S.W.3d 815, 827 (Tenn. 2007); Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000).

180. Hutchins v. Hutchins, 7 Hill 104, 109-10 (N.Y. 1845); Vogt v. Witmeyer, 665 N.E.2d 189, 190 (N.Y. 1996) (following *Hutchins*).

181. Alabama: *Ex parte* Batchelor, 803 So. 2d 515, 515 (Ala. 2001) (quashing, without explanation, prior opinion recognizing the tort); Holt v. First Nat'l Bank of Mobile, 418 So. 2d 77, 79-80 (Ala. 1982). 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) (declining to recognize the tort under Delaware law because probate remedies were available). Kansas: Axe v. Wilson, 96 P.2d 880, 885-88 (Kan. 1939). Maryland: Anderson v. Meadowcroft, 661 A.2d 726, 728-31 (Md. 1995). *But see* Geduldig v. Posner, 743 A.2d 247, 257 (Md. Ct. Spec. App. 1999) (declining to recognize the tort on the facts of the case but assuming the Maryland Court of Appeals "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).

182. Minnesota: Botcher v. Botcher, No. CX-00-1287, 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).

183. *See* Umsted v. Umsted, 446 F.3d 17, 20-21 (1st Cir. 2006) (applying Rhode Island law).

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

185. Connecticut: *Compare* Benedict v. Smith, 376 A.2d 774, 775 (Conn. Super. Ct. 1977) (recognizing a claim in tort for spoliation of a will), *with* Moore v. Brower, No. X10UWYCV054010227S (CLD), 2006 WL 2130385, at *6 (Conn. Super. Ct. June 14, 2006) (unpublished table decision) (stating that *Benedict* "simply did not recognize, or even consider, the tort of intentional interference with an inheritance as" regards allegations of procuring a will or trust by undue influence). Hawaii: Foo v. Foo, 65 P.3d 182, No. 24158, 2003 WL 220495, at *3-4, *7 (Haw. Ct. App. Jan. 10, 2003) (unpublished table decision) (declining to recognize the tort because probate remedies were available, but the opinion was not precedential under Hawaii Rule of Appellate Procedure 35). Louisiana: Kelly v. Kelly, 10 La. Ann. 622, 622 (1853) (allowing an action "in damages"); *see also* McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951) (failing to state whether applying Colorado or Louisiana law, but stating 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, 717 (S.C. 2001) (dismissing claim without deciding issue of whether tort is available). D.C. also lacks clear precedent. *Compare In re* Ingersoll Trust, 950 A.2d 672, 699-700 (D.C. 2008) (dismissing claim after assuming without deciding that D.C. recognized the tort), *with 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).

In just two decades, therefore, lawyerly sensibilities have shifted much closer to Prosser's views on the suitability of tort for policing interference with inheritance. 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.[186] 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 relative to prior editions, typically taking the Second Restatement as their starting point.[187] A small but growing corpus of scholarly oriented writing has examined the tort,[188] a significant increase from the previously limited scholarly attention.[189]

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186. *See, e.g.*, W. Fletcher Belcher, *Tortious Interference in Estate Planning*, *in* LITIGATION UNDER FLORIDA PROBATE CODE (8th ed. 2009); Angela G. Carlin, *Intentional Interference with an Expectancy of Inheritance—Revisited*, 14 OHIO PROB. L.J. 152 (2004); Dominic Campisi, Marshall v. Marshall*:* Rashōmon *Revisited*, PROB. & PROP. Jan.-Feb. 2007, at 8, 13-14.

187. *Compare* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS (2d ed. 2003) (lacking any coverage), *and* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 221-22 (6th ed. 2000) (including a one-page note on the tort), *with* STEWART E. STERK ET AL., ESTATES AND TRUSTS 473-82 (4th ed. 2011) (successor edition to DOBRIS ET AL., *supra*, that includes a separate section with a principal case and discussion of Anna Nicole Smith with photo), *and* DUKEMINIER ET AL., *supra* note 22, at 215-21 (incorporating an expanded section on tortious interference with a principal case and discussion of Anna Nicole Smith with photo).

188. *See, e.g.*, Fried, *supra* note 50, 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). Notably, Diane Klein has undertaken a series of in-depth analyses of the tort across jurisdictions. *See* Klein, *supra* note 82; Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003); Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235 (2004) [hereinafter, Klein, *Disappointed Yankee*]; 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*].

189. *See, e.g.*, Alvin E. Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 187 (1944); Morris Blumer, Comment, *Tort Liability for Depriving the Plaintiff, Through False Representations, of an Expected Inheritance*, 27 YALE L.J. 263 (1917); Katheryn Keene, Comment, *Torts—Interference with a Gift as a Cause of Action:* Ross v. Wright, *Mass. Adv. Sh. (1934) 797*, 14 B.U. L. REV. 860 (1934); Note, *Intentional Interference with the Expectation of a Gift*, 48 HARV. L. REV. 984 (1935); Recent Decision, *Torts—Recovery in Tort for False Representations Preventing an Expected Inheritance*, 23 VA. L. REV. 614 (1937); Recent Decision, *Torts—Wills—Interference with Testamentary Disposition*, 5 FORDHAM L. REV. 514 (1936); Leo H. Whinery, Comment, *Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates*, 19 U. KAN. CITY L. REV. 78 (1950).

Although we have focused on the role of academics and the ALI, the emergence of the interference-with-inheritance tort also reflects on-the-ground realities of litigation practice. Like numerous other academic innovations, section 774B might well have remained obscure had it not meshed with the interests of practicing lawyers. Lawyers representing disappointed expectant beneficiaries have understandably seized upon the tort to circumvent certain of the specialized procedures of inheritance law and to try their cases before juries with the possibility of pain-and-suffering and punitive damages.

The tort's contemporary salience also derives in part from the publicity surrounding a suit involving former Playboy Playmate Anna Nicole Smith, which reached the U.S. Supreme Court twice.[190] Smith's litigation is featured in the leading trusts and estates casebooks and is routinely cited by commentators.[191] Smith alleged that her stepson tortiously interfered with her expected gift from her deceased husband, 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 stepson was litigated in federal court incident to her bankruptcy proceeding.[192]

The Supreme Court's first opinion, a unanimous decision that addressed the substantive nature of Smith's tortious interference allegations, changed the litigation landscape in two ways. First, the Court gave its imprimatur to the tort by characterizing it as "widely recognized" and citing section 774B.[193] 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.[194] The availability of a federal forum for interference-with-inheritance claims caught the immediate attention of practitioners.[195]

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

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190. *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).

191. *See, e.g.*, THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 179-81 (5th ed. 2011); Campisi, *supra* note 186; Johnson, *supra* note 188, at 769-70; sources cited *supra* note 187.

192. *See* Marshall v. Marshall (*In re* Marshall), 275 B.R. 5 (C.D. Cal. 2002), *rev'd*, 392 F.3d 1118 (9th Cir. 2004), *rev'd*, 547 U.S. 293; DUKEMINIER ET AL., *supra* note 22, at 220.

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

194. 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 id.* at 311-12.

195. *See, e.g.*, THOMAS FEATHERSTONE, JR. ET AL., 2 TEXAS PRACTICE GUIDE PROBATE § 14:16 (Supp. 2011); Campisi, *supra* note 186, at 11-15; James A. Herb & Jay L. Kauffman, *The Supreme Court Takes Exception to the "Probate Exception"—Mrs. Smith Goes to Washington*, FLA. BAR J., Nov. 2006, at 49.

explained: "State probate courts possess no 'special proficiency' . . . in handling [such] issues."[196] 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 in restitution seeking the equitable remedy of constructive trust.

