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Can Religious Influence Ever Be "Undue" Influence?

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> [T]here are no instances where men are so easily imposed upon as at the time of their dying, under pretense of charity . . . .
>
> *Attorney-General v. Bains*[1]

The short answer to my title's question is "yes." The longer answer is, well, longer. The Lord Chancellor's quoted remark about charity and deathbed susceptibility reflects our law's longstanding uneasiness with eleventh-hour charitable bequests and our courts' struggle to differentiate between a testator's own independent charitable impulses and those imposed on her by an outsider playing upon her fears or weakness. The *Bains* case itself involved an improperly executed will.[2] The defective will contained a charitable bequest, and the Chancellor was asked to rule that the bequest was nonetheless effective (as an appointment), presumably because of the longstanding judicial policy favoring transfers to charity.[3] He refused.[4] A lack of proper execution may suggest

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[1] Prec. Ch. 270, 272, 24 Eng. Rep. 131, 131 (1708). A similar—indeed, possibly identical—case is reported as *Attorney-General v. Barnes*, Gilbert Eq. Ca. 5, 25 Eng. Rep. 4 (1708).

[2] Strictly speaking, the term "will" states a legal conclusion about a document: that the document has been validated (provisionally, at least) by a probate court. Until such validation occurs, the document is only a "purported will." *See*, *e.g.*, Stephen v. Huckaba, 838 N.E.2d 347, 350 (Ill. App. 2005). Similarly, until a purported will is admitted to probate, the maker of that will is not a testator but only an "apparent testator." *See*, *e.g.*, Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 726 (S.C. 2006). In the interests of simplicity, however, I shall follow custom and use only the words "will" or "testator" in this Article except in those instances where "purported will" or "apparent testator" is necessary to avoid ambiguity.

[3] *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY 1532-1827, at 3-4 (1969). Jones writes:

that a testator was subjected to undue influence at the time her will was written,[5] and the Chancellor implied by his remarks that the presence of a charitable bequest in the will made the suggestion of undue influence—and therefore of invalidity—*more* plausible rather than less.

An extreme, but not unrepresentative, example of the circumstances the Chancellor had in mind can be found in the facts of *In re Estate of Hee*.[6] The testator, Louis Hee, was an elderly man living alone and in extreme ill health.[7] Indeed, he was bedridden, and none of his relatives lived nearby.[8] A few months before Hee's death, some members of the Jehovah's Witnesses called at his home to interest him in their literature and religious beliefs, and their visits were soon followed by other members on a similar mission.[9] (Hee had never been and never became a member of the Jehovah's Witnesses.[10]) One of these visitors, John Hartley, Jr., proceeded to prepare for Hee's signature a will making the Watch Tower Bible and Tract Society of Pennsylvania (the parent organization of the Jehovah's Witnesses) Hee's sole legatee.[11] Some seventy-five days before Hee's death, Hartley, accompanied by two other members of Jehovah's Witnesses, traveled to Hee's home and obtained his signature on the will.[12] Hartley immediately sent the executed will to the main office of the Watch Tower Bible

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> Many privileges were [in the years before the Reformation] granted to the charitable legacy which were denied to the private legacy. For example, no charitable legacy was allowed to fail because it was too indefinite, and generous rules of construction were developed to cure the uncertainty. So, a testator who had bequeathed [personal] property 'to the church' was deemed to have bequeathed it to his parish church . . . .

Id. at 5. As to privileges accorded charitable legacies under more recent law, see *infra* notes 74-76 and 85.

The frustratingly brief published report of *Bains* does not clearly explicate the petitioner's argument for validating the charitable transfer. Nonetheless, the Chancellor's quoted remark strongly—albeit circumstantially—supports my assumption that the petitioner directly or indirectly invoked this policy of favoritism toward charities.

[4] *Bains*, Prec. Ch. at 272, 24 Eng. Rep. at 132.

[5] *See*, *e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4-5 (1941).

[6] Hartley v. Toth (*In re* Estate of Hee), 252 So. 2d 846 (Fla. Dist. Ct. App. 1971).

[7] *Id.* at 847.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

and Tract Society of Pennsylvania.[13] No copy of the will was left with the testator, and indeed no disclosure of the will's existence was made until after Hee's death.[14] Hee's siblings contested the will on the ground of the undue influence of Hartley and others, and quite appropriately the siblings succeeded.[15]

For centuries, Anglo-American courts and legislatures entertained suspicions of gifts to charities generally and to religious charities in particular. During the late middle ages, a time when the culture at large was deeply religious, these suspicions amounted to outright hostility generated by the fears of the feudal aristocracy.[16] Later, as notions of testamentary freedom took hold, two other concerns replaced the feudal ones. First, lawmakers began to have misgivings about the amount of wealth that charitable bequests removed from the stream of unimpeded commerce:

> [B]y the specious pretence of charity, the solicitations of [potential charitable donees], and the pride and vanity of donors, it is to me highly probable, that too great a part of the lands in this kingdom may soon come to be [held in perpetuity by charitable foundations], to the prejudice of the nation in general, and to the ruin or unjust disappointment of many a man's poor relations . . . .[17]

And second, they were concerned that "the church was taking advantage of . . . the [deathbed] fears of the faithful for its own aggrandizement."[18] These concerns, for the welfare of the commonwealth and for the security of testators, led Parliament and many American legislatures to enact statutes,

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 848.

[16] *See infra* text accompanying notes 24-51.

[17] These words were spoken by a member of the English House of Lords in a 1736 floor debate on a piece of legislation that barred charitable devises of land. *See* JONES, *supra* note 3, at 110-11. For a discussion of this 1736 legislation, see *infra* text accompanying notes 103-111.

[18] A.H. Oosterhoff, *The Law of Mortmain: An Historical and Comparative Review*, 27 U. TORONTO L.J. 257, 267 (1977). Indeed, "some [eighteenth century] legislators expressed a distrust of the clergy and a belief that a failure to control conveyances in trust for charitable uses would result in a renewal of death-bed vigils on the part of ambitious clerics." *Id.* at 282. These concerns were not without historical foundation. As early as the thirteenth century, in response to a papal decree, English testators who bequeathed nothing *ad pias causas* (for pious purposes) "might be denied the Eucharist and interred in unconsecrated ground." JONES, *supra* note 3, at 3.

often called *mortmain* statutes, placing limits on testamentary transfers to charity.[19]

Between 1976 and 1998, the last eleven American mortmain statutes were repealed or overturned,[20] but their repeal did not reflect any observed changes in human nature. On the contrary, the human frailties that had prompted the statutes' original enactment continued to mar the legal landscape as before. The statutes were repealed because they were unworkable, not because they were unnecessary. Undergirding the repeal movement was a belief that the law of undue influence could be relied upon to prevent, in individual cases, the kinds of imposition that the mortmain statutes' broader brush was designed to reach.[21] But the law of undue influence can serve as an adequate substitute for mortmain statutes only if courts treat the influence of charitable or religious actors with the same wariness as they exhibit with secular, avowedly materialistic actors. And, unfortunately, courts have sometimes displayed an inappropriate indulgence

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[19] "Mortmain" means "dead hand" in the Anglo-Norman variant of French spoken in England during the Late Middle Ages. The most widely accepted explanation of the term's invention and application is that given by Lord Coke:

> [T]he true cause of the name and the meaning thereof was taken from the effects as it is expressed in the statute itself . . . so as the lands were said to come to dead hands as to the lords for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-service for the defense of the realme, wards, marriages, reliefes and the like; and therefore was called a dead hand, for a dead hand yeeldeth no service.

1 EDWARD COKE, A COMMENTARY UPON LITTLETON subdiv. 2.b (Phila., Robert H. Small 1853) (15--?) (quoted in Oosterhoff, *supra* note 18, at 259).

The "dead hand" metaphor enjoys continued vitality today, but its application has been broadened to include *all* the posthumous influences of testators. *See generally* ARTHUR HOBHOUSE, THE DEAD HAND (1880); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992); Gareth H. Jones, *The Dead Hand and the Law of Trusts*, *in* DEATH, TAXES AND FAMILY PROPERTY 119 (Edward C. Halbach, Jr. ed., 1977). (Actually, "dead hand" is more of a synecdoche than a metaphor.)

[20] *See infra* note 124.

[21] *See*, *e.g.*, *In re* Estate of Kinyon, 615 P.2d 174, 175 (Mont. 1980) (noting that the annulment of the state's mortmain statute "in no way abandons these safeguards [the prevention of overreaching by charities and the protection of the interests of relatives] since existing law is sufficient to prevent the abuses at which the mortmain statute was directed"); Mary F. Radford & F. Skip Sugarman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605, 669-70 (1997) (explaining the reasons for Georgia's repeal of its mortmain statute). *See* Oosterhoff, *supra* note 18, at 294-95. Writing in 1951, one scholar argued that mortmain statutes should be retained and their prevalence increased because "[t]he legal principles of fraud, undue influence, or mental incapacity have not and do not meet the problem." G. Stanley Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761, 763 (1951) (punctuation altered).

toward the former. While the old mortmain statutes themselves would be anachronisms in today's estate planning climate of nonprobate transfers[22] and split-interest giving,[23] American law still has much to learn from them as it confronts charitable bequests procured in dubious circumstances.

In Part I of this Article, I shall discuss the long but ultimately unsatisfactory career enjoyed by mortmain statutes as bulwarks against undue religious or charitable influence. In Part II, I shall discuss the law of undue influence generally. And in Part III, I shall discuss how traditional undue influence law has fallen short in the context of religious bequests and how traditional law can be strengthened by a rule declaring that all relationships between a testator and her religious or spiritual advisor are per se "confidential relationships" for purposes of litigating any will contest. Such a rule would largely shift to the proponent of the will the burden of producing evidence supportive of the will's validity.

I. MORTMAIN STATUTES: THE TRADITIONAL LEGISLATIVE SOLUTION

A. Early English Mortmain Law: A Public Law Response

While American mortmain statutes were private law devices designed to protect the expectations of a charitably inclined testator's family, the English mortmain restrictions began life as public law devices with a political purpose: protecting the feudal aristocracy.[24] Under English law at the time of feudalism, all land was said to be held of the King. Every other person who had the right to occupy and cultivate a piece of land possessed that right only as a tenant—either a

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[22] Today, a decedent's nonprobate transfers, such as life insurance and revocable inter vivos trusts, generally govern more of her property than a traditional will, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984), and mortmain statutes were often held to apply only to wills and not to nonprobate transfers. *See*, *e.g.*, Kent v. Katz (*In re* Estate of Katz), 528 So. 2d 422, 426-27 (Fla. Dist. Ct. App. 1988) (held not to apply to a revocable inter vivos trust); *In re* Will of Frank, 383 N.Y.S.2d 777, 779-80 (App. Div. 1976) (same).

[23] "Split-interest" trusts—that is, trusts in which one interest (say, a life income interest) is granted to or retained by an individual and another interest (say, the remainder interest) is granted to a charity—have become popular estate planning instruments to take advantage of favorable valuation rules to lessen the impact of transfer taxes, particularly for unmarried property owners who cannot avail themselves of the estate tax marital deduction. *See*, *e.g.*, F. Ladson Boyle, *Evaluating Split-Interest Valuation*, 24 GA. L. REV. 1, 2-3, 28-40 (1989).

[24] *See* Oosterhoff, *supra* note 18, at 296.

tenant of the King himself or a tenant of another tenant of (another tenant of) the King[25]—and, as a condition of his continued tenure, he owed certain obligations to the person from whom he held that right (that is, his lord).[26]

The most common form of feudal land tenure was "knight service," pursuant to which the tenant owed military service to or on behalf of his lord. While historians have noted considerable variations in local customs, there seems to have been some agreement that a single knight's fee should normally have comprised sufficient acreage to generate an annual income of about £20, so a tenant with sufficient acreage to produce, say, £60 of annual income would have owed his lord the service of three knights: the service of three fully armed horsemen to serve in the army for 40 days in the year in time of war.[27] But of even more value to the lord than these obligations of military service were a number of financial obligations, known as the incidents of knight service. Among the most important of these feudal incidents were *aids* (a right to demand money from the tenant in certain circumstances of need),[28] *relief* (a right to payment of a certain sum of money when an adult heir to the land assumed his inheritance upon the death of the prior tenant),[29] *wardship* (a vendible right,

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[25] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 24 (Cambridge Univ. Press 1979) (1908). *But see* SUSAN REYNOLDS, FIEFS AND VASSALS: THE MEDIEVAL EXPERIENCE REINTERPRETED (1994) (critiquing the conventional understanding of feudalism as a coherent, distinctive socio-legal system).

[26] MAITLAND, *supra* note 25, at 25. If a named tenant's lord was not the King himself but rather some other tenant of the King or a tenant of another tenant of the king, the lord of that named tenant was known as a *mesne* or intermediate lord. If a named tenant's lord *was* the King himself, then there was no *mesne* lord and the tenant was one of the King's tenants in chief (or tenants *in capite*). *Id.* at 24.

[27] *Id.* at 25-26. "[T]he division of land into districts, each with an allotted quota of men and material, is a simple and obvious device; we find, for example, in 1679 that an act in Virginia required each district to provide one man armed and mounted for service in the Indian wars." THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 514 (5th ed. 1956) (citing Virginia Statutes at Large, ii, 434, 435).

[28] MAITLAND, *supra* note 25, at 27.

> [T]he lord can legitimately demand aid . . . from his tenant when [the lord] is in need of money. The aid has been considered as a free-will offering, but one which ought not to be refused when the demand is reasonable . . . [In the Magna Carta, King] John was compelled to promise that he would exact no aid without the common counsel of the realm save in three cases, namely in order to make his eldest son a knight, in order to marry his eldest daughter, and in order to redeem his body from captivity . . . .

Id.

[29] *Id.*

arising upon the death of a tenant leaving a minor child as heir, to enjoy the profits from the land until the child attained the age of twenty-one (if male) or fourteen (if female)),[30] *marriage* (a vendible right to sell the ward (that is, the deceased tenant's minor child) in marriage),[31] and *escheat* (the right to recover the tenanted land if the tenant died without an heir).[32]

In general, a feudal lord cared very little about *who* his tenant was at any time, so long as he could be sure that the tenant had the means to meet his feudal obligations, and the ancillary rules of land law reflected the aristocracy's indifference as to the tenant's identity and its insistence on his material sufficiency. The system of primogeniture, which by the twelfth century had become the customary form of descent in England, assured the lord that his new tenant (the deceased tenant's eldest son, to the exclusion of all other children of the decedent) would have the same means of providing knight

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> If the tenant in knight service having an inheritable estate died leaving an heir of full age, that heir owed a relief for his land . . . a sum due on his taking up the fallen inheritance. . . . [Lords sometimes used the occasion to demand that the heir] buy the land at nearly its full price.

Id. Eventually, it became common for the relief for a knight's fee to be £100. *Id.*

[30] *Id.* at 28.

> If the heir of a military tenant is under the age of twenty-one, being male, or fourteen, being female, the lord is entitled to wardship—to wardship of the body of his tenant, to wardship of the land also. This means that he can enjoy the lands for his own profit until the boy attains twenty-one or the girl fourteen. He is bound to maintain the child and he must not commit waste, but within these limits he may do what he likes with the land and take the profits to his own use—and this profitable right is a vendible commodity: wardships are freely bought and sold.

Id. At least one authority maintains that the relevant age for females was sixteen, not fourteen. *See* Oosterhoff, *supra* note 18, at 265.

[31] *See* MAITLAND, *supra* note 25, at 28.

> [T]he lord can dispose of the ward's marriage, can sell his ward in marriage. The only limit to this is that the match must be an equal one; the ward is not to be disparaged, married to one who is not his or her peer. At first apparently all that the lord claims is that his female tenant shall not marry without his consent—a demand which is reasonable enough while the military tenures are great realities:—my female tenant must not carry the land which she holds of me to a husband who is my enemy. But the right has grown far beyond this reason:—it is now [i.e., the end of Edward I's reign] extended to males as well as females, and the marriage of every ward is a vendible commodity.

Id.

[32] *See id.* at 29 ("If the tenant died without an heir[,] the land escheated, that is, fell back to the lord—it became his to do what he pleased with.").

service as his deceased ancestor had, since the land would never be subdivided upon the ancestor's death.[33] Further, under primogeniture, land was not subject to devise at all,[34] except in certain privileged cities such as London.[35] But, starting in about the year 1200, land *was* freely subject to inter vivos alienation, even in derogation of an eldest son's expectations,[36] and the problems of mortmain originally arose in this inter vivos context.

Two types of inter vivos land transfers particularly threatened the feudal lord's interests. The first was *subinfeudation*, the creation of a subtenancy by a tenant.[37] The subinfeudating tenant would transfer to another person a portion of the land that he held of his lord, thereby becoming an inferior lord to whom the new grantee owed feudal obligations.[38] Subinfeudation created a risk for the original lord that his original tenant would, after the partial conveyance, have insufficient remaining assets to meet his original feudal obligations.[39] At the behest of the feudal aristocracy, therefore, Parliament, as part of the famous Statute *Quia emptores*,[40] barred all subinfeudation but authorized alienation by substitution.[41] A tenant could no longer convey part of his estate but could convey *all* of it by means of a substitution of holders of the tenancy:[42] a substitution that presumably preserved the lord's feudal rights.[43]

The second kind of inter vivos conveyance that threatened the feudal lord was a conveyance to the Church,[44]

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[33] *See* PLUCKNETT, *supra* note 27, at 527.

[34] A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 54 (2d ed. 1986). Personal property *could* be bequeathed, but jurisdiction over wills of personalty was vested in ecclesiastical courts, not in the secular courts. MAITLAND, *supra* note 25, at 523; PLUCKNETT, *supra* note 27, at 740-41; JONES, *supra* note 3, at 4.

[35] JONES, *supra* note 3, at 6 n.7.

[36] PLUCKNETT, *supra* note 27, at 528-29.

[37] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 257 (3d ed. 1990).

[38] *Id.*

[39] PLUCKNETT, *supra* note 27, at 540.

[40] 18 Edw. 1, c. 1 (1290) (Eng.).

[41] BAKER, *supra* note 37, at 298; PLUCKNETT, *supra* note 27, at 540.

[42] Oosterhoff, *supra* note 18, at 269.

[43] If the tenant in question was a tenant in chief of the Crown, restrictions on inter vivos alienation remained, notwithstanding *Quia emptores*. *See* PLUCKNETT, *supra* note 27, at 542.

[44] Strictly speaking, the Church *qua* Church was not a corporation capable of holding title to property. Instead, title might be held by "the Bishop of Ely" in his capacity as Bishop, or by "the Abbey of S. Albans" as such. *See* MAITLAND, *supra* note 25, at 510. Remember, therefore, that whenever I use a phrase like "Church property,"

known as a conveyance in mortmain.[45] An ecclesiastical tenant could certainly furnish a lord with hired knights on horseback, just as a secular tenant could, but the Church could not marry, have offspring, or die. Thus, a conveyance by a human tenant to the Church, though it did not deprive the lord of continued knight service,[46] did deprive him of valuable future incidents of relief, wardship, marriage, and escheat. The feudal aristocracy was particularly concerned about collusive gifts of land to the Church, whereby a tenant could evade his feudal obligations and deprive the lord of the lord's due by ostensibly granting lands to the Church while retaining the right to occupy and the right to demand a regrant of the land.[47] The Great Charter of 1217 explicitly barred such collusive transfers,[48] and then, some sixty years later, the 1279 Statute of Mortmain (*De viris religiosis*)[49] barred all alienations in mortmain—whether collusive or not—and the penalty for such attempted conveyances was declared to be forfeiture to the lord of the fee.[50] Transfers to secular corporations were likewise considered alienations in mortmain and barred by the 1279

I am referring to any of various properties held by particular religious officers or houses, rather than to assets held by an organization known as "the Church."

[45] *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 257 (1986); *see also supra* note 19.

[46] *See* HOGUE, *supra* note 45, at 25. While "knight service" was a common form of tenure even for ecclesiastical officers or houses, an exceptional form of ecclesiastical tenure—*frankalmoign*—existed until it was all but abolished by the Statute *Quia Emptores* in 1290. SIMPSON, *supra* note 34, at 10-11.

> Sometimes religious bodies and religious persons, monasteries, bishops, parsons, hold land for which they do no earthly service to the lord. They are said to hold by way of free alms, free charity, *per liberam elemosynam*, in frankalmoign. The theory of tenure however is saved by the doctrine that they owe spiritual service, that they are bound to pray for the soul of the donor who has given them this land, and this duty can be enforced by spiritual censures in the ecclesiastical courts.

MAITLAND, *supra* note 25, at 25.

[47] Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 900 (1997).

[48] BAKER, *supra* note 37, at 277; PLUCKNETT, *supra* note 27, at 541.

[49] 7 Edw., stat. 2, c. 13 (1279) (Eng.).

[50] *Id.* The ecclesiastical grantee's title was not void; it was merely voidable at the instance of the lord or of *his* lord. That is, termination of the grantee's title required a positive act by the lord or by the King. Moreover, a license to alienate in mortmain could, without much difficulty, be purchased from the King, Brody, *supra* note 47, at 900, and such licenses were in fact granted "lavishly." PLUCKNETT, *supra* note 27, at 542. If an alienation in mortmain was made without the purchase of a license, but no lord thereafter exercised in fact his right of entry to undo the conveyance pursuant to the 1279 statute, the grant in mortmain was deemed to have been impliedly licensed through waiver of the right of entry. Oosterhoff, *supra* note 18, at 268.

statute inasmuch as corporations, like ecclesiastical houses, never die or marry or have children.[51]

Thus, the original mortmain statute was designed to protect the feudal aristocracy as a class,[52] not to protect the lord's heirs from disinheritance as individuals.[53] What protected the lord's heirs (or at least the lord's eldest son) from disinheritance were the rules of primogeniture and the lack of any right of testation. But change was afoot that would soon expose heirs to a risk of disinheritance: the development of the "use." The use may have begun its existence as a device for circumventing primogeniture.[54] For example, if A owned land and wanted to transfer it at death to all his sons equally instead of to his eldest son only, A could convey the land inter vivos to B and his heirs to the use of A for life and then, upon A's death, to the use of A's sons. Such a conveyance had the added benefit of insulating A from the feudal incidents owed to A's lord inasmuch as the incidents attached only to the transmission of a *legal* estate.[55] But not only did the use permit circumvention of primogeniture and feudal obligations, it effectively permitted testation where none had been permitted before, since A could convey the land to the use of anyone, not just to the use of his sons. Indeed, a landowner could convey land to a feoffee during his lifetime to such uses *as he might declare in his yet-to-be-executed will*.[56] Consequently, by the early fifteenth century, most land in England was held in use,[57] and landowners became accustomed to making the equivalent of testamentary transfers. Finally, in 1540, freeholders in land were granted the power to devise it without going through the rigmarole of enfeoffment to uses.[58]

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[51] *See* HOGUE, *supra* note 45, at 74.

[52] The statute, in its opening lines, stated that it was enacted to prevent "services which are owed from fiefs of this sort, and which were originally established for the defense of the kingdom[, from being] wrongfully withheld." *See id.*

[53] Concern that land might vest perpetually in ecclesiastical organizations to the detriment of the state was not peculiar to England. "Already during the Roman Empire prohibitions were enacted by one of the first Christian emperors to prevent the aggrandizement of the church through the acquisition of land." Oosterhoff, *supra* note 18, at 260.

[54] *See* Brody, *supra* note 47, at 900-01.

[55] WILLIAM E. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 7 (3d ed. 1965). (Of course, *B* was chargeable with the feudal incidents, but evidently methods existed for insulating *B* as well. *Id.*)

[56] JONES, *supra* note 3, at 6-7.

[57] Brody, *supra* note 47, at 901.

[58] The 1540 statute was the Statute of Wills, 32 Hen. 8, c. 1 (1540) (Eng.). Four years earlier, as a response to the loss of feudal benefits occasioned by the

From the aristocracy's point of view, the availability of devise aggravated the mortmain problem. Back when charitable transfers of land could be accomplished only inter vivos, a tenant's natural desire to hold until death what was his could be relied upon to check what Professor Simpson called "excesses of piety";[59] but once charitable *devises* could be freely made, that natural desire no longer served as a check.

Coinciding with this development was the English Reformation. Although King Henry VIII made extensive use of his rights of entry (as lord Paramount) under the Statute of Mortmain in his efforts to destroy religious houses and the power of the Roman Catholic Church in England,[60] the protection of individual lords' feudal incidents took on a diminished importance in his national policy.[61] Instead, national policy was directed toward the encouragement of charitable giving: *secular* charitable giving.

That legislative enactments to encourage private secular philanthropy came about concurrently with the English Reformation is a matter of historical fact.[62] Different hypotheses exist, however, as to the reasons for the concurrence of these developments. Certainly there was at the time of the Reformation a need for schools, hospitals, and venues of relief for the poor and aged; and King Henry's suppression of the monasteries, which had hitherto provided some of those services,[63] could only have aggravated the need. Moreover, the Reformation itself, by altering people's views of the nature of religion, may have altered their understanding of the function of philanthropy. Jones notes:

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employment of uses and to what were evidently informal testamentary dispositions of uses, Parliament had enacted the Statute of Uses, 27 Hen. 8, c. 10 (1536) (Eng.), which declared that henceforth the holder of the use (the *cestui que use*) would be treated as the owner of the legal estate. BURBY, *supra* note 55, at 9. This foreclosure by Parliament of the possibility of testation proved so immediately unpopular that Parliament enacted the Statute of Wills to undo the damage. *See* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1285, 1298 (1999).

[59] SIMPSON, *supra* note 34, at 53.

[60] Oosterhoff, *supra* note 18, at 271.

[61] Indeed, Parliament abolished the feudal incidents altogether in 1645, during the days of the Commonwealth, and that abolition was reconfirmed at the time of the Restoration. Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 241-42 (1995).

[62] Oosterhoff, *supra* note 18, at 274.

[63] *See* LEONARD SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MORTMAIN, AND CHARITABLE USES AND TRUSTS 42-43 (1842).

> The objects of charity were to become more secular as the majority of Englishmen reflected less on the fate of their souls and became more concerned with the worldly needs of their fellow men.[64]

Thus, a gift to a secular corporation for the maintenance of a school or hospital came to appeal more to religiously-motivated potential donors than did a gift to an ecclesiastical body for the saying of masses or the upkeep of a chapel.

Funds bequeathed for charitable purposes were frequently misapplied by the persons charged with their administration, and few if any remedies were available to enforce the restrictions that the charitable grantors had originally sought to impose.[65] As the need for private charitable endowments increased and as those endowments came to be more likely secular than spiritual, Parliament was moved to enact statutes making the enforcement of charitable "uses" easier to accomplish.[66] Also at this time, Parliament, by various acts, "dispensed with" the old statutory mortmain restrictions applicable to land.[67] Soon, property could be readily conveyed or devised to charitable corporations or to individuals in trust for any charitable use. But accompanying these liberalizing changes applicable to secular charitable transfers came a fierce determination, partly legislative and partly judicial, to ensure that no charitable transfers could benefit the Roman Catholic Church.[68]

It is tempting to view this anti-Catholic agenda as merely another example of the sectarian bigotry we occasionally see today in the United States, but such a view is quite ahistorical. The impetus for this sixteenth century hostility was not sectarianism but incipient nationalism. When King Henry VIII, for dynastic and political reasons, determined to abrogate all Papal authority within England,[69] Parliament in furtherance of that agenda enacted the so-called Act of Supremacy (1534), declaring "that the King, our sovereign lord, his heirs and successors, kings of this realm, shall be taken,

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[64] JONES, *supra* note 3, at 10.

[65] *See*, *e.g.*, *id.* at 10, 16. Remember, even before the English Reformation, personal property could be disposed of by will and in mortmain. *See supra* note 34.

[66] *See*, *e.g.*, Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.). *See generally* JONES, *supra* note 3, at 16-56.

[67] SHELFORD, *supra* note 63, at 42-57.

[68] *See infra* text accompanying notes 72-79.

[69] For a short discussion of the background of King Henry's actions, see Jeffrey G. Sherman, *A Tax Teacher Tries Law and (Dramatic) Literature*, 37 SUFFOLK U. L. REV. 255, 275-78 (2004).

accepted, and reputed the only supreme head in earth of the Church of England."[70] By virtue of that enactment, one could no longer remain simultaneously a scrupulous Catholic and a loyal Englishman inasmuch as any profession that the Pope's ecclesiastical authority exceeded that of the King constituted an act not simply of religious nonconformity but of political treason. And the Church's belligerent response to the schism only strengthened the connection in the English mind between Catholicism and violent subversion.[71]

The principal judicial tool for preventing charitably inclined donors from benefiting the Catholic Church was the doctrine of "superstitious uses."[72] By the end of Elizabeth's reign, secular charitable trusts had become actively favored by chancellors,[73] who

> would . . . save charitable trusts despite defects in form or because of incapacity of the feoffees to uses even though such defects or incapacity would be fatal to other trusts. Moreover, statutes of limitation were held ineffective to bar actions to enforce charitable uses, a charitable use could not be destroyed by a tortious feoffment[,] and charitable legacies were preferred on a marshalling of assets.[74]

Chancellors also developed the doctrine of *cy pres*, which continues to be applied even today. The trustees of a charitable trust lack the authority to alter the terms of the transfer merely because they think such an alteration would be desirable. However, if an intended charitable trust would otherwise fail because its purposes are or have become impossible to achieve, the doctrine of *cy pres* allows courts to

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[70] Act of Supremacy, 26 Hen. 8, c. 1 (1534) (Eng.).

[71] In 1570 Pope Pius V issued a bull, *Regnans in Excelsis*, declaring the English monarch (Elizabeth I at the time) an excommunicate and purporting to absolve her subjects of their sworn duty to obey her. *See* Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187, 222 (2001). Pius's immediate successor went on to proclaim that the assassination of Elizabeth would not be a mortal sin. *See*, *e.g.*, CAROLLY ERICKSON, THE FIRST ELIZABETH 318-19 (1997).

[72] Courts' employment of the word "superstitious" in this context may have had a legislative genesis in the preamble to a 1547 statute—the Chantries Act, 1 Edw. 6, c. 14 (1547) (Eng.)—aimed at suppressing charitable endowments for private, presumably Catholic, chapels. The preamble applied the words "superstition and errors" to such matters as the belief in Purgatory and the saying of masses on behalf of the dead. *See* JONES, *supra* note 3, at 12.

[73] Obviously, the question arose then and has continued to arise as to what trust purposes are to be considered "charitable." This question lies beyond the scope of this Article, but the interested reader is directed to WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 390-92 (3d ed. 2004).

[74] Oosterhoff, *supra* note 18, at 277.

authorize the trustee to apply the trust property to other, but similar, charitable purposes if such an alteration would not contravene the grantor's intent.[75]

But none of these indulgent and curative policies available to secular charitable trusts—including the prospect of perpetual duration even after the "rule against perpetuities" developed for private transfers[76]—were made available under English law at the time if the purposes of the trust were found to be "superstitious." On the contrary, the trust was declared void and forfeit to the Crown,[77] albeit with the hope that the Crown would then, as *parens patriae*, apply the forfeited funds to some lawful charitable use, rather than simply adding them to the royal coffers.[78] Initially, "superstitious uses" meant uses for the support of the beliefs, institutions, or clergy of the Roman Catholic Church,[79] but the understanding of the term expanded over the years to include trusts for the benefit of such other non-Anglican religions as Unitarianism[80] and Judaism.[81] Indeed, the doctrine of "superstitious uses" continued to be employed to strike down trusts for the benefit of non-Anglican religions even after English law was changed to officially "tolerate" those religions,[82] although an occasional court might "save" the superstitious trust by applying *cy pres* and directing the trustees to use the trust funds for an Anglican purpose that the court considered similar.[83]

The doctrine of superstitious uses has survived in English law, but not as a tool to invalidate, on a per se basis, trusts for the benefit of a minority religion. Rather, the doctrine has survived (and is applied under American law as

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[75] For a historical discussion of the doctrine of *cy pres*, see Joseph Willard, *Illustrations of the Origin of* Cy Près, 8 HARV. L. REV. 69 (1894).

[76] Pursuant to the rule against perpetuities, all the beneficiaries' interests under a private trust must vest or fail within the period of the Rule, but a charitable trust may continue in perpetuity. 4A AUSTIN WAKEMAN SCOTT, SCOTT ON TRUSTS § 365 n.1 (William Franklin Fratcher ed., 4th ed. 1989).

[77] JONES, *supra* note 3, at 13.

[78] *Id.* at 77.

[79] *See id.* at 82-87.

[80] Attorney-General v. Pearson, 3 Mer. 353, 353, 36 Eng. Rep. 135. 136 (1817).

[81] Da Costa v. De Paz, 1 Dick. 258, 258-59, 21 Eng. Rep. 268, 268 (1754).

[82] As late as 1854, a gift for the saying of masses was held void as being intended for a superstitious use. Heath v. Chapman, 2 Drew. 417, 426, 61 Eng. Rep. 781, 784-85 (1854).

[83] *See*, *e.g.*, *Da Costa*, 1 Dick. at 258, 21 Eng. Rep. at 268 (modifying a trust originally intended to support instruction in the Jewish religion to support a foundling hospital whose inmates were to be instructed in the Christian religion).

well), albeit without the pejorative word "superstitious," as a useful tool for invalidating trusts that neither confer a public benefit[84] nor support definitely identifiable individuals.[85] In the 1923 English Chancery case of *In re Hummeltenberg*,[86] the testator had bequeathed a substantial sum in trust for the purpose of "training and developing suitable persons, male and female, as mediums." The trust was a perpetuity and therefore had to be declared invalid unless it was found to be charitable;[87] and to be classified as charitable, a trust must be designed to confer some sort of significant public benefit.[88] The court, after expressing its understanding that a medium is "an individual who professes to act as an intermediate for communication between the living and the spirits of persons now dead," held that the training of mediums did *not* confer a public benefit and that the trust was therefore invalid.[89] While the court did not go so far as to call mediums frauds or to call spiritualism superstition,[90] it did liken the testator's intention to "the

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[84] *See* Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867). To be considered charitable, a trust must benefit

> an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Id. at 556; *accord* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369 (rev. 2d ed. 1991).

[85] A private trust, unlike a charitable trust, must have definitely identifiable individual beneficiaries to be valid. If no individual beneficiaries can be identified, then no one has standing to enforce the trust; and if no one has standing to enforce the trust, then the putative trustee is not bound by any fiduciary constraints. And if the putative trustee is not bound by any fiduciary constraints, she is not a trustee and therefore no trust exists. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 518-19 (7th ed. 2005). In the case of a charitable trust, however, the state attorney-general, or some other designated public official, has standing to enforce the trust, so identifiable individual beneficiaries are unnecessary. MCGOVERN & KURTZ, *supra* note 73, at 389.

[86] [1923] 1 Ch. 237, All Eng. Rep. 49.

[87] *See supra* note 76.

[88] *See supra* note 84.

[89] *In re Hummeltenberg*, [1923] 1 Ch. at 242, All Eng. Rep. at 51.

[90] The Supreme Court of Michigan invalidated a will that bequeathed the bulk of the testator's estate "to be used as a nucleus in founding, building and equipping a home for poor and aged mediums." O'Dell v. Goff, 112 N.W. 736, 737 (Mich. 1907). Such a bequest does not raise quite the same public policy issues as the will in *Hummeltenberg* did, inasmuch as the *O'Dell* bequest was intended to benefit the needy—a valid charitable aim—rather than to advance a particular doctrine. But there was considerable evidence in *O'Dell* that the testator believed that his will was dictated to him by spirits, and the court invalidated the entire will not on public policy grounds but on the grounds of testamentary incapacity and undue influence. *Id.*

promoting of all kinds of fantastic (though not unlawful) objects of which the training of poodles to dance might be a mild example;"[91] and it hinted that, had the perpetuities objection not been dispositive, it would have been at least open to the argument that the trust was invalid on public policy grounds.[92]

How have English courts responded in modern times to the kinds of trusts at which the anti-Catholic Tudor policies were specially aimed: trusts to support the saying of masses for the repose of souls? Courts continued to apply the "superstitious uses" doctrine to invalidate such trusts until 1919,[93] when the House of Lords overruled these longstanding precedents and held that trusts for the saying of masses were not "superstitious" and therefore could be valid trusts.[94] There still remained, however, the requirement that charitable trusts provide a public benefit. As to this, courts held that trusts to support the saying of masses were valid if the public (or a significant portion of the public) had access to the masses[95] but invalid if the public was excluded.[96] As to public masses, courts were willing to give religious beliefs—even "minority" religious beliefs—more allowance than they were willing to give belief in mediums:

> A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.[97]

But as to private masses, the public benefits postulated to accrue from *them*—the beneficial public effects of intercessory prayer and the edification of the public by example—were held to be, respectively, incapable of proof and

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[91] *In re Hummeltenberg*, [1923] 1 Ch. at 242, All Eng. Rep. at 51.

[92] If the perpetuities issue had not been dispositive (because, let us say, the duration of the trust was expressly limited to twenty-one years), the court's finding that the trust was not charitable might still have supported a holding that the trust was invalid if the trust did not have definitely identifiable beneficiaries. *See supra* note 85. For some reason, however, the court does not discuss this alternative rationale; it mentions only public policy as an alternative rationale.

[93] For examples of cases applying the "superstitious uses" doctrine as late as the nineteenth century, see Heath v. Chapman, [1854] 2 Drew. 417; West v. Shuttleworth, [1835] 2 Myl. & K. 684.

[94] Bourne v. Keane, [1919] A.C. 815, 926.

[95] *In re* Hetherington, [1990] Ch. 1, 13 (1989).

[96] Gilmour v. Coats, [1949] A.C. 426, 442-55 (H.L.).

[97] *Id.* at 459.

too intangible.[98] That these invalidated trusts for private masses bear some resemblance to the private chantries condemned and invalidated as superstitious by the Chantries Act of 1547 is interesting but not cause for disquiet.[99] The modern English courts' distinction between publicly accessible and private religious observance is neutral as to religious content and treats religious belief no differently from any other belief that is unsusceptible of proof,[100] while the sixteenth century statute was—by its design and in its effect—entirely sectarian.

B. Later English Mortmain Law: A Private Law Response

The early English mortmain law, just discussed, dealt with a public law problem: the erosion of the feudal aristocracy's privileges. But this Article is concerned with a private law problem that has outlasted feudalism: individual testators who allow charitable inclinations to outweigh supposed obligations to the natural objects of their bounty. Both post-feudal English legislators and their American counterparts responded to this private law concern by enacting statutes

> to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check that unhappy propensity, which sometimes is found to exist under a bigotted enthusiasm, and the desire to gain fame as a religious devotee and benefactor, at the expense of all the natural claims of blood and parental duty to children.[101]

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[98] *See* Giles v. McDonnell, [1989] Ch. 133 Sol. J. 457.

[99] *See supra* note 72.

[100] Unique among American jurisdictions, the District of Columbia had a mortmain statute that imposed restrictions on bequests to clergy or religious institutions like churches but not on bequests to charitable, educational, or artistic institutions, even those operated by religious institutions. *See* Estate of French v. Doyle, 365 A.2d 621, 622 (D.C. 1976). Thus, a bequest to a semi-cloistered order of nuns was held invalid, McInerney v. District of Columbia, 355 F.2d 838 (D.C. Cir. 1965), while a bequest to the Little Sisters of the Poor was held valid. *In re* Estate of Susan Evelyn Murray, No. 29831 (D.C. Dec. 26, 1924) (cited in *Estate of French*, 365 A.2d at 622). The District of Columbia statute was later held unconstitutional. *Estate of French*, 365 A.2d at 625. *See infra* text accompanying notes 174-176.