The problem with this redundancy is that it creates a potential, realized in many of the cases discussed below, for 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 in 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.[197] By resolving inheritance disputes on different 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.[198]

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. Quite the opposite, courts have recognized the tort primarily out of ignorance and confusion. In some cases, they have overlooked the availability of relief in restitution, recognizing the tort in order to fill a mistakenly perceived remedial gap. In other cases, they 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 in 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.

196. *Marshall*, 547 U.S. at 312 (alterations in original) (internal quotation mark omitted).

197. *See supra* Part I.B.

198. This point has been observed by the tort's leading chronicler. *See* Klein, *Disappointed Yankee*, *supra* note 188, at 250-52.

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 Co.*,[199] perhaps the first case formally to recognize the interference-with-inheritance tort.[200] In that case, the court suggested that (1) the tort was necessary to fill a gap so as not to leave a disappointed expectant beneficiary without a remedy for wrongful interference with his expected inheritance, and (2) the tort was justified by precedents allowing such a beneficiary to recover in an action in restitution by way of constructive trust.[201] 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 *Bohannon* alleged that the decedent "had formed the fixed intention and settled purpose of providing for the plaintiff and in the distribution of his estate, and would have carried out this intention and purpose but for the wrongful acts of [the defendants]."[202] Analogizing to actions for wrongful interference with a contractual expectancy, the court deemed the plaintiff to have stated a valid cause of action.[203] The court summed up the rationale as follows: "There is an old maxim of the law, 'No wrong without a remedy.'"[204]

This rationale supposes that the plaintiff would have lacked a remedy unless the court recognized the tort. But the availability of relief in restitution to prevent unjust enrichment from the wrongful obstruction of the making of a will (as in *Latham v. Father Divine*) or the wrongful obstruction of the revocation of a will (as in *Brazil v. Silva*) was by this time already established.[205] Indeed, just a few months after the decision in *Bohannon*, the ALI published the First Restatement of Restitution, which, as we have seen, codified this principle.[206]

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199. 188 S.E. 390 (N.C. 1936).

200. *See supra* Part II.A.

201. *Bohannon*, 188 S.E. at 393-94.

202. *Id.* at 393.

203. *See id.* at 393-94.

204. *Id.* at 394. A more precise translation of the original Latin—*ubi jus, ibi remedium*—is "where there is a right, there is a remedy." Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008). Whether there is a wrong is dependent in the first instance on the existence of a right. In Blackstone's clearer formulation, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy." 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

205. *See supra* Part I.B.2.

206. *See supra* text accompanying note 90; *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46, illus. 10 & reporter's note e (2011) (using an illustration based on *Bohannon*).

Foreshadowing Prosser's move in the Second Restatement of Torts,[207] the court suggested that one of the old writs under which tort actions once were brought—the "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."[208] 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.[209] Instead, this conception of tort is an early manifestation of the Realist theory of tort advanced by Prosser and his sympathizers.[210]

In support 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.[211] But *Mitchell* is a poor precedent for *Bohannon*. In *Mitchell*, the plaintiff had made "some allegations . . . looking in the direction of equitable relief," but had framed the claim "as one for damages."[212] In other words, the court was faced with a claim for restitution by way of constructive trust that had been mispleaded as a tort claim 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 *Mitchell* court invoked the action on the case.[213] The court cited the principle that "the original beneficiary" could have brought an "equitable petition to have a trust declared in his favor, if the benefit which would have accrued to him was diverted from him and the fund went into the possession of another by means of fraud."[214]

Accordingly, in asserting the need for a novel tort cause of action to fill a remedial gap, *Bohannon* relied on a precedent that had explicitly recognized that restitution by way of constructive trust already filled this 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 section 774B. They argued that case law support for the interference-with-inheritance tort could be found in cases of restitution.[215] Neither *Bohan-*

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207. *See supra* text accompanying notes 154-172.

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

209. *See infra* Part IV.A.

210. *See infra* Part IV.C.

211. *Bohannon*, 188 S.E. at 393-94 (citing Mitchell v. Langley, 85 S.E. 1050 (Ga. 1915)).

212. *Mitchell*, 85 S.E. at 1052.

213. *See id.* at 1051-53.

214. *Id.* at 1051.

215. *See supra* notes 171-172 and accompanying text. Some contemporary cases likewise cite restitution cases in support of the tort. *See, e.g.*, Morrison v. Morrison, 663 S.E.2d 714, 717 (Ga. 2008); *In re* Estate of Ellis, 923 N.E.2d 237, 241 (Ill. 2009); *see also* Holt v. First Nat'l Bank of Mobile, 418 So. 2d 77, 79-80 (Ala. 1982) (citing Pope v. Garrett, 204

non 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.[216]

B. *An Unnecessary Tort: The Forgetting of Restitution*

Following the promulgation of section 774B, some 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 in restitution for constructive trust. Here we consider three typical examples: (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.

1. *Interference with a nonprobate transfer*

The recipient of any form of donative 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.[217] Thus, wrongful interference with a will sub-

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S.W.2d 867 (Tex. Civ. App. 1947)); Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979) (citing Latham v. Father Divine, 85 N.E.2d 168 (N.Y. 1949)).

216. In one important respect, the interference-with-inheritance tort covers less ground than an action in 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. Liability in restitution arises irrespective of whether the holder acquired the property through his own wrongdoing. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2011) (defining unjust enrichment). The practical effect of the distinction is illustrated by *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948), which involved wrongful interference that benefited innocent takers. *See supra* notes 106-107 and accompanying text. 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 interference-with-inheritance tort, in such circumstances only restitution can provide a remedy. *See Wednesday Afternoon Session*, *supra* note 169, at 246-47.

Against this, Diane Klein has suggested that "[m]any courts will not impose a constructive trust on an 'innocent' party." Klein, *supra* note 82, at 290 n.169. Klein is right that some older cases denied relief in restitution against an innocent third party. *See* Victoria J. Haneman, *Changing the Estate Planning Malpractice Landscape: Applying the Constructive Trust to Cure Testamentary Mistake*, 80 UMKC L. REV. 91, 110 & n.140 (2011). But the prevailing modern view is that relief in restitution is indeed available to prevent the unjust enrichment of even an innocent third party. *See* UNIF. PROBATE CODE § 1-106 (amended 2010) (quoted in the text accompanying *supra* note 127); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46(1); PALMER, *supra* note 89, § 20.16.

217. *See supra* Part I.B.2.

stitute, such as an inter vivos trust or a pay-on-death contract, is remediable through the equitable device of constructive trust. In some states, however, a disappointed beneficiary may alternatively bring suit in tort.[218] Some commentators, too, have urged recognition of the tort in such circumstances.[219]

Davison v. Feuerherd, decided just after the promulgation of section 774B, is representative of this type of case. The decedent's stepdaughter sued certain of the decedent's caretakers for tortious interference with the stepdaughter's expectation of taking under the decedent's inter vivos trust.[220] The stepdaughter sought compensatory damages, litigation costs, and punitive damages.[221]

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.[222] The decedent had even instructed an attorney to draft the necessary documents. The decedent never finished the amendment process, however, because her caretakers falsely persuaded her that her stepdaughter did not love her and was not worthy of receiving her estate.[223] The caretakers threatened to quit caring for the decedent.

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.[224]

As in *Bohannon*, the opinion in *Davison* reads as if the plaintiff would not have had recourse without the tort. But the plaintiff could have brought an action in restitution for constructive trust.[225] Instead, because the plaintiff styled her claim as sounding in tort, she was entitled to demand punitive damages and a trial by jury under a preponderance of the evidence standard.[226] In *Davison*, therefore, the tort functioned as a rival cause of action with different, more plaintiff-friendly procedural and remedial rules. The trend in inheritance law, by contrast, has been toward unifying will contest procedures with those for

218. *See* Siegel, *supra* note 188, at 250-55 (surveying wrongful interference with trust cases).