[101] This passage comes from an anonymous "Note I" printed as an appendix to *Philadelphia Baptist Ass'n v. Hart's Executors*, 17 U.S. (4 Wheat.) 1 (1819) [hereinafter Note I, *Phila. Baptist Ass'n*]. This appendix is published (and separately paginated) at the end of Volume 17 of United States Reports; the quoted passage appears on page 23 of this appendix. Professor Brody identifies Mr. Justice Story as the author of this anonymous Note. *See* Brody, *supra* note 47, at 907.

In 1736, long after the medieval mortmain restrictions were "dispensed with,"[102] the English Parliament enacted what we know as the Modern Law of Mortmain.[103] It was enacted at a time of rampant anti-clericalism in England, a time when many "feared that the clergy would emulate what they thought to be the example of their medieval predecessors and terrorise them into making death-bed devises" to religious causes.[104] But the statute continued in operation long after this wave of anti-clericalism faded, for the logic and function of the statute was neither to prevent increases in the Church's wealth nor to curb testators' attempts at gratifying their vanity through pious acts. Rather, the statute was designed to "strike down the death-bed charitable devise which deprived the heir of land deemed to be his natural right."[105] Among other things, the Act prohibited the conveyance of lands (or the conveyance of personalty to be applied to the purchase of lands) for charitable uses unless

> [a] the conveyance [was] by deed signed, sealed, and delivered in the presence of two or more witnesses at least twelve months before the death of the donor or grantor; [b] the deed [was] enrolled in the high Court of Chancery within six months after its execution; [c] in the case of the transfer of stocks to be laid out in the purchase of lands, such stocks [were] transferred in the [corporate] books kept for that purpose six months before the death of the donor or grantor; and [d] the conveyance [was to] take effect in possession forthwith on its making . . ., without power of revocation . . . .[106]

Observe that, inasmuch as no devise could possibly satisfy these conditions, the effect of the statute was to bar devises of land to charity.[107] But this bar operated quite differently from the medieval and Tudor mortmain restrictions. Under the earlier mortmain rules, an improper devise to charity was not void but merely voidable;[108] only if the lord or the King exercised his right of entry would the land be forfeited.[109] The 1736 statute, on the other hand, rendered such

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[102] *See supra* notes 63-67 and accompanying text.

[103] Mortmain Act, 9 Geo. 2, c. 36 (1736).

[104] JONES, *supra* note 3, at 109.

[105] *Id.* at 117-18; *see* Oosterhoff, *supra* note 18, at 281.

[106] Oosterhoff, *supra* note 18, at 284.

[107] And the fourth restriction effectively barred inter vivos conveyances of remainders to charity. Inter vivos transfers had to be outright and immediate.

[108] *See supra* note 50.

[109] *See* Oosterhoff, *supra* note 18, at 278, 288.

devises void absolutely.[110] Furthermore, the 1736 statute—like all American mortmain statutes that came after it—contemplated that such improperly devised land would pass to the testator's heirs (or residuary devisees) rather than escheating to the public fisc.[111]

Several comparative observations may usefully be made at this point. First, in the decades between the 1601 enactment of the Statute of Charitable Uses and the 1736 enactment of the Mortmain Act, English courts came to favor charitable devises and were inclined to take an expansive view as to what transfers qualified as "charitable" so that such transfers would enjoy the special *protections* afforded charitable donations.[112] In contrast, after the 1736 Act, taking an expansive view of what constituted "charity" *endangered* more transfers by bringing them within the invalidating reach of the statute;[113] and the same possibility of endangerment existed under the American mortmain statutes that we shall discuss shortly. Second, the 1736 Act dealt only with transfers of land, not transfers of personalty: an arbitrary distinction (since the feudal incidents had been abolished[114]) that allowed a charitably inclined testator to frustrate Parliament and disappoint his heirs by converting all his land to personalty before executing his will. On the other hand, few American mortmain statutes treated land differently from personalty.[115] Third, while the 1736 Act invalidated all testamentary transfers of land to charity, it invalidated inter vivos transfers of land only if they were made less than one year before the transferor's death.[116] Parliament seems to have assumed that a landowner was unlikely to make improvident land-transfers that stood to jeopardize his standard of living. Since testamentary transfers do not reduce a transferor's wealth, all testamentary transfers came within

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[110] *Id.* at 284.

[111] *See* JONES, *supra* note 3, at 113-19. For example, suppose a testator in her will devised Blackacre to Charity A, £10,000 to Charity B without restrictions, and the residue of her estate to individual C. Upon application of the 1736 rule, Blackacre would become part of the residue and pass to C; it would not escheat to the Crown.

[112] *See* Oosterhoff, *supra* note 18, at 277.

[113] *See* JONES, *supra* note 3, at 107-08.

[114] *See supra* note 61.

[115] Even today, some American jurisdictions restrict the amount of land that may be held by the trustees of a charitable or benevolent association. *See, e.g.*, VA. CODE ANN. § 57-20 (2006) (five acres); *see also* MISS. CODE ANN. § 79-11-33 (2006) (effectively prohibiting religious societies from owning land other than that reasonably related to certain enumerated institutional purposes).

[116] *See* Oosterhoff, *supra* note 18, at 284.

the reach of the statute. But since inter vivos transfers *do* reduce a transferor's wealth, no special restrictions were needed unless the landowner was so close to death that his self-interest could not be relied upon as a check on his improvidence. American mortmain statutes, on the other hand, rarely applied to inter vivos transfers at all.

C. American Mortmain Law—A Similar Private Law Response

The 1736 English Mortmain Law never had any force in the American colonies.[117] But American judges and legislators undoubtedly knew of the 1736 Law, and after the founding of our republic many of them thought the English example worthy of emulation. Justice Story, for instance, urged American legislators to follow the "enlightened" example of the English Parliament by enacting legislation to prevent the "imposition upon pious and feeble minds in their last moments" and to restrain charitable impulses when they threaten "the natural claims of blood and parental duty to children."[118] For without such legislation, American courts often had to watch helplessly as charitable bequests shattered family members' expectations.

In *Doughten v. Vandever*, for example, a testator had left almost her entire estate to a number of charities and almost nothing to her blood relatives.[119] Although the will described the intended charitable legatees in vague and inaccurate language, the court upheld the bequests nonetheless, a result quite consistent with the traditional judicial favoritism shown to attempted charitable transfers.[120] But the court expressed its disapproval of the testator's intention to leave all to charity at the expense of her family. The court stated:

> There is nothing in the will . . ., with respect to these charitable bequests, at the expense of her relatives in blood, that meets the approval of my judgment. Her example in this respect I would not commend as worthy of imitation; and nothing but a sense of duty, which compels me to follow the law as expounded by courts of equity, has caused me to give an interpretation to the provisions of her

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[117] Brody, *supra* note 47, at 906; Oosterhoff, *supra* note 18, at 297 (citing Attorney-Gen. v. Stewart, (1817) 35 Eng. Rep. 895, 900-01).

[118] *See supra* note 101.

[119] Doughten v. Vandever, 5 Del. Ch. 51, 51-52 (1875).

[120] *See supra* note 3; *supra* text accompanying notes 62-74.

> will . . . by which her heirs at law are excluded from the benefit of sharing her estate.[121]

Consequently, American legislators, some at least as early as 1848, began to take Justice Story's advice.[122] For example, the Supreme Court of California, writing in 1907, explained the purpose of that state's mortmain statute:

> It is that a man's fears or superstition, or his death-bed hope of purchasing a blissful immortality, shall not be allowed to influence the disposition which he may thus make of his property, to the injury of his heirs.[123]

American mortmain statutes, all of them since repealed,[124] generally fell within one of two categories: (1) statutes that limited the percentage of a testator's estate that she was permitted to bequeath to charity (we shall use the term "percentage restrictions" to refer to this first group); and, more commonly, (2) statutes that annulled charitable bequests if the testator died only a short time after executing the will (we shall use the term "deathbed restrictions" to refer to the second).[125] Among the percentage restrictions were Iowa's (invalid in excess of twenty-five percent)[126] and New York's (invalid in excess of fifty percent).[127] Among the deathbed restrictions were California's (30 days),[128] Florida's (6 months),[129] and Idaho's (120 days).[130] And a few statutes—

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[121] *Doughten*, 5 Del. Ch. at 77.

[122] *See* Shirley Norwood Jones, *The Demise of Mortmain in the United States*, 12 MISS. C. L. REV. 407, 409 (1992).

[123] *In re* Lennon's Estate, 92 P. 870, 871 (Cal. 1907).

[124] In 1970, eleven American jurisdictions still had mortmain statutes: California, District of Columbia, Florida, Georgia, Idaho, Iowa, Mississippi, Montana, New York, Ohio, and Pennsylvania. All of them have since been repealed or held unconstitutional. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.7 cmt. c, note 3 (2003).

[125] Strictly speaking, these American statutes were not mortmain statutes, inasmuch as they did not purport to limit the amount of wealth that a charitable body might accumulate. *See* Kramer v. Eckart (*In re* Estate of Eckart), 348 N.E.2d 905, 909 (N.Y. 1976). Nonetheless, it is common to use the word "mortmain" in the context of these statutes, *see*, *e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.7 cmt. (2003); Michael G. Walsh, Annotation, *Modern Status, Validity, and Effect of Mortmain Statutes*, 6 A.L.R.4th 603 § 2(a) (1981), and I shall continue to do so in this Article.

[126] IOWA PROB. CODE § 633.266 (repealed 1980).

[127] N.Y. EST. POWERS & TRUSTS LAW § 5-3.3 (repealed 1981).

[128] CAL. PROB. CODE § 41 (repealed 1971).

[129] FLA. STAT. ANN. § 732.803, *invalidated by* Shriners' Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 68-69 (Fla. 1990).

[130] IDAHO CODE ANN. § 15-2-615 (repealed 1994).

such as Ohio's—combined the features of both groups (invalid in excess of twenty-five percent if the testator died less than six months after executing the will).[131] The ostensible targets of the percentage restrictions were "excesses of piety,"[132] while those of the deathbed restrictions were bequests generated by "the [deathbed] fears of the faithful."[133] Both kinds of restrictions did succeed in reaching their targets, but not without difficulties that made enforcement inconsistent and problematic.

For example, did the statutes render the offending charitable bequest absolutely void or merely voidable if challenged by someone with standing to do so? Under the 1736 English statute that served as a model for American legislation,[134] such bequests were void.[135] Under the American statutes, however, such bequests generally were held merely to be voidable. The Iowa mortmain statute, for instance, provided:

> No devise or bequest to a [not-for-profit corporation] shall be valid in excess of one-fourth of the testator's estate after the payment of debts, if a spouse, child, child of a deceased child, or parent survive the testator.[136]

Read literally, this statute provides that if a specified relative survives the testator, the excess bequest is automatically void, even if none of those relatives actually files an objection.

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[131] OHIO REV. CODE ANN. § 2107.06 (repealed 1985). In addition to invalidating all charitable bequests made within thirty days of death, the California statute invalidated even charitable bequests made more than thirty days before death to the extent that such earlier bequests exceeded one-third of the estate. CAL. PROB. CODE § 41 (repealed by 1971 Cal. Stat. ch. 1395).

[132] *See supra* note 59.

[133] *See supra* note 18 and accompanying text. The Supreme Court of Florida stated that Florida's mortmain statute was "obviously [designed] to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty." Taylor v. Payne, 17 So. 2d 615, 618 (Fla. 1944), *overruled by* Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990).

[134] The case of universities provides an interesting illustration of the extent to which American legislators were indebted to their English progenitors. When the 1736 English statute was being debated, Parliament granted exemptions for transfers made to the universities and colleges at Oxford and Cambridge and to the schools of Eton, Westminster, and Winchester, since Parliament considered these institutions to be the only public foundations "either useful or necessary in this Kingdom." JONES, *supra* note 3, at 111. Florida legislators included a similar exemption in their state's mortmain statute, which by its terms did not apply to "devises or bequests made to institutions of higher learning." FLA. STAT. ANN. § 731.19; *see also* CAL. PROB. CODE § 42 (repealed 1971). (The California repealing legislation exempts certain public and private educational institutions from the restrictions of the state's mortmain statute. 1971 Cal. Stat. ch. 1395 § 1.)

[135] *See supra* note 111 and accompanying text.

[136] IOWA PROB. CODE § 633.266 (repealed 1980).

Nonetheless, the Iowa courts construed the statute to make the charitable bequest merely voidable, at the instance of one or more of the specified relatives.[137] California courts—noting the public policy "in favor of charities and against the concept of mortmain"—reached a similar result under the California statute.[138] And the Florida mortmain statute quite explicitly stated that a charitable bequest could be avoided only if one or more of the lineal descendants or a spouse who would receive any interest in the devise, if avoided, "file[d] written notice to this effect in the administration proceeding within 4 months after the date letters [testamentary were] issued."[139] The mortmain statutes of a few states, however, contained no references to enumerated relatives, and accordingly those statutes were held to render the offending bequests void absolutely inasmuch as courts saw no textual basis for tying invalidity to the claims of particular persons.[140]

D. Why Mortmain Statutes Proved Unworkable

Even in the majority of states whose mortmain statutes *were* dependent on challenges brought by enumerated relatives, some courts required not only that the challenger be one of the enumerated relatives but also that she be entitled to take an additional share of property in the event the challenge was successful. In other words, an objectant's standing depended not simply on being one of the enumerated relatives but also on enjoying the prospect of benefiting from the objection. For example, suppose a state's mortmain statute was interpreted to require that an objection be filed by a spouse or descendant before a charitable bequest might be successfully challenged. A testator's will provided, "I bequeath $100,000 to Charity X and the residue of my estate to my niece." The testator, who was also survived by a son, died less than a month after executing the will, so the charitable bequest was voidable under the mortmain statute. But even if the

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[137] *See* Watson v. Manley, 130 N.W.2d 693, 696-97 (Iowa 1964), and the cases cited therein.

[138] McCormack v. Catholic Church Extension Soc'y of the United States of Am. (*In re* Estate of Reardon), 52 Cal. Rptr. 68, 73 (Dist. Ct. App. 1966); Villa v. Gutierrez (*In re* Estate of Gutierrez), 33 Cal. Rptr. 593, 598 (Dist. Ct. App. 1963).

[139] FLA. STAT. ANN. § 732.803, *invalidated by* Shriners' Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 68-69 (Fla. 1990).

[140] *See, e.g.*, IDAHO CODE § 15-2-615 (repealed 1994); MONT. CODE ANN. § 72-11-334 (declared unconstitutional in *In re Estate of Kinyon*, 615 P.2d 174 (Mont. 1980)).

charitable bequest were successfully challenged, the challenge would profit the son nothing inasmuch as the $100,000 would drop into residue for the niece's benefit, rather than passing by intestacy to the son. The niece *would* benefit from a successful challenge, but she lacked standing to bring one inasmuch as she was not an enumerated relative. Consequently, the deathbed charitable bequest could not be reached under this hypothetical statute.[141]

A testator might use a substitutionary gift as a device for thwarting such a mortmain statute: for example, "I bequeath $100,000 to Charity X, but if this bequest should for any reason be declared invalid, then I bequeath that $100,000 to Individual A. And I bequeath the residue of my estate to my son." Even though the son would ordinarily have standing to maintain an action to avoid the charitable bequest under this hypothetical mortmain statute inasmuch as he was both an enumerated relative and a residuary legatee, in this case he would lack standing inasmuch as a successful challenge to Charity X's bequest would not benefit the son but only Individual A. Consequently, the charitable bequest would survive any attack brought pursuant to this mortmain statute.[142] The Iowa rule, by contrast, did not deprive an enumerated relative of standing even though she would not derive any pecuniary benefit from a successful objection,[143] and thus the charity would indeed lose, but Individual A, rather than the objecting son, would gain. And if the testator carefully chose Individual A, who was in fact a director or officer of Charity X, even the successful contest under the Iowa mortmain statute would not thwart the testator's charitable intentions inasmuch as Individual A would be expected to use his inheritance to benefit the same charity that the testator wanted to benefit.[144]

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[141] *See* Whelpley v. Union Trust Bank of St. Petersburg (*In re* Estate of Lane), 186 So. 2d 257, 260 (Fla. Dist. Ct. App. 1966).

[142] *See, e.g.*, Syster v. Roman Catholic Bishop of San Diego (*In re* Estate of Sanderson), 375 P.2d 37, 40 (Cal. 1962); Rauf v. Salvation Army at Ocala (*In re* Estate of Rauf), 213 So. 2d 31, 32 (Fla. Dist. Ct. App. 1968); Cent. Nat'l Bank of Cleveland v. Morris, 222 N.E.2d 674 (Ohio Prob. Ct.), *aff'd*, 227 N.E.2d 418 (Ohio Ct. App. 1967).

[143] *See, e.g.*, Davis v. Davis (*In re* Estate of Davis), 114 N.W.2d 314, 317 (Iowa 1962).

[144] The device of naming a charity's officer as a substitute taker worked splendidly to protect the charitable bequest in an Iowa-type jurisdiction, as long as the gift over was to Individual A in his individual capacity so that the will did not purport to impose on Individual A any legal obligation to use the inheritance to benefit the charity. *See, e.g.*, Durkee v. Smith, 156 N.Y.S. 920, 922-23 (App. Div.), *aff'd*, 114 N.E.

The availability of the substitutionary gift technique provided testators with "a ready instrument" for protecting charitable bequests from successful challenges pursuant to a mortmain statute by depriving potential contestants of standing.[145] It is difficult to believe that courts' allowance of this technique was consistent with legislatures' intent, especially where the substitute takers were officers of the charitable legatee. To the extent legislatures wanted to restrain bequests generated by the deathbed fears of the faithful, they could hardly have approved of this technique when the inclusion of the substitutionary gift might have been prompted by the same undue influence or the same deathbed fears that prompted the charitable bequest. Nonetheless, the availability of this technique—the ease with which a mortmain statute could be

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1066 (N.Y. 1916). I have some doubts as to the soundness of citing this (or any) New York case as an illustration of the Iowa rule, for the New York decisions puzzle me. The result in the *Durkee* case is explainable only if New York followed the Iowa rule, inasmuch as the challenger was able to get a charitable bequest struck down even though substitute takers, not the challenger himself, benefited from the successful challenge. Yet a later case, *In re* Estate of Fitzgerald, 339 N.Y.S.2d 333, 337 (Sur. Ct. 1972), held that a substitutionary gift *deprived* an enumerated relative of his standing to contest a charitable gift; curiously, the *Fitzgerald* court cited the *Durkee* case in support of that proposition, 339 N.Y.S.2d at 337, even though *Durkee* seems to have held that such a relative did have standing. However, another New York case, *In re* Logasa's Estate, appears to disagree with *Fitzgerald* and agree with *Durkee*. 297 N.Y.S. 730, 731-32 (Sur. Ct. 1937). While the *Logasa* opinion is not so clear as it might be with regard to the facts, the case appears to have held that an enumerated relative could bring a challenge under the mortmain statute even though he would not benefit from the redirected money. *Id.*

The Iowa rule—granting standing to a petitioner who does not stand to benefit from a successful mortmain challenge—is inconsistent with over a century of wills law. In order to have standing to contest a will, an action quite analogous to challenging a charitable bequest pursuant to a mortmain statute, the contestant must show that a successful contest would increase the share of the decedent's property that would devolve to her. If the invalidation of the will would not be of direct pecuniary benefit to her, she lacks standing to contest. *See, e.g.*, Parker *ex rel.* Ames v. Reeves, 553 So. 2d 570, 572 (Ala. 1989); Fuqua v. Holt (*In re* Eskridge's Estate), 125 P.2d 527, 528 (Cal. Ct. App. 1942); *In re* Shephard's Estate, 32 A. 1040, 1042 (Pa. 1895).

[145] Note, *Standing to Contest Wills Violating Charitable Bequest Statutes*, 50 COLUM. L. REV. 94, 96 (1950). Indeed, the courts of at least one state consistently held that a testator bent on circumventing the statute need not have named a substitute taker; all she had to do was declare in the will that the relatives enumerated in the statute should receive no portion of her estate either by will or by intestacy. *See In re* Kramer v. Eckart (*In re* Estate of Eckart), 348 N.E.2d 905, 909-10 (N.Y. 1976). It should be noted, however, that some states, regardless of the existence of any mortmain statutes, do not permit a testator to disinherit her heirs simply by fiat; they require a testator bent on such disinheritance to make an effective bequest of her estate to other persons. *See, e.g.*, Cook v. Estate of Seeman, 858 S.W.2d 114, 115 (Ark. 1993); Clark v. Baxter (*In re* Estate of Baxter), 827 P.2d 184, 186 (Okla. Civ. App. 1992).

circumvented—lay behind at least one legislature's decision to repeal that state's mortmain statute.[146]

Mortmain statutes in the form of percentage restrictions frequently presented valuation and calculation issues. How, for example, should one value the bequest of a future interest to a charity? Suppose a hypothetical mortmain statute bars charitable bequests in excess of one-third of a testator's net probate estate. A particular testator with a net probate estate of $300,000 bequeaths $101,000 in trust and the residue to her children outright. The terms of the trust provide that the income from the trust property is to be paid to Individual X for ten years, and then the remainder in the trust is to be distributed outright to Charity Y. At least one court held that since it could not determine as of the testator's death the amount that would ultimately pass to Charity Y, it had to wait until the trust terminated to see how much actually ended up going to the charity.[147] So, under such an interpretation, if the principal of our hypothetical trust remains at $101,000 until final distribution, the charitable bequest will be found retroactively to have violated the mortmain statute. Not only is this valuation method administratively unsatisfactory inasmuch as it requires the beneficiaries to wait many years before they know who inherits what, the method is also doctrinally wrong. While it is certainly true that $101,000 is more than one-third of the $300,000 over which the testator had testamentary control, the testator did not bequeath the entire $101,000 to charity. She bequeathed only a remainder

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[146] Margaret Valentine Turano, *Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK; *see* N.Y. EST. POWERS & TRUSTS LAW § 5-3.3 (repealed 1981). I find it interesting that the New York legislature regarded the substitutionary gift as a sure-fire method of undermining the mortmain statute, inasmuch as at least two New York cases—*Durkee* and *Logasa*—held that a substitutionary gift to a nonrelative does *not* deprive an enumerated relative of standing to object to the charitable bequest. *See supra* note 144. Perhaps the legislature had only the more recent *Fitzgerald* case in mind. *See In re Estate of Fitzgerald*, 339 N.Y.S.2d at 337. Or perhaps the legislature believed that most enumerated relatives, even if they had standing to object, would not spend the time or money necessary to press their objection when any success would enrich the substitute taker rather than themselves. In *Shriners Hospitals for Crippled Children v. Zrillic*, the Florida Supreme Court, in an opinion declaring Florida's mortmain statute unconstitutional, noted the ease with which the statute could be circumvented through the use of substitutionary gifts. 563 So. 2d 64, 69 (Fla. 1990).

[147] *See* McCormack v. Catholic Church Extension Soc'y of the United States of Am. (*In re* Estate of Reardon), 52 Cal. Rptr. 68 (Dist. Ct. App. 1966). This valuation method was employed by the trial court as reported in the appellate court's opinion. *Id.* at 70-71. The appellate court reversed the trial court on grounds unrelated to this valuation issue. *Id.* at 76.

interest in that $101,000; the income from the $101,000 for ten years was bequeathed to an individual. If we assume an interest rate of 5 percent and employ standard actuarial valuation techniques, the present value of X's income interest in that $101,000 is about $39,000, and the present value of the charitable bequest is about $62,000: well within the one-third limit.[148]

Even if a court is willing to use actuarial valuation techniques,[149] carrying out the statute may require considerable ingenuity. Suppose, in our previous example, the testator had bequeathed $200,000 to the trust instead of $101,000. The present value of the charitable remainder would be about $123,000: clearly in excess of one-third of the estate. If we reduced the amount of the bequest in trust to $163,000, that would lower the value of the charitable remainder to $100,000, which satisfies the mortmain statute. But lowering the trust corpus to $163,000 (that is, removing $37,000 from the $200,000 pecuniary bequest and adding that $37,000 to residue) would reduce more than just the charitable bequest. It would reduce X's income interest as well, and X is an individual, not a charity. Perhaps the soundest solution would be to divide the $200,000 pecuniary bequest into two trusts: one in the amount of $163,000, with the income going to X for ten years and the remainder going to Charity Y; and another in the amount of $37,000, with the income going to X for ten years and the remainder going to testator's children (the residuary legatees).

Mortmain statutes in the form of percentage restrictions also presented interpretive problems whenever the testator owned property in more than one state. Under the customary principles of conflict of laws, the law of the situs determines the effectiveness of an attempted devise of land.[150] For example,

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[148] Sometimes actuarial valuation techniques cannot be used to calculate a remainder's present value, as where the trustee is authorized in its discretion to make corpus distributions to the life income beneficiary. *See* Herrington v. Nation Found. for Infantile Paralysis (*In re* Estate of Nicely), 44 Cal. Rptr. 804, 807 (Cal. Dist. Ct. App. 1965).

[149] *See, e.g.*, Upole v. Roberts (*In re* Estate of Roberts), 437 N.E.2d 1205, 1208 (Ohio Ct. App. 1980).

[150] *See In re* Gracey's Estate, 253 P. 921, 924 (Cal. 1927); Biederman v. Guzman Ramos *ex rel.* Estate of Barteau (*In re* Estate of Barteau), 736 So. 2d 57, 58 (Fla. Dist. Ct. App. 1999); Hyman v. Glover (*In re* Estate of Hannan), 523 N.W.2d 672, 674 (Neb. 1994). Devolution of personal property is governed by the law of the decedent's domicile at death. Hemingway v. McGehee (*In re* Estate of Chrichton), 228

where a Missouri domiciliary owned land located in Illinois, the land was held to pass by intestacy even though he left a will that was valid in Missouri, because an Illinois statute treated the will as having been revoked by the testator's subsequent marriage.[151] Consequently, if State One has a deathbed restriction mortmain statute while State Two has none, and if a testator domiciled in State One makes a deathbed charitable devise of land located in State Two, the devise will not be voidable under State One's mortmain statute. And similarly, if a testator domiciled in State Two makes a deathbed charitable devise of land located in State One, the devise *will* be voidable under State One's mortmain statute. But suppose State One's mortmain statute is a percentage restriction; will the State Two land be taken into account for purposes of determining whether State One's percentage restriction has been exceeded?

New York law, to take one example, answered that last question affirmatively. First, said the Court of Appeals, the value of all the testator's property, wherever located, must be ascertained.[152] Then the value of all property not subject to New York law (that is, out-of-state real property and, in the case of a nondomiciliary, all personal property[153]) but bequeathed to charity must be ascertained.[154] If that second total equals or exceeds fifty percent of the first total, any charitable bequests of property subject to New York law (that is, New York realty and, in the case of a New York domiciliary, all personal property) are voidable under New York's mortmain statute.[155] But if that second total is less than fifty percent of the first total, so much property subject to New York law may pass to charities as will bring the total passing to charity up to fifty percent of the first total.[156] Thus, if a New York domiciliary's estate consisted of $60,000 of New York real estate, $40,000 of New Jersey real estate, and $50,000 of personalty, and if the testator's will devised all his land to charity, New York courts would allow not more than $35,000 of the New York realty to

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N.E.2d 799, 806, 808, 823 (N.Y. 1967); Howard v. Reynolds, 283 N.E.2d 629, 630-31 (Ohio 1972).

[151] Sternberg v. St. Louis Union Trust Co., 68 N.E.2d 892, 894, 897-98 (Ill. 1946). Illinois law no longer provides that a testator's marriage revokes his premarital wills. *See* ILL. COMP. STAT. § 5/4-7(b) (2007).

[152] Decker v. Vreeland, 115 N.E. 989, 992 (N.Y. 1917).

[153] *See supra* note 150.

[154] *Decker*, 115 N.E. at 992.

[155] *Id.*

[156] *Id.*

pass to charity free of New York's mortmain statute.[157] But this result assumes that no New Jersey mortmain statute would limit the effectiveness of the charitable devise of the New Jersey land. If both states had a percentage mortmain restriction, the process would be more complex still.

Mortmain statutes in the form of deathbed restrictions presented fewer interpretive problems than mortmain statutes in the form of percentage restrictions. The one persistent problem common to the former but not to the latter was deathbed wills that reaffirmed charitable bequests made before the deathbed period began. Suppose a state's mortmain statute voids all charitable bequests made within six months of death. Two years before her death, a testator executes Will #1, which bequeaths $10,000 to Charity A and the residue to individual X. One month before her death, the testator executes Will #2, which (1) expressly revokes Will #1, (2) bequeaths $10,000 to Charity A, and (3) bequeaths the residue to individual Y. Since the purpose of deathbed restrictions is "to protect . . . against the influences . . . [of the] last moments" that prompt a testator to make charitable bequests "as a means of tranquilizing a disturbed conscience,"[158] one might argue that the statute ought not to be applied in this case inasmuch as the charitable bequest predates those "last moments." Indeed, if the statute *did* apply in these circumstances, testators in their last illnesses might thereafter refrain from making needed changes in the noncharitable portions of their wills lest charitable bequests in prior wills lose their "grandfathered" status. On the other hand, the testator in our example might have intended, when she drew Will #2, to revoke the charitable bequest altogether and was dissuaded from doing so only by those "influences of the last moments." Under this new assumption, one would think that the statute *ought* to be applied.

And the case I have presented so far is relatively easy. Suppose we hold in this case that the $10,000 bequest to Charity A is indeed "grandfathered" under the mortmain statute and therefore valid. Would a $15,000 bequest to Charity A in Will #2 be similarly grandfathered? Grandfathered only to the extent of $10,000? And what about a bequest of $10,000 to Charity B in Will #2 to replace the

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[157] The total value of the testator's estate is $150,000, so fifty percent of that amount equals $75,000. Since the $40,000 of New Jersey realty is effectively devised to charity, not more than $35,000 of New York property may be so devised.

[158] Stephenson v. Short, 92 N.Y. 433, 444-45 (1883).

bequest to Charity A? Most mortmain statutes were silent on these points. The mortmain statutes of at least two states, however, Florida and Pennsylvania, contained language intended to address these problems, but the language created new problems of its own. Florida's six-month deathbed mortmain statute did not apply in cases where the "testator, by his will duly executed immediately next prior to such [deathbed] last will and more than six months before his death, [had] made a valid charitable bequest or devise in substantially the same amount for the same purpose or to the same beneficiary."[159] The exception in the Pennsylvania statute was for "an identical gift for substantially the same religious or charitable purpose."[160] The Pennsylvania language was slightly more specific as to amount than the Florida language ("identical gift" is more specific than "substantially the same amount"), while the Florida language was slightly more specific as to purposes ("the same purpose" as compared with "substantially the same . . . purpose"). But in each case the more specific language was *so* specific that courts could hardly have interpreted it strictly. For example, in *In re Estate of Rauf*,[161] the testator, more than six months before her death, executed a will bequeathing the residue of her estate to two charities: the Salvation Army of New York City and a Cancer Fund in New York. Within six months of her death, she executed a new will leaving the residue of her estate to three charities: the Salvation Army at Ocala, Florida; the Marion County Heart Association; and Father Flanagan's Boys' Home.[162] The court held that the three residuary bequests in the deathbed will were indeed "for the same purpose" as the two residuary bequests in her prior will and therefore were insulated from the reach of the mortmain statute, even though the charities named in the later will were, with one exception, not even close to identical with those named in the earlier will.[163]

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159 FLA. STAT. § 731.19 (repealed 1974).

160 *See In re* Estate of Prynn, 315 A.2d 265, 266 n.6 (Pa. 1974).

161 213 So. 2d 31 (Fla. Dist. Ct. App. 1968).

162 *Id.* at 32.

163 *Id.* at 32-33.

E. Constitutional Objections to Mortmain Statutes

We have seen that the American mortmain statutes were deeply flawed. They could be easily circumvented by making inter vivos gifts or by designating alternative takers in the event of invalidity. They presented extremely difficult questions of interpretation. And they jeopardized estate planning techniques (charitable lead trusts and charitable remainder trusts, for example) that were needed to preserve a family's after-tax wealth. All of these were good reasons for repealing the statutes, and most of them were in fact repealed for reasons such as these.[164] But a number of mortmain statutes were held to be not merely unwise but unconstitutional: an extreme and unwarranted holding.

The Supreme Court of Ohio held that the state's mortmain statute[165] violated the due process clauses of the Ohio and U.S. constitutions because the distinction the statute made between bequests executed within six months before death and those executed more than six months before death was an arbitrary, irrational distinction bearing no relation to whether the particular bequest was the result of unsound judgment or undue influence.[166] That objection cannot reflect a correct understanding of the requirements of due process inasmuch as legislatures routinely draw distinctions based on age or time. Some fifteen-year-olds are better drivers than some twenty-year-olds, but a state is nonetheless permitted to enact and enforce an inflexible minimum driving age.[167] Similarly, when Congress, anxious to prevent Social Security spousal death benefits from enriching partners in "sham marriages" entered into solely for the purpose of obtaining these benefits, enacted a

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[164] *See, e.g.*, *supra* note 146 and accompanying text. For a discussion of the reasons behind the repeal in 1960 of England's modern mortmain statute, see Oosterhoff, *supra* note 18, at 291-95.

[165] *See supra* note 131 and accompanying text.

[166] Shriners' Hosp. for Crippled Children v. Hester, 492 N.E.2d 153, 156 (Ohio 1986). The Supreme Court of Pennsylvania invalidated that state's mortmain statute on similar grounds. *In re* Estate of Cavill, 329 A.2d 503, 505-06 (Pa. 1974). "The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary." *Id.* at 505-06; *accord In re* Estate of Kinyon, 615 P.2d 174, 176 (Mont. 1980) (invalidating Montana's mortmain statute).

[167] Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 597 (2006).

provision denying such benefits to surviving spouses whose marriages had lasted less than nine months,[168] the United States Supreme Court upheld the constitutionality of the provision, even though not all nine-month marriages are shams and some sham marriages may last for more than nine months.[169] The Court reasoned:

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the [legislative] concern reflected in the statute. Such a rule would ban all prophylactic provisions. . . . The question is whether [the legislature], its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[170]

When the Supreme Court of Florida invalidated that state's mortmain statute,[171] it took the faulty Ohio view, condemning as irrational the statutory distinction between bequests made within six months before the testator's death and those made six months or more before the testator's death.[172] The Florida court also condemned the statute's differentiation between bequests to charities and those to individuals: "There is no reason to believe that testators need more protection against charities than against unscrupulous and greedy relatives, friends, or acquaintances."[173] And the District of Columbia mortmain statute[174] made a more troubling distinction—unique among American mortmain statutes[175]—between bequests to religious entities (invalid if made within thirty days of the testator's death) and bequests to secular charities (valid regardless of when made). The District of Columbia Court of Appeals, citing the irrationality of that distinction, held that the statute violated the due process clause of the Fifth Amendment.[176]

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[168] 42 U.S.C. § 416(c)(1)(E), (g)(1)(E) (2000).

[169] Weinberger v. Salfi, 422 U.S. 749, 777 (1975).

[170] *Id.* at 777.

[171] FLA. STAT. ANN. § 732.803 (repealed 1991).

[172] Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990).

[173] *Id.* at 70.

[174] D.C. CODE ANN. § 18-302 (repealed 1981).

[175] *See* Estate of French v. Doyle, 365 A.2d 621, 622 n.3 (D.C. 1976), *appeal dismissed on other grounds*, 434 U.S. 59 (1978).

[176] *Id.* at 624-25.

The District of Columbia's unique mortmain distinction between religious charities and secular charities might indeed have raised constitutional questions concerning the freedom of religion.[177] However, a statutory rule distinguishing between *all* charities on the one hand and all noncharities on the other does not implicate First Amendment values. In the famous peyote case, *Employment Division v. Smith*,[178] the United States Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . ."[179]

But what about the Florida Supreme Court's opinion that the state mortmain statute's charity/noncharity distinction, because of its arbitrariness, violated not the free exercise principle but the equal protection clause?[180] Even if the state's purpose in enacting the statute is legitimate, "Equal protection analysis," said the Florida court, "requires that classifications be neither too narrow nor too broad to achieve [that] desired end."[181] The court reasoned that the mortmain statute was simultaneously too narrow *and* too broad: too narrow insofar as it failed to invalidate bequests to unscrupulous noncharitable legatees who were guilty of overreaching, and too broad insofar as it invalidated bequests to charitable legatees who were innocent of overreaching.[182] Was the Florida court correct in its equal protection analysis?

Since the right to bequeath one's property is an economic and not a fundamental right,[183] proper equal

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[177] The trial court had found that the mortmain statute did indeed violate the First Amendment, but the appellate court, finding the due process objection determinative, expressly declined to consider the First Amendment issue. *Id.* at 623. The issue of freedom of religion is discussed in more detail *infra* in the text accompanying notes 325-378.

[178] 494 U.S. 872 (1990); *see also infra* text accompanying notes 326-331.

[179] *Smith*, 494 U.S. at 879 (internal punctuation and citations omitted); *accord* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531.

[180] Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990).

[181] *Id.* at 69-70.

[182] *Id.* at 70.

[183] In 1942, the United States Supreme Court famously declared:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a

protection analysis rests with the so-called "rational basis" test,[184] and "rational basis" does not demand "mathematical nicety."[185] In *Dandridge v. Williams*,[186] for example, the State of Maryland had imposed a $250 cap on the monthly amount of need-based benefits that the state paid to any one family pursuant to its Aid to Families with Dependent Children ("AFDC") program. Because the same dollar cap applied to both large families and small ones, despite the presumably greater financial need of the former, the petitioners argued that the dollar cap "operate[d] to discriminate against them merely because of the size of their families, in violation of the Equal Protection Clause of the Fourteenth Amendment."[187] The essence of the petitioners' argument was one of overbreadth. Maryland imposed the cap, in part, to limit the financial benefits of unemployment and thereby encourage gainful employment;[188] yet, argued petitioners, the cap was imposed even on families in which no one was employable: that is, families who could not possibly respond to that statutory incentive.[189] (The statute was impliedly underbroad as well. If a family's actual needs were below the $250 cap, such a family's AFDC grants would equal their needs, so the statutory scheme and its cap would in that case generate no effective pressure to seek employment.) The United States Supreme Court rejected

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> state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (punctuation altered). In 1987, the Court held that the federal government's abrogation of the right to bequeath certain fractional interests in aboriginal tribal lands amounted to a "taking" of property that required compensation pursuant to the Fifth Amendment. Hodel v. Irving, 481 U.S. 704, 717-18 (1987). Some scholars regarded *Hodel* as a signal that the Court was retreating from its 1942 rejection of a constitutional basis for a right to bequeath, while others read *Hodel* as creating only a minor exception to *Irving Trust*. *See* Sherman, *supra* note 58, at 1288-89. Noteworthy is the fact that state courts, long after *Hodel* was decided, continued to declare—and to cite pre-*Hodel* cases—that the right to bequeath is not a natural right but rather a statutory privilege. *See, e.g.*, Estate of Della Sala v. Father Flanagan's Boys' Home, 86 Cal. Rptr. 2d 569, 572 (Cal. Ct. App. 1999); Thompson v. Hardy, 43 S.W.3d 281, 285 (Ky. Ct. App. 2000); *In re* Estate of Long, 600 A.2d 619, 622 (Pa. Super. Ct. 1992).