219. *See, e.g.*, Klein, *supra* note 82, at 267-68.

220. 391 So. 2d 799, 799-800 (Fla. Dist. Ct. App. 1980).

221. *Id.* at 800.

222. *Id.*

223. *Id.*

224. *Id.* at 801-02.

225. *See* Siegel, *supra* note 188, at 255-63 (arguing that restitution by way of constructive trust should be preferred over tort to remedy wrongful interference with a nonprobate transfer).

226. *See* Klein, *supra* note 82, at 265, 270.

posthumous trust contests,[227] consistent with a "policy of unifying the law of wills and will substitutes."[228]

2. *Fraud in connection with a probate proceeding*

A recurring application of the interference-with-inheritance tort involves fraud in a probate proceeding—for example, concealing the fact of the proceeding from an interested party or wrongfully suppressing or destroying a will. Although relief has long been available in restitution for such "extrinsic fraud,"[229] in some states the interference-with-inheritance tort has emerged as a rival cause of action.[230]

A prominent example is *Schilling v. Herrera*, decided by a Florida appellate court in 2007.[231] In *Schilling*, the testator had executed a will in 1996 that left her entire estate to the plaintiff, her brother.[232] Subsequently, as the testator's health deteriorated, she hired the defendant, a nurse, to assist her.[233] By 2003, the testator could no longer live alone, so she moved in with the defendant, who had "converted her garage into a bedroom."[234] Later that year, while "completely dependent on" the defendant, the testator executed a new will that revoked her 1996 will and left her entire estate to the defendant.[235]

When the testator died in 2004, the defendant offered the 2003 will for probate. The defendant did not, however, tell the plaintiff that his sister had died.[236] Instead, while waiting for Florida's three-month probate limitations period to expire, the defendant ducked the plaintiff's calls and led him to be-

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227. *See, e.g.*, UNIF. TRUST CODE § 604 cmt. (2000); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 531-34 (2008).

228. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003).

229. *See supra* Part I.B.2.b.

230. *See, e.g.*, Tartaglia v. Hatten (*In re* Estate of Hatten), 880 So. 2d 1271, 1273-75 (Fla. Dist. Ct. App. 2004) (recognizing relief in tort for suppression of a will); Ebeling v. Voltz, 454 So. 2d 783, 784-85 (Fla. Dist. Ct. App. 1984); Wilburn v. Meyer, 329 S.W.2d 228, 229 (Mo. Ct. App. 1959).

231. 952 So. 2d 1231 (Fla. Dist. Ct. App. 2007); *see also* DUKEMINIER ET AL., *supra* note 22, at 215 (excerpting *Schilling*).

232. *Schilling*, 952 So. 2d at 1232-33.

233. *Id.* at 1233.

234. *Id.*

235. *Id.*

236. *Id.* 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) (2012), *with* UNIF. PROBATE CODE § 3-705 (amended 2010) (requiring such notice). Foreclosing a claim by an heir without notice to the heir is probably unconstitutional. *Cf.* Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 491 (1988) (holding that the Due Process Clause of the Fourteenth Amendment requires that known or reasonably ascertainable creditors be given notice of probate proceedings).

lieve that his sister was still alive.[237] After the three-month period, on petition by the defendant, the probate court entered a final order closing the probate proceeding. Nominally foreclosed from bringing a will contest by the probate court's order, the plaintiff sued the defendant for tortious interference with his expected inheritance.[238]

The defendant audaciously moved to dismiss the suit on the grounds that the plaintiff had failed to bring a timely will contest.[239] In Florida, as in most 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."[240] The court denied the defendant's motion. Quoting an earlier case, the court held that the adequacy-of-probate rule contemplates not just "an adequate remedy in probate," but also "a fair opportunity to pursue it."[241] In addition to the undue influence worked upon the testator (the underlying wrong), the plaintiff in *Schilling* alleged that the defendant prevented him from bringing a timely contest by concealing the fact of the probate proceedings (an extrinsic fraud).[242]

But the plaintiff could have brought an action in restitution for constructive trust. Although the opinion does not hint at this possibility—it reads as if the tort were the plaintiff's only hope—relief in restitution for extrinsic fraud in a probate matter is well established. A comparison of *Schilling* with *Caldwell v. Taylor*, discussed earlier, is instructive.[243] In *Caldwell*, the testator's purported wife induced the testator's son not to contest the testator's will by making a series of misrepresentations to the son.[244] After the probate limitations period expired, the son discovered the wife's fraud.[245] Without recourse in probate, the son brought an action in restitution seeking the imposition of a constructive trust on the property that the wife took under the will.[246] The court upheld the son's complaint. Section 1-106 of the Uniform Probate Code, quoted earlier, codifies the underlying principle.[247]

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237. *See Schilling*, 952 So. 2d at 1233.

238. *Id.* at 1232.

239. *See id.* at 1232-34.

240. *Id.* at 1236 (quoting DeWitt v. Duce, 408 So. 2d 216, 218 (Fla. 1981)) (internal quotation mark omitted); *see also* Wilson v. Fritschy, 55 P.3d 997, 1001-02 (N.M. Ct. App. 2002) (collecting authority). Some states have rejected this limitation. *See, e.g.*, Plimpton v. Gerrard, 668 A.2d 882, 886-87 (Me. 1995); Butcher v. McClain, 260 P.3d 611, 616 (Or. Ct. App. 2011).

241. *Schilling*, 952 So. 2d at 1236-37 (emphasis omitted) (quoting but distinguishing *DeWitt*, 408 So. 2d at 221).

242. *See id.* at 1236-37. On "extrinsic fraud," see *supra* Part I.B.2.b.

243. Caldwell v. Taylor, 23 P.2d 758 (Cal. 1933); *see supra* notes 118-126 and accompanying text.

244. 23 P.2d at 759.

245. *Id.*

246. *Id.*

247. *See supra* note 127 and accompanying text.

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*, in which the fraud took the form of misrepresentations that induced a party to forbear from bringing a will contest.[248] In *Ebeling*, a replay of the basic facts of *Caldwell*, the court held that this allegation was enough to satisfy the exhaustion-of-probate rule.[249]

The transformation of restitution into tort in *Schilling* created not just redundancy but also rivalry. It allowed the plaintiff to try a simple will contest[250] before a jury, with access to punitive damages, and in circumvention of the proponent's presumptive right to pay costs out of the estate.[251] If the plaintiff had been required instead to bring an action in restitution for constructive trust, there would have been no jury and almost certainly no punitive damages.[252]

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 property would have been in the donor's estate and thus would have passed to the plaintiff. Commentators who favor the tort have also endorsed this theory.[253]

Peralta v. Peralta, decided in 2005 by an appellate court in New Mexico, is illustrative.[254] 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 certain real property to them and to name them as the pay-on-death beneficiaries of her bank accounts.[255] The two children also convinced the decedent to execute a codicil to her will that removed the third child.[256]

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248. Schilling v. Herrera, 952 So. 2d 1231, 1236-37 (Fla. Dist. Ct. App. 2007) (citing Ebeling v. Voltz, 454 So. 2d 783, 784 (Fla. Dist. Ct. App. 1984)).

249. *Ebeling*, 454 So. 2d at 785.

250. The facts in *Schilling* are typical for a probate will contest, in which the plaintiff would have had a strong case. Because the defendant was in a confidential relationship with the decedent, and because there were multiple suspicious circumstances, in Florida (as in most states, *see supra* Part I.B.1.a) the plaintiff would be entitled to a presumption of undue influence. *See* FLA. STAT. § 733.107(2) (2012).

251. *See* Klein, *supra* note 82, at 265-66 (arguing for recognition of the tort in part on the grounds that the expenses of pursuing a claim in probate are borne by the estate).

252. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51 cmt. k (2011) (noting that punitive damages, while perhaps available in tort, are not within "the law of unjust enrichment"). On reform of probate and restitution to allow punitive damages, see *infra* notes 374-376 and accompanying text.

253. *See, e.g.*, Klein, *supra* note 82, at 268-69.

254. 131 P.3d 81 (N.M. Ct. App. 2005).

255. *Id.* at 82.

256. *Id.*

The excluded child sued her siblings for tortious interference with her expected inheritance. The trial court dismissed the suit on the grounds that relief was available in probate.[257] In New Mexico, as in Florida,[258] an interference-with-inheritance tort claim "will not lie when probate proceedings . . . can otherwise provide adequate relief."[259] This rule reflects a policy preference for resolution "in probate because the legislature had enacted the Probate Code to deal with such matters."[260]

The appellate court reversed. It held that relief in probate was inadequate, because the "estate ha[d] been depleted so that there could be no remedy in probate."[261] 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."[262] In the court's view, this was precisely the kind of "injustice that the tort of intentional interference with inheritance was meant to remedy."[263]

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.[264] 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.[265] Although it was once true that certain of the decedent's legal claims perished on his death, today a "survival statute . . . continues in existence the injured person's claim after death as an asset of his estate."[266] The fiduciary of a decedent's estate "has the same standing to sue . . . as his decedent had immediately prior to death."[267] The court in *Peralta* overlooked the plaintiff's claim in restitution to recover her share of the bank assets and the power of the fiduciary of the decedent's estate to bring a survival action to recover into the estate the real property.[268]

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257. *Id.* at 81.

258. *See supra* notes 240-241 and accompanying text.

259. *Peralta*, 131 P.3d at 83 (quoting Wilson v. Fritschy, 55 P.3d 997, 1006 (N.M. Ct. App. 2002)) (internal quotation mark omitted).

260. *Id.* (discussing *Wilson*).

261. *Id.*

262. *Id.* at 84.

263. *Id.* at 83.

264. *See supra* Parts I.B.2, III.B.1.

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

266. 1 STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1:13, at 1-44 to 1-46 (4th ed. 2005) (emphasis omitted).

267. UNIF. PROBATE CODE § 3-703(c) (amended 2010); *see also* Siegel, *supra* note 188, at 259 ("After the donor's death, the personal representative of the donor's estate . . . can bring an action . . . .").

268. Several commentators have likewise overlooked these potential claims and the capaciousness of restitution to prevent unjust enrichment. *See* Johnson, *supra* note 188, at 784-85 (arguing that "an action in equity seeking a constructive trust would also be a possibility,

Peralta may be usefully compared with *Plimpton v. Gerrard*,[269] decided in 1995 by the Supreme Judicial Court of Maine. In *Plimpton*, the plaintiff alleged that the defendant had wrongfully induced the decedents, during life, to transfer to the defendant certain real estate that the plaintiff expected to receive under the decedents' wills.[270] 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 "[t]he theoretical possibility of adequate relief in the Probate Court does not" foreclose a suit in tort.[271] 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.[272] 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.[273]

C. *Reform Without Reason and "Adequacy of Probate"*

1. *Rivaling the will contest*

Thus far, we have focused on cases that illustrate how forgetting restitution has led courts to recognize a redundant tort on the mistaken premise that doing so is necessary to fill remedial gaps. In *Davison*, *Schilling*, and *Peralta*, the courts expressed a preference for resolution of inheritance disputes under inheritance law, but then overlooked the availability of restitution as a supplement to probate. As a consequence, those cases created an accidental rivalry in which tort procedural norms displaced those of inheritance law. In *Plimpton*, by contrast, the court expressly invited disappointed expectant beneficiaries to circumvent the specialized procedural and remedial norms of inheritance law by recasting their claims in tort. *Plimpton* is thus an example of a different and more troubling kind of judicial decision in which the court forthrightly sanctions the creation of a rival legal regime, yet does so for no other reason than that the complainant has chosen to pursue her claim in tort rather than in probate or in restitution.

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but it would not provide A with relief if, for example, B spent the estate assets during the pendency of the litigation" (footnote omitted)); Siegel, *supra* note 188, at 263 (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").

269. 668 A.2d 882 (Me. 1995).

270. *Id.* at 886.

271. *Id.* at 887.

272. *See id.*

273. *Id.*

Perhaps the best examples of this 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,[274] in some states a disappointed beneficiary may alternatively bring suit in tort.[275]

Theriault v. Burnham is illustrative.[276] In that case, 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 defendant befriended the testator.[277] In 2006, the testator, then a nonagenarian, 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.[278]

The evidence at trial showed that the defendant had taken advantage of the testator, who was dependent on the defendant for transportation, cooking, and other basic needs. The defendant pressured the testator, threatened her, and isolated her from others. The defendant 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.[279] On these facts, which are typical of undue influence cases and resemble those of the *Lakatosh* case discussed earlier,[280] 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.[281]

The court also considered 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.[282] The 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 litigation, then the plaintiff would be entitled to a presumption of undue influence.[283] If the case had been litigated as a will contest, however, then un-

274. *See supra* Part I.B.1.

275. *See, e.g.*, Howard v. Nasser, 613 S.E.2d 64, 65 (S.C. Ct. App. 2005); Harkins v. Crews, 907 S.W.2d 51, 54 (Tex. App. 1995); Wickert v. Burggraf, 570 N.W.2d 889, 890 (Wis. Ct. App. 1997).

276. 2 A.3d 324 (Me. 2010).

277. *Id.* at 325.

278. *Id.*

279. *Id.* at 326.

280. *See supra* notes 70-76 and accompanying text.

281. *Theriault*, 2 A.3d at 325-26.

282. *See id.* at 326-28.

283. *Id.*

der applicable state law the plaintiff would have been required to prove that fact by clear and convincing evidence and would have been entitled only to an inference rather than a presumption of undue influence.[284]

What is striking about *Theriault*, therefore, is the court's explicit sanctioning of the rival interference-with-inheritance tort despite the different evidentiary rules that would have applied if the claim had 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."[285] 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.[286]

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."[287] In a tort action, by contrast, the disappointed expectant beneficiary "seeks only monetary damages."[288] This is an untenable distinction. Because wealth is today held predominantly in fungible financial assets,[289] in many cases there will be no difference between an award of damages and an order denying probate to the purported will.

More importantly, 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.[290] The controlling consideration is the intent of a decedent who necessarily cannot give live testimony to authenticate or clarify his intentions or to explain the subtleties of the relationships at issue. Unlike tort law, which has not been shaped in light of judicial experience with the worst evidence problem, the plasticity of undue influence, or posthumous reconstruction of relationships pertaining to wealth, the law of inheritance has evolved specialized procedures precisely for these kinds of cases. In sanction-

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284. *Id.* at 327-28 (citing *In re* Estate of Lewis, 770 A.2d 619, 622 (Me. 2001); *In re* Will of Fenwick, 348 A.2d 12, 15 (Me. 1975)).

285. *Id.* at 327 n.4 (remarking upon but declining to revisit the redundancy).

286. *See supra* notes 269-273 and accompanying text.

287. *Theriault*, 2 A.3d at 327-28.

288. *Id.* at 327.

289. *See, e.g.*, John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723, 738 (1988).

290. *See supra* Part I.B. One of the comments to section 774B of the Second Restatement of Torts hints at the need for the plaintiff to establish his claim "by proof of a high degree of probability." RESTATEMENT (SECOND) OF TORTS § 774B cmt. d (1979). But the rest of the comment is fuzzier, nowhere stating clearly the applicable standard of proof. *See id.* Moreover, section 912 states as a general rule that a tort plaintiff need only prove his claim "with as much certainty as the nature of the tort and the circumstances permit." *Id.* § 912. As evidenced by *Theriault* and the other cases discussed in this Part, in litigation involving the interference-with-inheritance tort, courts have applied the ordinary civil preponderance of the evidence standard.

ing the tort as a rival cause of action that as a practical matter overrides the different procedural and remedial rules of inheritance law, the courts have not considered the policy bases for those differences.