[184] *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 33-34 (1987) (Stevens, J., concurring); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

[185] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). "Strict scrutiny" analysis *does* require mathematical nicety, often phrased as a requirement that the legislature choose "the least restrictive means of achieving" its end. Thomas v. Review Bd. Of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

[186] 397 U.S. 471 (1970).

[187] *Id.* at 475.

[188] *Id.* at 483.

[189] *Id.* at 486.

the petitioners' constitutional challenge, pointing out that while overbreadth could be a constitutionally fatal flaw in statutes impinging on First Amendment rights, it was an irrelevant consideration under the "rational basis" standard applicable to economic or social regulation.[190]

> [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.[191]

A state has a legitimate interest in regulating the devolution of property at death: that is, an interest in fostering an orderly transfer of material resources from one generation to the next. While a state could constitutionally abolish the right of testation and require that all estates devolve pursuant to the state's intestacy statute,[192] all states do in fact permit property owners to direct the devolution of their estates upon death.[193] But in the absence of specific testamentary directions from a decedent, the state's intestacy statute prescribes the manner in which the decedent's property is to be distributed. This statutory distribution scheme is designed to approximate the distribution that decedents would have adopted had they made a will;[194] indeed, the seventeenth century jurist Hugo Grotius believed that the very legitimacy of the rules of intestate succession depended on their correspondence with the presumed intentions of decedents.[195] Thus, if a decedent expresses a desire to have her estate distributed to persons other than—or in shares different from—those set forth in the intestacy statute, she is expressing desires different from those the state presumes her to have. Consequently, a state acts rationally when it demands that the decedent express those unpredicted individuated wishes in a manner and under

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[190] *Id.* at 484-85.

[191] *Id.* at 486-87 (citing *Lindsley*, 220 U.S. at 61). The Court's language here was quite similar to the language it would use five years later in *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975), when it held that overbreadth had no bearing on a due process challenge to a piece of social/economic regulation. *See supra* text accompanying notes 168-170.

[192] *See supra* note 183.

[193] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, Introduction (2003).

[194] *See* King v. Riffee, 309 S.E.2d 85, 87-88 (W. Va. 1983); *see also* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 501 (1977).

[195] *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 4 (1977).

circumstances suggesting particular thoughtfulness and voluntariness.[196] Inasmuch as American intestacy statutes without exception prescribe distributions only to natural persons related to the decedent by blood or marriage,[197] a state likewise acts rationally when it subjects to particular scrutiny bequests in favor of persons outside those categories: notably, corporate bodies such as religious or secular charities.

Scholars have identified other state objectives underlying intestacy statutes: objectives related not to the presumed intentions of property owners but rather to the interests of society as a whole. But these societal objectives, too, suggest that a state may properly subject institutional bequests to special scrutiny. For example, some scholars have observed that intestacy statutes serve society's interests by "protect[ing] the financially dependent family [and by] . . . promot[ing] and encourag[ing] the nuclear family."[198] Clearly the state has an interest in thwarting a testator who intends, by bequeathing his property to nonfamily members, to pauperize his dependents and leave to the state the burden of supporting them. Another societal interest served by intestacy statutes is the avoidance of disharmony within the particular family and the avoidance of disdain for the legal system generally that would be spawned by a distribution scheme that potential recipients regarded as unwise or unfair.[199]

It should be self-evident that *excessive* or *impulsive* bequests to charity are especially calculated to engender feelings of resentment and ill-usage among all the testator's family members[200] (not merely the particular family members who receive less than other particular family members), and

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[196] The formal requirements that states impose by statute on the execution of wills—e.g., the requirement that the document be signed by the testator and attested by witnesses in the testator's presence—are designed in part to reassure courts that the testator understood the legal consequences of her act and that she was free from imposition at the time she performed that act. Gulliver & Tilson, *supra* note 5, at 1-10. And if, despite those formal precautions, the testator executes a will that—because of fraud, duress, or undue influence by extrinsic parties—does not represent her wishes, the document will be declared invalid.

[197] Most states' intestacy statutes prescribe identical treatment for siblings of the half-blood and siblings of the whole-blood. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 2 n.9 (2000).

[198] Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 324 (1978).

[199] LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 2-5 (4th ed. 2006).

[200] *See supra* text accompanying notes 119-121.

thus a state bent on minimizing such unpleasantness could quite rationally treat each charitable bequest as a potential intrafamilial *casus belli*.[201] Moreover, the special indulgences accorded charitable transfers, including the exemption from the rule against perpetuities, give the state cause for even greater concern than in the case of bequests to individuals.[202]

The key words here are "excessive" and "impulsive." How might a state preclude "excessive" charitable bequests while continuing to allow nonexcessive ones? The state might authorize probate judges to strike down or reduce those charitable bequests that they regard as unreasonably large, but such a free-floating discretionary power would make reliable tax planning impossible, since attorneys would have no way of predicting the portion of a client's estate that would end up passing to charity, and every will containing a charitable bequest would be potentially subject to judicial modification. Furthermore, judges would be asked to make a determination of "reasonableness" unmoored to any definable standards, and wildly inconsistent holdings could be expected. On the other hand, the fixed percentage limits imposed by American mortmain statutes of the "percentage restriction" type[203] represent a more practicable approach to the excessiveness problem; and the inflexibility of such arithmetic, prophylactic solutions does not render them constitutionally objectionable.[204]

How might a state preclude "impulsive" charitable bequests while continuing to allow thoughtful ones? If the impulse emanates from another person, the doctrine of "undue influence" might furnish a solution by invalidating the bequest. If the impulse is largely self-generated, proof of a lack of "testamentary capacity" might work. Both doctrines proceed on

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[201] A number of courts, in deciding whether a doubtful charitable gift is invalid, have taken into account the family status of those objecting to the gift, leaning towards overturning the gift when the objectants were close relatives of the transferor and toward upholding the gift when the objectants were distant relatives. For example, in *Wilber v. Owens*, 65 A.2d 843 (N.J. 1949), the Supreme Court of New Jersey upheld the vice-chancellor's decision to rescue a dubious charitable gift by applying *cy pres*, *id.* at 848, and, in upholding the decision, the Court noted that the testator "had no kin nearer than first cousins." *Id.* at 846; *accord* Howard Sav. Inst. v. Peep, 170 A.2d 39, 45 (N.J. 1961). *See generally* Robert J. Lynn, *The Questionable Testamentary Gift to Charity: A Suggested Approach to Judicial Decision*, 30 U. CHI. L. REV. 450, 463-65 (1963). State legislators displayed a similar instinct when they enacted mortmain statutes that invalidated charitable bequests only when challenged by particular relatives. *See supra* text accompanying notes 137-139.

[202] *See supra* notes 3, 74-76, and 85.

[203] *See supra* text accompanying note 125.

[204] *See supra* text accompanying note 170.

the notion that, had the testator *not* been subjected to undue influence or not been laboring under some sort of mental aberration, he would not have made the challenged bequest; and therefore the state acts rationally when it refuses to give effect to the bequest of a testator whose volition was so undermined. But actual evidence of undue influence or mental deficiency is rare. Will contestants generally must rely on circumstantial evidence to prove their case,[205] and the availability of circumstantial evidence cannot always be counted upon. If a testator whose prior wills contained no charitable bequests writes a deathbed will bequeathing property to a particular secular or religious charity, it seems not unreasonable to infer that, had he not been facing a fearfully imminent death, he would have acted differently or not acted at all.[206] Rather than relying upon the difficult and time-consuming task of sifting through circumstantial evidence that the testator's own morbid notions or the pressure of another person undermined the testator's mental faculties, a state acts rationally when it decides upon a prophylactic rule, however imprecise,[207] like a mortmain statute of the deathbed type.

II. A SUMMARY OF THE LAW OF UNDUE INFLUENCE

Although mortmain statutes can respond effectively—and constitutionally—to a problem that continues to blight American families' lives, the harshness and inflexibility of those statutes argue against their reenactment. Consequently, the doctrine of undue influence must continue to serve as the primary bulwark against the imposition by charitable or religious organizations upon the mind and free agency of anxious testators.[208]

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[205] *See infra* text accompanying note 215.

[206] Indeed, scholars, judges, and legislatures have, for centuries, questioned the propriety of deathbed charitable bequests. *See supra* notes 1, 17, 18, 59, 101, 118, and 123 and accompanying text.

[207] *See supra* note 170 and accompanying text.

[208] Although mortmain statutes applied only to testamentary transfers, the doctrine of undue influence applies to both testamentary and inter vivos conveyances. In determining whether a conveyance resulted from undue influence, courts generally apply the same standards in the testamentary and inter vivos contexts. MCGOVERN & KURTZ, *supra* note 73, § 7.3. Consequently, this portion of the Article will cite, without distinguishing between them, both challenges to testamentary transfers and challenges to inter vivos transfers, unless clarity or doctrinal accuracy demands that the distinction be made. As to differences in the limitations rules applicable to these two types of challenges, see John B. Jarboe, *Undue Influence and Gifts to Religious*

If a purported will does not represent the wishes of the testator who signed it, the instrument is not a valid will, and the court having jurisdiction over the matter will refuse to admit the instrument to probate. The charge of undue influence, as a ground for contesting a will, is a charge that the will reflects not the wishes of the testator but rather those of a person who destroyed the testator's free agency and caused him to execute a will representing the wishes of that other person. This displacement or substitution of agency is the vital underpinning of undue influence, since people persuade people every day without destroying free agency and without invalidating wills that reflect such persuasion.[209] For influence to be "undue," it must amount to more than "the influence which springs from natural affection or kind offices[; it must instead spring] from fear, coercion, or any other cause that deprives the testator of this free agency in the disposition of property. . . ."[210] But however malign or sinister may be the intentions of a person charged with imposition upon the testator, her conduct does not constitute undue influence unless it caused the testator to execute a will that did not represent his own wishes.[211] And conversely (and more important, for purposes of this Article), the propriety or even beneficence of an influencer's motives will not protect a purported will from a successful contest if that influence in fact overcame the testator's free agency.[212] The purpose of the doctrine is not to deprive wrongdoers of their ill-gotten gains[213]

Organizations, 35 CATH. LAW. 271, 273 (1994). As to differences relating to a certain evidentiary presumption, see *infra* text accompanying notes. 278-287.

[209] Henderson v. Jackson, 111 N.W. 821, 823 (Iowa 1907).

[210] Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 507 (Ark. Ct. App. 1987).

[211] 1 WILLIAM HERBERT PAGE, PAGE ON THE LAW OF WILLS § 15.6 (2003).

[212] *In re* Craven's Will, 86 S.E. 587, 591-92 (N.C. 1915); Anderson v. Brinkerhoff, 756 P.2d 95, 100 (Utah Ct. App. 1988); *see Carpenter*, 730 S.W.2d at 505 (stating that moral turpitude on the part of the influencer is not required for undue influence to be found).

[213] Some laws relating to wills do indeed target wrongdoers. The law of almost every American jurisdiction bars an intestate decedent's murderer from inheriting any portion of the victim's estate, even though the murderer is an heir of the decedent. *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 844-47 (1993). In some states, a person convicted of the abuse or financial exploitation of an intestate elderly or disabled person is likewise barred from inheriting from the victim, even though the wrongdoer is an heir. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/2-6.2 (2007). But the law of undue influence does not target wrongdoers as such. If a decedent's will is declared invalid on the ground of undue influence, with the result that the decedent becomes intestate, the person successfully charged with exerting

but rather to ensure that the testamentary wishes given effect by the probate court truly are the testator's wishes: that is, to ensure that the will is not "the product of a captive mind."[214]

Because undue influence is generally exerted in secret, direct evidence of such influence almost never exists; a finding of undue influence is usually based entirely on circumstantial evidence.[215] And to that end, black-letter law traditionally identifies four elements of the circumstantial case: four elements that need to be proved in order for a will to be rejected on the ground of undue influence. Despite the circularity of this four-part "test," courts and commentators quote it so often that it is worth quoting again. It must be shown

> (1) that the testator was *susceptible* to undue influence, (2) that the influencer had the *disposition* or *motive* to exercise undue influence, (3) that the influencer had the *opportunity* to exercise undue influence, and (4) that the disposition is the *result* of the influence.[216]

Some of these elements require further elaboration. Although the first of these four elements presupposes that the testator's condition or circumstances rendered him especially susceptible to influence,[217] this element does not require that the testator have been so far gone as to lack the mental capacity to make a valid will.[218] Indeed, strictly speaking, a claim of undue influence is logically inconsistent with a claim of testamentary incapacity inasmuch as undue influence

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undue influence may still share in the decedent's intestate property if he or she is an heir of the decedent. *In re* Randall's Estate, 132 P.2d 763, 766 (Idaho 1942).

[214] PAGE, *supra* note 211, at § 15.3.

[215] *In re* Ferrill's Will, 640 P.2d 489, 493 (N.M. Ct. App. 1981); *see* Smith v. Moore, 176 So. 2d 868, 871 (Ala. 1965); *In re* Estate of Olsson, 344 S.W.2d 171, 173-74 (Tex. Civ. App. 1961); *see also In re* The Bible Speaks, 869 F.2d 628, 642 (1st Cir. 1989), *cert. denied*, 493 U.S. 816 (1989).

[216] DUKEMINIER ET AL., *supra* note 85, at 159; *accord* Burgess v. Bohle (*In re* Hull's Estate), 146 P.2d 242, 245 (Cal. Ct. App. 1944); *In re* Estate of Herbert, 979 P.2d 39, 53 (Haw. 1999); *In re* Estate of Opsahl, 448 N.W.2d 96, 100 (Minn. Ct. App. 1989); Estate of Kamesar, 259 N.W.2d 733, 737-39 (Wis. 1977).

[217] *See, e.g.*, Gardiner v. Goertner, 149 So. 186, 189 (Fla. 1932); Wallace v. Scott, 844 S.W.2d 439, 441 (Ky. Ct. App. 1992); *In re* Cotcher's Estate, 264 N.W. 325, 327 (Mich. 1936).

[218] *In re* Estate of Miller, 778 N.E.2d 262, 267 (Ill. App. Ct. 2002). To lack the mental capacity to write a valid will, a testator must be very "far gone" indeed; a person who lacks sufficient mental capacity to write an enforceable contract or to manage his own property may still have sufficient mental capacity to execute a valid will. Gibony v. Foster, 130 S.W. 314, 323 (Mo. 1910); *see* Bye v. Mattingly, 975 S.W.2d 451, 456 (Ky. 1998) ("Merely . . . possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable of validly executing a will.").

postulates that a decedent's testamentary intent was overcome by another person while testamentary incapacity postulates that the decedent was incapable of forming any testamentary intent in the first place.[219] In point of fact, however, many contestants who challenge a will on undue influence grounds do also raise separate objections based on lack of testamentary capacity,[220] for the two doctrines are more closely related than strict logic would indicate: a relation that implicates the fourth element of undue influence.

The fourth element of undue influence—often reworded *coveted result* by Wisconsin courts[221]—requires that the provisions of the will appear on their face to reflect the desires of the alleged influencer rather than reflecting what one would suppose to be the "natural" desires of the testator: that is, that the will fail to provide for the natural objects of the testator's bounty. Thus, a substantial bequest to a mere casual acquaintance suggests undue influence when the testator's father was still living at the time she executed her will,[222] as does a substantial bequest to a housekeeper to the exclusion of several nieces and nephews who had been named in prior wills.[223] "Unnatural" provisions are hardly conclusive proof of undue influence—indeed, a testator is theoretically permitted to be as arbitrary and unfair in her will as she wishes without thereby forfeiting the right to have her testamentary directions honored[224]—but they do raise suspicions of such influence. And

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[219] *In re* Estate of Aageson, 702 P.2d 338, 342 (Mont. 1985).

[220] *See, e.g.*, First Sec. Bank & Trust Co. v. Christianson (*In re* Estate of Dankbar), 430 N.W.2d 124, 127 (Iowa 1988); Hodges v. Hodges, 692 S.W.2d 361, 365 (Mo. Ct. App. 1985); McKee v. Stoddard, 780 P.2d 736, 740 (Or. Ct. App. 1989); Gold's Estate, 182 A.2d 707, 709 (Pa. 1962); *In re* Estate of Burt, 169 A.2d 32, 34-35 (Vt. 1961).

[221] *See, e.g.*, Lee *ex rel.* Estate of Kamesar v. Kamesar (*In re* Estate of Kamesar), 259 N.W.2d 733, 737 (Wis. 1977).

[222] *See In re Estate of Dankbar*, 430 N.W.2d at 131.

[223] *See In re* Will of Ridge, 275 S.E.2d 424 (N.C. 1981). In most successful will contests based on undue influence, the influencer is named as a beneficiary. That is, the result "coveted" by the influencer was financial benefit for himself. But occasionally an influencer might pressure a testator to benefit someone else, and such pressure can still constitute undue influence even though the influencer was not himself a beneficiary. Bedree v. Bedree, 528 N.E.2d 1128, 1129 (Ind. Ct. App. 1988) (the influencer was the grantor's husband; the grantees were his sisters); Needels v. Roberts, 879 S.W.2d 550, 551 (Mo. Ct. App. 1994) (the influencer was the testator's wife; the beneficiary was the wife's son by a prior marriage); Suagee v. Cook (*In re* Estate of Maheras), 897 P.2d 268, 274 (Okla. 1995) (the influencer was a pastor; the beneficiary was the pastor's church).

[224] *See, e.g.*, Joseph v. Grisham 482 S.E.2d 251, 252 (Ga. 1997) (upholding a will even though the testator disinherited her children in favor of her grandchildren); Nelson v. O'Connor, 473 P.2d 161, 162-63 (Or. 1970) (upholding a will even though the

not only do unnatural bequests support an inference of undue influence, they may also support an inference of testamentary incapacity. A testator, to be judged mentally competent, must know and understand who the natural objects of her bounty are.[225] Consequently, a will that "unnaturally" prefers strangers in blood to significant family members may suggest not only the pernicious influence of an outsider (undue influence) but also a failure on the testator's part to know the identities of the natural objects of her bounty (testamentary incapacity). Because a testator possessed of a normal strength of will is unlikely to yield to undue influence, Lawrence Frolik has suggested that a finding of undue influence presupposes an intermediate level of mental deficiency, neither fully capable nor fully incapable.[226] He calls it "marginal testamentary capacity," between that of the fully incapacitated testator, who is barred from executing any will at all, and that of the "normal" testator, who is permitted to execute any will at all, including an "unnatural" one.[227]

For influence to be "undue" in the context of a will contest, the influence must have operated at the time the testator executed his will. The influencer's actual *conduct* need not have coincided with the execution; what is required is only that the constraining *effect* of that conduct have been felt by the testator at the very time he executed his will.[228] In *Trust*

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testator disinherited her only child in favor of her neighbor); *see also* Clapp v. Fullerton, 34 N.Y. 190, 197 (1866) ("The right of a testator to dispose of his estate, depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.").

[225] Wrigley v. Wrigley (*In re* Estate of Wrigley), 433 N.E.2d 995, 1003 (Ill. App. Ct. 1982); Bye v. Mattingly, 975 S.W.2d 451, 455 (Ky. 1998); Estate of Record, 534 A.2d 1319, 1321 (Me. 1987); *In re* Will of Wasson, 562 So. 2d 74, 77 (Miss. 1990).

[226] Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?*, 24 INT'L J.L. & PSYCHIATRY 253, 264-66 (2001).

[227] *Id.*

[228] Tobin v. Jenkins, 29 Ark. 151, 157 (1874); Trust Co. of Ga. v. Ivey, 173 S.E. 648, 654 (Ga. 1934); Tawney v. Long, 76 Pa. 106, 115 (1874).