2. *Unprincipled application of the "adequacy of probate" rule*

An even more blatant kind of rivalry arises through unprincipled application of the inadequacy-of-probate rule.[291] 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 an overt displacement of the contrary rule in the law of inheritance. Three decisions exemplify this overt kind of law reform: *In re Estate of Hatten*,[292] *In re Estate of Ellis*,[293] and *Huffey v. Lea*.[294]

In *Hatten*, the plaintiffs alleged that immediately after the testator's death, the defendant located and then destroyed the testator's will.[295] The defendant had a strong motive to do so. Under the will, the defendant was to inherit just one dollar, whereas if the decedent had died intestate, the defendant would have received $100,000.[296]

A lost will that was not properly revoked by the testator is entitled to probate if its contents can be proved.[297] Such proof commonly takes the form of a copy retained in the drafting lawyer's files or testimony from the lawyer.[298] 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."[299] 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.[300] 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.[301]

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291. *See supra* notes 240-241, 258-261.

292. 880 So. 2d 1271 (Fla. Dist. Ct. App. 2004).

293. 923 N.E.2d 237 (Ill. 2009).

294. 491 N.W.2d 518 (Iowa 1992).

295. 880 So. 2d at 1274.

296. *Id.* at 1273-74.

297. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. k (1999).

298. *See id.*

299. *Hatten*, 880 So. 2d at 1275 (quoting FLA. STAT. § 733.207 (2003)). The statute is still good law. *See* FLA. STAT. § 733.207 (2012).

300. *Hatten*, 880 So. 2d at 1273-75.

301. *Id.* at 1275.

This statute reflects a legislative policy judgment, not unique to Florida,[302] 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 modern law is to the contrary, the Florida statute is consistent with an older tradition of barring interested testimony generally and in inheritance matters specifically.[303] To get around the statute, which made relief unavailable in probate, the plaintiffs sued in tort.[304] The court allowed the action but did not consider *why* relief was unavailable in probate,[305] 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 note its utility in circumventing inheritance law rules that limit interested testimony.[306]

A similar pattern is evident in *Ellis*, in which the court held that relief in probate was inadequate because the state's six-month limitations period for a will contest had run.[307] The court reasoned that, because the plaintiff, a hospital, was unaware of its claim during that period, it did not have a fair opportunity to bring a timely contest in probate.[308] But the purpose of a short limitations period, which as we have seen is common in probate codes across the country,[309] 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 short limitations period in inheritance law for such disputes.[310]

Finally, in *Huffey*, the plaintiff had earlier won a will contest on the grounds of undue influence and lack of capacity.[311] The plaintiff's expectation 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."[312] Nonetheless, after the successful contest in probate,

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302. *See* 3 BOWE & PARKER, *supra* note 39, § 29.157.

303. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o.

304. *Hatten*, 880 So. 2d at 1275.

305. *See id.* at 1275-76.

306. *See* Klein, *supra* note 82, at 266-67.

307. *In re* Estate of Ellis, 923 N.E.2d 237, 241-43 (Ill. 2009).

308. *Id.* at 243.

309. *See supra* notes 80-81 and accompanying text.

310. If, as in *Schilling v. Herrera*, 952 So. 2d 1231, 1233-34 (Fla. Dist. Ct. App. 2007), 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 in restitution, as in *Caldwell v. Taylor*, 23 P.2d 758 (Cal. 1933). *See supra* Part III.B.2. 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 Ellis*, 923 N.E.2d at 242-43 (discussing *Schilling*, 952 So. 2d at 1236-37).

311. Huffey v. Lea, 491 N.W.2d 518, 519 (Iowa 1992); *see also* Glickstein v. Sun Bank/Miami N.A., 922 F.2d 666, 674 (11th Cir. 1991).

312. *Huffey*, 491 N.W.2d at 524 (McGiverin, C.J., dissenting in part).

the plaintiff brought a second suit against the undue influencer in tort. The plaintiff sought not his lost expectancy, which he had recovered in probate, but rather his attorney fees and costs in the earlier will contest, the value of his "time lost in his farm operation," compensation for his mental anguish and emotional distress, and punitive damages.[313] 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 defendants. An adequate remedy has not been provided by the mere setting aside of the will.[314]

In *Huffey*, therefore, the court held that the remedial structure of probate itself was inadequate, justifying a supplemental action in tort. A clearer example of the tort overriding purposeful limitations within inheritance law could scarcely be imagined.

Again, we acknowledge that the law of inheritance may not have optimal rules and procedures. But they are nevertheless rooted in principled decisions, consciously made, about how best to safeguard freedom of disposition in posthumous litigation. 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 and unpromising manner. We are not arguing against reform, but rather against reform without reason.[315]

IV. THE INCONGRUITY OF INTERFERENCE WITH INHERITANCE AS A TORT

Inheritance law deals with the problem of wrongful interference with a testamentary disposition directly, by vindicating 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 resulting from 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 to come to grips.

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 vindicates the donor's

313. *Id.* at 520-22 (majority opinion).

314. *Id.* at 521.

315. Compare the deliberate but more modest fee-shifting rule adopted in California for "care custodians" and lawyers who draft the instrument of transfer. *See supra* note 83.

right to freedom of disposition.[316] On the other hand, interference-with-inheritance claims are sometimes characterized as *primary* claims—that is, as alleging a violation of a primary right of 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."[317]

These alternate characterizations put into sharp relief the conceptual difficulties of the interference-with-inheritance tort. 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 the courts to embrace this problematic tort is a testament to the pervasive influence of what we will refer to as the Realist conception of tort law. On this view, tort law is an unconstrained delegation of authority to courts to shift losses from victims to antisocial actors when doing so promises to achieve deterrence or compensation. The Realist account strips away the core tenet of tort law 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, tort law has the potential to swallow all of private law, 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 Justice 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."[318] Benjamin Zipursky describes this rule as a "substantive standing" requirement.[319] We shall refer to this rule 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 by another person acting carelessly toward her. Even if one suffers injury because of the careless actions of another, if those actions were not careless as to the injured person, she 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 inju-

316. *See infra* notes 324-325 and accompanying text.

317. 391 So. 2d 799, 802 (Fla. Dist. Ct. App. 1980).

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

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

ries resulted from conduct that was careless only as to others.[320] Her claim was derivative, not primary. She was attempting to recover "as the vicarious beneficiary of a breach of duty to another."

The other common law torts likewise deny derivative claims.[321] 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.[322] 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.[323]

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 "[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."[324] The court continued, "*In a sense*, the beneficiary's action is *derivative* of the testator's rights."[325] 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 resolving, the deep conflict between the tort and the *Palsgraf* principle. In the law of torts, derivative claims are not merely "unusual"; they are not recognized.

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 criminal and regulatory offenses in part because tort law empowers a private plaintiff to harness the pow-

320. *See id.* at 9.

321. 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* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1685-88 (2002); Zipursky, *supra* note 319, at 30, 35-36.

322. Zipursky, *supra* note 319, at 25-26.

323. *Id.* at 17-18.

324. Schilling v. Herrera, 952 So. 2d 1231, 1234 (Fla. Dist. Ct. App. 2007) (emphasis added) (quoting Whalen v. Prosser, 719 So. 2d 2, 6 (Fla. Dist. Ct. App. 1998)).

325. *Id.* (emphasis added).

er of the state to obtain redress from a wrongdoer for having herself been wrongfully injured.[326]

The rule against derivative claims 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 directly injured victim: the victim's family, his neighbors, emergency responders, taxpayers, and so on. The more remote the plaintiff is from the wrongful act, the less plausible is the plaintiff's claim to have been wronged personally. 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 higher-order claims, the *Palsgraf* principle sets a principled boundary on tort liability.[327]

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 relative.[328] The claim is usually derivative, because the defendant's conduct is usually tortious as to the decedent but not as to the decedent's family members. 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 authorization by statute.[329]

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326. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928) (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").

327. 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 266-267 and accompanying text.

328. SPEISER & ROOKS, *supra* note 266, § 1:13, at 1-46 to 1-47. As far as we are aware, no plaintiff has pointed to a wrongful death statute in support of recognizing the interference-with-inheritance tort.

329. *See* JOHN C.P. GOLDBERG ET AL., 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—as claims by the patriarch for the violation of his right to the decedent's services. *See* John Fabian Witt, Note, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 732 (2000).

B. *Interference with Inheritance as a Primary Claim*

1. *Multiple primary claims versus derivative claims*

A single act can infringe upon the rights of more than one victim, giving rise to multiple *primary* claims, each of which satisfies the *Palsgraf* principle. 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 her 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.[330] 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,[331] interference with a donor's freedom of disposition does not involve conduct that is multiply tortious. In order 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 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 to 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 dependent on the donor's whim. 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.[332] The utter dependence of the expectant beneficiary's interest on the donor's exercise

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330. 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.*

331. *See infra* Part IV.B.3.

332. *See supra* Part I.A.

of his right of freedom of disposition suggests that the beneficiary's claim is derivative, not primary.

And yet, as in *Davison v. Feuerherd*, some courts have insisted that "[i]t is the expectancy status to which this theory of liability applies."[333] 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, 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*[334] and *Butcher v. McClain*,[335] is instructive.

In *Harmon*, the plaintiff sued his brother for interference with the plaintiff's expectation of an inheritance from their mother while she was still alive.[336] 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.[337] The court deemed the complaint to state a valid claim even though the mother was still alive at the time the suit was commenced. The court reasoned that the brother's interference with the plaintiff's expectation was "complete" at the moment the brother took ownership of the property in question.[338]

But this 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.[339] After the mother's death, those claims would pass as survival actions to the fiduciary of the mother's estate.[340] Now suppose that the mother knowingly and voluntarily waived her claims against the brother during her life. 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

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333. 391 So. 2d 799, 802 (Fla. Dist. Ct. App. 1980).

334. 404 A.2d 1020 (Me. 1979).

335. 260 P.3d 611 (Or. Ct. App. 2011).

336. 404 A.2d at 1021.

337. *Id.*

338. *Id.* at 1022-23.

339. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 13, 15 (2011). If the mother became incompetent, the mother's fiduciary (such as a guardian or conservator) would have the power and likely a duty to pursue such claims. *See* Siegel, *supra* note 188, at 259.

340. *See supra* notes 266-267 and accompanying text.

life by reducing the plaintiff's chances of inheriting the property.[341] But this conceptualization of the brother's injury is in truth a backhanded acknowledgment that his claim was derivative and therefore not viable as a tort claim. What made the plaintiff's expectancy a mere chance was his mother's right to change her mind about the 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.[342]

The alternative manner of dealing with the donor's lawful right to destroy the expectant beneficiary's interest is illustrated by *Butcher*.[343] In that case, an Oregon appellate court held that the tort is not complete until the donor's death.[344] The court reasoned that "although the alleged interference occurred when 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."[345] In other words, because actions by the testator subsequent to the defendants' wrongful acts could lawfully defeat the plaintiffs' claim, the plaintiffs could not have been injured during the donor's lifetime. But this is to say that the plaintiffs' interest is derivative of the donor's freedom of disposition.

2. *The implausibility of a right in the expectant beneficiary*

The utter dependency of the plaintiff's expectancy on the donor's freedom of disposition counsels against recognizing within tort law a right to an expectant inheritance giving the expectant beneficiary a primary rather than a

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341. *Harmon*, 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* David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 641 (2001) (noting that a lost chance of avoiding injury is a cognizable injury in a "minority" of states, and generally only for certain medical malpractice claims). Loss-of-a-chance medical malpractice claims rest on a primary right, rooted in the breach of an affirmative undertaking by the defendant to provide a benefit to the plaintiff. *See* Goldberg & Zipursky, *supra* note 321, at 1657-59.

342. *Harmon*, 404 A.2d at 1022 n.1. In allowing the plaintiff's claim to go forward, the court made another revealing observation: 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." *Id.* 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 because the plaintiff's expectancy was entirely dependent on her whim.

343. *See* Butcher v. McClain, 260 P.3d 611, 615 (Or. Ct. App. 2011).

344. *Id.*

345. *Id.*

derivative tort claim. In this respect, we share the general outlook of older cases, such as *Hutchins v. Hutchins*, which declined to recognize the interference-with-inheritance tort.[346] 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 seem to have assumed that the primary rights recognized by tort law are dependent on, or limited to, the rights conferred by other bodies of law.

The domain of tort law is not so limited. Recognition of a tort is 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.[347] 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.[348]

As Prosser recognized, a more pertinent example is in the recognition of claims for tortious interference with commercial advantage.[349] 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 recognizes a right in *P* to *L*'s renewal, in some jurisdictions *P* can sue *D* for tortiously interfering with his commercial expectancy.[350] A similar pattern of tort protection for "prospective advantage" is found in certain corners of negligence law.[351] Cases in which commercial fishermen are allowed to recover from a defendant who carelessly

346. *See supra* Part II.A.

347. *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).

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

349. *See supra* notes 154-159 and accompanying text; *see also* Klein, *Go West*, *supra* note 188, at 226 (analogizing interference-with-inheritance claims to interference-with-prospective-advantage claims).

350. *See* DAN B. DOBBS, THE LAW OF TORTS § 450, at 1276 (2000) (citing Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183 (5th Cir. 1985), to illustrate the proposition that "courts have sometimes held interference with economic opportunity actionable when the defendant's interference is improperly motivated").

351. Another possible analogue for the interference-with-inheritance tort is liability for attorney malpractice in estate planning. *See infra* Part IV.C.2.

destroys fishing stocks—even though the fishermen cannot claim the as-yet-uncaught fish as their property—are a favorite teaching example.[352]

So *Hutchins* and similar 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 recognition within tort law of a right against interference with the beneficiary's expected inheritance. But our argument does not rely on this assumption. Rather, we argue that the fragility of an expected inheritance militates strongly against recognizing within tort law a legally cognizable right in such an expectancy.[353]

As we have seen, an expectant beneficiary's interest in a future inheritance is always subject to lawful defeasance at the donor's whim.[354] 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,[355] that are forbidden in other legal contexts.

The weakness of a prospective beneficiary's interest in an expected inheritance is even more evident when compared 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.[356] 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.[357] True, in market competition the landlord might lose out on the renewal or the fishermen might lose out on catching the fish. In Judge Posner's pithy formulation: "Competition is not a tort."[358] However, recourse in tort is available if "the defendant employed unlawful means to stiff a competitor."[359]

At stake for both the landlord and the fisherman is what might be described as a liberty interest—an interest in pursuing productive activity free from

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352. DOBBS, *supra* note 350, § 452, at 1284 (citing Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)).

353. *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).

354. *See supra* Part I.A.

355. *See supra* notes 30-33 and accompanying text.

356. *See supra* note 350 and accompanying text.

357. *See supra* note 352 and accompanying text.