In 1983, the Idaho legislature, concerned that for-profit nursing homes might exert undue influence on residents to induce them to bequeath property to the homes, enacted a statute making such bequests void in certain circumstances. 1983 Idaho Sess. Laws, ch. 236, § 1, at 642. Originally, the statute applied only if the testator resided at the legatee-home at the time the will containing such a bequest was executed. In 1994, when the statute was amended to create a mere presumption of undue influence rather than an absolute bar to such bequests, the legislature removed the requirement that the testator had to be in residence when the will was executed (though the testator still had to have resided in the legatee-home within one year of his

Co. of Georgia v. Ivey, for instance, a will was successfully challenged on the basis of the undue influence of a person who had already died by the time the testator executed the contested instruments.[229] The testator's wife, Dosia, had written a will leaving the entire residue of her estate for the founding of a residence for elderly "gentlewomen."[230] Evidence was introduced showing that when Doria learned that the will executed by her husband made no provision for Dosia's pet project, Dosia harassed him with constant appeals and threats and warned him that he would never again live peaceably with her unless he changed his will to suit her wishes.[231] And the testator, a man in a weakened and diseased condition, was thereby induced to change his will so as to bequeath substantial assets to Dosia's residence.[232] Dosia predeceased the testator, yet even after her death, the testator executed two codicils increasing the share of his estate that would pass to Doria's residence.[233] After rejecting on undue influence grounds the last will that the testator had executed while Dosia was still live, the court also rejected these last two codicils on the ground of Dosia's *posthumous undue influence* over her husband.[234] "[T]he influence and domination of [Dosia] over [the testator] . . . [was] so complete and deep rooted that they persisted even after the death of [Dosia], and continued to dominate and control his will and to substitute her will therefore [sic], in the disposition of his estate . . . ."[235]

Dosia's conduct as reported in the *Ivey* case illustrates one kind of conduct that can constitute undue influence. What other kinds of conduct might amount to undue influence? If they succeed in overcoming a testator's free agency, threats of violence can certainly constitute undue influence,[236] though they might be more properly characterized as duress inasmuch

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death for the statute to apply). 1994 Idaho Sess. Laws, ch. 350, § 1, p. 1110. The statute is now codified at IDAHO CODE § 15-2-616 (2007). By removing the requirement of contemporaneous residence, the legislature implicitly acknowledged that the effect of undue influence can continue to be felt by its target even after the influential conduct has ceased.

229 *Trust Co. of Georgia v. Ivey*, 173 S.E. 648, 655 (Ga. 1934).

230 *Id.* at 649.

231 *Id.* at 651.

232 *Id.*

233 *Id.* at 652-53.

234 *Id.* at 655.

235 *Id.* at 652.

236 *See, e.g.*, Gay v. Gillilan, 5 S.W. 7, 10 (Mo. 1887).

as such threats are criminal violations of the law.[237] But threats to do perfectly legal acts—threats to divorce the testator,[238] threats to bring a criminal prosecution against the testator,[239] threats to abandon a sick or imperiled testator,[240] threats to put the testator in a nursing home[241]—can likewise constitute undue influence.[242] A pattern of harassing requests for money can constitute undue influence.[243] Playing upon the testator's religious beliefs or beliefs in spiritualism can likewise constitute undue influence.[244] So too can a pattern of behavior calculated to isolate the testator from the natural objects of her bounty, either isolating her emotionally by making false statements about those objects or isolating her physically.[245]

The fact that the influential statements made to the testator were true, or that the influencer believed them to be true, will not prevent a proper finding of undue influence.[246] Undue influence is not fraud. One can find the occasional old case that describes undue influence as a "species of fraud,"[247] but such usage is mere shorthand. Indeed, one of these old

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[237] *See* MCGOVERN & KURTZ, *supra* note 73, at 305.

[238] Needels v. Roberts, 879 S.W.2d 550, 551 (Mo. App. 1994).

[239] *In re* Brunor, 47 N.Y.S. 681, 684-85 (App. Div. 1897).

[240] Pohlmann v. Naschel (*In re* Pohlmann's Estate), 201 P.2d 446, 452 (Cal. App. 1949); *In re* Sickles's Will, 50 A. 577, 579 (Prerog. Ct. N.J. 1901), *aff'd*, 53 A. 1125 (Ct. Err. & App. N.J. 1902).

[241] *In re* Panek, 667 N.Y.S.2d 177, 179-80 (App. Div. 1997).

[242] One should keep in mind, of course, that if these threats do not in fact deprive the testator of his free agency, the threats do not constitute undue influence. *See, e.g.*, Kirby v. Manies, 351 S.W.2d 429, 430 (Ark. 1961) (finding that a threat by the testator's step-grandson to abandon her if she failed to make a will in his favor did not constitute undue influence inasmuch as the testator was not in any way helpless or dependent).

[243] Erb v. Lee, 430 N.E.2d 869, 872 (Mass. App. Ct. 1982).

[244] *In re* Bishop's Estate, 39 P.2d 201, 201-02 (Cal. 1934); Orchardson v. Cofield, 49 N.E. 197, 202 (Ill. 1897); *see also* Ingersoll v. Gourley, 139 P. 207 (Wash. 1914). In this last case, the trial court had held the will invalid on the grounds of both testamentary incapacity and undue influence. *Id.* at 207. The state supreme court affirmed the trial court's finding of testamentary incapacity but did not address the issue of undue influence. *Id.* at 209.

[245] *In re* Stoddart's Estate, 163 P. 1010, 1011-13 (Cal. 1917) (finding that allegations that influencers told the testator that her married daughters had married extravagant husbands who were likely to dissipate any inheritance were sufficient to state an undue influence claim); Cox v. Wall, 179 N.E.2d 815, 816-17 (Mass. 1962) (physical isolation); McPeak v. McPeak, 593 N.W.2d 180, 185 (Mich. App. 1999) (finding that a lengthy "pattern of conduct directed at isolating" the decedent sustained a finding of undue influence).

[246] Roberts-Douglas v. Meares, 624 A.2d 405, 420 (D.C. Ct. of App. 1992), *modified on other grounds and reaff'd*, 624 A.2d 431 (D.C. 1993); *see also* Gockel v. Gockel, 66 S.W.2d 867, 870 (Mo. 1933); Corrigan v. Pironi, 23 A. 355, 355 (N.J. 1891).

[247] *See, e.g.*, Coghill v. Kennedy, 24 So. 459, 468 (Ala. 1898); Flanigan v. Smith, 169 N.E. 767, 769 (Ill. 1929).

cases that use the inaccurate "species of fraud" phrase goes on immediately to state the law correctly:

> Deceit is the use of any trick, false statement, secret device, or false pretense to defraud another; and it is clear that undue influence may be exercised without the use of any of these means,—for example, through the imposition of fear, or constant importunity, to which the testator yields from a desire for peace. It was not necessary to aver that fraud or deceit was practiced upon the testatrix [to justify an inference of undue influence].[248]

Doctrinally, the distinction between fraud and undue influence is clear. In a case of undue influence, the testator's free agency has been destroyed, and the will does not represent her wishes. In a case of fraud, the testator's free agency is unimpaired and the will does indeed represent her wishes, but she formulated her wishes on the basis of false information deceitfully proffered.

In a will contest brought on the ground of undue influence, the contestant bears the burden of persuasion.[249] In some jurisdictions, this burden must be met by clear and convincing evidence;[250] other jurisdictions require only a preponderance of the evidence.[251] Because a contestant usually has available to him only circumstantial evidence with which to meet this burden,[252] courts have attempted to ease the contestant's difficulties by developing a two-part test that can enable him to raise a presumption of undue influence:

> A presumption of undue influence arises if [1] the alleged [influencer[253]] was in a *confidential relationship* with the [testator] and [2] there were *suspicious circumstances* surrounding the preparation, formulation, or execution of the [will] . . . .[254]

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[248] *Coghill*, 24 So. at 468.

[249] *See, e.g.*, Williams v. Thornton, 145 So. 2d 828, 829 (Ala. 1962); *In re* Estate of Herbert, 979 P.2d 39, 54 (Haw. 1999); *In re* Estate of Kline, 613 N.E.2d 1329, 1336-37 (Ill. App. Ct. 1993); Martin v. O'Connor, 406 S.W.2d 41, 43 (Mo. 1966).

[250] *See, e.g.*, Russo v. Miller, 559 A.2d 354, 357 (Me. 1989); Anthony v. Evangelical Lutheran Church (*In re* Anthony), 121 N.W.2d 772, 776-77 (Minn. 1963).

[251] *See, e.g.*, *In re* Estate of Herbert, 979 P.2d 39, 54 (Haw. 1999); *In re* Estate of Duebendorfer, 721 N.W.2d 438, 447 (S.D. 2006).

[252] *See supra* text accompanying note 215.

[253] The Restatement uses the word "wrongdoer," not "influencer." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (2001). I believe "wrongdoer" to be an ill-advised term in this context inasmuch as the influencer's conduct need not be wrongful to be undue. *See supra* note 212.

[254] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f (2001) (emphasis added); *see In re* Ferrill's Will, 640 P.2d 489, 493 (N.M. Ct. App. 1981); Knutsen v. Krippendorf, 862 P.2d 509, 515 (Or. Ct. App. 1993). It should be

A confidential relationship is a relationship of inequality: a relationship in which the testator reposes an exceptional degree of reliance on the integrity and loyalty of another, either because of that other person's knowledge or status or because of the testator's dependence or subservience. Some relationships—known in law as fiduciary relationships—are confidential relationships as a matter of law. For example, the law imposes fiduciary duties on an attorney vis-à-vis her client; therefore, for purposes of this presumption of undue influence, the testator's attorney is in a confidential relationship with the testator.[255] Similarly, the relationship between the trustee of a trust and the beneficiary of that trust is a confidential relationship,[256] as is the relationship between a court-appointed guardian and her ward.[257]

Outside the narrow confines of fiduciary relationships, the existence or nonexistence of a confidential relationship between influencer and testator has been treated as a question of fact.[258] Such nonfiduciary confidential relationships generally fall into one of two categories, *reliant relationships* and *dominant-subservient relationships*,[259] although the categories often overlap. The first category comprises relationships based

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noted that the contestant need not establish the existence of a confidential relationship to win her case. That is, undue influence can be found even though no confidential relationship existed between the alleged influencer and the testator. Blits v. Blits, 468 So. 2d 320, 321 (Fla. Dist. Ct. App. 1985). A finding of a confidential relationship is a requirement only of raising this *presumption* of undue influence. But this presumption has considerable practical importance, and many a will has been set aside on undue influence grounds where a confidential relationship existed that would not have been set aside in the absence of a confidential relationship. *See* Roberts-Douglas v. Meares, 624 A.2d 405, 421 (D.C. 1992), *modified on other grounds and reaff'd*, 624 A.2d 431 (D.C. 1993).

[255] *See, e.g.*, Allen v. Estate of Dutton, 394 So. 2d 132, 134 (Fla. Dist. Ct. App. 1980); *In re* Estate of Novak, 458 N.W.2d 221, 224, 227 (Neb. 1990); Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890, 897 (N.J. 1981); *In re* Putnam's Will, 177 N.E. 399, 400 (N.Y. 1931).

[256] *See, e.g.*, *In re* Estate of Cass, 719 A.2d 595, 598 (N.H. 1998).

[257] Pepin v. Ryan, 47 A.2d 846, 847 (Conn. 1946); Birch v. Coleman, 691 S.W.2d 875, 878 (Ark. Ct. App. 1985); Consul Gen. of Yugoslavia v. Thomas (*In re* Basich's Estate), 398 N.E.2d 1182, 1186 (Ill. Ct. App. 1979); Estate of Bodman v. Bodman, 674 So. 2d 1245, 1246 (Miss. 1996).

[258] *See In re* Estate of Olsson, 344 S.W.2d 171, 173 (Tex. Civ. App. 1961) ("If a rule of general application exists at all with respect to undue influence cases, it is that each case must stand on its own bottom as to the legal sufficiency of the facts proven." (emphasis omitted)).

Later in this Article, I shall recommend treating certain nonfiduciary relationships between pastor and communicant as confidential as a matter of law. *See infra* text accompanying notes 339-342.

[259] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. g (2003).

on special trust and confidence, where, for example, the testator "was accustomed to be guided by the judgment or advice of the alleged [influencer] or was justified in placing confidence in the belief that the alleged [influencer] would act in the interest of the [testator]," as in the case of the testator and his financial advisor.[260] The second category comprises relationships in which the testator "was subservient to the alleged [influencer's] dominant influence," such as might exist between an enfeebled testator and his hired caregiver.[261]

A good example of a *reliant* confidential relationship is to be found in *In re Estate of Borsch*.[262] The testator and the alleged influencer, one Alan Herbert, had been friends for twenty-five years and saw each other on a daily basis and often ate meals together.[263] Herbert and Herbert's wife frequently did odd jobs for the testator, "such as mowing his lawn and driving him to town."[264] The testator consulted the Herberts (especially Alan Herbert) "on all his business and personal matters" and "on just about anything that came along."[265] Alan Herbert helped the testator prepare an inventory of his assets that the testator's attorney had requested, and he also prepared at the testator's request lists of the testator's mining claims.[266] Indeed, the testator "frequently asked [Herbert] to do things like that for him, to write letters, make notes, whatever he happened to have that needed writing."[267] Based on all these facts, the court concluded that a confidential relationship existed between Alan Herbert and the testator.[268]

An example of a *dominant-subservient* confidential relationship is to be found in *Gentry v. Rigsby*.[269] The alleged influencer was Dorothy Rigsby: the testator's friend and, evidently, paid caregiver. Evidence showed that she "pressured [the testator] into going to places and participating in activities

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[260] *Id.*

[261] *Id.*

[262] 353 N.W.2d 346 (S.D. 1984).

[263] *Id.* at 348. Evidence showed that the testator feared missing some of these dining engagements lest Herbert and his wife "get mad at me." *Id.* at 350. Such evidence suggests that this confidential relationship was not exclusively of the reliant type but also had elements of the dominant-subservient type.

[264] *Id.* at 350.

[265] *Id.* at 348.

[266] *Id.* at 349.

[267] *Id.*

[268] *Id.* at 351.

[269] No. 01A01-9610-CV-00455, 1997 Tenn. App. LEXIS 419 (Ct. App. June 11, 1997).

in which he had no desire."[270] At one point, she advised the testator against taking some medication prescribed by his doctor, and he followed Rigsby's advice.[271] The testator "was an emotional man who frequently cried," and "[m]ore than one witness testified that [the testator] did whatever Rigsby said."[272] And on at least four occasions during the last eleven months of the testator's death, Rigsby drove him to local banks where the testator added Rigsby's name as joint owner for a number of accounts and certificates of deposit.[273] With all of these facts before it, the court held that a confidential relationship existed between the testator and Rigsby.[274]

But in order to raise a presumption of undue influence, a will contestant must do more than prove the existence of a confidential relationship. She must also prove the existence of what the Restatement of Property calls "suspicious circumstances."[275] In the *Borsch* case, for example, evidence showed that Alan Herbert advised the testator that his earlier will (which benefited the testator's family) "won't stand up for thirty seconds" and participated quite actively in the preparation of the testator's last will, which left virtually the entire estate to Herbert and Herbert's wife.[276] The comments accompanying the Restatement of Property offer a nonexclusive list of eight factors that may be considered suspicious circumstances for purposes of raising this presumption of undue influence where a confidential relationship exists:

> (1) the extent to which the [testator] was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence;
>
> (2) the extent to which the alleged [influencer] participated in the preparation or procurement of the will . . .;
>
> (3) whether the [testator] received independent advice from an attorney . . . in preparing the will . . .;
>
> (4) whether the will . . . was prepared in secrecy or in haste;

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[270] *Gentry*, 1997 Tenn. App. LEXIS 419 at *9.

[271] *Id.*

[272] *Id.* at *15-16.

[273] *Id.*

[274] *Id.*

[275] *See infra* note 259 and accompanying text; *see also* Hurd v. Brown (*In re* Baird's Estate), 168 P. 561, 563 (Cal. 1917); Barton v. Beck's Estate, 195 A.2d 63, 67 (Me. 1963); *In re* Estate of Borsch, 353 N.W.2d 346, 348 (S.D. 1984).

[276] *In re Estate of Borsch*, 353 N.W.2d at 347, 350-51.

> (5) whether the [testator's] attitude toward others had changed by reason of his or her relationship with the alleged [influencer];
>
> (6) whether there is a decided discrepancy between a new and previous wills . . . of the [testator];
>
> (7) whether there was a continuity of purpose running through former wills . . . indicating a settled intent in the disposition of his or her property[: a continuity that the challenged will evidently did not reflect]; and
>
> (8) whether 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.[277]

One should note that the Restatement's list does not include a mere bequest in favor of a person with whom the testator had a confidential relationship. Indeed, treating every such bequest as a suspicious circumstance would threaten the validity of a wide variety of small or routine bequests to persons who happened to be the testator's caregiver or physician or guardian. Oddly enough, courts have, in the inter vivos context, treated a gift in any amount or situation as a suspicious circumstance.[278] But in the testamentary context they seem to agree with the Restatement's implication that a mere bequest to the confidential party is not considered suspicious.[279] For a bequest to be suspicious, it must suggest overreaching: for example, a bequest to the confidential party amounting to a substantial portion of the estate,[280] or a bequest to the confidential party that disadvantages the natural objects of the testator's bounty.[281]

If a will contestant raises a presumption of undue influence, the burden then shifts to the proponent, but courts disagree as to the nature of the burden that is shifted. Some

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[277] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h (2003). *See* Estate of Hamilton v. Morris, 67 S.W.3d 786, 793 (Tenn. App. 2001).

[278] *See, e.g.*, Upman v. Clarke, 753 A.2d 4, 5 (Md. 2000); DesMarais v. Desjardins, 664 A.2d 840, 844 (Me. 1995); Summit Bank v. Quake, 631 N.E.2d 13, 15 (Ind. Ct. App. 1994), *abrogated on other grounds by* Mitchell v. Mitchell, 695 N.E.2d 920 (Ind. 1998).

[279] *See, e.g.*, Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890, 897 (N.J. 1981) (citing *In re* Rittenhouse's Will, 117 A.2d 401, 402 (N.J. 1955)) (suggesting that "additional circumstances of a suspicious character" are required to raise the presumption of undue influence even where "the will benefits one who stood in a confidential relationship to the testat[or]").

[280] *See, e.g.*, Enders v. Parker *ex rel.* Estate of Kottke (*In re* Estate of Kottke), 6 P.3d 243, 244, 247-48 (Alaska 2000).

[281] *See, e.g.*, Pepin v. Ryan, 47 A.2d 846, 847 (Conn. 1946).

courts hold that the ultimate burden of persuasion shifts to the proponent;[282] but the better view is that the contestant's raising of the presumption shifts to the proponent only the burden of going forward with contrary evidence (that is, the burden of production).[283] If the proponent has no contrary evidence, the contestant is, of course, entitled to a directed verdict.[284] But if the proponent does produce contrary evidence, the presumption of undue influence dwindles to a mere inference of undue influence: an inference that the trier of fact may accept or reject after considering all the evidence produced by both sides (including the evidence the contestant used to raise the presumption) but leaving the ultimate risk of nonpersuasion with the contestant.[285]

The proponent's response to the contestant's showing of undue influence can take different forms. For example, the proponent might present evidence contradicting the elements of the contestant's case, such as the contestant's claim that a confidential relationship existed between the influencer and the testator or the claim that the testator was peculiarly susceptible to undue influence.[286] Or the proponent might present evidence going directly to the contestant's underlying claim by showing that the will did indeed represent the testator's own wishes, such as evidence that the testator had independent reasons for adopting a seemingly "unnatural" plan of disposition[287] or evidence that the testator received truly independent legal advice from an attorney.[288]

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[282] *See, e.g.*, Bernard v. Foley, 139 P.3d 1196, 1199 (Cal. 2006); *In re* Last Will and Testament of Melson, 711 A.2d 783, 784 (Del. 1998).

[283] *See e.g.*, Carpenter v. Carpenter (*In re* Estate of Carpenter), 253 So. 2d 697, 704 (Fla. 1971); Franciscan Sisters Health Care Corp. v. Dean, 448 N.E.2d 872, 876 (Ill. 1983); Guill v. Wolpert, 218 N.W.2d 224, 235 (Neb. 1974); Martin v. Phillips, 369 S.E.2d 397, 401 (Va. 1988).

[284] *In re* Estate of Henke, 561 N.E.2d 314, 317 (Ill. App. 1990).

[285] *Id.*; *see also* Gillett v. Michigan United Traction Co., 171 N.W. 536, 538 (Mich. 1919) ("It is now quite generally held by the courts that a rebuttable . . . presumption has no weight as evidence. It serves to establish a prima facie case; but, if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced [by the party who previously invoked the presumption], and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself.").

[286] PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 47 (2d ed. 1994).

[287] *See, e.g.*, *In re* Estate of Weickum, 317 N.W.2d 142, 146 (S.D. 1982).

[288] Enders v. Parker *ex rel.* Estate of Kottke (*In re* Estate of Kottke), 6 P.3d 243, 248 (Alaska 2000); *In re* Estate of Wright, 199 N.E.2d 54, 59 (Ill. App. 1964).

III. ERRONEOUS APPLICATION OF THESE STANDARDS IN CASES OF RELIGIOUS INFLUENCE

American law should be no less concerned today about the "imposition upon pious . . . minds"[289] than it was when mortmain statutes were still on the books. As recently as 2006, the North American Securities Association reported an increase in the fraudulent bilking of the faithful by religious organizations. "The scammers are getting smarter, and the *investors don't ask enough questions because of the feeling that they can be safe in church*."[290] And one can hardly forget the appalling illustration of religious conversion's power provided by the events in 1979 when "hundreds of members of the People's Temple, after having given up homes and country to move to the jungles of Guyana, obeyed their leader Jim Jones's commands to commit suicide and even to murder their children and reluctant comrades."[291] In the more placid world of testamentary transfers, modern courts have often prevented religion-based imposition upon testators by correctly applying the conventional rules of undue influence law.[292] Of course, by correctly applying those rules, courts have sometimes found there to be no undue influence.[293] But where courts have reasoned erroneously in religious undue influence cases, their error generally consists in holding either (1) that a testator cannot be unduly influenced by a clergyman's remarks addressed to a whole congregation rather than to her alone; or (2) that a finding of undue influence in religion-based cases violates the First Amendment's guarantee of freedom of religion.

In the discussion that follows, I wish to disclaim any intention to treat a testator's religious belief—however

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[289] Note I, *Phila. Baptist Ass'n*, *supra* note 101, at 22-23.

[290] *Swindlers Fleecing Faithful of Billions*, CHI. TRIB., Aug. 14, 2006, at sec. 2, p. 3 (emphasis added) (quoting the president of the securities association).

[291] C. DANIEL BATSON ET AL., RELIGION AND THE INDIVIDUAL: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE 32 (1993).

[292] *See*, *e.g.*, Estate of Hee v. Toth (*In re* Estate of Hee), 252 So. 2d 846, 847 (Fla. Dist. Ct. App. 1971); Bryan v. Norton, 265 S.E.2d 282, 283-84 (Ga. 1980); Suagee v. Cook (*In re* Estate of Maheras), 897 P.2d 268, 270 (Okla. 1995); Nelson v. Dodge, 68 A.2d 51, 57-58 (R.I. 1949) (invalidating inter vivos transfers). The cited opinion in *Bryan* merely reversed a directed verdict in favor of the proponent and remanded the case with instructions to submit the issue of undue influence to the jury. 265 S.E.2d at 284. That the contest was successful on remand was reported in a subsequent case involving attorney fees. *See* Bryan v. Granade, 357 S.E.2d 92, 93 (Ga. 1987).

[293] *See*, *e.g.*, Doyle v. Clancy (*In re* McIntyre's Estate), 159 N.W. 517, 524 (Mich. 1916); Caughey v. Bridenbagh, 57 A. 821, 828-29 (Pa. 1904).

unconventional it may be or however rigidly it may be held—as a form of delusion suggestive of mental incapacity. While some courts maintain that religious belief never can be considered evidence of incapacity,[294] others take a less absolute view and hold that "a man may, through manifestations of religious belief, evidence mental disorder."[295] By confining the discussion to undue influence, however, we can avoid inquiries into the reasonableness of particular religious beliefs inasmuch as statements can constitute undue influence even if they are true.[296] Thus, if clergyman Smith says to the testator, "The Lord wants you to leave all your money to my church," such conduct should constitute undue influence if it overcomes the testator's free agency and causes her to execute a church-favoring will that she would not otherwise have executed, even if Smith is factually correct about the Lord's wishes.[297] Undue influence does not mean fraud.[298] Nor does it mean malevolence; Smith's conduct can still constitute undue influence even if it is motivated only by concern for the salvation of the testator's soul since beneficence of motive does not rule out undue influence.[299]

A. The Unwarranted Requirement of Personal Contact

In *In re Cotcher's Estate*,[300] the testator had bequeathed one-third of her residuary estate to a Catholic orphanage and two-thirds to the pastor of her local Catholic cathedral for the benefit of a local parochial school. This will was prepared for

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[294] *See, e.g.*, Minturn v. Conception Abbey, 61 S.W.2d 352, 359 (Mo. Ct. App. 1933).

[295] *See, e.g.*, Ingersoll v. Gourley, 139 P. 207, 209 (Wash. 1914); Henderson v. Jackson, 111 N.W. 821, 822-23 (Iowa 1907). The *Henderson* court wrote:

> It is true that if there be other circumstances fairly tending to show unsoundness of mind, . . . all these peculiarities of life and conduct, religious or otherwise, will properly be a matter of inquiry, and may in some instances furnish legitimate support to a verdict or judgment against the validity of a will. But standing alone, we think no case can be found in which it has been held that such peculiarities of the testator are sufficient to impeach his testamentary capacity . . . .

Id. at 823.

[296] *See supra* text accompanying note 246.

[297] *Cf. supra* text accompanying note 97, to the effect that the value of religion does not depend on the objective truth of its tenets.

[298] *See supra* text accompanying notes 247-248.

[299] *See supra* text accompanying note 212.

[300] *In re* Cotcher's Estate, 264 N.W. 325, 325-26 (Mich. 1936).

her by the attorney for the local Roman Catholic bishop.[301] The will was contested on the ground of undue influence.[302] While the court conceded that the Roman Catholic priest charged with exerting the influence had visited her in her home and had, from the pulpit, advised his parishioners that for the benefit of their own souls and those of their predecessors it would be wise to make financial donations to the Church or its institutions,[303] the court rejected the contestants' claim of undue influence on the ground that the priest's solicitations "were made to all parishioners alike" rather than to the testator as an individual.[304]

The *Cotcher* court's distinction overlooks the extraordinary power that pastoral exhortations can exert upon the members of a congregation to whom the exhortations are addressed.[305] The Internal Revenue Service certainly recognizes that power when it challenges the income tax exemption of a church whose minister, from the pulpit, exhorts his parishioners to vote for (or against) a particular political candidate.[306] If a testator's pricks of conscience stemming from

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[301] *Id.* at 326. The testator had executed two previous wills. *Id.* Curiously, while the court implies that these earlier wills were drafted by someone other than the bishop's attorney, the court does not indicate whether the religious bequests made in the last will were included in the prior wills. *Id.* I describe the court's omission as curious because any substantial increase in religious bequests reflected in that third will might be a "suspicious circumstance" not inconsistent with a charge of undue influence. *See supra* text accompanying note 277 (quoting RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h (2003)).

[302] *In re Cotcher's Estate*, 264 N.W. at 325.

[303] *Id.* at 326.

[304] *Id.* at 327; *accord* Roberts-Douglas v. Meares, 624 A.2d 405, 421 (D.C. 1992), *modified on other grounds and reaff'd*, 624 A.2d 431 (D.C. 1993) ("If the only connection between donor and donee is that the former sits in a church pew, listens to the latter's sermon, and conscientiously makes a contribution, the occasion for special scrutiny does not arise."). The court did acknowledge, however, that exhortations from the pulpit might weaken an individual's resolve so as to make him more susceptible to one-on-one influence than he otherwise would have been. *Id.* at 424.

[305] In *Roberts-Douglas*, the court stated that "[s]ermons by [a bishop] to his entire flock . . . are not the stuff from which a confidential relationship is derived." 624 A.2d at 422.

[306] The income received by a not-for-profit religious organization can be exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code, but the organization must forfeit its 501(c)(3) exemption if it "participate[s] in, or intervene[s] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (1986). Thus, in *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), it was held that the Internal Revenue Service acted properly in revoking the taxpayer's § 501(c)(3) tax-exemption, where the taxpayer had "used its publications and broadcasts to attack candidates and incumbents who were considered too liberal. It attacked President Kennedy in 1961 and urged its followers to elect conservatives like Senator Strom Thurmond . . . ." *Id.* at 856.

the pleas of a person now dead can support a finding of undue influence,[307] it seems no stretch to conclude that pricks of conscience stemming from a clergyman's exhortations to his congregation can support such a finding. I am not suggesting that statements from a pulpit necessarily constitute undue influence, but merely that they are capable of doing so and should not be excluded as the *Cotcher* case excluded them.[308]

Clergymen are certainly aware of the powerful influence they can wield from the pulpit. When it seemed likely that Congress would amend the federal hate crimes statute to add sexual orientation to the list of hatreds warranting enhanced penalties if they motivated violent crimes, a number of clergymen expressed the fear that their anti-gay sermons might subject them to hate crime prosecutions if their sermons spurred congregants to violent action. One pastor stated, "I don't believe the Bible condones gay lifestyles. Yet the way these laws would be invoked would be that whoever is *a commander or director* of this kind of action can be brought up on the same charges as the actual perpetrator of a crime."[309]

The court in *Cotcher* offered another justification for its per se rule exempting the priest's pulpit exhortations: "This method of raising money for churches . . . prevails throughout

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Two days before the 2004 presidential election, the Reverend George Regas, a guest preacher at All Saints Episcopal Church in Pasadena, California, preached a fiery sermon in which he imagined Jesus talking to George W. Bush and John Kerry and sharply condemning the Bush administration's prosecution of the war in Iraq. Father Regas then urged the congregants to "bring a sensitive conscience to the ballot box" and to "vote your deepest values." http://www.ombwatch.org/article/articleview/3167. A week after the election, the Internal Revenue Service notified the church that it considered the sermon to be a possible violation of the § 501(c)(3) restriction on political activity in opposition to a candidate, and that it was considering the revocation of the church's tax exemption. In September 2007, the IRS finally informed the church that it was not going to pursue revoking the church's tax exemption, but the IRS stated that the sermon did in fact constitute a violation of the restrictions in § 501(c)(3). Rebecca Trounson, *Pasadena Church Wants Apology from IRS*, L.A. TIMES, Sept. 24, 2007. Whether or not the IRS originally acted out of partisan malice and whether or not the Service interpreted the statute correctly, its intervention in the case was a clear acknowledgment of the strong influence that a pastor's "mere" sermon might have on the future actions of his listeners.

[307] *See supra* note 229 and accompanying text.

[308] I believe that the court in *Cotcher* decided correctly when it upheld the validity of the will, but the court should have reached that decision by noting the testator's undoubted free agency, not by noting the absence of one-on-one contact.

[309] Howard Witt, *Anti-Hate Law Shifts Debate on Gays*, CHI. TRIB., Aug. 13, 2007, at 1, 14 (emphasis added) (quoting Bishop Harry Jackson, pastor of Hope Christian Church of Beltsville, Maryland, who joined three dozen other pastors to buy a full-page advertisement in *USA Today* denouncing the proposed amendment to the hate crimes statute).

all Christendom."[310] Such a justification cannot be allowed to stand. That a course of conduct is common has no bearing on whether that conduct, in a particular case, overpowered the particular testator and destroyed her free agency. Pleading and solicitation are common enough behaviors, even among the laity. Sometimes they amount to undue influence,[311] and sometimes they do not.[312]

> [T]he mere fact that arguments and suggestions are adopted by a testator, and his will, on that account, is different from what it otherwise would have been, is not sufficient [for a finding of undue influence]. It necessarily depends upon the further question as to whether such advice or suggestions are intelligently and freely adopted, because they have appealed to the judgment of the testator, so as to become in accordance with his own desires, or whether because of the persistency of the importunity, or for any other reason, the testator is unable to resist, and finally yields, not because of the voluntary action of his own judgment, but because, on account of the strength of the influence, or the weakness of his own judgment and will, he cannot resist longer. It is undoubtedly true, as has been argued, that in some cases it may be very difficult to determine whether a suggestion has been thus freely adopted, or has been merely followed by the testator because it has overcome his free agency; but it is none the less the true and decisive question, and must be determined as well as possible in each case from all the facts and circumstances of the case. The citation of authorities in support of these statements of the rule is unnecessary, because such authorities are so exceedingly numerous.[313]

B. Needless Concerns About the First Amendment[314]

Even five decades after *Cotcher* was decided, judges in will contests continued to treat statements from the pulpit with special indulgence, but they did so in the belief that the First Amendment required such indulgence. The Court of Appeals for the District of Columbia, in *Roberts-Douglas v. Meares*,[315] was confronted with some rather extreme declarations from the

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[310] *In re* Cotcher's Estate, 264 N.W. 325, 327 (Mich. 1936). It was actually the trial court that first used these words, but the Michigan Supreme Court explicitly endorsed and repeated them.

[311] *See*, *e.g.*, Greuner v. Wells Fargo Bank & Union Trust Co. (*In re* Greuner's Estate), 87 P.2d 872 (Cal. App. 1939).

[312] *See*, *e.g.*, *In re* Campbell's Will, 60 A. 880 (Me. 1905).

[313] *Id.* at 881.

[314] The freedom of religion clause of the First Amendment applies to the several states as well as to the federal government. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[315] 624 A.2d 405 (D.C. 1992), *modified on other grounds and reaff'd*, 624 A.2d 431 (D.C. 1993).

pulpit, including statements by the congregation's bishop that "God would punish those who failed to make adequate contributions."[316] Despite the likelihood that such statements played a determinative role in inducing parishioners to make gifts to the bishop's Evangel Temple, the court cautioned: "When such remarks are directed from the pulpit to the congregation as a whole, . . . any attempt to use the sermon as a basis for setting aside a gift [on undue influence grounds] implicates significant First Amendment concerns."[317]

"Implicates" is a weasel word; *everything* implicates First Amendment concerns.[318] What the *Roberts-Douglas* court presumably meant, but was too fainthearted to say, is that even when a clergyman's statements from the pulpit unduly pressure a parishioner to execute a will in the clergyman's (or in his church's) favor, a probate court would violate the freedom of religion clause if it barred such a bequest from taking effect. Such an understanding of freedom of religion is incorrect. In *In re The Bible Speaks*,[319] for example, in which a donor sought to rescind on undue influence grounds several inter vivos gifts made to a religious organization called The Bible Speaks ("TBS"), the Federal Court of Appeals for the First Circuit explicitly rejected the notion that the free exercise clause shields from attack on undue influence grounds the solicitation of funds by a religious organization.[320] The court reasoned, "Those who run TBS may freely exercise their religion, but they cannot use the cloak of religion to exert undue influence of a non-religious nature with impunity."[321]

Of course, to characterize TBS's conduct as "non-religious" somewhat begs the question. How did the court *conclude* that TBS's fundraising activities were non-religious (and therefore outside the protection of the free exercise clause)? Some of those activities consisted of lying—for

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316 *Roberts-Douglas*, 624 A.2d at 410.

317 *Id.* at 422.

318 *Cf.* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316 (1997). In that case, the Supreme Court was asked to interpret the breadth of a federal preemption statute, the Employee Retirement Income Security Act of 1974 ("ERISA") § 514(a), 29 U.S.C. § 1144(a) (1994). *Id.* at 39. Following the pattern of previous cases, the majority focused its attention on the statutory phrase "relate to." *Id.* Justice Scalia, in a concurring opinion, argued that "relate to" offers no guidance or limitation at all inasmuch as "everything is related to everything else." *Id.* at 335.

319 Dovydenas v. The Bible Speaks, 869 F.2d 628, 642 (1st Cir.1989).

320 *Id.* at 645-46. The issue of undue influence was decided on the basis of Massachusetts law. *See id.* at 641.

321 *Id.* at 645.

example, telling the donor that her previous gift to TBS had miraculously cured a TBS member's migraine headaches when in fact the members making that statement knew quite well that the headaches had continued unabated[322]—and the court had little difficulty finding that freedom of religion did not include the freedom to lie. But some of TBS's statements were arguably religious; at least, they were phrased using conventional religious idiom and were not susceptible of logical or evidentiary disproof. For example, according to testimony, the head of TBS (Pastor Stevens) and his subordinates isolated the donor from her husband (who had opposed her donations) and told her that she should keep her gifts to TBS secret from her husband and that her husband's family and her family "were evil and were controlled by Satan and demons."[323] According to testimony, Stevens told the donor that her largest gift to TBS "would be particularly influential in shaping the world for the return of God."[324] That these statements—made with undeniably religious terms—were held to evidence TBS's undue influence suggests that the case should be read as holding that *solicitations for contributions are inherently non-religious* and therefore unprotected by the Free Exercise Clause, even if the solicitors' religion deems the fundraising activities to be theologically required.

The law of undue influence focuses on a testator's response to *conduct*. While the Free Exercise Clause embraces both the freedom to believe and the freedom to act, it is only the latter freedom that is implicated in undue influence cases, and that latter freedom is not absolute.[325] When a religious person's freedom to act in accordance with that religion is burdened by a federal or state law, that law passes constitutional muster—even in the absence of a compelling governmental interest—if the burden is an "incidental effect" of a "law that is neutral and of general applicability."[326] The law of undue influence is indeed religiously neutral and of general applicability. It makes no distinction between religious

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[322] *Id.* at 633-34.

[323] *Id.* at 632.

[324] *Id.* at 635.

[325] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[The First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

[326] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

influencers and secular influencers.[327] It was not designed to suppress the beliefs of any particular religion.[328] It does not involve an inquiry into the truth or falsity of the beliefs of any religion.[329] Consequently, the law of undue influence applies to the grasping clergyman no less than to the grasping nephew. No "balancing test"—comparing societal benefit with religious burden—is to be undertaken.

The *Bible Speaks* case was decided before (though only shortly before) the Supreme Court rejected "balancing tests" for neutral laws of general applicability.[330] Accordingly, the *Bible Speaks* court may have thought that its rejection of the proponents' freedom of religion argument required a finding that fundraising was inherently nonreligious. Certainly conduct motivated by pecuniary considerations was, even according to prior Supreme Court precedents, "particularly suspect."[331]

C. A Recommended Per Se Rule for Spiritual Advisors

Evidence suggests that the cases in which religious undue influence is found to have occurred generally involve nontraditional religions,[332] while the cases in which such

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[327] *See* McDaniel v. Paty, 435 U.S. 618, 621, 629 (1978) (declaring unconstitutional a state law barring any "Minister of the Gospel, or priest of any denomination whatever" from serving as delegates to the state's constitutional convention).

[328] In *Church of the Lukumi Babalu Aye*, the Supreme Court declared unconstitutional a city ordinance that prohibited ritual animal sacrifice. 508 U.S. at 547. The ordinance's defect was its motivation: the suppression of a particular religious community. *Id.* at 534-35.