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

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

wrongful interference. An expectant beneficiary has no comparable interest. Until the donor's death, the expectant beneficiary awaits a transfer that might—but might not—occur. The policy that undergirds the law's facilitation of donative transfers at death is the right of the donor to dominion over his property, not an interest of the donee in the receipt of an expected gratuitous transfer.[360]

Adding to the weakness of the expectant beneficiary's interest is that its vindication will often require courts to assess causation and injury against the backdrop of intrafamilial dynamics. Here it is notable that one of the very few instances in modern law in which a tort has been widely repudiated—the abolition of the "heartbalm" actions—was a rejection of the failed use of tort to provide relief for third-party interference with intimate relationships.[361]

3. *The special case of malicious interference*

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 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 that the wrongdoer acts out of malice, arguably tort law should protect the beneficiary, for in such a case the beneficiary has been deliberately targeted for mistreatment.

The notion 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 injuries are a special case warranting protection in tort. In his classic article, *Privilege, Malice, and Intent*, Holmes identified several in-

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360. *See supra* Part I.A. It could be argued that some expectant beneficiaries have an interest in a future inheritance on the basis of caregiving rendered to the donor. But this argument runs counter to the law's presumption that such services by a family member are gratuitous. *See* Tate, *supra* note 40 (discussing caregiving, disinheritance, and testamentary freedom). Moreover, because of the obvious problems of proof, most states subject a contract to make a will to the statute of frauds, *see* DUKEMINIER ET AL., *supra* note 22, at 328, and hence an agreement to make a bequest in return for caregiving must be reduced to writing to be enforceable.

One could argue, alternatively, that the typical expectant beneficiary has an interest in her reputation that supports treating her tort claim against the interfering party as primary rather than derivative. But this is in truth 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. 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.

361. *See* Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 364, 408-09 (2008).

stances in which an injurer's malice toward the victim converted nontortious into tortious conduct.[362] 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.[363] Seavey later published an article amplifying Holmes's thesis.[364]

Given Seavey's and Holmes's scholarly writings, it seems likely that in fashioning the interference-with-inheritance illustrations to section 870 of the First Restatement of Torts, Seavey had in mind malicious interference. The black letter of section 870 limits its applicability to cases in which the defendant acted "for the purpose of" injuring another.[365]

In contrast to Prosser's extension of the interference-with-inheritance tort to cases in which the beneficiary's loss is a predictable side effect of the wrongdoer's mistreatment of the donor, the malice-based cause of action is substantially narrower and has a firmer conceptual basis. The insight undergirding 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 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.[366] On this view, every person has a right, cognizable in tort, not to be targeted for injury out of malice. In effect, the wrongdoer's own understanding of his conduct estops him from denying that the conduct was a violation of the victim's own rights.

Having conceded the potential cogency of treating the special case of malicious interference with an expected inheritance as actionable, we must put this concession into perspective. Instances of genuinely malicious or spiteful interference with an expected inheritance appear to be rare. In the prototypical interference-with-inheritance case, the wrongdoer interferes with the donor's freedom of disposition in order to secure a personal benefit. The loss to the ex-

362. Holmes, *Privilege, Malice, and Intent*, *supra* note 148, at 2 (describing liability for "malevolent motive for action, without reference to any hope of a remoter benefit").

363. *Id.* at 5-6; *see also* DOBBS, *supra* note 350, § 446, at 1262-63 (discussing "bad motives" as a basis for liability for interference with contract).

364. Warren A. Seavey, *Bad Motive Plus Harm Equals a Tort*, 26 ST. JOHN'S L. REV. 279, 280-82 (1952).

365. *See* RESTATEMENT (FIRST) OF TORTS § 870 (1939) ("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 . . . ."); *id.* § 870 cmt. e (indicating that liability does not attach simply because the defendant knows that, by harming one person, he will deprive another of a gift).

366. *Cf.* Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427, 456-57 (David G. Owen ed., 1995) (explaining that 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").

pectant beneficiary is a predictable side effect rather than the purpose of the wrongdoer's action.

In light of the 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 a factfinder first to isolate those cases in which a defendant has intentionally and wrongfully interfered with the plaintiff's expected inheritance, and then to isolate within that set 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 decision costs in such cases seem quite likely to overwhelm any benefit from recognizing the cause of action.[367] Given the existence of a well-developed, alternative body of law with procedures specifically designed to determine whether a testamentary 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 Revisited*

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 reduced to an open-ended and unstructured delegation of power to courts to impose liability for the purpose of compensating victims, deterring antisocial conduct, or both.[368] It follows that, in any circumstance in which *A* suffers a loss 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 leading academic proponent, 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 conception. Prosser defended his inclusion of the tort in the Second Restatement of Torts on Realist terms.[369] *Bohannon*, *Mitchell*, *Davison*, and other such cases adopted the tort on the basis of Realist-type reason-

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367. New Jersey allows punitive damages in a will contest that involves such circumstances, but only upon proof by clear and convincing evidence. *See infra* note 376.

368. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521-29 (2003); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 920-28 (2010) (surveying theories of tort rooted in deterrence and compensation).

369. *See supra* notes 159-160 and accompanying text.

ing.[370] And contemporary academic proponents argue for recognition of the tort on Realist grounds.[371]

Perhaps the clearest example is in the work of Diane Klein, the contemporary scholar who has charted the growth of the tort most carefully.[372] Klein argues that inheritance law remedies are deficient because they do not "fully compensate certain potential tort plaintiffs or deter certain tort defendants."[373] Implicit in this argument is a depiction of tort as a grant of regulatory power to courts for deterrence of antisocial conduct and compensation of losses that result from such conduct. Klein also argues that the tort should be recognized because, through the device of punitive damages, it allows for the punishing of wrongdoers, a deterrence benefit lacking in inheritance law.[374]

We do not deny that deterrence and punishment objectives might point toward awarding punitive damages for wrongful interference with inheritance.[375] There may be cases of wrongful interference that involve obvious and egregious wrongdoing or that may be difficult to detect. But rather than seeing in these special cases a reason to abandon the *Palsgraf* principle and embrace the Realist conception, courts should ask instead whether such cases require reforming probate practice and restitution actions to allow punitive damages.[376] Reform undertaken in this more transparent manner would invite a balancing of deterrence and punishment objectives with the risk that punitive damages might aggravate the problem of strike suits or magnify the cost of error in policing the

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370. *See supra* Part III.A-B.

371. *See, e.g.*, Johnson, *supra* note 188, at 774; Klein, *Disappointed Yankee*, *supra* note 188, at 239-40.

372. *See supra* note 188.

373. Klein, *Disappointed Yankee*, *supra* note 188, at 239. Included in Klein's notion of full compensation is an award of attorneys' fees. *See* Klein, *supra* note 82, at 265. But in all other contexts, tort follows the American rule against fee shifting. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

374. *See* Klein, *supra* note 82, at 267.

375. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889-90 (1998) (explaining how punitive damages might serve to correct for underdeterrence of certain kinds of misconduct).

376. *See, e.g.*, *In re* Estate of Stockdale, 953 A.2d 454, 473 (N.J. 2008) (allowing punitive damages in a will contest with a showing by clear and convincing evidence "that the acts or omissions of the actor causing the harm [were motivated] by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed" (internal quotation mark omitted)). A more fundamental objection to recognizing the tort for the purpose of making punitive damages available is that tort law is not public law on par with criminal or regulatory law. A notion of punitive damages that is true to tort law as authorizing private redress for personal wrongs would not authorize tort liability and punitive damages for the sole purpose of punishing misconduct. Rather, it would authorize punitive damages for the victim's having been mistreated in a particularly egregious manner by the defendant. The difference is not merely conceptual, but rather has significant implications for the terms on which punitive damages should be awarded. *See* Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1778-85 (2012).

murky line between permissible persuasion and impermissible overpersuasion. A danger of Realist tort is that it invites thoughtless imposition of punitive damages for no reason other than the disappointed beneficiary's choice to plead his claim in tort.

Put in more general terms, the problem with the Realist conception is that it drains tort law of its doctrinal structure and content, leaving only an open-ended license for courts to shift losses and mete out punishment. On this view, a tort plaintiff need only prove a loss or a setback owing to the defendant's antisocial conduct. Core concepts that have historically defined tortious conduct—such as duty, breach of duty, proximate cause, and injury—are reduced to empty labels. Tort is converted into the "chancellor's foot" caricature of old equity. It becomes an unstructured loss-shifting apparatus that has the potential to swallow better-defined fields of law,[377] 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.[378] 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.[379] 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 practice.[380] 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.[381] In this application, tort is playing the role of equity, offering a less structured alternative to probate and restitution.

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377. *See* GRANT GILMORE, THE DEATH OF CONTRACT 95, 103 (Ronald K.L. Collins ed., 2d ed. 1995) (1974) (arguing that, by the 1970s, contract law was collapsing into tort law, understood as law that compensates for the causation of harm, often irrespective of fault).

378. *See supra* notes 240-241, 258-261, and accompanying text.

379. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105-06 (4th ed. 2002); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 271-72 (2009).

380. *See* LANGBEIN ET AL., *supra* note 379, at 354-55. *Peralta v. Peralta* lauded the tort for its role in avoiding the "injustice" of an expectant beneficiary's (erroneously) assumed lack of remedy in inheritance law. *See supra* note 263 and accompanying text.

381. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.5 (2d ed. 1993).

The perversion of tort into a kind of shapeless equity is also discernible in another peculiar feature of the interference-with-inheritance tort—namely, the imposition of liability without the commission of a tortious act. As 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*."[382] 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."[383] The concept is meant to capture "overreaching" and "overpersuasion"[384] forms of mistreatment that are less overtly coercive than fraud or force or threat of force. 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.

Regardless of the influencer's blameworthiness, undue influence is not "independently tortious" as to the donor or anyone else. There is no tort of undue influence. In the absence of fraud, assault, or other such tortious mistreatment, a donor who transfers property as 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.[385] 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 restitution.[386]

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 browbeating an 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 confronted the oddity of the nontortiousness of the paradigmatic interference-with-inheritance cases in a revealing way. Instead of limiting the tort to genuine instances of tortious conduct, Wade proposed making explicit in

382. RESTATEMENT (SECOND) OF TORTS § 774B cmt. c (1979) (emphasis added).

383. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 15 (2011).

384. *Id.* § 15 cmt. b.

385. *Id.* § 15(2).

386. *See supra* Part I.B.

commentary to section 774B that the interference-with-inheritance action could be predicated on the defendant's commission of an "equitable tort[]."[387] Although Wade's proposal was not adopted, his arresting neologism is a candid expression of the Realist conception of tort as equity unbound.

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. A salient example is the recognition in modern law of malpractice claims by an intended beneficiary against the donor's lawyer for negligence in preparing the donor's estate plan to the detriment of the beneficiary.[388] Although this type of tort claim is allowed in the overwhelming majority of states today,[389] under traditional rules there was no recourse in probate or otherwise for such a beneficiary. As such, recognizing this kind of malpractice liability in tort filled a genuine remedial gap.

The plaintiff in an estate planning malpractice case also has a plausible claim to be vindicating a personal right. The lawyer's affirmative undertaking to assist the donor in benefiting the intended beneficiary imposes on the lawyer a duty of care owed to the beneficiary.[390] 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.[391] Whether it sounds in tort or contract, the plaintiff's claim is rooted in the defendant's breach of an affirmative duty, voluntarily assumed, to exercise due care for the benefit of the intended beneficiary.

The emergence of tort liability for legal malpractice is thus 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.[392] And unlike the plaintiff in an estate planning malpractice suit, for the reasons discussed earlier, the plain-

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387. *Wednesday Afternoon Session*, *supra* note 169, at 245.

388. *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, 332 (2001).

389. *See* DUKEMINIER ET AL., *supra* note 22, at 62.

390. For instance, in *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (en banc), the court imposed a duty of care running to an intended beneficiary on a nonlawyer who had engaged in the unauthorized practice of law on the grounds that the "[d]efendant undertook to provide for the formal disposition of [the decedent's] estate by drafting and supervising the execution of a will." *Id.* at 18-19.

391. *See, e.g.*, Simpson v. Calivas, 650 A.2d 318, 322-23 (N.H. 1994); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (recognizing third-party beneficiary standing to enforce a contract).

392. *See supra* Part III.

tiff in an interference-with-inheritance case does not have a plausible claim to be vindicating a personal right.[393]

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 an inquiry into whether the lawyer misrendered the donor's instructions. Wrongful interference claims, by contrast, involve difficult judgments about whether the donor acted volitionally, judgments that must be made against the backdrop of family dynamics and customs that are often alien to outsiders. In the face of such difficulties, there is good reason to limit the inquiry to the question of rightful ownership (i.e., probate and restitution), rather than the question of wrongful injury (i.e., tort).

Finally, the estate planning malpractice cases are beginning to yield to a movement within inheritance law to permit reformation of mistaken terms and excuse harmless errors in execution.[394] Those reforms, which are rooted in equity traditions,[395] are taking hold because they more expeditiously correct the underlying mistake in the original probate proceeding without requiring a separate tort action.[396]

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 remedies with an origin in chancery. As the ALI put the point in the recently published Third Restatement of Restitution and Unjust Enrichment: "A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law."[397]

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393. *See supra* Part IV.A-B.

394. *See* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The* Restatement of Wills *Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 29 (2004). On reformation, see UNIF. PROBATE CODE § 2-805 (amended 2010); UNIF. TRUST CODE § 415 (2000); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (2003). On harmless error, see UNIF. PROBATE CODE § 2-503; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999). Jesse 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, 151 (1979).

395. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (1999); DUKEMINIER ET AL., *supra* note 22, at 336; Langbein, *supra* note 394, at 31.

396. The reforms also bring to bear the specialized procedural norms of inheritance law, most significantly a requirement of clear and convincing evidence. *See* UNIF. PROBATE CODE §§ 2-503, 2-805; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (1999); *id.* § 12.1 (2003).

397. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) (2011); *see also* Laycock, *supra* note 204, at 169.

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 Second Restatement of Torts, the tort has been adopted by courts in 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 policy 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 remedies 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 or to explain family dynamics and customs that are alien to outsiders. 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 in 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 sometimes recognizes rights that are not based in other bodies of law, it should not recognize a right that is in fundamental conflict with the rights structure of a field of law that specializes in 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, judges, and academics of restitution and equitable remedies. On this score, the ALI is to be commended for the Third Restatement of

Restitution and Unjust Enrichment, which collects and organizes those rules in an easily accessible form.[398] On the other hand, the interference-with-inheritance tort owes its current prominence to an ill-considered provision slipped into the Second Restatement of Torts. The ensuing 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 any form of antisocial conduct causing loss, irrespective of whether the conduct and the loss are linked in a way that plausibly can be characterized as a violation of a right of the plaintiff's. 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.

From the example of interference with inheritance, we are reminded that interdisciplinary study across fields of law is no less important than interdisciplinary study that makes use of analytical methods from the social sciences. The ALI's acceptance of Prosser's draft, which granted life to a new tort that so profoundly conflicts with fundamental rules and policies of inheritance law and that reflects a deep ignorance of basic principles of equity practice, is a clear example of the need for coordination across fields of legal specialization. Vetting of Prosser's proposal by scholars and practitioners with expertise in the law of inheritance and the law of restitution and unjust enrichment might have alerted the ALI to the tort's deep conceptual and practical difficulties.

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