[329] The Freedom of Religion Clause bars courts from inquiring into the truth or falsity of a religious belief. United States v. Ballard, 322 U.S. 78, 86-87 (1944). But truth or falsity is not an issue in undue influence cases; a statement can constitute undue influence even if it is factually true. *See supra* text accompanying notes 246-248.

[330] The first case generally thought to have rejected the balancing test approach was *Employment Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 882-84 (1990). That *Roberts-Douglas* was decided after *Smith* and *Ballard* rejected any balancing test makes quite surprising the *Roberts-Douglas* court's warnings about the First Amendment. *See supra* text accompanying note 317.

[331] Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 42 (1977).

[332] *See*, *e.g.*, Dovydenas v. The Bible Speaks, 869 F.2d 628, 624, 631 (1st Cir. 1989), (a religious group calling itself "The Bible Speaks"); Roberts-Douglas v. Meares, 624 A.2d 405, 408 (D.C. 1992), *modified and reaff'd*, 624 A.2d 431 (D.C. 1993) (the "Evangel Temple"); Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 503 (Ark. Ct. App. 1987) (proponent professed to be a spiritual healer); Hartley v. Toth (*In re* Estate of Hee), 252 So. 2d 846, 847 (Fla. Dist. Ct. App. 1971) (Jehovah's Witnesses); Nelson v. Dodge, 68 A.2d 51, 53 (R.I. 1949) ("The Church of Jesus, Inc."). *Contra* Corrigan v. Pironi, 23 A. 355, 355-56 (N.J. 1891) (setting aside on undue influence

influence is found *not* to have occurred generally involve mainstream religions.[333] One scholar, at least, would probably find this evidence unsurprising—"I suspect that judgments about which forms of religious influence are 'undue' will often (though not always) lead to improper consideration of whether the religion seems unreasonable, excessively authoritarian, or too threatening of extratemporal consequences [*i.e.*, punishment after death]"[334]—and he therefore cautions against *any* undue influence inquiries in will contests involving religious bequests.[335] I share his reluctance to distinguish

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grounds an inter vivos transfer to a Roman Catholic priest); Suagee v. Cook (*In re* Estate of Maheras), 897 P.2d 268, 270, 274-75 (Okla. 1995) (a successful contest where proponent was a Baptist minister); *see also* Bryan v. Norton, 265 S.E.2d 282, 283 (Ga. 1980) (a successful contest in which the proponent was identified only as a "pastor of the church which the testatrix attended").

[333] *See*, *e.g.*, Else v. Fremont Methodist Church, 73 N.W.2d 50, 51, 59-60 (Iowa 1955); Waggener v. Gen. Ass'n of Baptists in Ky., 306 S.W.2d 271, 272, 274 (Ky. 1957); Doyle v. Clancy (*In re* McIntyre's Estate), 159 N.W. 517, 517, 519, 524 (Mich. 1916) (Roman Catholicism); Martin v. Bowdern, 59 S.W. 227. 228, 232 (Mo. 1900) (Roman Catholicism); First Christian Church in Salem v. McReynolds, 241 P.2d 135, 136-37, 142 (Or. 1952); *In re* Rowlands' [sic] Estate, 18 N.W.2d 290, 291, 294 (S.D. 1945) (Roman Catholicism); Naihaus v. Feigon, 244 S.W.2d 325, 326, 329 (Tex. Civ. App. 1951) (Judaism). *But see* Stanchfield v. Stanchfield (*In re* Estate of Stenerson), 348 N.W.2d 141, 142, 144 (N.D. 1984) (informal Bible study group held not to have exerted undue influence).

In support of its conclusion that a Roman Catholic priest's exhortations did not constitute undue influence, one court noted that the priest's exhortations did not go "beyond the teachings of the church." *In re* Cotcher's Estate, 264 N.W. 325, 327 (Mich. 1936).

[334] Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 627 n.100 (1999).

[335] *Id.* Professor Volokh may undercut the persuasive force of his warning by citing as support *Carpenter v. Horace Mann Life Ins. Co.*, 730 S.W.2d 502 (Ark. App. 1987), a case that, to me, cries out for the relief of the undue influence finding that the court quite properly made.. The testator in *Carpenter* was raised a Catholic and "considered by her family to be very religious." *Id.* at 503. She worked as a registered nurse and put her husband (who converted to Catholicism to marry her) through college. *Id.* They had one son. *Id.* She entered into a correspondence with Carpenter.

> His doctrine is somewhat unclear from the record but appears to have involved delving into the metaphysical in an effort to get closer to God and included reincarnation, soul mates, and meditation. He apparently did not advocate the study of the Bible. He did advocate tithing, however. . . .
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> Carpenter's wife, Sherry, wrote letters to [Testator] in which she claimed that Carpenter was able to transmigrate, did not have to eat or perform other bodily functions, could heal himself and others, and had other supernatural powers. . . . From testimony of his other followers, it appears that Carpenter and Sherry also convinced his "disciples" that he could control their lives from afar and, if they didn't want bad things to happen to them, they must give more and more of their money to him for his "work."

Id. The testator and her husband had frequent disagreements about money; he resisted her sending money to Carpenter. Carpenter sent the testator a letter enclosing an astrological chart for her; the entry for July 1975 (sent in Dec. 1973) said that it was a

"reasonable" religious beliefs from "unreasonable" ones,[336] but I do not share his reluctance to subject religious bequests to undue influence analysis. And since I have no reason to suppose that members of mainstream religions are more strong-willed or independent-minded than members of nontraditional religions, I cannot but suspect that mainstream religions' greater success in undue influence cases can be traced to an erroneous—and overly lenient—application of undue influence law.[337] We must correct this error. Human nature is unlikely to have changed markedly since the days of the repealed mortmain statutes, when legislators feared that some religious leaders were taking advantage of the faithful,[338] and I remain unwilling to obey the testamentary instructions of a person whose free will was overcome by the conduct of another.

The best solution to this problem of clerical over-reaching is to treat all relationships between a testator and her spiritual advisor as per se confidential for purposes of the law of undue influence. Not only would such a solution recognize the enormous power of religious influence[339] and thereby prevent undue leniency in the face of undue influence by

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favorable period "to begin undertaking new friendships." *Id.* at 504. Carpenter urged her to get a divorce and join his family. Testator did divorce her husband: in July 1975! *Id.* She moved to Carpenter's town. *Id.* By this time she was giving Carpenter approximately seventy-five percent of all her earnings. *Id.* Her will left him everything. *Id.*

Two psychologists who reviewed the letters between Testator and her parents and between Testator and the Carpenters and reviewed the depositions of several witnesses "concluded that [Testator] had a very dependent personality, was searching for a father figure to care for her and that Carpenter fit her needs perfectly. . . . Both testified that it was not their belief that Carpenter had actually knowingly attempted to extort money from [Testator]. . . . It was their opinion that he was not intentionally a 'con artist' but that his teachings had this effect on gullible women. . . . [He] encouraged them to give him money for his 'work' and free him from the necessity of holding a job so he could devote his entire time and energy to his teaching and writing. Both psychologists concluded that because of Carpenter's mental hold on [Testator], the veiled threats that if she left him something terrible might happen to her, . . . she was not free to fully exercise her own independence . . . . [and was] under the influence of Carpenter." *Id.* at 504-05. "The record supports a finding that there was a systematic alienation of [Testator] from her husband, son, parent, and siblings." *Id.* at 508.

If *that* is not undue influence, I do not know what is.

[336] The rules of undue influence, properly applied, do not require such a distinction to be made. *See* text at *supra* note 296.

[337] That a court seemed willing to exempt from undue-influence examination a practice that "prevails throughout all Christendom" illustrates the unwarranted leniency to which I refer. *See supra* note 310 and accompanying text.

[338] *See supra* note 18.

[339] *See*, *e.g.*, BATSON ET AL., *supra* note 291, at 198, 296.

mainstream clergyman,[340] it would also guard against the temptation to assess the reasonableness of any religious or spiritual beliefs. The contestant would need to produce evidence only as to the *category* into which the alleged influencer fell (together with evidence of a "suspicious circumstance"[341]); the inquiry would then turn, with the proponent having the burden of production, to the fundamental—and purely secular—issue of whether the will represented the testator's own wishes.[342]

One can find the occasional case that already does treat the relationship between a testator and her spiritual advisor as per se confidential,[343] but most courts currently view the question as one of fact, to be decided on a case by case basis.[344] Accordingly, the creation of the per se rule that I recommend would represent a change in the law for most jurisdictions. At least one court has opined that such a change would require legislative action,[345] but legislatures have acted along these lines before. Idaho, for example, enacted a statute providing that a bequest to a nursing home where the testator was in residence shall be *presumed* to have been the result of undue

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[340] A transfer might be set aside on undue influence grounds where a confidential relationship existed that would not be set aside in the absence of a confidential relationship. Roberts-Douglas v. Meares, 624 A.2d 405, 421 (D.C. 1992), *modified on other grounds and reaff'd*, 624 A.2d 431 (D.C. 1993).

[341] *See supra* text accompanying note 252.

[342] *See supra* text accompanying note 254.

[343] *See*, *e.g.*, Nelson v. Dodge, 68 A.2d 51, 57 (R.I. 1949) (inter vivos transfer); *In re* Rowland's Estate, 18 N.W.2d 290, 293 (S.D. 1945).

[344] *See*, *e.g.*, Else v. Fremont Methodist Church, 73 N.W.2d 50, 57 (Iowa 1955); First Christian Church in Salem v. McReynolds, 241 P.2d 135, 142 (Or. 1952); Barlowe v. Brevard, 213 S.W.3d 298, 304 (Tenn. App. 2006); *see also In re* The Bible Speaks, 869 F.2d 628, 641-42 (1st Cir.), *cert. denied*, 493 U.S. 816 (1989) ("Massachusetts has never directly addressed the question of whether a pastor-communicant relationship is *per se* a confidential one when undue influence is alleged. We need not decide whether Massachusetts would hold that the pastor-communicant is by itself a confidential relationship. Here, we have found such a relationship on the basis of other factors . . . .").

[345] *See* Miller v. Kraft (*In re* Estate of Wagner), 265 N.W.2d 459, 464 (N.D. 1984) ("[I]f a presumption is to be created providing that undue influence is presumed whenever the attorney who drew the will is also directly or indirectly a substantial beneficiary under the will[,] it should be accomplished by a legislative act rather than by a judicial decree."). In point of fact, since the attorney-client relationship is a confidential relationship and since being a substantial beneficiary is a "suspicious circumstance," *see supra* text accompanying notes 278-281, virtually *every* American jurisdiction would—as a matter of judge-made law—find that those facts give rise to a presumption of undue influence, so I am puzzled why the North Dakota law of undue influence was thought to have a lacuna that only legislative action could fill.

influence, and only clear and convincing evidence to the contrary can rebut that presumption.[346]

So far as I know, the per se rules in Rhode Island and South Dakota—treating all relationships between testators and their spiritual advisors as confidential relationships[347]—have not been challenged on freedom of religion grounds. But *should* they be challenged? That is, would my proposed per se rule survive a challenge based on freedom of religion? Clearly, such a rule would be neither neutral nor of general applicability;[348] rather, it would specially target religion-based relationships and treat them differently from most secular relationships. To pass muster under the Freedom of Religion Clause, such a rule, said the United States Supreme Court in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, "must be justified by a compelling governmental interest [as opposed to being merely reasonable] and must be narrowly tailored to advance that interest."[349] In other words, the rule should be subject to strict scrutiny.[350]

The state governmental interest at issue here is "the orderly settlement of estates and the dependability of titles to property passing under [wills or] intestacy laws."[351] Clearly, the settlement of estates would not be orderly if serious doubt existed among interested family members as to the genuineness or trustworthiness of a purported will, and titles to property would remain unreliable as long as such doubts remained unresolved.[352] But is such an interest "compelling?" The United States Supreme Court has characterized it as "substantial,"[353] but such a characterization does not preclude its being "compelling" as well. The Court made the characterization in an unsuccessful challenge, on "equal protection" grounds, to a statute affecting the inheritance rights of nonmarital children: a group whose interests require

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[346] IDAHO CODE § 15-2-616 (2007).

[347] *See supra* text accompanying note 343.

[348] *See supra* note 326.

[349] 508 U.S. 520, 531-32 (1993).

[350] Perhaps the initial case applying strict scrutiny analysis to a statute arguably impinging on the freedom of religion was *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963), where state law denied the petitioner unemployment compensation because her unemployment resulted from her refusal to violate her religious principles by working on Saturdays. The law was declared unconstitutional.

[351] Lalli v. Lalli (*In re* Estate of Lalli), 371 N.E.2d 481, 482-83 (N.Y. 1977), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259, 264 (1978).

[352] *See supra* text accompanying notes 195-199.

[353] *Lalli*, 439 U.S. at 271 (plurality opinion).

only "intermediate scrutiny"[354] of potentially discriminatory state actions, and under the immediate scrutiny standard a "substantial" state interest is good enough.[355] It was unnecessary for the Court to determine whether the interest rose to the level of being compelling.[356]

Certainly one can adduce examples of state interests that have been found sufficiently compelling to justify incidental burdens on the free exercise of religion. In *Braunfeld v. Brown*,[357] a state's "interest in providing one uniform day of rest for all workers"[358] was held to justify Sunday closing laws, even though such laws made more expensive the religious beliefs of business owners whose religion required them to close on Saturdays as well.[359] In *Hernandez v. Commissioner of Internal Revenue*, the federal government's "interest in maintaining a sound tax system free of myriad exceptions flowing from a wide variety of religious beliefs" was held to justify the denial of an income tax charitable deduction for payments for "training" and "auditing" sessions made mandatory by a particular religion.[360] Difficult as it may be to compare apples and oranges, it seems intuitively correct to say that a state's interest in the orderly settlement of estates and the dependability of titles to property ought to be no less compelling than its interest in providing a uniform day of rest or maintaining a sound tax system.

A useful approach to the problem of identifying the kinds of conduct protected by the Free Exercise Clause is suggested by language in the majority opinion in *Sherbert v. Verner*.[361] The case involved a South Carolina statute that

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[354] *See In re Estate of Lalli*, 371 N.E.2d at 482-83. The Supreme Court of Appeals of West Virginia held that—under that state's constitution—nonmarital children were a "suspect classification" requiring strict scrutiny of any state statute treating them differently from marital children. Adkins v. McEldowney, 280 S.E.2d 231, 233 (W. Va. 1981).

[355] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 688 (7th ed. 2004).

[356] The Supreme Judicial Court of Massachusetts seems to have characterized such a state interest as "compelling," though evidently the characterization was made for state constitutional purposes, not federal. Lowell v. Kowalski, 405 N.E.2d 135, 140 (Mass. 1980) (citing Commonwealth v. MacKenzie, 334 N.E.2d 613, 616 (Mass. 1975)).

[357] 366 U.S. 599 (1961).

[358] Sherbert v. Verner, 374 U.S. 398, 408 (1963).

[359] *Braunfeld*, 366 U.S. at 609.

[360] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699-700 (1989) (internal quotation marks omitted) (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

[361] *Sherbert*, 374 U.S. 398.

denied an unemployed person certain insurance benefits if her unemployed status was prolonged, without good cause, by her failure to accept available work.[362] The petitioner in the case refused on religious grounds to work on Saturdays, and her refusal prolonged her unemployed status.[363] The Court held that the state's denial of unemployment insurance benefits in her case violated her rights under the Freedom of Religion Clause. In reaching that result, the Court noted that refusing to work on Saturdays was a "basic tenet" of her religion,[364] and that the state law violated her freedom of religion because it "*force*[*d*] *her to choose* between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[365] Similarly, in a successful constitutional challenge to a city requirement forbidding police officers to wear beards brought by Muslim officers whose religious beliefs compelled them to wear beards,[366] the court of appeals took pains to find that the wearing of beards was a fundamental requirement of Sunni Islam;[367] accordingly, the invalidated requirement would have forced these men to *choose* between (1) keeping their jobs (by committing a "sin"[368]) and (2) following their religious beliefs and losing their jobs.

My proposed presumption does not put anyone in such a dilemma. Clergymen do not have to choose between speaking about bequests (and thereby forfeiting them) and remaining silent. The faithful do not have to choose between yielding to persuasion (and having their gifts annulled) and making no religious gifts at all. The presumption is intended to reach only those instances where a clergyman's conduct has destroyed a testator's free agency, and courts should be suspicious of any claim that the destruction of a congregant's free agency is a "basic tenet" of any religion.[369]

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[362] *Sherbert*, 374 U.S. at 401.

[363] *Id.* at 399-400.

[364] *Id.* at 400 n.1.

[365] *Id.* at 404 (emphasis added).

[366] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

[367] *Id.* at 360-61.

[368] *Id.* at 360.

[369] Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981) ("One can, of course, imagine an asserted claim so bizarre, *so clearly nonreligious in motivation*, as not to be entitled to protection under the Free Exercise Clause" (emphasis added)).

My proposed presumption likewise satisfies the requirement of being "narrowly tailored."[370] It recognizes the extraordinary power of religion and it recognizes the state's interest in distributing property only on the basis of reliable indicia of intent, but it does not prohibit bequests to religious actors or institutions. It does not even create a presumption of invalidity (which the Idaho nursing home statute *does*).[371] It mandates that the relationship between a testator and her spiritual advisor be considered per se confidential, but even the confidentiality designation does not give rise to a presumption of invalidity unless the contestant can produce evidence of a "suspicious circumstance," such as active participation in the procurement of the will. Even then, the result is only a presumption of invalidity, and it can be rebutted.

The First Amendment does not require that the income of religious organizations be exempt from federal income tax. That it is in fact exempt is merely a matter of legislative grace.[372] Accordingly, the government is permitted to make substantial inquiries into a religious organization's activities in order to determine whether the organization is entitled to its claimed exemption, including inquiries as to the content and intended effect of the organization's publications or statements.[373] The rights to bequeath and inherit property are likewise matters of legislative grace.[374] A state could constitutionally abolish the right of testation, requiring all of a decedent's property to pass to natural persons under the intestacy statute.[375] Accordingly, a testator's power to bequeath property to a religious charity exists at the sufferance of the state and may accordingly be subject to conditions, so long as the conditions do not operate to inhibit or deter the exercise of constitutionally protected freedoms[376] and as long as the conditions operate similarly in the case of all religions rather than favoring one religion over another.[377]

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[370] *See supra* text accompanying note 350.

[371] *See supra* note 228.

[372] *See* Better Bus. Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279 (1945); New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972).

[373] *Christian Echoes Nat'l Ministry*, 470 F.2d at 855-56.

[374] *See supra* note 183.

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

[376] Sherbert v. Verner, 374 U.S. 398, 405 (1963).

[377] Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719, 729 (1964).

The proposed per se rule does require courts to distinguish those persons who are dispensing religious or spiritual advice to a testator from those who are acting as advisors in some other capacity, but distinguishing the religious from the nonreligious is a necessary and familiar judicial duty. "Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it."[378]

IV. CONCLUSION

Courts and legislatures have, for centuries, been wary of bequests to religious organizations or leaders. Concern that such bequests reflected merely the deathbed fears of the faithful manipulated by the clergy led legislatures to enact mortmain statutes. But such statutes were not only unworkable; they sometimes invalidated perfectly genuine religious bequests. The law of undue influence remains a worthy tool for ensuring the legitimacy of such bequests, but it can best serve as protection if relationships between testators and their spiritual advisors are deemed to be per se confidential. Such a per se rule, which recognizes the extraordinary power of religious influence (for good and for ill), would allocate more sensibly the risks of nonpersuasion. Under it, the proponent of the will, after the contestant presented evidence of a "suspicious circumstance" such as a substantial bequest in favor of the influencer, would have the burden of producing evidence that the bequest represented the testator's actual wishes.

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[378] Founding Church of Scientology of Washington, D.C. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (footnote omitted).